

STATE OF MICHIGAN

COURT OF APPEALS

HYDRODYNAMICS, INC.,

Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE CO.,

Defendant-Appellee.

UNPUBLISHED

July 11, 1997

No. 193389

Oakland Circuit

LC No. 95-502395-CZ

Before: Michael J. Kelly, P.J., and Wahls and Gage, JJ.

PER CURIAM.

In this declaratory action to determine defendant's duty under an insurance policy to defend plaintiff in a lawsuit, plaintiff appeals as of right from an order granting defendant summary disposition pursuant to MCR 2.116(I). We affirm.

We review a motion for summary disposition under MCR 2.116(I) de novo to determine whether the pleadings show that a party was entitled to judgment as a matter of law or whether affidavits or other documentary evidence showed that no genuine issue of material fact existed. *Asher v Exxon Co, USA*, 200 Mich App 635, 638; 504 NW2d 728 (1993).

Plaintiff's insurance policy with defendant included a pollution exclusion clause that excluded coverage for "[b]odily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants." The circuit court held that sewage constituted a pollutant for purposes of this clause. On appeal, plaintiff argues that this holding was in error and points to the definition of sewage contained in the underlying complaint, which states:

Sewage means urine, feces, blood, other human bodily fluids, toxins, bacteria including e coli, microbes, viruses including hepatitis, HIV and other AIDS viruses, pathogens, carcinogens, disease organisms, disease carrying organisms, spores, chemicals, fertilizers[,] other elements of sewage, combined sewage overflow, groundwater, rainwater, debris, sewer gases, vapors and odors, liquids and solids, sewer influent of every kind and nature and/or any other gases, liquids and solids and components of

sewage which may have been contained in the solutions which backed up or came into the homes of the Plaintiffs. Sewage includes these solutions whether fully treated, partially treated or untreated.

Plaintiff contends that because the complaint's definition of sewage includes groundwater and rainwater, which are not necessarily pollutants, the lower court erred in granting summary disposition because defendants owed a duty to defend against the claims until the exact nature of the damages to the complainants' residences could be determined. *American Bumper and Mfg Co v Hartford Ins Co*, 207 Mich App 60, 66; 523 NW2d 841 (1994). We disagree.

In the context of a pollution case, the parameters of the duty of an insurance company to defend its insureds from the claims of third parties are defined by the allegations in the complaint of the third party against the insured. *Protective Nat Ins Co of Omaha v City of Woodhaven*, 438 Mich 154, 159; 476 NW2d 374 (1991). However, this Court has held that the duty to defend is not based solely on the terminology used in the pleadings. *State Farm Fire and Casualty Co v Basham*, 206 Mich App 240, 242; 520 NW2d 713 (1994). Rather, a court must focus on the cause of the injury to determine whether coverage exists. *Id.*

Here, although the underlying complaint included groundwater and rainwater as components of its definition of sewage, it is clear from the face of the complaint that none of the damage alleged was caused by groundwater or rainwater alone. The complaint refers to the failing of the "influent pumps" causing rain to accumulate with sewage that backed up into the complainants' homes. Groundwater and rainwater, when mixed with effluent from sanitary sewers, is considered a pollutant. See *Black Marsh Drainage Dist v Rowe*, 350 Mich 470, 477; 87 NW2d 65 (1957).

Because there is no issue of material fact that the sewage back-up causing damage to the underlying complainants' basements was a mixture of rainwater, groundwater and other pollutants, the trial court did not err in granting defendant's motion for summary disposition on the basis that the pollution exclusion clause negated defendant's duty to defend the claims made against plaintiff.

Affirmed.

/s/ Myron H. Wahls

/s/ Hilda R. Gage

Judge Kelly did not participate.