

2024 WL 126739 (Wis.App. III Dist.) (Appellate Brief)  
Court of Appeals of Wisconsin, District III.

DISTINGUISHED MULTIPLYING BUILDINGS (D.M.B.), LLC, Plaintiff-Appellant,  
v.  
GERMANTOWN MUTUAL INSURANCE COMPANY, Defendant-Respondent.

No. 2023AP1717.  
January 3, 2024.

Appeal from Eau Claire County Circuit Court Honorable Emily M. Long Presiding Eau Claire County Case No. 20-CV-323

**Brief of Respondent Germantown Mutual Insurance Company**

Morrison Sund, PLLC, [Bradley J. Ayers](#), Bradley J. Ayers (State Bar No 1029184), 5125 County Road 101, Suite 200, Minnetonka, MN 55345, (952) 975-0050, bayers @morrisonsund.com.

**\*2 TABLE OF CONTENTS**

Table of Authorities .....	4
Issues Presented .....	7
Statement on Oral Argument and Publication .....	7
Statement of the Case .....	8
Argument .....	10
I. The plain language of the Policy's Ordinance Or Law Exclusion applies regardless of whether the city's issuance of a raze order means D.M.B. suffered a constructive total loss .....	10
A. Interpretation of insurance policies under Wisconsin law .....	10
B. The circuit court's analysis that the Ordinance Or Law Exclusion bars D.M.B. from recovering losses caused by the raze order rather than the fire is sound and should be affirmed .....	10
II. The Ordinance Or Law Exclusion applies to this case whether or not the issuing of the raze order means the property suffered a constructive total loss .....	12
A. The statutes governing constructive total losses do not contain language tying them to commercial insurance policies .....	12
B. B. The case law D.M.B. cites does not support its argument that this Court should read the Ordinance Or Law Exclusion out of the Policy .....	13
III. D.M.B. fails to identify any other Wisconsin statutory law in support of its argument .....	16
A. D.M.B.'s argument that laws may operate together does not provide meaningful support for its appeal ....	16
B. The reference in <a href="#">Wis. Stat. § 66.0413</a> to a municipality's ability to collect expenses incurred razing a property from *3 the owner's insurance proceeds does not support D.M.B.'s argument .....	16
C. The Policy is not breached because it does not cover all of D.M.B.'s claimed losses and expenses .....	17
D. The doctrines of reasonable expectations, contractual ambiguities in insurance policies being interpreted in favor of insureds, and illusory coverage are inapplicable .....	18
IV. The secondary authorities D.M.B. cites do not support its argument that the Ordinance Or Law Exclusion has no applicability here .....	20
V. Germantown's ability to challenge the raze order is irrelevant .....	21
VI. The anti-concurrent language in the Ordinance Or Law Exclusion operates to bar coverage for increased costs and losses caused by the raze order .....	22
Conclusion .....	24
Certifications by Attorney .....	25

**\*4 TABLE OF AUTHORITIES**

<b>Cases</b>	
<a href="#">Am. Family Mut. Ins. Co. v. Am. Girl, Inc.</a> , 2004 WI 2, 268 Wis. 2d 16, 673 N.W.2d 65 .....	10, 11

<i>Am. Family Mut. Ins. Co. v. Schmitz</i> , 2010 WI App. 157, 330 Wis. 2d 263, 793 N.W.2d 111 .....	23
<i>At. Mut. Ins. Cos. v. Lotz</i> , 384 F. Supp. 2d 1292 (E.D. Wis. 2005) .....	11
<i>Bulen v. W. Bend Mut. Ins. Co.</i> , 125 Wis. 2d 259, 371 N.W.2d 392 (Ct. App.1985) .....	19
<i>Cont'l W Ins. Co. v. Paul Reid, LLP, GPS</i> , 2006 WI App 89, 292 Wis. 2d 674, 715 N.W.2d 689 .....	19
<i>Danzeisen v. Selective Ins. Co. of America</i> , 298 N.J. Super. 383, 689 A.2d 798 (1997) .....	20
<i>Drangstviet v. Auto-Owners Ins. Co.</i> , 195 Wis. 2d 592, 536 N.W.2d 189, 191-92 (Ct. App. 1995), .....	14
<i>Gimbels Nw., Inc. v. Nw. Nat. Ins. Co.</i> , 72 Wis. 2d 84, 240 N.W.2d 140 (1976) .....	14, 15
<i>Haynes v. Am. Family Mut. Ins. Co.</i> , 2014 WI App. 128, 359 Wis. 2d 87, 857 N.W.2d 478 .....	15
<i>Hertog v. Milwaukee Mut. Ins. Co.</i> , 415 N.W.2d 370 (Minn. App. 1987) .....	21
<i>Horizon West Condo. Homes Assoc.</i> , 641 F. Supp. 3d 567 (E.D. Wis. 2022) .....	11
<i>Hughes v. Allstate Indem. Co.</i> , No. 2019AP1234, 2019 WL 6205101, *5 (Ct. App. Nov. 21, 2019) .....	23
*5 <i>Marks v. Houston Cas. Co.</i> , 2015 WI App 44, 363 Wis. 2d 505, 866 N.W.2d 393, <i>aff'd</i> , 2016 WI 53, 369 Wis. 2d 547, 881 N.W.2d 309 .....	19
<i>Peace ex rel. Lerner v. Nw. Nat'l Ins. Co.</i> , 228 Wis. 2d 106, 596 N.W.2d 429 (1999) .....	10
<i>Preisler v. Gen. Cas. Ins. Co.</i> , 2014 WI 135, 360 Wis. 2d 129, 857 N.W.2d 136 .....	19
<i>Siebert v. Wisconsin Mut Ins. Co.</i> , 2011 WI 35, 333 Wis. 2d 546, 797 N.W.2d 484 .....	23
<i>Spears v. Shelter Mut. Ins. Co.</i> , 73 P.3d 865 (Ok. 2003) .....	10
<i>State ex rel Kalal v. Circuit Court for Dane County</i> , 2004 WI 58, 271 Wis. 2d 633, 681N.W.2d 110 .....	16
<i>State Farm Mut. Auto. Ins. Co. v. Langridge</i> , 2004 WI 113, 275 Wis. 2d 35, 683 N.W.2d 75 .....	10
<i>State v. Caban</i> , 210 Wis. 2d 597, 563 N.W.2d 501 (1997) .....	19, 21
<i>Tufail v. Midwest Hospitality, LLC</i> , 2013 WI 62, 348 Wis. 2d 631, 833 N.W.2d 592 .....	16
<i>Wilson Mut. Ins. Co. v. Falk</i> , 2014 WI 136, 360 Wis. 2d 67, 857 N.W.2d 156 .....	10
<i>Wisconsin Label Corp. v. Northbrook Prop. &amp; Cas. Ins. Co.</i> , 2000 WI 26, 233 Wis. 2d 314, 607 N.W.2d 276 .....	18, 20
<b>Statutes</b>	
Wis. Stat. § 203.21 .....	14
Wis. Stat. § 632.05 .....	14, 15
Wis. Stat. § 632.103 .....	17
*6 Wis. Stat. § 66.0413 .....	passim

## \*7 ISSUES PRESENTED

### ISSUE NO. 1

Whether the Circuit Court erred in holding as a matter of law that the Ordinance Or Law Exclusion excluded insurance coverage for increased costs incurred by Plaintiff-Appellant Distinguished Multiplying Buildings, LLC (“D.M.B.”) due to a raze order issued by the City of Eau Claire (“City”).

**Held:** The Circuit Court ruled that the Ordinance Or Law Exclusion was unambiguous and that it applied to the raze order under the undisputed facts. Accordingly, it held that loss attributable to the raze order was not covered under the insurance policy of Defendant-Respondent Germantown Mutual Insurance Company (“Germantown”).

### STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Germantown does not believe oral argument is necessary to decide this appeal. It does not believe that this Court needs to publish its opinion because the standards for publication under [Wis. Stat. § 809.23](#) have not been met.

**\*8 STATEMENT OF THE CASE**

Germantown believes the Statement of the Case in the brief of D.M.B. is satisfactory. [Brief of Plaintiff-Appellant Distinguished Multiplying Buildings (D.M.B.), LLC (“D.M.B. Brief”) at pp. 5-10]. D.M.B. is a domestic limited liability company having its principal place of business at 923 South Hastings Way, #188, Eau Claire, WI 54701. [Doc. 2, ¶ 1]. It owned an apartment building located at 902 Menomonie Street, Eau Claire, WI 54703 (the “Property”) that was damaged by fire on February 21, 2020. [*Id.*, ¶¶ 3-4]. On June 29, 2020, the City issued a raze order for the Property. [D.M.B. Brief, at p.5]. Germantown paid D.M.B. \$301,009.88 for the actual cash value of repairs necessary for the Property and for some personal property contents. [*Id.*, at p.6 (citation to record omitted)]<sup>1</sup>. Germantown denied liability for losses it determined were not covered by operation of the Ordinance Or Law Exclusion. [*Id.*].

The Policy contains the following exclusionary language:

**B. Exclusions**

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

**a. Ordinance Or Law**

(1) the enforcement of or compliance with any ordinance or law:

(a) Regulating the construction, use or repair of any property; or

(b) Requiring the tearing down of any property, including the cost of removing its debris.

(2) This exclusion, Ordinance Or Law, applies whether the loss results from:

**\*9** (a) An ordinance or law that is enforced even if the property has not been damaged; or

(b) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property or removal of its debris, following a physical loss to that property.

[A. App. 027-028].

In September 2020, D.M.B. brought a motion for declaratory and summary judgment, asking the Circuit Court to rule that the Ordinance Or Law Exclusion did not apply because the raze order made the Property a constructive total loss. [Doc. 8, pp.1, 21]. Germantown opposed the motion and asked the Circuit Court to rule in its favor that the exclusion barred recovery for increased costs and damages caused by enforcement of the raze order. [Doc. 23, p.p. 1, 13].

In an order filed on January 27, 2021, the Circuit Court ruled the Ordinance Or Law Exclusion applied. [A. App. 001]. It cited the exclusion's language that stated coverage was excluded for “increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris following a physical loss to that property.” [A. App. 002]. It remarked that no evidence in the record suggested that the Property was not repairable after the fire. [*Id.*]. Relying on D.M.B.'s submissions, it reasoned that “but for the raze order” the Property would not have been a constructive loss. [*Id.*]. The Circuit Court found that the Ordinance Or Law Exclusion was unambiguous and that the raze order

fell “squarely within” its language. [*Id.*; see also A. App. 010, Ins. 6-25]. It also found that on the record before it questions of fact existed regarding the dollar amounts of the costs that resulted from the raze order versus those resulting from the fire. [*Id.*].

Litigation continued, and an appraisal panel was convened to determine the dollar amount of the loss to the Property attributable to the fire. [D.M.B. Brief, at pp. 9-10]. Following the appraisal, the Circuit Court dismissed the case. [*Id.* at p.9]. In doing so, it incorporated its prior holding that the Ordinance Or Law \*10 Exclusion barred coverage for losses attributable to the raze order. [*Id.*, at pp. 9-10].

This appeal followed.

## ARGUMENT

As D.M.B. states, a circuit court's granting of summary judgment is reviewed de novo. [D.M.B. Brief, at p. 10 (citations omitted)]. An appellate court reviews summary judgment using the same criteria and methodology as the circuit court. *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 2004 WI 2, ¶ 22, 268 Wis. 2d 16, 673 N.W.2d 65.

### I. THE PLAIN LANGUAGE OF THE POLICY'S ORDINANCE OR LAW EXCLUSION APPLIES REGARDLESS OF WHETHER THE CITY'S ISSUANCE OF A RAZE ORDER MEANS D.M.B. SUFFERED A CONSTRUCTIVE TOTAL LOSS.

#### A. Interpretation of insurance policies under Wisconsin law.

When interpreting insurance policies, the court's goal is to determine and carry out the parties' intent. *Wilson Mut. Ins. Co. v. Falk*, 2014 WI 136, ¶ 23, 360 Wis. 2d 67, 857 N.W.2d 156 (citation omitted)). Language in insurance policies is ambiguous only where it is “fairly susceptible to more than one reasonable interpretation.” *Id.* (quoting *Peace ex rel. Lerner v. Nw. Nat'l Ins. Co.*, 228 Wis. 2d 106, 121, 596 N.W.2d 429 (1999)). Where policy language is ambiguous, it is narrowly construed; however, ambiguity arises only if a policy may be subject to more than one reasonable interpretation. *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Langridge*, 2004 WI 113, ¶ 46, 275 Wis. 2d 35, 683 N.W.2d 75).

#### B. The circuit court's analysis that the Ordinance Or Law Exclusion bars D.M.B. from recovering losses caused by the raze order rather than the fire is sound and should be affirmed.

Ordinance or law exclusions are not inherently vague or confusing. See, e.g., *Spears v. Shelter Mut. Ins. Co.*, 73 P.3d 865, 871 (Ok. 2003) (finding such an \*11 exclusion to be plain, unambiguous, and conspicuous). The Eastern District of Wisconsin has held that policy language excluding coverage for loss caused by enforcement of an ordinance or law applied when a municipality ordered a house to be razed due in part to mold damage. *Atl. Mut. Ins. Cos. v. Lotz*, 384 F. Supp. 2d 1292, 1305 (E.D. Wis. 2005). More recently, that court held that refusing to apply an ordinance or law exclusion where a raze order is issued violates the rule that courts do “not interpret insurance policies to provide coverage for risks that the insurer did not contemplate or underwrite and for which it has not received a premium.” *Horizon West Condo. Homes Assoc.*, 641 F. Supp. 3d 567, 576 (E.D. Wis. 2022) (quoting *Am. Girl*, 2004 WI 2, ¶ 23).

The Ordinance Or Law Exclusion here states that Germantown would not pay for loss or damage caused directly or indirectly due to enforcement or compliance with any ordinance or law “[r]equiring the tearing down of any property, including the cost of removing debris.” [D.M.B. Brief, at p.7]. The exclusion applies whether the loss results from: “[t]he increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property or removal of its debris, following a physical loss to that property.” [*Id.*]. As the Circuit Court found, there is nothing ambiguous about the language of Germantown's Ordinance Or Law Exclusion. See, e.g., *Horizon West Condo. Homes*, 641 F. Supp. 3d

at 575 (explaining that the “issuance of the raze order qualifies as the ‘enforcement’ of a law that satisfies the terms of the ordinance-or-law exclusion”).

The Circuit Court applied the Ordinance Or Law Exclusion correctly and in a manner that accords with the undisputed facts. The raze order emanates from [Wis. Stat. § 66.0413 \(1\)\(b\)](#), a state law. *Horizon West Condo. Homes*, 641 F. Supp. 3d at 575. D.M.B. conceded that it was the issuance of the raze order that led to the Property being deemed a constructive total loss. [D.M.B. Brief, at p.7]. The Circuit Court recognized that no facts in the record showed that the damage from the fire standing alone made the Property irreparable. [*Id.*, at pp. 7-8]. Thus, \*12 its reasoning that the raze order increased D.M.B.'s costs is grounded in fact and logic. It rightly concluded the plain language of the Ordinance Or Law Exclusion excludes coverage for those cost increases. Accordingly, this Court should affirm the Circuit Court's decision.

## II. THE ORDINANCE OR LAW EXCLUSION APPLIES TO THIS CASE WHETHER OR NOT THE ISSUING OF THE RAZE ORDER MEANS THE PROPERTY SUFFERED A CONSTRUCTIVE TOTAL LOSS.

D.M.B.'s appeal goes awry because it treats the constructive total loss that stemmed from the raze order as though it rendered the Ordinance Or Law Exclusion legally unenforceable. Contrary to D.M.B.'s arguments, however, the raze order and the exclusion are not so connected. D.M.B.'s appeal fails as a result.

### A. *The statutes governing constructive total losses do not contain language tying them to commercial insurance policies.*

D.M.B. fails to identify statutory language or case law that leads to the neutralization of the Ordinance Or Law Exclusion simply because a raze order was issued. It cites the following statutory provisions governing constructive total losses:

If a building is old, dilapidated, or out of repair and consequently dangerous, unsafe, unsanitary, or otherwise unfit for human habitation and unreasonable to repair, order the owner of the building to raze the building or, if the building can be made save by reasonable repairs, order the owner to either make the building save and sanitary or to raze the building, at the owner's option.

[Wis. Stat. § 66.0413\(1\)\(b\)1.](#)

*Reasonableness of repair; presumption.* Except as provided in sub. (3), if a municipal governing body, building inspector or designated officer determines that the cost of repairs of a building described in par. (b) 1. would exceed 50 percent of the assessed value of the building divided by the ratio of the assessed value to the recommended value as last published by the department of revenue for the municipality within which the building is located, the repairs are presumed unreasonable for purposes of par. (b)1.

\*13 [Wis. Stat. § 66.0413\(c\)](#). [D.M.B. Brief, at p.12]. That statute is in Chapter 66 of the Wisconsin Statutes, which governs “General Municipality Law.” Subsection (c) of that statute does not contain the word “insurance.” It merely creates a presumption that repairs are unreasonable where their cost exceeds 50% of the assessed value. The text of [Section 66.0413\(c\)](#) expresses no intent to eliminate exclusions and exceptions in insurance policies. By contrast, Chapters 600 through 655 of the Wisconsin Statutes govern insurance, with Chapter 632, Subchapter 1 governing fire and property insurance specifically. With no statutory or case law in support, D.M.B. urges this Court to use the raze order statute to usurp the Ordinance Or Law Exclusion.

D.M.B. asserts that once the raze order was issued, Wisconsin law gave it no option to repair the Property. [D.M.B. Brief, at p. 12]. It cites case law that explains that the purpose of raze orders is to protect the public from dangerous buildings. [*Id.*, at p. 13]. It also notes that the exclusive remedy for a party affected by a raze order is to bring a motion within thirty-days objecting to the order. [*Id.*] Germantown takes no issue with these points as general propositions. But they are impertinent to the issue of coverage. The public safety rationale for raze orders and the limited means by which to challenge them do not modify the contractual relationship between Germantown and D.M.B. D.M.B. fails to explain how or why it is logical to read [Section 66.0413\(c\)](#) in a way that leads to removal of the Ordinance Or Law Exclusion from the Policy.

For the reasons explained above, the Circuit Court did not err by refusing to adopt D.M.B.'s position that the issuance of the raze order negated the Ordinance Or Law Exclusion.

***B. B. The case law D.M.B. cites does not support its argument that this Court should read the Ordinance Or Law Exclusion out of the Policy.***

D.M.B. finds no support from Wisconsin case law. [D.M.B. Brief, at pp. 10-12]. First, it cites [Gimbels Nw., Inc. v. Nw.Nat. Ins. Co.](#), 72 Wis. 2d 84, 240 N.W.2d 140 (1976). \*14 [D.M.B. Brief, at p. 14]. The issue in that case was whether the defendant insurance company was bound by the “valued policy law” to pay the full face-value of an insurance policy after the City of Milwaukee issued a raze order. *Id.* at 91. In *Gimbels*, the Court was not asked to interpret an ordinance or law exclusion to analyze its interplay with the valued policy law and raze orders. On that basis alone, it is distinguishable.

More significant, the valued policy law the *Gimbels* court reviewed in 1976 was materially different than the one currently in effect. That statute read as follows: “[w]henever any policy insures real property and the property is wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the policy shall be taken conclusively to be the value of the property when insured and the amount of loss when destroyed.” *Id.*, at 91 (citing [Wis. Stat. § 203.21](#)). In contrast, the current version of the valued policy law reads as follows:

Whenever any policy insures real property that is ***owned and occupied by the insured primarily as a dwelling and the property is wholly destroyed***, without criminal fault on the part of the insured or the insured's assigns, the amount of the loss shall be taken conclusively to be the policy limits of the policy insuring the property.

[Wis. Stat. § 632.05\(2\)](#) (emphasis added). There is nothing in the record that shows that D.M.B.'s principals, much less D.M.B. as the insured, occupied the Property (an apartment building) as a dwelling. Accordingly, and unlike the insured in *Gimbels*, the valued policy law is inapplicable and gives no aid to D.M.B.

Furthermore, in [Drangsviet v. Auto-Owners Ins. Co.](#), 195 Wis. 2d 592, 600, 536 N.W.2d 189, 191-92 (Ct. App. 1995), this Court stated that the statute applied to insureds “who are persons living in or actually using a residence or place of habitation. The estate is not a person or living presence that actually lived in the residence. The estate, as an inanimate entity, simply could not occupy a residence under the ordinary meaning of the terms of [§ 632.05\(2\)](#).” D.M.B. is not a person. Like the estate in *Drangsviet*, it is an inanimate entity that could not \*15 occupy the Property. Accordingly, it could not as a matter of law invoke the valued policy law for this reason as well.

D.M.B.'s reliance on *Gimbels* and the valued policy law illustrates why the statute governing raze orders does not enable D.M.B. to recover policy limits and avoid the Ordinance Or Law Exclusion. In contrast to [Wis. Stat. § 66.0413\(1\)\(c\)](#) governing raze orders and constructive total losses, [Wis. Stat. § 632.05\(2\)](#), the valued policy law, expressly references insurance coverage and ties it to an insured property suffering a total loss. *See, e.g., Haynes v. Am. Family Mut. Ins. Co.*, 2014 WI App. 128, ¶¶ 15-17,



359 Wis. 2d 87, 857 N.W.2d 478 (applying [Section 66.0413\(1\)\(c\)](#) and [Section 632.05\(2\)](#) together when a property owned and occupied as a dwelling was subject to a raze order). The raze order statute does not do this. It focuses on municipal governance, while the valued policy law focuses on insurance. D.M.B.'s argument misses the significance of this distinction.

For its argument to make sense, D.M.B. sidesteps this distinction by blurring the difference between the statute governing raze orders and the valued policy law. It wants the raze order statute to function as a valued policy law. The plain language of that statute does not allow this. If D.M.B. were a person (not a corporation) owning and occupying the Property primarily as a dwelling, its claim would be much stronger. It would have a solid argument that the valued policy law applied and that it would be entitled to the limits of the Policy. The constructive total loss resulting from the raze order could be synonymous with the complete destruction of an occupied dwelling that the valued policy statute requires. *See* [Wis. Stat. § 632.05\(2\)](#). But that hypothetical cannot play out here. Distilled to its core, this appeal reflects D.M.B.'s belief that the Circuit Court erred because it did not apply the valued policy law to D.M.B.'s loss. The Circuit Court was correct not to do so.

In sum, the text of the valued policy law shows the Legislature can write a statute that requires an insurance company to pay policy limits when certain criteria are met. D.M.B. does not meet those qualifications. And the statute **\*16** governing raze orders does not fill the void. D.M.B.'s efforts to have the raze order statute treated as a valued policy statute fail as a matter of law. This Court should affirm the Circuit Court's decision.

### III. D.M.B. FAILS TO IDENTIFY ANY OTHER WISCONSIN STATUTORY LAW IN SUPPORT OF ITS ARGUMENT.

The arguments of D.M.B. that the Circuit Court found unpersuasive have not gained strength on appeal. D.M.B. turns to other statutory concepts to bolster its arguments. But these arguments also fail.

#### ***A. D.M.B.'s argument that laws may operate together does not provide meaningful support for its appeal.***

D.M.B. claims that Germantown's position “assumes that each and every law exists in its own vacuum unaffected by other laws” and that this “cannot be the case.” [D.M.B. Brief, at p. 16]. D.M.B.'s characterization is unfounded. Germantown depends on well recognized legal principles to support its position. Statutory language is interpreted according to its plain meaning. *State ex rel Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶¶ 45-46, 271 Wis. 2d 633, 681 N.W.2d 110. The same is true for contracts. *Tufail v. Midwest Hospitality, LLC*, 2013 WI 62, ¶ 28, 348 Wis. 2d 631, 833 N.W.2d 592. Germantown relies on these legal maxims to show that the statute governing raze orders is not the equivalent of a valued policy law. As the valued policy law does not apply, the contractual language in the Ordinance Or Law Exclusion is unaffected by the issuance of the raze order.

#### ***B. The reference in [Wis. Stat. § 66.0413](#) to a municipality's ability to collect expenses incurred razing a property from the owner's insurance proceeds does not support D.M.B.'s argument.***

D.M.B. calls attention to a provision in [Section 66.0413](#) that states that if a municipality is compelled to incur costs to raze a building subject to a raze order due to the owner's noncompliance and is unable to recover expenses from the **\*17** owners, it may seek reimbursement “from funds withheld for an insurance settlement may be assessed and collected as a special tax.” [Wis. Stat. § 66.0413\(1\) 2\(f\)](#). [D.M.B. Brief, at pp. 17-18]. Foreshadowing the impertinence of its argument, D.M.B. admits this case does not involve [Wis. Stat. § 632.103](#). [*Id.* at p. 18]. Rather, D.M.B. believes the fact that a city is statutorily authorized to recoup the costs to raze a building from insurance settlement proceeds indicates “raze orders are not a separate loss and are simply part of the covered risk.” [D.M.B. Brief, at p.18].

Here again, D.M.B. makes an argument that statutory language does not support. The focus of [Wis. Stat. § 66.0413](#) generally, and its subpart 1(f) specifically, relates to municipal authority to seek reimbursement for the cost to raze buildings. Insurance proceeds may be a source of payment for costs associated with carrying out a raze order. But it is unmistakable that the focus

of the statute is on municipalities' abilities to issue raze orders and to take actions directly related to raze orders that include recouping expenses. Insurance coverage is not addressed. As with the constructive total loss provision of [Wis. Stat. § 66.0413](#), the provision regarding municipal authority to seek reimbursement states nothing at all about what an insurer may or may not insure, what may be excluded from coverage, and what obligations an insurance company owes when an insured building is subject to a raze order. Accordingly, and contrary to the arguments of D.M.B., the Legislature conferring authority on a municipality to seek reimbursement for razing costs from property owner's insurance proceeds gives no support to D.M.B.'s premise that the Ordinance Or Law Exclusion became inoperable when a raze order is issued.

***C. The Policy is not breached because it does not cover all of D.M.B.'s claimed losses and expenses.***

D.M.B. then argues that Germantown's assertion that it must only pay for repairs to the structure “does not comport with reality” because D.M.B. could not **\*18** repair the building due to the raze order. [D.M.B. at p. 19]. The “reality” is that insurance policies cover enumerated risks and costs according to their terms. See [Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.](#), 2000 WI 26, ¶ 25, 233 Wis. 2d 314, 607 N.W.2d 276 (citation omitted) (stating that courts will not rewrite policies to give coverage for risks the insurer did not contemplate and the insured did not pay for). They are not surety bonds or guarantees that every loss an insured suffers will be compensated under a policy. Germantown's relationship with D.M.B. is contractual. Absent an overriding law, Germantown's obligations to cover D.M.B.'s losses therefore are dictated by the terms and conditions of the Policy, including the Ordinance Or Law Exclusion, not the amount of loss D.M.B. suffers.

As D.M.B. cites, the Ordinance Or Law Exclusion excludes coverage for orders or laws requiring the “tearing down of any property.” [D.M.B. Brief, at p. 19 (citing A. App. 027-028)]. As explained earlier in this brief, the fact that the Property is deemed a constructive total loss due to the raze order does not mean the Ordinance Or Law Exclusion gets removed from the Policy. D.M.B. wishes that the issuing of a raze order triggered policy limits coverage or caused an override of the Ordinance Or Law Exclusion. But no statute is written in a way that converts a raze order into an edict that the increased costs attributable to the raze order are covered.

***D. The doctrines of reasonable expectations, contractual ambiguities in insurance policies being interpreted in favor of insureds, and illusory coverage are inapplicable.***

Continuing, D.M.B. cites case law stating that insurance policies are to be interpreted as a reasonable person would understand them. [D.M.B. Brief, at p.20]. It then cites general legal maxims regarding interpretation of ambiguous policy provisions and goes on to argue that exclusion of costs associated with a raze order would render the Policy “essentially illusory.” [*Id.*]. D.M.B. gets traction with none of these arguments.

**\*19** A reasonable insured is presumed to understand that an exclusion in an insurance policy limits, rather than confers, coverage. [Bulen v. W. Bend Mut. Ins. Co.](#), 125 Wis. 2d 259, 263, 371 N.W.2d 392 (Ct. App.1985). When examining an exclusion, the court's task is to construe the terms according to their plain and ordinary meanings as understood by a reasonable person in the insured's shoes. [Preisler v. Gen. Cas. Ins. Co.](#), 2014 WI 135, ¶ 35, 360 Wis. 2d 129, 857 N.W.2d 136. The Ordinance Or Law Exclusion excludes from coverage any ordinance or law “requiring the tearing down of any property” and applies “even if the property has not been damaged”. [D.M.B. Brief, at p. 11]. It's labeled as an “exclusion” in bold letters. It states in clear language that if an insured structure is ordered to be torn down, the resulting loss will not be covered. There is no ambiguity in the language. D.M.B. as a reasonable insured did or should understand the limits that the Ordinance Or Law Exclusion imposed. This argument does not help D.M.B.

The doctrine of illusory coverage likewise does not apply. Coverage is illusory if the policy language defines coverage in a manner such that coverage will never actually be triggered. [Marks v. Houston Cas. Co.](#), 2015 WI App 44, ¶ 23, 363 Wis. 2d 505, 866 N.W.2d 393, *aff'd*, 2016 WI 53, 369 Wis. 2d 547, 881 N.W.2d 309 (citing [Cont'l W. Ins. Co. v. Paul Reid, LLP, GPS](#),



2006 WI App 89, ¶ 7, 292 Wis. 2d 674, 715 N.W.2d 689). Courts may reform policies deemed illusory to meet the insured's reasonable coverage expectations.

D.M.B. did not argue to the Circuit Court that applying the Ordinance Or Law Exclusion violated the illusory coverage doctrine. [Doc. 8 (*Brief in Support of Motion for Declaratory and Summary Judgment*, filed Sept. 9, 2020)]; *State v. Caban*, 210 Wis. 2d 597, 563 N.W.2d 501 (1997) (internal quotation omitted) (“As a general matter, when a party fails to raise an issue in the circuit court, the issue will not be considered as a matter of right for the first time on appeal.”). Even if this Court entertained D.M.B.'s illusory coverage argument, it would be inapplicable as a matter of law. Neither party disputes the Policy covered D.M.B. for losses caused by the fire. D.M.B. received payments of \$301,009.88. [D.M.B. \*20 Brief, at p.6]. The Policy was not illusory with respect to insuring losses caused by fire. The illusory coverage doctrine does not apply.

No other statutes or doctrines D.M.B. raises undermine the decision of the Circuit Court.

#### IV. THE SECONDARY AUTHORITIES D.M.B. CITES DO NOT SUPPORT ITS ARGUMENT THAT THE ORDINANCE OR LAW EXCLUSION HAS NO APPLICABILITY HERE.

D.M.B. draws attention to several factually and legally distinguishable opinions from other jurisdictions. [D.M.B. Brief, at pp. 22-23]. D.M.B. first cites *Danzeisen v. Selective Ins. Co. of America*, 298 N.J. Super. 383, 689 A.2d 798 (1997). [*Id.* at p. 22]. In that case, it appears the property owner was an individual the type of structure was not discussed other than it being non-confirming. 689 A.2d at 799. There, the New Jersey court stated the provision precluding coverage for a raze order applied only where a structure became unsafe due to deterioration or non-catastrophic causes. *Id.* at 801.

The New Jersey court cited no language from the insurance policy that led it to interpret the ordinance or law exclusion as being applicable only where raze orders are caused by deterioration or non-catastrophic events. See *Wisconsin Label Corp.*, 2000 WI 26, ¶ 24 (citation omitted) (stating that Wisconsin courts will not rewrite policy language to provide coverage the insurer did not contemplate). The *Danzeisen* opinion thus defied a basic tenet of Wisconsin insurance law that forbids courts from injecting language into a policy that does not exist. Further, the opinion did not mention whether the insurance policy contained anti-concurrent language that barred coverage for loss due to an ordinance or law even if some other insured cause contributed to the loss. *Id.* By contrast, here the anti-concurrent cause language in the Ordinance Or Law Exclusion applies “regardless of any other cause.” [D.M.B. Brief, at pp. 6-7]. In short, *Danzeisen* is distinguishable and does not help D.M.B.

\*21 D.M.B. also cites *Hertog v. Milwaukee Mut. Ins. Co.*, 415 N.W.2d 370 (Minn. App. 1987). [D.M.B. Brief, at p.23]. In that case, a flower shop partially damaged by a tornado was ordered razed because it was nonconforming to newer zoning codes and could not be rebuilt in the same fashion. *Hertog*, 415 N.W.2d at 372. The Minnesota Court of Appeals found that a reasonable insured would expect coverage for a total loss in that circumstance. *Id.* at 373. There was no discussion regarding anti-concurrent language. And critically, Minnesota's valued policy law, which required an insurer to pay policy limits in the event of a total loss, applied under the facts of that case. *Id.* at 372. That is not the case here. Accordingly, rather than supporting D.M.B.'s appeal, the *Hertog* opinion cuts against it. It illustrates that the existence (or absence) of an applicable valued policy law determines whether the issuance of a raze order might lead to an insured being able to claim policy limits or a total loss under the policy.

#### V. GERMANTOWN'S ABILITY TO CHALLENGE THE RAZE ORDER IS IRRELEVANT.

D.M.B. contends the Circuit Court erred by determining that the Property was repairable, and consequently, erred by determining that the raze order increased D.M.B.'s loss because there was no way to repair the structure. It attempts to buttress this argument by pointing out that Germantown did not challenge the raze under Wis. Stat. § 66.0413(1)(h). [D.M.B. Brief, at pp. 21-23]. This argument fails.

As cited, arguments first raised on appeal are generally not considered by this Court. *Caban*, 210 Wis. 2d 597. D.M.B. did not argue to the Circuit Court that Germantown's decision to challenge the raze order impacted the Circuit Court's interpretation of the Policy and the Ordinance Or Law Exclusion. [See Doc. 8 (D.M.B.'s Declaratory and Summary Judgment Brief)]. Nor did it argue to the Circuit Court that it could not rule in the manner it did absent Germantown \*22 bringing such a motion. [*Id.*]. This Court should not entertain this argument because it was not brought before the Circuit Court.

D.M.B.'s position on this issue fails in any event. D.M.B. cites authority stating that, absent appeal, raze orders are conclusive. [D.M.B. Brief, at p.22 (citations omitted)].<sup>2</sup> That may be true. But D.M.B. fails to explain how the conclusive nature of raze orders that go unchallenged affects application of the Ordinance Or Law Exclusion. It cites no statutory or case law stating that insurers like Germantown forfeit their ability to rely on exclusions if they do not take it upon themselves to challenge a raze order. The malady that plagues this argument is the same one that undermines its entire appeal: D.M.B. believes the raze order affects insurance coverage. As shown, it does not. Accordingly, Germantown's decision not to challenge the raze order has no impact in this case.

## VI. THE ANTI-CONCURRENT LANGUAGE IN THE ORDINANCE OR LAW EXCLUSION OPERATES TO BAR COVERAGE FOR INCREASED COSTS AND LOSSES CAUSED BY THE RAZE ORDER.

Finally, D.M.B. argues that the anti-concurrent cause language in the Policy has no relevance here. [D.M.B. Brief, at p.27 of 30]. In one sense, it is correct. This Court need not consider the anti-concurrent cause language to see that the plain language of the Ordinance Or Law Exclusion applies, and the statute governing raze orders does not negate it. If this Court needed to consider the anti-concurrent cause language in the Ordinance Or Law Exclusion, however, Germantown asserts application of that doctrine bolsters the reasons why the circuit court's decision should be upheld.

When a policy insures one loss but excludes another, there will be coverage under the independent concurrent loss doctrine. *Siebert v. Wisconsin Mut. Ins. Co.*, 2011 WI 35, ¶ 40, 333 Wis. 2d 546, 797 N.W.2d 484 (citations omitted). \*23 But it follows that the independent concurrent cause of loss doctrine may be modified or eliminated with anti-concurrent policy language. See *Am. Family Mut. Ins. Co. v. Schmitz*, 2010 WI App. 157, ¶¶ 23-25, 330 Wis. 2d 263, 793 N.W.2d 111 (discussing anti-concurrent cause provisions); see also *Hughes v. Allstate Indem. Co.*, No. 2019AP1234, 2019 WL 6205101, \*5 (Ct. App. Nov. 21, 2019) (discussing anti-concurrent cause provisions). The Ordinance Or Law Exclusion excludes “damage caused directly or indirectly” by the enumerated exclusions, including the Ordinance Or Law Exclusion, “**regardless of any other cause or even that contributes concurrently or in any sequence to the loss.**” [D.M.B. Brief, at p. 11](emphasis added)]. This is anti-concurrent cause language. D.M.B. argues that it does not apply because the raze order “is not a separate loss or separate damage.” [*Id.*, at p. 27]. The fire occurred on February 21, 2020, while the raze order was issued on June 29, 2020. [*Id.* at p.5]. The City initiated the raze order. It had nothing to do with the fire. The fire and raze order are indisputably separate events causing separate losses. Accordingly, under the Ordinance Or Law Exclusion's plain language, including its anti-concurrent cause provision, the portion of the loss caused by the raze under is not covered. The Circuit Court's decision was correct.

## \*24 CONCLUSION

For the reasons set forth herein, this Court should affirm the circuit court's holding that the Ordinance Or Law exclusion applies and that it operates as a bar to D.M.B. recovering losses attributable to the issuing of the raze order.

Dated: January 3, 2024

MORRISON SUND PLLC

Electronically signed by:

/s/ Bradley J. Ayers

Bradley J. Ayers (WI No.: 1029184))

5125 County Road 101

Suite 200

Minnetonka, MN 55345

P: (952) 975-0050

F: (952) 975-0058

E: bayers@morrisonssund.com

***ATTORNEYS FOR DEFENDANT-RESPONDENT GERMANTOWN MUTUAL INSURANCE COMPANY***

---

### Footnotes

- 1 Citations to pages of D.M.B.'s Brief are to the page numbers assigned by electronic filing of the brief and are located in the upper right-hand corner of each page rather than the pagination at the bottom of the brief inserted by D.M.B.
- 2 D.M.B. also cites authority stating that raze orders involve matters of public policy and not money. [Id., at p. 26].

---

End of Document

© 2025 Thomson Reuters. No claim to original U.S. Government Works.