

**STATE OF MICHIGAN
IN THE SUPREME COURT**

CHARLIE B. HOBSON and,
MARY L. HOBSON, husband and wife,

Supreme Court No.: 151447
Court of Appeals No.: 316714
Wayne County CC No.: 12-008167-CK

Plaintiffs/Appellees,

vs.

INDIAN HARBOR INSURANCE COMPANY, a
foreign corp., XL INSURANCE AMERICA, INC.,
a foreign corp., and XL INSURANCE COMPANY OF
NEW YORK, INC., a foreign corp.,

Defendants/Appellants,

-and-

WILSON INVESTMENT SERVICE AND CONSTRUCTION, INC.,
WILSON INVESTMENT SERVICE , CRESCENT HOUSE APARTMENTS,
CRESCENT HOUSE APARTMENTS, LLC, W-4 FAMILY LIMITED
PARTNERSHIP, W-4 FAMILY, LLC AND JAMES P. WILSON,

Defendants/Appellees

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STATEMENT OF FACTS

1. Background Facts

This supplemental Brief is filed pursuant to this Court's Orders of December 9, 2015 (Ex. 14)¹ and January 27, 2016 (Ex. 15).² As here pertinent, the December 9th Order provided that:

“The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the Total Pollution Exclusion Endorsement is ambiguous, and (2) whether there was a discharge, dispersal, seepage, migration, release, or escape of a pollutant that caused the plaintiffs' injuries.”

The background facts which shape those issues are detailed in the Counter-Statement of Material Facts and Proceedings found as pp. 1-10 of Plaintiff's Brief in Opposition to the Application for Leave to Appeal, reproduced for the Court's convenience as Ex. 16. For present purposes, a short summary is sufficient to provide context to the legal issues.

Plaintiffs Charles Hobson and his wife, Mary Hobson, were tenants in an apartment building owned by Wilson Investments (Ex. 3, Complaint, ¶¶ 2, 3, 7). They were severely injured in a fire which broke out when Wilson Investment's building

¹ The Order of December 9th requested Supplemental Briefs and oral argument on Defendant Insurer's Application for Leave to Appeal. Exhibits to Plaintiff's Brief in Opposition to the Application are numbered 1 to 13 and are referred to accordingly in this Supplemental Brief.

² The Order of January 27th granted Plaintiff's Motion for a 21 day extension of time to file this Supplemental Brief. Counsel is grateful for the accommodation and regards the provision allowing Appellant to file a reply as eminently reasonable under the circumstances.

manager fell asleep while cooking a meal (Ex. 3, ¶¶ 9-11; Ex. 4). This gave rise to a negligence suit by the Hobsons against Wilson Investments (Ex. 3).

The suit against Wilson Investments alleges several acts of negligence by the landlord (Ex. 3, p. 9). The Complaint also pleads numerous injuries “due to fire and smoke” (Ex. 3, ¶ 10).

Wilson Investments had purchased an insurance policy from Indian Harbor Insurance Company (Ex. 2). The policy, 55 pages in length, provides a variety of coverages, including Comprehensive General Liability (CGL) insurance. The insurer acknowledges that it provides coverage for the insured’s liability for negligently causing injury due to fire (Ex. 10, Tr. 5/24/13, p. 15). However, it argues that its policy does not provide coverage for injuries caused by smoke and, on that basis, refused to defend Wilson Investments in the suit filed by the Hobsons. This declaratory judgment action presents the insurance coverage dispute.

These background facts frame the critical issue: whether the insurance policy applies to the insured’s liability to the Hobsons. The circuit court (Ex. 11) and Court of Appeals (Ex. 1) held that the insurance policy applied. The insurance company has now filed its Application seeking Supreme Court review.

2. The Significant Language of the Insurance Policy

a. The Insuring Agreement

The scope of the insurance sold by Appellant is described in Section Ia, the “Insuring Agreement” of the CGL coverage (Ex. 2, Bates #0027), “BODILY INJURY AND PROPERTY DAMAGE LIABILITY”:

“We will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which the insurance applies. We will have the right and duty to defend the insured against any ‘suit’ seeking those damages. However, we will have no duty to defend the insured against any ‘suit’ seeking damages for ‘bodily injury’ or ‘property damage’ to which this insurance does not apply. We may, at our discretion, investigate any ‘occurrence’ and settle any claim or ‘suit’ that may result.”

The meaning of “bodily injury” is found in “SECTION V – DEFINITIONS”

(Bates #0037):

“‘Bodily injury’ – means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.”

It is unquestioned that Plaintiffs sustained “bodily injury” and filed a “suit” seeking “bodily injury” “damages”. The Insuring Agreement obligates the Insurer to fulfill two promises: to “pay those sums that the insured becomes legally obligated to pay”, and the “duty to defend the insured against any suit seeking those damages”.

3. The Pollution Exclusion In The Body of the Policy

The CGL insurance policy contains, in its body, a “Pollution” exclusion³ [exclusion 2(f), Bates ##0028-0029]. It provides:

“This insurance policy does not apply to:

³ Since this case involves two separate pollution exclusions, the term “endorsement” is used to describe the Total Pollution Exclusion Endorsement on which the insurer relies to disclaim coverage.

* * *

f. Pollution

(1) “ ‘Bodily injury’ or ‘property damage’ arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of ‘pollutants’:

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) ‘Bodily injury’ if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building’s occupants or their guests.

* * *

(iii) ‘Bodily injury’ or ‘property damage’ arising out of heat, smoke or fumes from a ‘hostile fire’.

* * *

[exclusion (f)(1)(a)]. “However, this subparagraph does not apply to... ‘bodily injury’ or ‘property damage’ arising out of heat, smoke or fumes from a ‘hostile fire’”

On page 5 of the CGL form [Bates #0031], exclusions (c) – (n) [including (f)] are deemed inapplicable under certain circumstances:

“Exclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you

with permission of the owner. A separate limit of insurance applies to this coverage as described in Section III – Limits of Insurance.”

The terms “pollutants” and “hostile fire” are found in “SECTION V – DEFINITIONS” (Bates ##0038, 0039):

“7. ‘Hostile fire’ means one which becomes uncontrollable or breaks out from where it was intended to be.”

* * *

“15. ‘Pollutants’ mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.”

3. The “Total Pollution Exclusion Endorsement”

Attached to the policy is a form identified as “CG 21 49 09 99” labelled “TOTAL POLLUTION EXCLUSION ENDORSEMENT” (Bates #0047). It states that, “This endorsement modifies insurance provided under... COMMERCIAL LIABILITY COVERAGE PART”, then provides:

“Exclusion f. under paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability is replaced by the following:

This insurance does not apply to:

f. Pollution
‘Bodily injury’ or ‘property damage’ which would not

have occurred in whole or part but for the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time."

While this endorsement purports to "replace" the exclusion (f) found in the body of the policy, the original "Pollution" exclusion, quoted at length above, remains part of the insurance policy (Bates #0028-0029). In fact, the Declarations pages reflect that the insurance provided includes both the CGL language itself [Bates #0017] and the Total Pollution Exclusion Endorsement [Bates #0021] which, together, "complete the above numbered policy" [Bates #0018].

ARGUMENT

I. THE INSURANCE POLICY AS A WHOLE, AND THE TOTAL POLLUTION EXCLUSION ENDORSEMENT IN PARTICULAR, ARE AMBIGUOUS

The Court's Order of December 9th requires the parties to brief, "whether the Total Pollution Exclusion Endorsement is ambiguous". While Plaintiffs are happy to comply with that directive, they respectfully submit that focus on a single portion of the insurance policy is too narrow.

The prior contract jurisprudence of this Court looks to interpretation of the contract as a whole. Klapp v United Ins Group Agency, 468 Mich 459, 468; 663 NW 2d 447 (2003) ("courts must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory"); Leon v Detroit Harvester Co, 363 Mich 366, 370; 109 NW2d 804 (1961) ("In construing this contract... we must give effect to all of its provision if it is possible to do so").

Similarly, the determination whether a contract is ambiguous depends on, "a fair reading of the entire contract of insurance". Farm Bureau Mutual Ins Co v Nikkel, 460 Mich 558, 566; 596 NW2d 915 (1999); Raska v Farm Bureau, 412 Mich 355, 362; 314 NW2d 440 (1982).

Consideration of the entire contract serves a critical role in the "ambiguity" analysis. The meaning of words that may be ambiguous in isolation may be discerned from the broader context of the other policy language. Wilkie v Auto Owners Ins Co,

469 Mich 44, 51; 664 NW2d 776 (2003). Conversely, terms that might seem clear standing alone may take on a different meaning from the need to avoid nullifying other contract language.

For these reasons, Plaintiffs suggest that the appropriate inquiry is whether the insurance contract is ambiguous, not just whether the Total Pollution Exclusion Endorsement is ambiguous. With that said, both these distinct issues will be addressed.

A. THE REALITIES OF INSURANCE CONTRACTS

It is customarily said that an insurance contract is to be construed just like any other contract, without any consideration of the real world features of insurance contracts. Plaintiffs do not now advocate any radical change in the law of insurance contracts, They do, however, suggest that it makes little sense to ignore completely the unique realities of insurance contracts.

The conventional contract principles commonly applied to insurance policies have their roots in English common law. In that era, the typical contract was likely negotiated between tradesmen of equal sophistication and bargaining strength, perhaps aided by equally competent solicitors. If, for example, a barrel-maker did not like the terms offered by a prospective wood supplier, the barrel-maker could purchase supplies from another source. Similarly, a tenant and landlord each retained the option of seeking a different tenant or landlord on more favorable terms. With this level of equality and negotiation, there is no reason to consider much beyond actual words, and no significant

policies to be served by the law other than freedom of contract and the virtue of predictability.

Much the same may be said of modern commercial transaction, such as a contract between an auto company and parts suppliers. It is likely the subject of actual negotiation, probably between lawyers for the parties, complete with haggling over the semantic nuances of key provisions.

Insurance contracts are fundamentally different. They effectuate important public policies in spreading risk and providing protection to individuals and businesses in a variety of endeavors. Many aspects of insurance are dictated by an elaborate insurance code in recognition of the important role served by insurance. In some settings, Government requires people to purchase insurance (e.g. the No-Fault Act), or taxes them for failure to obtain insurance (e.g the Affordable Care Act).

In other settings, it is deemed prudent to purchase insurance. Ordinary citizens may obtain life insurance to provide for their dependents in case of death, disability insurance to protect against the physical inability to work, homeowners insurance to protect against property damage to a home or tort liability of the insured. On top of auto insurance and health insurance, the individual insured may have an umbrella or excess liability insurance policy as well. Each of these policies may include multiple coverages, as well as multiple exclusions, definitions and the like.

More to the facts of this case, a company like Wilson Investments acts very foolishly if it doesn't procure liability insurance. Liability insurance avoids, or reduces, the prospect of being put out of business by a lawsuit to recover for catastrophic injuries

caused by a careless employee - - with the resultant non-payment of creditors and unemployment of staff. Buying liability insurance is the right thing to do morally, legally, and as a matter of sound financial business strategy. Most businesses, like Wilson Investments, have the good sense to attempt to protect themselves from the liability which landlords face in their business activities.

What happens when our hypothetical small businessperson seeks to buy liability insurance protection? He or she can go to insurer A and get a form CGL policy with standardized endorsements, expressed in standardized language,⁴ or, they can go to insurer B and be allowed to purchase the exact same CGL form, with the identical endorsements and policy language. The fiction of a “negotiated” insurance contract is just that, a fiction.

If our policyholder turns to an independent insurance agent - - regarded in law as an agent of the policyholder despite selling insurance as an agent of the insurer - - can our businessperson expect that the agent knows the difference in policy language between insurer A’s “intentional act” exclusion and company B’s? The agent will likely be adept at advising how to save \$50.00 on an umbrella policy. Whether that agent, almost certainly not a lawyer, has the foresight to care about the scope of the fire insurance liability is another question. It is also questionable whether that agent can recite the

⁴ To be clear, this is not an indictment of standardized insurance policies and endorsements. They serve the salutary function of developing a common and (more or less) uniform meaning of the purpose and legal construction of the language used by every insurer. The point, instead, is that it is insurers who choose the policy language.

linguistics of a clause or exclusion (buried in a 55 page document in this case), much less explain how those differences impact the business risk of a policyholder.

When speaking of “ambiguity” the term implicates a body of contract law that attempts to discern the parties’ “real” intention in agreeing upon a contract. If a court is unable to confidently say what a contract means, “ambiguity” serves as a tie-breaker. It means that where there is ambiguity, which cannot be resolved by resort to extrinsic evidence, the contract is to be construed against the party which drafted it, the insurer. Wilkie v Auto-Owners Ins Co, 469 Mich 41, 62; 664 NW2d 776 (2003); Arco Industrial Corp v American Motorists Ins Co, 448 Mich 395, 403; 531 NW2d 168 (1995); ACIA v DeLaGarza, 433 Mich 208, 214; 444 NW2d 803 (1989).

The “ambiguity against drafter” principle is common to all forms of contract. There are two particular precepts applicable specifically to insurance contracts. First, when relying on an exclusion, the insurer bears the burden of showing its applicability, bearing in mind that exclusions are strictly construed against the insurer. Auto-Owners v Churchman, 440 Mich 560, 562; 489 NW2d 431 (1992). The second is that since the very purpose of an insurance policy is to insure, doubts regarding coverage must be resolved in favor of a finding that coverage exists. Connecticut Indemnity Co v Nestor, 4 Mich App 578, 581; 145 NW2d 399 (1966); Shelby Mutual Insurance Co v United States Fire Insurance Co, 12 Mich App 145, 149; 162 NW2d 676 (1968); Arrigo’s Fleet Service, Inc v Aetna, 54 Mich App 482, 494; 221 NW2d 206 (1974).

In the specific context of the Total Pollution Exclusion Endorsement, many courts have taken a facially broader view of “ambiguity” than some of this Court’s more recent contract cases. For example, other courts in sister states have considered whether a hypothetical businessperson purchasing standard CGL insurance could reasonably understand the policy language to have an outcome-determinative meaning at odds with the interpretation urged by the insurer. Kerr-McGee v Georgia Casualty, 568 SE2d 484 (Ga App, 2002); Nautilus Ins Co v Jabar, 188 F3d 27, 30 (1st Cir., 1999). This Court’s decisions of the most recent two decades have ostensibly refused to look to the “reasonable expectations of the insured”.

Other courts take into consideration that the insurer’s proposed interpretation, if adopted, will create an “absurd result”. Pipefitters Welfare Education Fund v Westchester Fire Ins Co, 976 F2d 1037, 1043 (7th Cir. 1992). Cases from this court can be read to require a deciding judge to ignore the real world consequences of the insurer’s proposed construction, and the absurdity of those consequences.

Plaintiffs suggest that the differences between earlier opinions of this Court and the sister state and federal authorities are more semantic than anything. In considering the “reasonable businessperson”, Plaintiffs do not advocate ignoring the specific words used. The precise language is indisputably the primary expression of the “mutual assent” which is the very foundation of an enforceable contract. Nor do Plaintiffs deny how important are prior precedents interpreting the same language. A common knowledge, understanding, and stability are important to businesspeople as well as lawyers. Those who run apartment buildings and other businesses may fairly be held to a reasonable level

of knowledge about CGL insurance policies and exclusions. They are not, however, insurance companies engaged exclusively in the business of insurance, who belong to professional groups that standardize insurance policies, employing a cadre of knowledgeable attorneys, to draft, revise, and flyspeck the language of the product they sell.

In truth, “reasonable expectations of the insured” is properly viewed as different terminology for “when the language is capable of two reasonable interpretations”. Understandably, in a coverage dispute the parties offer two alternative interpretations which, not by accident perhaps, each favor the outcome most beneficial by the proponent. The presumptively reasonable insurer offers its preferred interpretation while the insured offers its competing construction. Both are grounded in the contract language, which the case law regards as indicative of the intent or expectations of the parties. In essence, each side presents its favored view, grounded in the contract language. If that language supports the “reasonable expectation of the insured”, this is but another way of saying that the contract is reasonably capable of two different interpretations, one favorable to the insured, with the outcome of the insurance coverage dispute hanging in the balance.

Similarly, the foremost focus on contract law is discerning the “intent” of the contracting parties. It may be fictitious to think of “mutual intent” in light of the way that insurance is purchased with no discussion of meaning and likely no personal meeting between the policyholder and the representative of the insurer. Even so, the importance of finding actual “intent” is undeniable.

Unless one adopts the inference that contracting parties are negotiating to come up with an “absurd result”, the consequences of differing interpretations are worth looking at. To say that an insurance policy should be construed to avoid “absurd results” is but another way of saying that, other indicia of intent being equal, one may infer that the intent of contracting parties is to accomplish something that makes sense rather than something absurd.

To return to the issue posed the pollution exclusions in this case, and other exclusions in business insurance policies are “ambiguous” if they can be reasonably understood in different ways. Stated otherwise, business insurance is “ambiguous” if the language of the policy as a whole - - viewed with due regard to dictionaries, the purpose of the provision, and applicable precedent - - are such that a reasonable insurer and reasonably informed businessperson can each reasonably interpret the language in different, outcome-determinative ways.

The Wisconsin appellate court explained the point in Guenther v City of Onalaska, 588 NW2d 375 (Wis App, 1998):

“The principle underlying the doctrine is straightforward. As the drafter of the insurance policy, an insurer has the opportunity to employ expressive exactitude in order to avoid a misunderstanding of the policy’s terms. Because the insurer is the party best situated to eliminate ambiguity in the policy, the policy’s terms should be interpreted as they would be understood from the perspective of a reasonable person in the position of the insured.”

B. THE MEANING OF AMBIGUITY

The term “ambiguity” has been defined in several decisions. An insurance contract is ambiguous, “when its words may reasonably be understood in different ways”. Raska v Farm Bureau Ins Co, 412 Mich 355, 362; 314 NW2d 440 (1982); Farm Bureau Ins Co v Nikkel, 460 Mich 558, 566; 596 NW2d 915 (1999). In a case such as this, the definition of “ambiguity” might be something like this: an exclusion is ambiguous” if, after considering the words of the document and other interpretative aids, an insurer and reasonably prudent businessperson would reasonably interpret the words in different, outcome-determinative ways.

C. POTENTIAL SOURCES OF AMBIGUITY

To determine the legal consequence of an “ambiguity”,⁵ as so defined, it may help to consider potential sources of language which “may reasonably be understood in different ways”. As will be shown, “ambiguity” may arise from the inherent imprecision of the English language, or from the fact that the draftperson did not anticipate the issue that has arisen, or because the insurer drafted the language in a way that lacks clarity about what (if anything) was really “intended”. A non-exclusive list of sources of ambiguity comes readily to mind.

1. Use Of A Word or Words With Vastly Different Meanings

A contract might use the verb “cleave”. The dictionary definitions of that word include both “adhere strongly” and “split apart”. Viewed in isolation, the word is

⁵ For present purposes, the term “ambiguity” is meant to identify words subject to more than one reasonable interpretation, either standing alone or in the broader context of the insurance policy as a whole. It is not meant to suggest that the law overlooks ways to interpret the disputed meaning one way or the other.

accurately described as “ambiguous”, as the reader has no idea of which of the two opposite meanings is intended.

Fortunately, context is an important consideration in contract interpretation. In the given example, the word “cleave”, ambiguous by itself, has a readily discernable meaning as part of the phrase “cleave to” or “cleave apart”.

2. Use of Words Too Vague Or Subjective In Nature To Permit A Mutual Understanding

Imagine an insurance policy in which the insurer undertook to provide the insured with a “fair” settlement. There may be a common understanding of the concept of being “fair”. In cases at either extreme of the range of “fairness”, both parties might agree that a certain course of conduct was or was not “fair”. Still, the word is so vague and so subjective in nature that there can be no consensus on what it means in practice. The parties can reasonably differ on whether a particular course of conduct is “fair”, so in that sense the term is itself “ambiguous”.

3. Use Of Words With Multiple Definitions Differing In Degree

Many words have multiple dictionary definitions covering a range of degrees. To speak of “blowing wind” can encompass everything from a hurricane to the gentlest breeze. Where the difference matters, the ambiguity may arise from the failure to specify which definition is intended.

4. Contradictory Policy Language

When the contract is considered as a whole, it may contain conflicting provisions. As an example, one provision might say, in substance, “we cover injuries caused by

water damage” while another says “we do not cover injuries caused by water damage”. In practice, the contradiction may be slightly more subtle, but substantially the same. Absent clear contextual information, the conflicting phrases create an insoluble ambiguity in light of the principle that contracts may not be construed in a fashion that nullifies any provision. Knight Enterprises v Fairlane Car Wash, 482 Mich 1006; 756 NW2d 88 (2008); Wells Fargo Bank v Cherryland Mall, 295 Mich App 99, 111; 812 NW2d 799 (2011); Laurel Woods Apts v Roumayah, 274 Mich App 631, 638; 734 NW2d 217 (2007).

One related possibility, not exactly an “ambiguity”, merits contemplation. Consider an insurance policy that promises to insure against injuries caused by a “dog bite”, and may even be advertised or promoted as “dog bite” insurance. That hypothetical insurance policy might define “dog” as a small, fish, commonly gold in color, if kept in an aquarium and under two inches in length. The insured may be surprised to learn that the insurance does not cover injuries caused by a pitbull attack because the “dog bite” insurance was negated by a definitional section that, if found, and carefully read, and literally applied, clearly defines “dog” in a way not reasonably contemplated by the common understanding of “dog”.

5. **Inherent Conflict / Impossibility**

Consider an insurance policy which promises to pay liability arising from the insured’s negligence. Add to it a provision excluding coverage when the insured fails to exercise reasonable care. Since negligence is defined as lack of reasonable care, these

provisions, not contradictory on their face, create an ambiguity when the legal definition of negligence is considered.

6. Grammatical Imprecision By The Drafter

Ambiguity may also arise from awkward sentence structure. Consider, for example, the sentence “we insure against injuries caused by beagles, German shepherds, and bulldogs that are brown in color”. The sentence is far from clear whether the phrase “brown in color” modifies just “bulldogs” or all breeds; *i.e.* whether a bite caused by a non-brown beagle is covered.⁶

Injudicious use of punctuation may also result in ambiguity. There is a world of difference between, “The man, said she, was offensive” and “The man said, ‘she was offensive’.”

Historically, ambiguities have sometimes been resolved by a variety of “rules of construction”, often arrayed on both sides of the interpretation dispute, cited by judges in support of each possible construction. Often, facial ambiguities can be resolved by consideration of other portions of the contract, or case law interpreting the language in controversy, or uniform dictionary definitions.

In other instances, like this, one cannot confidently say which of two ambiguous meanings - - meanings reasonably understood in different outcome determinative ways - - was “really” intended by parties who likely did not even consider the issue at the time of contracting (else the contract would have been drafted to state the meaning

⁶ The imprecision of sentences like the example is discussed in Kimble, the Puzzle of Trailing Modifiers, Michigan Bar Journal, January, 2016.

unambiguously). Ultimately, the source of the ambiguity is the language unilaterally selected by the insurer. Under those circumstances, it is only just to give the benefit of the doubt to the non-drafter, particularly in light of the purpose of insurance (to insure) and the obligation of the insurer to draft exclusionary clauses with clarity.

D. THE INSURANCE POLICY AND THE TOTAL POLLUTION EXCLUSION ENDORSEMENT ARE “AMBIGUOUS”, THEY CAN BE REASONABLY CONSTRUED IN DIFFERENT, OUTCOME DETERMINATIVE WAYS, ONE PROVIDING COVERAGE AND THE OTHER WITHHOLDING COVERAGE

The Court of Appeals accurately traced the development and popularity of the pollution exclusion generally, and the “total pollution exclusion endorsement” specifically (Ex. 1, p. 5). Further explication can be found in Jones v Francis Drilling Fluids, 642 F Supp 2d 643, 665-666 (SD Tex, 2009), and the Opinion of Judge Posner writing for the Seventh Circuit Court of Appeals in Scottsdale Indemnity Co v Village of Crestwood, 673 F3d 715 (7th Cir., 2012). The exclusion was largely a reaction to the enactment of CERCLA and the extraordinary risk of massive liability for environmental hazards, often difficult or impossible to detect (Scottsdale, 673 F3d at 718-719) (finding no coverage for environmental expenses associated with carcinogenic contaminant in groundwater used in municipality’s sale of water to residents).

Looking to the background and purpose of the exclusion, several courts have viewed the clause, or construed it against the insurer, when the insurer seeks to avoid coverage by construing the language much more broadly than the purpose of the

exclusion. See e.g. Roofers Joint Training v General Accident Ins Co, 713 NYS 2d 615; 275 App Div 2d 90, 91-92 (2000) (ambiguous as applied to exposure to toxic fumes in an enclosed classroom); Mistick, Inc v Northwestern National Casualty Co, 806 A2 39 (Pa Super, 2002) (the exclusion does not bar coverage for injuries to a child from lead-based paint); Builders Mutual Ins Co v Parallel Design, 785 F Supp 2d 535, 550 (ED Va, 2011) ('pollutant' deemed 'ambiguous'); Jones v Francis Drilling Fluids, Ltd., 342 F Supp 2d 643, 665-669 (SD Tex, 2009); S.N. Golden Estates v Continental Casualty Co, 680 A2d 1114 (NJ Sup, 1996); American States Ins Co v Kiger, 662 NE2d 945 (Ind, 1996) (declining to read the clause broadly and literally, as to do so would render the coverage itself close to illusory); Nautilus Ins Co v Jabar, 188 F3d 27, 29-31 (1st Cir., 1999); Pipefitters Welfare Education Fund v Westchester Fire Ins Co, 976 F2d 1037, 1043 (7th Cir. 1992).

A discussion of the competing lines of authority can be found in Gainsco Ins Co v Amoco Production Co, 53 P3d 1051, 1064-1066 (Wy, 2002). There, the Supreme Court of Wyoming, after surveying the law on point, found the exclusion ambiguous and concluded that, from the language, "We cannot believe that any person in the position of the insured would understand the word 'pollution' in this exclusion to mean anything other than environmental pollution").

Plaintiff urges the Court to reach the same conclusion in this case. The insurance contract as a whole, and the endorsement, are "ambiguous", as the language used is readily capable of more than one reasonable interpretation leading to different outcomes.

This is so for the reasons cited in the cases just referred to, and in the discussion of different sources of ambiguity.

1. The Pollution Exclusion and Endorsement Are Inconsistent, And The Endorsement Cannot Be Applied Without Rendering The Exclusion In The Body Of The Contract Nugatory

The Insurer's argument relies exclusively on the endorsement. Understandably so. The exclusion in the body specifically provides that liability is not excluded under that version of a pollution exclusion for a "hostile fire". The endorsement that is the foundation of the insurer's argument, which it argues excludes coverage, is directly at odds with, and inconsistent with, the body of the CGL policy (see ambiguity source #4 above).

The conflict is magnified by the fact that the endorsement claims that it "modifies Exclusion (f) and also "replaces" the other pollution exclusion, yet it doesn't. The standard clause is not "replaced". It remains part and parcel of the CGL insurance policy that Wilson Investments purchased. There would be no purpose (except confusion and misdirection) to keep the pollution exclusion as part of the CGL policy if, as the Insurer now argues, it is not part of the insurance contract.

The continued vitality of the version found in the body of the policy is attested to by the declarations. As is made clear, both the body and the endorsements are part of the contract.

By selling coverage with two conflicting pollution exclusions, Defendant has created an irreconcilable internal conflict. Contracts must be construed in a fashion that would render each provision meaningful and would render neither nugatory. Knight Enterprises v Fairlane Car Wash, Inc, 482 Mich 1006; 756 NW 2d 88 (2008); Klapp v United Insurance, 468 Mich 459, 468; 663 NW 2d 447 (2003); Woodington v Shokooki, 288 Mich App 352, 374; 792 NW 2d 63 (2010).

One cannot apply the pollution exclusion in the body of the policy - - to the effect that there is coverage for “hostile fires” - - without nullifying the endorsement. By the same token, one cannot apply only the endorsement without nullifying the coverage for hostile fires found in the policy itself. This inherent internal conflict is one source of ambiguity.

The ultimate outcome is not changed by the doctrine that different provisions of a contract are to be construed as harmonious with each other. Leon v Detroit Harvester Co, 363 Mich 366, 370; 109 NW2d 804 (1961); Burton v Travelers Ins Co, 341 Mich 30, 32; 67 NW2d 54 (1954); Murphy v Seed-Roberts Agency, 79 Mich App 1, 8; 261 NW2d 198 (1977); Associated Truck Lines v Baer, 346 Mich 106, 110; 77 NW2d 384 (1956). The only conceivable method of reconciliation is to construe the body of the policy as applicable to “hostile fires”, while applying the endorsement to “pollutants” which do not include hostile fires. Plaintiffs would, of course, prevail under that analysis as well.

2. The Contract is Ambiguous As To What Portions (If Any) Are Replaced By The Endorsement And Is Ambiguous As To The Exception To The Exclusion

While seeking to “replace” the exclusion in the body of the policy, the Insurer must necessarily rely on the definition of “pollutant” found in the body, as the endorsement contains no definition of that word. If the endorsement were to truly replace the policy exclusion, logic would dictate that it was replacing the “pollutant” definition that is part and parcel of the exclusion. Yet, there is nothing in the text of the contract that allows the insurer to pick and choose between sections of the body of the contract it may wish to keep or discard to suit its interests.

This lack of clarity is highlighted by the observation of Judge O’Connell in his concurring opinion. As he noted, the endorsement does not purport to eliminate the final paragraph regarding Exclusions which provides that, “Exclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with the permission of the owner.”

Among the 55 pages of legalese, the insurance policy does not define “you”. If it refers to the claimants, exclusion (f), in both forms, is inapplicable because the Hobsons were damaged by fire while in premises “rented to you”.

If the undefined term “you” is meant to apply to Wilson Investments and its employees, the result is arguably the same. From what the sparse record reveals, the “damage” [to Plaintiffs] was caused “by fire to premises... occupied by you [the negligent employee] with the permission of the owner [Wilson Investments].” The insurance policy is ambiguous in this sense as well.

3. The Contract Is Ambiguous By Practical Impossibility Or Illusory Provisions

Defendants undertook to sell an insurance policy that protected against injuries resulting from fire. They now argue that they only really meant to cover fires that don't produce smoke. This is essentially the same as discussed above for an insurance policy that purports to cover negligence liability, but only when the insured was not negligent.

As the common adage teaches, "where there is smoke, there is fire" (and vice versa). One cannot exclude injuries involving smoke without eviscerating the core fire liability insurance itself. This Court should join the others which construe the exclusion in light of the purpose of the insurance coverage itself.

4. Ambiguity As To The Meaning Of The Words Used

Several of the decisions in sister state jurisdictions have considered the vague nature of the words employed, or how the exclusion would swallow up the insurance coverage. They have also noted the varying dictionary definitions of the critical words in the "discharge..." phrase. The ambiguity of the "discharge..." clause is discussed in greater length in Issue II, infra.

Similar ambiguities arise as to the remainder of the endorsement. Those concerns are eloquently addressed in the cases cited in this Brief, and cannot be improved upon.

**II. THERE WAS NO DEMONSTRATED
"DISCHARGE, DISPERSAL, SEEPAGE,
MIGRATION, RELEASE, OR ESCAPE OF A
POLLUTANT" THAT CAUSED PLAINTIFFS'
INJURIES**

The Court has requested briefing on whether there was “discharge, dispersal, seepage, migration, release, or escape” of a “pollutant” that caused the Plaintiffs’ injuries”. There are three responses to that inquiry, any one of which leads to the conclusion that the insurer is responsible for its insured’s liability.

A. BECAUSE THE INSURER REFUSED TO DEFEND, THERE IS NO EVIDENCE AS TO WHETHER PLAINTIFFS’ INJURIES WERE CAUSED BY SMOKE, FIRE, OR BOTH

The Complaint in the tort action alleges that the injuries were caused by both fire (which the insurer acknowledges are covered injuries) and smoke (which it argues are excluded). With Indian Harbor’s abandonment of its insured, and subsequent settlement of the tort action, there is no evidentiary record which details the specific injuries or the precise causes of those injuries. What is known is that the Complaint, on its face, alleges injuries that do fall within the coverage of the insurance policy, even as construed favorably to the insurer.

That should be, and is, the end of the inquiry. As pointed out in Plaintiff’s earlier Brief in Opposition to the Application for Leave, pp. 20-24, an insurer is required to provide a defense when the Complaint alleges claims that are covered (injuries by fire) and those which arguably are not (injury by smoke). American Bumper & Mfg Co v Hartford Fire Ins Co, 452 Mich 440, 450-451; 550 NW2d 475 (1996). Having breached this duty to defend, the insurer is responsible for the settlement reached by claimant and the abandoned insured. Elliott v Causalty Association of America, 254 Mich 282, 287-288; 236 NW 782 (1931); Alyas v Gillard, 180 Mich App 154, 160; 446 NW2d 610

(1989). The short answer to the Court's inquiry is that the record does not reveal whether "discharge, dispersal, seepage, migration, release, or escape" of a "pollutant" (whatever that means) was the cause of some or all of plaintiffs' injuries. And, ultimately, with the refusal to defend, it doesn't matter.

B. THE PHRASE "DISCHARGE, DISPERSAL, SEEPAGE, MIGRATION, RELEASE, OR ESCAPE" OF POLLUTANTS" IS AMBIGUOUS

The words, "discharge, dispersal, seepage, migration, release, or escape" are terms of art in the field of environmental liability. Nautilus Ins Co v Jabar, 188 F3d 27, 30 (1st Cir., 1999); Atlantic Mutual Ins Co v McFadden, 595 NE2d 762, 764 (Mass, 1992); West American Ins Co v Tufco Flooring East, Inc, 409 SE2d 692, 699 (NC App. 1990).

All connote movement. In the typical environmental liability case, the insured is sued because the pollutant has travelled off of its property on to the property of another. Thus, while the phrase has historically referred to the movement of the pollutant off property owned by the insured, the words do not indicate, one way or the other, whether the phrase also extends to on site pollutants. This lack of clarity has led several courts to conclude that the "discharge..." phrase is itself ambiguous. See e.g. Meridian Mutual Ins Co v Kellman, 197 F3d 1178 (6th Cir., 1999) (applying Michigan law); Smith v Reliance Ins Co, 807 So 2d 1010 (La App, 2002) (duty to defend until the actual facts are developed); Nautilus Ins Co v Jabar, *supra*; Anderson v Highland House Co, 757 NE2d, 329 (Ohio, 2001) (liability for carbon monoxide injury from a heating vent in an apartment building is not excluded by the endorsement); Kerr-McGee v Georgia Casualty

& Surety Co, 568 SE 2d 484 (Ga App 2002) (“This definition of the escape of pollutants is overbroad and demonstrates ambiguity that would cause a reasonable person to be unsure of what is excluded and what is covered by the insurance”).

This Court should reach the same conclusion. The “discharge...” clause can be understood in two, reasonable, outcome-determinative ways. The Court should adopt the interpretation favorable to Wilson Investment, not the insurer whose lack of clarity created the ambiguity.

**C. PLAINTIFFS WERE NOT INJURED BY
“DISCHARGE, DISPERSAL, SEEPAGE,
MIGRATION, RELEASE, OR ESCAPE”**

One significant facet of this case is that the injury occurred in the same building, owned by the insured, where the injury-causing instrumentality (smoke or fire) originated. Unlike the typical environmental case, the claimed “pollutant” remained on the premises owned by the insured.

The insurer seemingly contends that the cause of the Hobsons’ injuries was not fire, but “discharge, dispersal, seepage, migration, release, or escape” (it doesn’t say which it relies on) of smoke (“pollutant”). Putting aside the lack of record evidence and the doctrine of ambiguity, consideration of the text of the “discharge...” phrase is in order. Notably, the endorsement lacks the “at or from” the insured’s premises provision found in the body of exclusion (f).

Several definitions of the (more or less) synonyms that comprise the “discharge...” phrase are found as Exhibit 13 to Plaintiffs’ Brief in Opposition to Application. Those

which might arguably apply often require movement from one confined locality to another. As examples, “discharge” may mean “to release from confinement”. “Dispersal” is first defined as, “the process... of the spreading of organisms from one place to another”. To “disperse” is to “cause to become spread widely” or “to spread or distribute from a fixed or constant source”. As an example, “Police ordered the crowd to disperse”.⁷ “Seepage” is “a quantity of fluid” (not a gas like smoke). “Migrate” is first described as “to move from one country, place, or, locality to another”. To “release” is “to release from something that confines”.

All of these terms involve significant movement from one locality to another. Viewed either from an abstract textualist perspective or in light of their environmental moorings, all refer to movement of the “pollutant” off the property owned by the insured. A review of the case law in analogous settings buttresses the conclusion that the total pollution endorsement exclusion does not relieve Indian Harbor of the indemnity coverage it promised and was paid to provide.

In Mistick, Inc. v Northwester National Casualty Co, 806 A2d 39 (Pa Super, 2001), suit was filed against the owner of rental property by the mother of a child who sustained lead poisoning as a result of eating lead paint chips which had fallen off the wall. The Court held that the movement of the paint chips within the premises did not fall within the “discharge....” clause, and that the lessor was entitled to insurance coverage.

⁷ Assuredly, police who order a crowd to disperse do not expect the subjects of the order to take a step or two, they expect them to leave the immediate area or building.

In American National Property v Wyatt, 400 SW3d 417 (Mo App. 2013), Mrs. Bentley drove her granddaughter and the child's friend to her apartment. She parked the car in the garage, and closed the door, but neglected to turn off the engine. One of the children died and the other was unconscious from carbon monoxide poisoning. The Court held that the "discharge..." clause was ambiguous as applied to the presence of the carbon monoxide confined to the garage.

In Kerr-McGee, supra, the employee of a sub-contractor was injured by the unintended exposure to a dangerous industrial chemical by the employee of another sub-contractor. The exposure was "wholly within Kerr-McGee's plant without any escape of the industrial chemical into the environment". Citing this fact, the court held that the exclusion did not apply because the terms "appl[y] only when pollutants escape outside the containment area"; "the exclusion [has] no application to a contained location".

Anderson v Highland House Co, 757 NE2d 329 (Ohio, 2001) also arose from a fatal exposure to carbon monoxide. In Anderson, the carbon monoxide fumes came from a faulty heating unit inside the apartment complex. Again the Court found the exclusion ambiguous and inapplicable.

Meridian Mutual Ins Co v Kellman, 197 F3d 1178 (6th Cir., 1999) arose from injuries sustained by a teacher at Detroit's Cass Technical High School. Ms. Kellman suffered respiratory injuries from fumes of a chemical that a contractor was using to seal a floor in the classroom immediately above hers. Applying Michigan law, the Court held that the pollution exclusion endorsement did not shield the insurer from liability.

The same outcome was reached in Nautilus Ins Co v Jabar, 188 F3d 27, 30 (1st Cir., 1999). In that case, the claimant was injured by hazardous chemical fumes from roofing products used to repair the roof at the claimant's place of employment.

The common theme of these cases is that the "discharge..." exclusionary clause is not triggered when the injurious substance causes its injury on the same property from which it originated. In this case, where the fire and smoke arose from the same building in which Plaintiffs were injured, there was no "discharge, dispersal, seepage, migration, release or escape" within the meaning of that phrase.

RELIEF SOUGHT

WHEREFORE, Plaintiffs pray that this Honorable Court deny the Indian Harbor Application for Leave to Appeal, or that this Court affirm the decisions of the Circuit Court and Court of Appeals; and that the Court allow Plaintiffs to recover the taxable costs and attorney fees of appellate proceedings.

Respectfully submitted,

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