STATE OF MICHIGAN

COURT OF APPEALS

CARPET WORKROOM,

Plaintiff-Appellant,

v

AUTO OWNERS INSURANCE COMPANY,

Defendant-Appellee,

and

LENA BENEDICT and ANTHONY BENEDICT,

Intervening Plaintiffs-Appellees.

UNPUBLISHED
July 23, 2002

No. 223646
Oakland Circuit Court
LC No. 98-008944-CK

MERIDIAN MUTUAL INSURANCE COMPANY,

Plaintiff-Appellant,

v

MARY ANNE HANDRINOS and PROFESSIONAL FLOOR COVERING,

Defendant-Appellees.

No. 224040
Oakland Circuit Court
LC No. 99-012356-CK

Before: Cooper, P.J., and Hood and Kelly, JJ.

PER CURIAM.

In these consolidated insurance coverage cases, plaintiffs sought declaratory relief concerning whether a pollution exclusion provision contained in a commercial liability insurance policy vitiated the insurers' duty to defend and indemnify their insured's for bodily injury to third parties who sustained injury after being exposed to fumes emanating from flooring adhesive.

In Docket No. 223646, plaintiff Carpet Workroom appeals as of right an order entered in the trial court denying its motion for summary disposition and granting defendant Auto Owners Insurance Company's (Auto Owners) cross-motion for summary disposition. In Docket No. 224040, plaintiff Meridian Mutual Insurance Company (Meridian) appeals as of right an order entered in the trial court granting defendant Mary Anne Handrinos' (Handrinos) motion for summary disposition. We affirm in Docket No. 223646 and reverse in Docket No. 224040.

I. Basic Facts and Procedural History

A. Docket No. 223646

Carpet Workroom installs carpet. It purchased a commercial general liability (CGL) insurance policy from Auto Owners that provided coverage for bodily injury arising out of an "occurrence" but also included a standard pollution exclusion provision.

In September 1995, Madison National Bank (Madison) entered into a contract with Harbor Pointe Interiors (Harbor Pointe) to remove and install new carpeting in an enclosed common stairway conjoining the first and second floors in a two-story office building owned by Madison. Madison occupied the first floor and Summit Insurance Agency (Summit) occupied the second. Harbor Pointe, in turn, subcontracted the work to Carpet Workroom. The individuals that actually installed the carpet were Carpet Workroom's subcontractors. To install the carpeting, Carpet Workroom's subcontractor used a professional/industrial grade contact cement containing "hazardous ingredients" toluol (toluene), acetone, and n-hexane. Soon after the contact cement was employed, Lena Benedict, one of Summit's employees on the second floor was overcome by fumes from the adhesive and transported by ambulance to the hospital. Benedict claims that as a result of this incident she sustained serious and permanent injuries.

Benedict filed suit against various parties including Carpet Workroom.[1] Carpet Workroom submitted the claim to Auto Owners, its insurer. Auto Owners denied coverage and Carpet Workroom filed a declaratory action seeking an order directing Auto Owners to defend and indemnify it in the underlying action. The parties filed cross motions for summary disposition in accord with MCR 2.116(C)(10). Determining that the pollution exclusion contained in the insurance contract precluded coverage, the trial court granted Auto Owners summary disposition and denied summary disposition to Carpet Workroom. Carpet Workroom appeals as of right.

B. Docket No. 224040

Defendant Professional Floor Covering Inc., (Professional) is also a company that installs carpet and other floor covering. It purchased a GCL insurance policy from Meridian which provided coverage for bodily injury arising out of an "occurrence" but also contained a pollution exclusion provision.

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[1] Plaintiff-Appellant Anthony Benedict, Lena's husband, filed a derivative claim for loss of consortium.

In September 1997, during the coverage period, Professional was hired to install new carpeting, tile, and molding in a commercial building that was being renovated. Professional's employee used an adhesive which contained the "hazardous component" potassium hydroxide solution to install the flooring and molding. Mary Anne Handrinos, a third party who worked in the building was overcome by fumes emanating from the adhesive.

Handrinos filed an action against Professional alleging that as a result of her exposure to the hazardous fumes, she sustained serious and permanent injuries. Professional submitted the claim to Meridian, its insurer. Relying upon the "absolute pollution exclusion" in the policy, Meridian denied coverage. Thereafter, Meridian filed a declaratory action against both Professional and Handrinos, seeking a declaration that it did not have a duty to defend or indemnify Professional in conjunction with the underlying suit. Meridian and Handrinos filed cross-motions for summary disposition in accord with MCR 2.116(C)(10). Handrinos argued that coverage was provided under two separate provisions, that being Section I/Coverage A for bodily injury and under the "products-completed operations" provision.

The trial court found that the language contained in the exclusion was ambiguous and construing that provision most strictly against Meridian, granted Handrinos summary disposition. This appeal of right ensued.

II. Standard of Review

This Court reviews de novo a trial court's decision regarding a motion for summary disposition in a declaratory judgment action. *Michigan Educational Employees Mut Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000). When reviewing a motion brought under MCR 2.116(C)(10), this Court reviews the documentary evidence to determine whether a party was entitled to judgment as a matter of law or whether a genuine issue of material fact exists. *Spiek v Dep't of Transportatio*n, 456 Mich 331, 337; 572 NW2d 201 (1998); *McGuirk Sand & Gravel, Inc v Meridian Mut Ins Co*, 220 Mich App 347, 352; 559 NW2d 93 (1996). Where the proffered evidence fails to establish a genuine issue of any material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

III. The Insurance Contracts

As an initial matter, we note that the disputed portions contained in both Auto Owner's and Meridian's insurance policies are identical and provide in pertinent part:

> COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement.
>
> * * *
>
> b. This insurance applies to "bodily injury" . . . only if:
>
> (1) The `bodily injury' . . . is caused by an `occurrence' that takes place in the `coverage territory' . . . .

* * *

2. Exclusions.

This insurance does not apply to

* * *

f. (1) `Bodily injury' . . . arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:

(i) if the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor . . . .

The terms "pollutants" and "occurrence" are terms of art defined in the respective insurance contracts. In both policies, the term "pollutants" means "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." And, an "occurrence" is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Interpretation of contractual language is an issue of law subject to review de novo. *Morley v Automobile Club of Michiga*n, 458 Mich 459, 465; 581 NW2d 237 (1998). An insurance policy is a contract to which well-settled principles of construction apply. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 332; 632 NW2d 525 (2001). As a contract, an insurance policy must be read as a whole to discern and effectuate the parties' intent. *Id*. Accordingly, an insurance contract must be enforced in accord with its specific terms. *Id*. Indeed, "`[a]ny clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy.'" *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558, 568; 596 NW2d 915 (1999). (Citation omitted.) To give effect to the parties' intent, contracts must be interpreted "according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense." *Farm Bureau Mutual Insurance Co v Stark*, 437 Mich 175, 181; 468 NW2d 498 (1991) overruled on other grounds in *Smith v Global Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) (citations omitted.) Where the terms employed are free of ambiguity, a court may not spawn ambiguity where none otherwise exists. *Nikkel, supra* at 568.

In addition to these general principles, a exclusionary provision contained in insurance contracts is most strictly construed against the insurer and in favor of the insured. *McGuirk v Meridian Mutual Ins Co*, 220 Mich App 347, 353; 559 NW2d 93 (1996). However, clear and specific exclusions must be given effect lest an insurance company become liable for a risk that it did not assume. *Id*.

IV. Analysis

Both CGL insurance policies at issue contain provisions excluding coverage for bodily injury "arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants." For purposes of the applicable insurance policies, the term "pollutants" include, "any solid, liquid, [or] gaseous . . . irritant or contaminant, including . . . vapor, . . . fumes, . . . [and] chemicals." The insureds argue that the pollution exclusion is ambiguous because the insurance industry only intended the exclusion to apply to traditional, environmental contamination and applying the exclusion to deny coverage under the circumstances that gave rise to the underlying litigation would defeat their reasonable expectation of coverage. We disagree.

The language contained in the exclusionary provisions of the insurance contracts specifically bars coverage for the "release" or "escape" of "pollutants," or "fumes" from:

> (d) any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:
>
> (i) if the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor . . .

Although factually distinguishable in some respects[2], we find that our recent decision in *McKusick* disposes of several issues raised herein: (1) the pollution exclusion contained in both insurance policies are clear and unambiguous; (2) a "pollutant" need not necessarily result in widespread contamination of land, air or other natural resources for the exclusion to apply and bar coverage. Thus, the exclusion is not limited to traditional environmental contamination claims; (3) the policy terms "discharge," "dispersal," "seepage," "migration," "release," and "escape" are to be accorded their plain, ordinary and commonly used meanings. This Court will not "judicially engraft" any exception or limitation onto the unambiguous policy language and (4) because the pollution exclusion is clear and unambiguous, this Court's speculation concerning the intent of the insurance industry in formulating the pollution exclusion at issue herein is neither required nor invited.

We thus conclude as a matter of law that the pollution exclusion contained in the insurance policies at issue herein is clear and unambiguous. The bodily injury sustained by third parties Benedict and Handrinos clearly arose out of the discharge, dispersal, migration, release or escape of pollutants defined to include any gaseous irritant or contaminant, such as vapor, fumes,

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[2] We recognize that the underlying claim in *McKusick* was a products liability claim while the underlying claims in the two cases herein sound in negligence. The plaintiffs in *McKusick* were harmed by the failure of a high pressure hose manufactured by the insured to carry the chemical away from the employees and not by "the inadvertent exposure to vapors and fumes from chemicals used as intended." See *McKusick, supra* at 337. However, this distinction is one without import considering that the pollution exclusions clearly and unambiguously exclude coverage and do not otherwise distinguish between the proper use of the polluting substance or negligent use of the polluting substance.

or chemicals. Despite arguments to the contrary, it cannot be seriously doubted that the adhesive vapors or fumes constituted pollutants. *See Protective Nat'l Ins Co of Omaha v Woodhaven*, 438 Mich 154, 165; 476 NW2d 374 (1991); *McKusick, supra* at 337. Carpet Workroom's subcontractor used an industrial grade contact cement, which according to its own label contained "hazardous ingredients," toluol, acetone, and n-hexane. And, Professional's employee used an adhesive that contained the "hazardous component" potassium hydroxide solution.

Considering that there are no exceptions to the applicable exclusions contained in the respective insurance policies and no language otherwise limiting the scope of their applicability, we are constrained to interpret the words contained in the exclusionary provisions in accord with their plain, ordinary, and popular sense and enforce the contract as written. See *Stark, supra* at 181. We are not permitted to concoct a limitation where none exists and judicially rewrite a contract with the benefit of hindsight and thus compel a party to assume a burden for which it did not bargain. As the *McKusik* court opined, "[w]e will not rewrite an insurance policy under the guise of interpretation or create an ambiguity where none exists." *McKusik, supra* at 338.

Accordingly, we reject the insureds' assertion that application of the exclusion to bar coverage violates their "reasonable expectation" of coverage. The "rule of reasonable expectations" does not apply where the policy language at issue is found to be clear and unambiguous. *McKusick, supra* at 338-339 (citation omitted.) Interestingly, John Lukasik, Carpet Workroom's owner, testified at deposition that he did not read the insurance policy. Considering that Lukasik did not read the document, any expectation regarding coverage that he formulated did not arise from the words contained in the contract itself. Thus, any expectation of coverage held by Lukasik was per se unreasonable. *Id*. at 339.

V. Products-Completed Operations Hazard

Finally, in No. 224040, Handrinos contends that the policy's "products-completed operations hazard" provides coverage for her bodily injuries independent of the pollution exclusion.[3] A close reading of the policy belies Handrinos' position.

Professional's "Artisan Contractors" policy provides coverage for "products/completed operations," with an aggregate limit of $2,000,000. The "definitions" section of the policy defines "products-completed operations hazard" to include "all `bodily injury' . . . occurring away from premises you own or rent and arising out of `your product' or `your work.'" Handrinos relies on this definitional language and the $2,000,000 aggregate limit for "products-completed operations," to support her claim that coverage for her bodily injury exists separate and apart from the general coverage provided under Section I, Coverage A, Bodily Injury. However, Handrinos fails to acknowledge language contained in Section III – Limits of Insurance which provides in relevant part:

> 2. The General Aggregate Limit is the most we will pay for the sum of:

[3] We note that the products-completed operations provision is contained in Meridian's policy and does not appear in the policy issued by Auto Owners.

a. Medical expenses under Coverage C.

b. Damages under Coverage A, except damages because of "bodily injury" . . . included in the "products-completed operations hazard"; and

c. Damages under Coverage B.

The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of "bodily injury" . . . included in the "products-completed operations hazard." (Emphasis added.)

Because the pollution exclusion applies to Coverage A, it likewise applies to the aggregate limit of damages under the products-completed operations hazard and excludes coverage. *See Auto Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992); *McKusick, supra* at 339 – 340.

The words contained in the pollution exclusion provisions are clear and free of ambiguity and we find that Auto Owners and Meridian have no duty to defend or indemnify plaintiffs. In accord with our decision, we affirm the trial court's decision granting Auto Owners summary disposition in No. 223646 and reverse the trial court's decision denying Meridian summary disposition in No. 224040.

Affirmed in No. 223646 and reversed in No. 224040.

/s/ Jessica R. Cooper
/s/ Harold Hood
/s/ Kirsten Frank Kelly