

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Peter D. O'Connell, Stephen L. Borrello, and Elizabeth L. Gleicher

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

Supreme Court No. 151447

Plaintiffs-Appellees,

Court of Appeals No. 316714

v

Lower Court No. 12-008167-CK

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
XL INSURANCE, ET AL.S'
REPLY TO PLAINTIFFS-
APPELLEES'
SUPPLEMENTAL BRIEF**

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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ARGUMENT

Plaintiffs-Appellees Charlie and Mary Hobson (“Plaintiffs”) begin their Supplemental Brief with the same faulty premise as their Brief in Opposition to the Application: Plaintiffs again assert that there are two conflicting pollution exclusions in the policy issued by Defendants-Appellants Indian Harbor Ins. Co., XL Ins. America Inc., and XL Ins. Co. of New York (hereinafter collectively referred to as “XL Insurance”). This assertion – which was never raised in the trial court – is demonstrably false and contrary to black-letter law. See *McKusick v Travelers Indem Co*, 246 Mich App 329, 340; 632 NW2d 525 (2001) (“[C]onflicts between the terms of an endorsement and the form provisions of an insurance contract are resolved in favor of the terms of the endorsement.”). Moreover, Plaintiffs have again failed to address any of the case law cited by XL Insurance which establishes that the exclusion “in the body of the policy” was completely superseded, nullified, and erased by the Total Pollution Exclusion Endorsement and therefore, there can be no conflict between the two. “[I]nsurance contract law ... dictates that when an endorsement [alters] language from a policy, a court must not consider the [prior] language in its interpretation of the remaining agreement.” *Valassis Communications v Aetna Cas & Sur Co*, 97 F3d 870, 873 (6th Cir 1996) (emphasis added, applying Michigan law in diversity). “When a conflict arises between the terms of an endorsement and the form provisions of an insurance contract, the terms of the endorsement prevail.” *Hawkeye-Security Ins Co v Vector Constr Co*, 185 Mich App 369, 380; 460 NW2d 329 (1990).¹

¹ See also *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 26; 800 NW2d 93 (2010) (“[E]ndorsements by their very nature are designed to trump general policy provisions, and where a conflict exists between the provisions of the main policy and the endorsement, the endorsement prevails.”); *Jones v Philip Atkins Constr Co*, 143 Mich App 150, 160; 371 NW2d 508 (1985) (“If the language of an endorsement and the general provisions of the policy conflict, the endorsement will prevail, and the policy remains in effect as altered by the endorsement.”); *Tiano v Aetna Casualty & Surety Co.*, 102 Mich App 177, 184; 301 NW2d 476 (1980) (same).

Here, the Total Pollution Exclusion Endorsement states: “THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.” (Ex. 1.) It goes on to state: “This endorsement modifies insurance provided under the following: COMMERCIAL GENERAL LIABILITY COVERAGE PART *Exclusion f.* under Paragraph 2., Exclusions ... is replaced by the following....” (Id.) “The following” does not include the “hostile fire” exception to the exclusion, which Plaintiffs tacitly relied upon below. Plaintiffs’ ambiguity argument therefore fails under well-established principles of insurance policy interpretation. See *McKusick*, 246 Mich App at 340 (“The pollution exclusion endorsement specifically indicated that it modified coverage under the CGL coverage form.”). Therefore, under well-established principles of insurance policy interpretation, the pollution exclusion “in the body of the policy” *simply is not part of the analysis*. The prior pollution exclusion cannot conflict with anything because it ceased to be a part of the policy once the endorsement was issued. The prior exclusion, and its hostile fire exception, became nothing more than drafting history once it was superseded by the endorsement. See *Bituminous Cas Corp v Sand Livestock Systems, Inc*, 728 NW2d 216, 222 (Iowa 2007).

Plaintiffs go on to argue that the replacement of the pollution exclusion “in the body of the policy” with the Total Pollution Exclusion Endorsement is somehow problematic because XL Insurance must still rely upon the definition of “pollutant” found “in the body of the policy.” (Plaintiffs’ Supplemental Brief, p 23.) This would admittedly be a problem if the definitions were contained in the exclusion, but they are not. The definitions “in the body of the policy” are set forth in a different section. (Ex. 2 attached to Plaintiffs’ 6/10/15 Answer to Application, Commercial General Liability Coverage Form, pp 2, 11-13.) The Total Pollution Exclusion Endorsement quite specifically defines what it replaces; it supplants the pollution exclusion but

does nothing to the definitions. Again, the Total Pollution Exclusion Endorsement states: “This endorsement modifies insurance provided under the following: COMMERCIAL GENERAL LIABILITY COVERAGE PART *Exclusion f.* under Paragraph 2., Exclusions ... is replaced by the following....” (Ex. 1.) The definitions, set forth elsewhere in the Commercial General Liability Coverage Form, are clearly retained and are unaffected by the endorsement.

While on the topic of definitions, Plaintiffs also claim that there is a problem with the policy because it does not define the term “you.” (Plaintiffs’ Supplemental Brief, p 23.) This is also demonstrably false. The XL Insurance policy unambiguously states: “Throughout this policy the words ‘you’ and ‘Your’ refer to the Named Insured shown In the Declarations, and any other person or organization qualifying as a Named Insured under this policy.” (Ex. 2.) The named insured shown in the declarations is “W-4 Limited Family Partnership.” (Id.) Plaintiffs have never argued that they were “named insureds” under this policy, and there is no policy language that could support any such argument. For this reasons, the policy language cited by Judge O’Connell in his concurrence (see Plaintiffs’ Supplemental Brief, p 23) is of no consequence, for reasons explained at pages 8-9 of XL Insurance’s January 20, 2016 Supplemental Brief.

Plaintiffs also offer a lengthy discussion of “The Realities of Insurance Contracts” (Plaintiffs’ Supplemental Brief, pp 8-14) which ultimately amounts to a repackaging of their invitation to consider things beyond the four corners of the policy (particularly, the “reasonable expectations of the insured,” Id., p 10), contrary to precedent. This Court has repeatedly “rejected the notion that the perceived expectations of a party may override the clear language of a contract.” *Ile v Foremost Ins Co*, 493 Mich 915; 823 NW2d 426 (2012), citing *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003). What Plaintiffs may be trying to do here, through their emphasis on the “reasonable expectations of the insured,” is inch this Court

into harmony with those jurisdictions that have written a “traditional environmental incident” limitation into the exclusion. But again, this would require this Court to overrule *McKusick*, 246 Mich App at 340, a decision that Plaintiffs have consistently refused to even address – much less articulate a reason for rejecting after 15 years – in any of their Briefs. Rewriting the Total Pollution Exclusion Endorsement, to include such a limitation, would also be irreconcilable with this Court’s decisions in *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 368; 817 NW2d 504 (2012),² *Rory v Cont’l Ins Co*, 473 Mich 457, 469; 703 NW2d 23 (2005),³ and *Wilkie*, 469 Mich at 51-52, among others. In other words, this State’s precedents have expressly rejected the notion that the “background and purpose of the exclusion” (Plaintiffs’ Supplemental Brief, p 19)⁴ are relevant considerations in interpreting a pollution exclusion.

Indeed, most of Plaintiffs’ arguments tacitly assume that Michigan is one of those jurisdictions that “have limited [pollution] exclusion[s] to situations involving traditional environmental pollution, either because they find the terms of the exclusion to be ambiguous or because they find that the exclusion contradicts policyholders’ reasonable expectations.” See

² “In reading a prejudice requirement into the notice provision where none existed, the Court of Appeals disregarded controlling authority laid down by this Court and frustrated the parties’ right to contract freely.” *DeFrain*, 491 Mich at 368.

³ “This approach, where judges . . . rewrite the contract . . . is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance such as a contract in violation of law or public policy.” *Rory*, 473 Mich at 469, quoting *Wilkie*, 469 Mich at 51.

⁴ Establishing what the “background and purpose of the exclusion” were would of course require extrinsic evidence. But “extrinsic evidence may not be used to identify a patent ambiguity....” *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010). Plaintiffs claim that the policy is ambiguous on its face (Plaintiffs’ 6/10/15 Answer to Application, pp 14-16) and therefore, Plaintiffs have asserted a patent ambiguity (as opposed to a latent ambiguity). Therefore under these circumstances, referring to evidence from outside the insurance contract, regarding the “background and purpose of the exclusion,” would violate the parol evidence rule. See *Mich Chandelier Co v Morse*, 297 Mich 41, 48; 297 NW 64 (1941); *Hall v Equitable Life Assurance Soc*, 295 Mich 404, 409; 295 NW 204 (1940).

Apana v TIG Ins Co, 574 F3d 679, 682-683 (9th Cir 2009). But it is not; for 15 years Michigan has applied such exclusions “literally,” see *Id.*, and Plaintiffs have articulated no reason to change this. As explained in *Apana*, 574 F3d at 682-683, nationally “[s]tate courts fall roughly into one of two broad camps” when it comes to the treatment of total pollution exclusions. “Some courts apply the exclusion literally because they find the terms to be clear and unambiguous.” *Id.* “Other courts have limited the exclusion to situations involving traditional environmental pollution, either because they find the terms of the exclusion to be ambiguous or because they find that the exclusion contradicts policyholders' reasonable expectations.” *Id.* Michigan falls within the first camp. *Id.*, citing *McKusick*, 246 Mich App at 329. Plaintiffs have consistently ignored this throughout this appeal and in their Supplemental Brief, have cited cases from the second camp without acknowledging this critical distinction.

For example, Plaintiffs cite *Gainsco Ins Co v Amoco Prod Co*, 2002 WY 122; 53 P3d 1051 (Wyo 2002) for the proposition that this type of exclusion is ambiguous and must be read to apply only to “environmental pollution.” (Plaintiffs’ Supplemental Brief, p 19.) But *Gainsco* is specifically identified in *Apana*, 574 F3d at 683 as being representative of the second “camp” that Michigan has historically rejected. The same is true of *Andersen v Highland House Co*, 93 Ohio St 3d 547; 757 NE2d 329 (Ohio 2001), which Plaintiffs rely upon without even acknowledging the jurisdictional dichotomy explained in *Apana*, 574 F3d at 683. (Plaintiffs’ Supplemental Brief, pp 26, 29.) Other cases relied upon by the Plaintiffs are not even authoritative in their own jurisdictions. For example, *Kerr-McGee Corp. v Ga Cas. & Surety Co*, 256 Ga App 458; 568 SE2d 484 (2002) (see Plaintiffs’ Supplemental Brief, pp 26-27, 29) has been found to lack precedential weight because “it is a one-judge opinion with two judges joining in the judgment only....” *Auto-Owners Ins Co v Reed*, 286 Ga App 603, 606 n 1; 649

SE2d 843 (2007).⁵ And *American National Property & Casualty Co v Wyatt*, 400 SW3d 417 (Mo App 2013) (see Plaintiffs' Supplemental Brief, p 29) has been criticized for "its limited consideration of Missouri case law and its failure even to address contrary authority...." *United Fire & Cas Co v Titan Contrs Serv*, 751 F3d 880, 885 n 2 (8th Cir 2014).⁶

Plaintiffs now also argue, for the first time, that the phrase "discharge, dispersal, seepage, migration, release or escape" or "pollutants" is ambiguous. (Plaintiffs' Supplemental Brief, p 26.) Plaintiffs' assertion that this phrase is ambiguous is directly at odds with *Protective Nat'l Ins Co v Woodhaven*, 438 Mich 154, 167; 476 NW2d 374 (1991), another decision that Plaintiffs have ignored. Plaintiffs nonetheless urge this Court to read the phrase in a manner that requires "the movement of the pollutant off the property owned by the insured...." (Plaintiffs' Supplemental Brief, p 26.) But upon closer inspection, this aspect of Plaintiffs' "ambiguity" argument really just paraphrases Plaintiffs' request that this Court graft a "typically environmental liability" limitation onto the Total Pollution Exclusion Endorsement (Id.) – something this State's precedent does not permit.

To the extent that Plaintiffs' argument is based upon a need for "movement" of the pollutant (Id.), that is precisely what their Complaint in the underlying case alleged. Plaintiffs' claim against their landlord (XL's insured) was predicated on the allegation that the "building manager fell asleep while cooking a meal," causing a fire. (Plaintiffs' Supplemental Brief, p 2.)

⁵ In *Auto-Owners*, 286 Ga App at 606-607, the pollutant was "completely contained inside the house," yet the pollution exclusion was applicable because the plain language of the exclusion *did not* restrict its scope "only to environmental pollutants." (Citations omitted.)

⁶ The Eighth Circuit, applying Missouri law in diversity, found that *American National Property*, 400 SW3d at 426 was "not ... especially instructive" because it relied "almost exclusively on cases from other jurisdiction" and conflicted with "several Missouri cases that have applied the absolute pollution exclusion to a wider range of substances," including at least one that "expressly reject[ed] the argument that 'pollutant' is limited to traditional environmental pollution...." *United Fire & Cas*, 751 F3d at 885 n 2 (citations omitted).

Smoke and/or soot from that fire allegedly *migrated* from the unit where the building manager was cooking, and *seeped* into the Plaintiffs' residential unit. (See Ex. 6 attached to Plaintiffs' 6/10/15 Answer to Application, p 1.)⁷ *No one has ever alleged that there was a fire inside the Plaintiffs' unit.* (See Ex. 3 attached to Plaintiffs' 6/10/15 Answer to Application.) In order to have suffered the smoke inhalation injuries alleged in their Complaint, smoke from the fire *that started in another unit* had to have dispersed, seeped, or migrated into the Plaintiffs' unit, and had to have been released or escaped from the unit where the building manager started the fire.

As noted in XL Insurance's prior briefs, the Total Pollution Exclusion Endorsement excludes any "bodily injury" 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" (which, again, the policy defines to include "smoke" and "soot"). (Ex. 1.) The exclusion uses the word "or," meaning the list is disjunctive and any one of the six events listed (a discharge, dispersal, seepage, migration, release, *or* escape) will trigger the exclusion. See *Holiday Hospitality Franchising, Inc v AMCO Ins Co*, 983 NE2d 574, 579 (Ind 2013). After making a half-hearted attempt to mine dictionaries for favorable definitions of these terms, Plaintiffs simply argue that an on-site fire can never constitute any of these things, because each of these terms "involve significant movement from one locality to another." (Plaintiffs' Supplemental Brief, p 28.) But again, a closer look at this argument reveals that it is really just a veiled invitation for this Court to graft a "typically environmental liability" limitation onto the Total Pollution Exclusion Endorsement. Moreover, if an on-site fire could not by its very nature cause

⁷ "The Hobsons' attorney claims that a fire occurred at this location during the early morning hours *in another apartment at this complex*, notably Apartment 2." (Ex. 6 attached to Plaintiffs' 6/10/15 Answer to Application, p 1, emphasis added.) This is from an exhibit relied upon *by the Plaintiffs* in the Court of Appeals.

a “discharge, dispersal, seepage, migration, release, or escape” as Plaintiffs assert, then the rescinded “hostile fire” exception that originally appeared in the policy *would have been completely superfluous* because, under Plaintiffs’ reasoning, a hostile fire could never implicate the pollution exclusion in the first place. The fact that such exceptions even exist in the insurance industry refutes the Plaintiffs’ position in this regard. See *Firemen's Ins Co v Kline & Son Cement Repair, Inc*, 474 F Supp 2d 779, 797 (ED Va 2007).⁸ In short, if the pollution exclusion required that the pollutant come into being somewhere other than on the insured’s property – and later move onto the insured’s property – before the exclusion could apply, then the policy easily could have said so. It does not. See *Bituminous Cas Corp*, 728 NW2d at 221 (carbon monoxide produced by a propane power washer, which had been improperly run inside a building without ventilation, represented a “dispersal,” “release,” or “escape” of a “pollutant”; there was no suggestion that the carbon monoxide had to have been contained at some point after the device created it, and then break free, in order for the exclusion to apply).

As noted, Plaintiffs’ argument – that a pollutant first had to be “contained” in order for the exclusion to apply – seems to flow largely from the tacit assumption that the pollution exclusion should only apply to traditional environmental incidents. This position cannot be

⁸ In *Firemen's Ins Co*, 474 F Supp 2d at 797, the District Court noted that the “Hostile Fire Exception to the Pollution Exclusion clause signifies that the Pollution Exclusion applies to indoor pollution.” Such an exception “ensures that the pollution exclusion does not eliminate coverage for outbreaks of fire on the premises by excluding coverage for damage resulting from smoke and fume inhalation, smoke damage, and other claims, whether such damage occurs on or off the premises.” *Id.* There, by implication, the omission of such an exception denotes that the pollution exclusion *does* eliminate coverage for “outbreaks of fire on the premises.” As further explained in *In Firemen's Ins Co*, 474 F Supp 2d at 797, “[t]he Hostile Fire Exception clearly applies to accidents that occur within a building and that do not result from what is commonly considered industrial environmental pollution” would therefore “be unnecessary if the Pollution Exclusion clause were limited to traditional environmental pollution scenarios, because the usual fires (and smoke and fumes generated) in an industrial or indoor setting do not qualify as a ‘traditional’ environmental occurrence.”

reconciled with *Protective Nat'l*, 438 Mich at 164 (rejecting the dissenting Justices' assertion that "the very title of the clause" itself implied that "the exclusion ... should apply only to acts of pollution"). This Court has found "the language of the policy to be better evidence of what the exclusion excepts from coverage" than the legal community's general understanding of how such exclusions operate. *Id.*

Again, as noted in *Apana*, 574 F3d at 682-683, numerous courts throughout the United States have held that pollution exclusions *are not* limited to "traditional environmental damage." See *Bituminous Cas Corp*, 728 NW2d at 221-222. As Nebraska's Supreme Court held in *Cincinnati Insurance Co v Becker Warehouse, Inc*, 262 Neb 746, 755-756; 635 NW2d 112 (2001), a pollution exclusion can be "quite broad" yet still be unambiguous; "[t]he language of the policy does not specifically limit excluded claims to traditional environmental damage; nor does the pollution exclusion purport to limit materials that qualify as pollutants to those that cause traditional environmental damage." The Nebraska Supreme Court further observed in 2001 that a "majority of state and federal jurisdictions have held that absolute pollution exclusions are unambiguous as a matter of law and, thus, exclude coverage for all claims alleging damage caused by pollutants," not just "traditional environmental pollution claims." *Id.* at 753 (citation omitted). The Eighth Circuit echoed this observation more recently in *Church Mut Ins Co v Clay Ctr Christian Church*, 746 F3d 375, 380 (8th Cir 2014). Such an approach is consistent with, if not mandated by, the holding in *Rory*, 473 Mich at 461 that an unambiguous insurance policy provision "is to be enforced as written" irrespective of any "judicial assessment of reasonableness...." See also *McKusick*, 246 Mich App at 337-338.

Plaintiffs also argue that there was no "discharge, dispersal, seepage, migration, release or escape" or "pollutants" because XL Insurance allegedly breached the duty to defend.

Exhibit 14

Order

December 9, 2015

151447

**CHARLIE B. HOBSON and
MARY L. HOBSON,**
Plaintiffs-Appellees,

v

**INDIAN HARBOR INSURANCE COMPANY ,
XL INSURANCE AMERICA, INC., and XL
INSURANCE COMPANY OF NEW YORK, INC.,**
Defendant-Appellants,

SC: 151447
COA: 316714
Wayne CC: 12-008167-CK

and

**WILSON INVESTMENT SERVICE &
CONSTRUCTION, INC., WILSON INVESTMENT
SERVICE, CRESCENT HOUSE APARTMENTS,
CRESCENT HOUSE APARTMENTS, L.L.C., W-4
FAMILY LIMITED PARTNERSHIP, W-4 FAMILY
L.L.C., and JAMES P. WILSON,**
Defendant-Appellees.

On order of the Court, the application for leave to appeal the March 10, 2015 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). 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 parties should not submit mere restatements of their application papers.

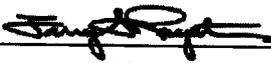
BERNSTEIN, J., not participating due to his prior relationship with The Sam Bernstein Law Firm.



a1202

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 9, 2015


Clerk

Michigan Supreme Court
Lansing, Michigan

Robert P. Young, Jr.,
Chief Justice

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

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Exhibit 15

Order

January 27, 2016

151447(74)

**CHARLIE B. HOBSON and MARY L.
HOBSON,**

Plaintiffs-Appellees,

v.

**INDIAN HARBOR INSURANCE COMPANY,
XL INSURANCE AMERICA, INC., and XL
INSURANCE COMPANY OF NEW YORK, INC.,
Defendants-Appellants,**

and

**WILSON INVESTMENT SERVICE &
CONSTRUCTION, INC., WILSON INVESTMENT
SERVICE, CRESCENT HOUSE APARTMENTS,
CRESCENT HOUSE APARTMENTS, L.L.C., W-4
FAMILY LIMITED PARTNERSHIP, W-4 FAMILY
L.L.C., and JAMES P. WILSON,
Defendants-Appellees.**

**Michigan Supreme Court
Lansing, Michigan**

**Robert P. Young, Jr.
Chief Justice**

**Stephen J. Markman
Brian K. Zahra**

**Bridget M. McCormack
David F. Viviano**

**Richard H. Bernstein
Joan L. Larsen,
Justices**

**SC: 151447
COA: 316714
Wayne CC: 12-008167-CK**

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On order of the Chief Justice, the motion of plaintiffs-appellees to extend the time for filing their supplemental brief is **GRANTED**. The brief will be accepted for filing if submitted on or before February 10, 2016. Because counsel for plaintiffs-appellees delayed filing the motion until the late afternoon of the day the parties' supplemental briefs were due, as directed by this Court, and after defendants-appellants had timely submitted their supplemental brief, defendants-appellants may file a reply, limited to no more than ten pages in length, within 21 days of being served plaintiffs-appellees' supplemental brief.



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 27, 2016


Clerk

Exhibit 16

COUNTER-STATEMENT OF MATERIAL FACTS AND
PROCEEDINGS

A. Background Facts

Indian Harbor Insurance Company or its affiliates¹ sold a Commercial General Liability insurance policy (Ex. 2)² to W-4 Family Limited Partnership (“Wilson”, “the insured”, or “the landlord”³). The insured business of Wilson was “APARTMENT BUILDINGS” (Ex. 2, p. 1).

Plaintiffs Charlie Hobson and Mary Hobson were tenants in one of the apartment buildings owned and operated by Wilson and covered by the Indian Harbor Insurance Policy (Ex. 3, Complaint, ¶¶ 3, 6, 7). On July 17, 2008, during the insurance policy coverage period, a fire broke out, causing serious injuries and losses to the Hobsons (Ex. 3, ¶¶ 10, 11). The injuries were caused by the negligence of the landlord (Ex. 3, ¶ 9)⁴.

When Plaintiff’s counsel contacted the Insurer pre-suit, it declined coverage, claiming that the Tenant Agreement required the tenants (Hobsons) to purchase

¹ Suit was filed against three affiliated insurers: Indian Harbor, XL Insurance America, Inc., and XL Insurance Company of New York, Inc. The three are collectively referred to as “Indian Harbor” or “the Insurer”.

² The Brief filed by the Insurer contains lettered exhibits. To avoid confusion, the exhibits to this Brief are numbered and include the full insurance policy (Pl. Ex. 2).

³ Several related entities which operate apartment buildings, called “Wilson” for simplicity, were defendants in the personal injury action but are not involved in this declaratory judgment action.

⁴ According to claims materials (Ex. 4), the fire occurred when the Wilson “building manager drifted off to sleep while preparing a meal”.

renter's insurance (Ex. 5). The Insurer has since abandoned that basis for denying coverage.

When Wilson sought protection, the Insurer again disclaimed coverage (Ex. 6). This time, it cited the "pollution" exclusion, the basis for its current argument. With this refusal of coverage, the Insurer closed its file (Ex. 7).

As a result, Plaintiffs filed their personal injury action against Wilson (Ex. 3) and a declaratory judgment action against the Insurer. Having been abandoned by the Insurer, Wilson defended the tort action at its own expense with its own counsel (Ex. 10, transcript of May 24, 2013, pp. 15-16).

The Insurer filed a motion for summary disposition offering two arguments. First, it argued that the Hobsons could not file a declaratory judgment action against it, an argument it has abandoned on appeal. Second, it argued that, because the personal injury Complaint alleged smoke inhalation, as one of the injuries caused by the fire, its duty to defend or indemnify Wilson was abrogated by a "pollution" endorsement. Plaintiffs responded with their Answer to the Insurer's motion and their counter-motion for summary disposition (Ex. 9).

B. The Insurance Policy

The insurance policy covers the negligence liability of the Insured, Wilson. It provides coverage for liability arising from a fire, as Defendant's counsel readily acknowledged (Ex. 10, Tr. 5/24/13, p. 15) ("Yes", "If they would have just been

burned, they would have been covered”). The Insurer claimed, however, that since the fire produced smoke, coverage was abrogated by the “pollution” endorsement.

The contract provisions bearing on the dispute are as follows.

1. The Insuring Agreement

The scope of the insurance sold by Appellant is described in Section I A, “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”:

“‘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”.

2. The Pollution Exclusion In The Body of the Policy

The CGL insurance policy contains, in its body, a “Pollution” exclusion [exclusion 2(f), pp. 2-3]. The exclusion applies to “ ‘Bodily injury’ or ‘property damage’ arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of ‘pollutants’” [exclusion (f)(1)(a)]. “However, this sub-paragraph does not apply to... ‘bodily injury’ or ‘property damage’ arising out of heat, smoke or fumes from a ‘hostile fire’” [exclusion (f)(1)(a)(iii)].

This case involves a “hostile fire” as that term is defined in the insurance policy. Thus, the “pollution” exclusion in the body of the insurance policy does not avoid coverage, since the reach of the exclusion does not extend to injuries to Plaintiffs “arising out of heat, smoke, or fumes” - - i.e. those injuries remain covered.

3. The Inapplicability of the Pollution Exclusion to Damage By Fire On Rented Property

On page 5 of the policy [Bates No. HOBSON00031], following the listing of the exclusions, the insurance policy language makes the pollution and other exclusions inapplicable to fire damage to leased premises:

“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.”

4. The Pollution Endorsement

There is a separate pollution endorsement invoked by Indian Harbor. It provides:

“This insurance does not apply to:

“‘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.”

The Definitions section defines “pollutants”:

“‘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.”

The “Total Pollution Exclusion Endorsement” (Bates No.HOBSON000047), which is the foundation of the Insurer’s argument, purports to “modif[y] insurance under the ... Commercial General Liability Coverage... Exclusion f...”. However, it does not retract the limitation by which exclusions “do not apply to damage by fire to premises while rented to you”. This language remained in effect, making the pollution exclusion [~~in whatever form~~] inapplicable to fire damage on leased premises.

C. The Circuit Court Summary Disposition Ruling

The summary disposition motion was argued before Hon. Kathleen MacDonald, Wayne County Circuit Court Judge, on May 24, 2013 (Ex. 10). By that time, Wilson, fending for itself, reached a settlement with Plaintiffs (Tr. 5/24/13, pp. 3-4). At the conclusion of the argument, the Court denied the Insurer’s motion, and granted that of Plaintiffs, regarding insurance coverage (Tr. 5/24/13, p. 15).

With this ruling, the Court allowed Wilson to pursue its claim for attorney fees incurred in defending the personal injury action (Tr. 5/12/13, p. 16). Consequently, the Order resolving the coverage dispute was not a final order (Ex. 11).

D. The Appellate Decision

The Insurer filed an Application for Leave to Appeal, seeking interlocutory appellate review. By Order of December 20, 2013 (Ex. 12), the Court of Appeals

denied the Application, “for failure to persuade the Court of the need for immediate appellate review”.

The Insurer then sought Supreme Court review. In lieu of granting leave, the Court remanded for consideration as on leave granted (Ex. 14).

On appeal, the Court of Appeals affirmed (Ex. 1). The lead opinion, with which all Judges concurred (Judges O’Connell, Borello and Gleicher) concluded that Plaintiffs’ claim was not excluded by the pollution endorsement, because that was not the nature of the claims (Ex. 1, p. 5):

“...[C]onstruing the exclusion in the context of the policy as a whole, it is clear that, under the plain terms of subsection (f), plaintiffs did not allege that they sustained injuries that ‘would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of’ a pollutant as that term is defined in the policy. Here, plaintiffs did not allege that their injuries were caused by a pollutant. Instead, plaintiff’s alleged that negligence on the part of the insured’s employees gave rise to their injuries. Specifically, in their complaint in this case, plaintiffs alleged in relevant part that employees of the insured ‘set a fire due to negligence... causing... Plaintiffs the injuries and damages set forth in the complaint in [the companion case against the Wilson defendants]’ (emphasis in the original). Indeed, the insurance defendants even acknowledge in their brief on appeal that ‘plaintiffs were allegedly injured in a fire, which occurred in the apartment complex

that started inside the building where plaintiffs were physically located. There was no migration. There was no seepage.

* * *

In this case, plaintiffs allegedly suffered injuries because of the negligence on the part of the insured that resulted in a fire. Plaintiffs did not allege injuries that were caused in whole or in part by the discharge, dispersal, release, seepage, migration, or escape of a pollutant. Defendant's contention that the pollutant was the basis for plaintiffs' claim is inaccurate. Plaintiffs were allegedly injured by when the fire and smoke engulfed them. It did not pollute them. Accordingly, the trial court did not err in denying the insurance defendant's motion for summary disposition."

Judge O'Connell, concurring, identified another reason why the trial court reached the correct result. According to the insurance policy, the pollution exclusion was inapplicable to fires on the leased premises (concurrence, p. 2):

"The insurance defendants' entire argument regarding the change in the pollution clause constitutes smoke and mirrors. The final paragraph of Section I – Coverages, 2. Exclusions, on the fifth page of the policy, provides that '[e]xclusions 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.' The parties' endorsement changed

subdivision f., which falls alphabetically between c. and n. By the plain language of the policy, exclusion f. does not apply in this case because the Hobson's claim concerns 'damage by fire to premises.'".

Plaintiffs had offered additional reasons why the trial court reached the correct decision. Because of its decision, the Court of Appeals found no need to address more reasons why there was insurer liability.

E. The Application For Supreme Court Review

The Insurer has now applied for Supreme Court review. The gist of its argument is that the Court of Appeals did not properly construe and apply the contract language - - even though the appellate court said it did exactly that (Ex. 1, pp. 2, 4-6). For the reasons which follow, Plaintiffs contend that the lower courts correctly applied the contract language in accord with settled contract jurisprudence; that the trial court and Court of Appeals had alternative grounds to reach the same outcome; and that this case and the issue it presents do not warrant extraordinary review by a Supreme Court of last resort.