MISSOURI COURT OF APPEALS
WESTERN DISTRICT

NORTHROP GRUMMAN GUIDANCE AND ELECTRONICS COMPANY, INC.
APPELLANT-RESPONDENT

vs.

EMPLOYERS INSURANCE COMPANY OF WAUSAU,
RESPONDENT-APPELLANT
ONEBEACON AMERICA INSURANCE COMPANY,
RESPONDENT-APPELLANT
CERTAIN UNDERWRITERS AT LLOYDS OF LONDON,
RESPONDENT-APPELLANT
CERTAIN LONDON MARKET INSURANCE COMPANIES,
RESPONDENT-APPELLANT

DOCKET NUMBER WD82615 (Consolidated with WD82623 and WD82636)

DATE: AUGUST 4, 2020

Appeal from:

The Circuit Court of Jackson County, Missouri
The Honorable J. Dale Youngs, Judge

Appellate Judges:

Division One: Thomas H. Newton, Presiding Judge, Mark D. Pfeiffer, Judge and Edward R. Ardini, Jr. Judge

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Attorneys:

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Nikki Cannezzaro, for Respondent-Appellant Employers Insurance of Wausau

Susan Ford Robertson, for Respondent-Appellant OneBeacon America Insurance Company, Certain Underwriters at Lloyds of London and Certain London Market Insurance Companies

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MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
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NORTHROP GRUMMAN GUIDANCE AND ELECTRONICS COMPANY, INC., APPELLANT-RESPONDENT,
v.
EMPLOYERS INSURANCE COMPANY OF WAUSAU, RESPONDENT-APPELLANT, ONEBEACON AMERICA INSURANCE COMPANY, RESPONDENT-APPELLANT, CERTAIN UNDERWRITERS AT LLOYDS OF LONDON, RESPONDENT-APPELLANT,
CERTAIN LONDON MARKET INSURANCE COMPANIES, RESPONDENT-APPELLANT

WD82615 (Consolidated with WD82623 and WD82636) Jackson County

Before Division One Judges: Thomas H. Newton, Presiding Judge, Mark D. Pfeiffer, Judge, and Edward R. Ardini, Jr., Judge

Northrop Grumman Guidance and Electronics Company, Inc. ("Northrop") manufactured printed circuit boards at its facility in Springfield, Missouri starting in the mid-1960s. Northrop was insured under primary and excess insurance policies issued by the other parties in this appeal: Employers Insurance Company of Wausau ("Wausau"), OneBeacon America Insurance Company ("OneBeacon"), and Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies ("London"). The policy periods spanned from May 2, 1964 to April 1, 1971, after which Northrop elected to "self-insure" at the primary level.

Northrop used the solvent TCE in manufacturing its circuit boards, and copper residue was generated during the process. Northrop managed its sludge containing TCE and wastewater containing dissolved TCE and copper residue in various ponds, pits, and lagoons at the facility. In 1993, the Missouri Department of Natural Resources ("MDNR") asserted an administrative claim against Northrop alleging its operations had caused environmental contamination at the facility's site. As a result, the parties entered into a 1993 consent agreement requiring Northrop to investigate and implement a remedial action plan to clean up impacted soil and groundwater within the boundaries of the site.

In December 2002, MDNR notified Northrop that contamination had been detected off-site. In mid-2004, Northrop sent correspondent to Wausau, OneBeacon, and London tendering coverage for the 2002 claim. Wausau took the position that it had no obligation to defend the claim, London requested additional information about the claim, and OneBeacon did not respond.

In 2010, the State of Missouri, on behalf of MDNR, filed an action against Northrop in federal court alleging that Northrop's operations resulted in contamination and seeking responsive action from Northrop. Contemporaneous with the filing of the suit, Northrop and the State entered into a consent decree addressing remedial action necessary both on- and off-site. The federal court approved and executed the 2010 consent decree, and the lawsuit was dismissed.

In December 2010, Northrop tendered coverage to Wausau, OneBeacon, and London. OneBeacon and London denied Northrop's claim. Wausau agreed to defend Northrop under a reservation of rights. Wausau and Northrop engaged in settlement negotiations, which were ultimately unsuccessful.

In 2013, Northrop filed this coverage action in the Circuit Court of Jackson County. It asserted three counts against Wausau—breach of contract, vexatious refusal to pay, and declaratory judgment—and one count of declaratory relief each against OneBeacon and London. The trial court issued a pre-trial ruling that the "pro rata" method of allocation would apply to damages if the jury were to find in favor of Northrop. The parties proceeded to a fourteen-day jury trial in the fall of 2017. At the conclusion of the trial, the jury found in favor of Northrop on its coverage claim against Wausau and awarded damages in the amount of $199,624. As to the claims against OneBeacon and London, the jury found in favor of the insurers.

Northrop filed a post-verdict motion for declaratory judgment against Wausau, seeking a declaration that Wausau had a continuing obligation to defend Northrop and cover Northrop's future liability to pay all cleanup costs. Northrop also sought reconsideration of the trial court's ruling that the "pro rata" allocation method applied to damages. The trial court granted Northrop's motion in part, and determined that Wausau was obligated to pay a portion of Northrop's future defense and indemnity costs. The trial court also reconsidered its previous allocation ruling, vacated that ruling, and determined that the "all sums" method of allocation applied.

All parties appealed.

AFFIRMED IN PART, REVERSED IN PART, REMANDED.

Division One holds:

(1) The trial court did not err in applying the "all sums" method of allocation pursuant to the Wausau policy. The Wausau policy contained language similar to that analyzed in other Missouri cases in which the courts found the "all sums" method applied based on the policy language.

(2) We decline to address OneBeacon and London's sole point on appeal that the trial court erred in ruling the "all sums" method of allocation applied to their policies. OneBeacon and London asserted this point solely to preserve their argument should we reverse the trial court's judgment as it relates to them, which we do not do.

(3) Northrop was not entitled to a new trial based on the trial court's initial determination that the "pro rata" allocation method would apply to damages. Although the trial court ultimately determined after trial that the "all sums" allocation method applied, Northrop failed to demonstrate how the pre-trial allocation ruling resulted in prejudice sufficient to warrant a new trial.

(4) The trial court did not abuse its discretion in admitting the testimony of the insurers' expert witness, Robert Karls. Karls provided "divisibility" evidence, i.e., evidence which tended to show that the groundwater contamination was divisible and attributable to different sources, and such evidence was relevant regardless of which allocation method applied.

(5) The trial court did not abuse its discretion in allowing Wausau to present evidence of Northrop's self-insurance.

(6) The trial court did not err in limiting Wausau's future indemnity obligation. The jury determined that the Wausau policy provided coverage solely for one divisible "Area of Concern," and the trial court did not err in limiting Wausau's future indemnity obligation to solely that Area of Concern.

(7) The trial court did not err in awarding Northrop future indemnity costs. Wausau argues Northrop was not entitled to any future indemnity costs because the jury only intended to award Northrop past legal defense fees. However, accepting Wausau's characterization of the jury's damage award would require us to look outside the jury's verdict and speculate as to the jury's intent in awarding damages, which we are not permitted to do.

(8) The trial court erred in awarding Northrop future defense costs. The 2010 consent decree constituted a final settlement between Northrop and the State, and after execution of the decree by the federal district court, the federal lawsuit was dismissed. Wausau's duty to defend terminated at the conclusion of that action, and any future costs incurred by Northrop relating to that consent decree cannot be deemed costs incurred in defense of the federal action.

(9) Northrop failed to preserve the claim of error raised in Point IV. Although Northrop asserts on appeal that the trial court erred in submitting OneBeacon's "failure to cooperate" affirmative defense in that OneBeacon never showed it requested Northrop's cooperation before denying coverage, Northrop failed to raise this argument before the trial court.

(10) The trial court did not err in submitting London's "failure to cooperate" affirmative defense to the jury. There was sufficient evidence presented that Northrop breached the London policies' cooperation clause and that London suffered prejudice as a result.

(11) The trial court did not err in giving Instruction Nos. 16 and 22, which related to London's and OneBeacon's "late notice of claim" affirmative defenses. These instructions followed the substantive law, were readily understandable, were consistent with the applicable MAI, and submitted solely the ultimate facts.

(12) The trial court did not err in submitting London's and OneBeacon's "late notice of claim" affirmative defenses to the jury. There was sufficient evidence presented that London and OneBeacon suffered prejudice as a result of Northrop's late notice of its claim.

Opinion by: Edward R. Ardini, Jr., Judge Date: August 4, 2020

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