STATE OF MINNESOTA
IN COURT OF APPEALS
A11-181

Midwest Family Mutual Insurance Company,
Appellant,

vs.

Michael D. Wolters, et al.,
Respondents,

Charles E. Bartz, et al.,
Respondents,

Jerry D. Larson,
Defendant.

Filed August 22, 2011
Reversed and remanded
Shumaker, Judge

Beltrami County District Court
File No. 04-CV-10-1537

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Considered and decided by Larkin, Presiding Judge; Shumaker, Judge; and Wright, Judge.

U N P U B L I S H E D O P I N I O N

SHUMAKER, Judge

In this insurance-coverage dispute, appellant argues that the district court erred by concluding that (1) the pollution exclusion was limited to environmental pollutants; (2) damages arose from a hostile fire; and (3) the policy did not exclude coverage for damages associated with the improper installation of a carbon-monoxide detector. Because we conclude that the pollution exclusion encompasses the emission of carbon monoxide from a boiler in a home; that the fire in the boiler was not hostile; and that damages from the improper installation of a carbon-monoxide detector are excluded from coverage, we reverse and remand.

FACTS

The facts are undisputed. On December 28, 2007, respondents Charles Bartz and Catherine Brewster went to sleep in Bartz's newly constructed residence. Brewster woke up at about 5:30 the next morning disoriented and nauseous. She could not wake Bartz and called 911. Both Bartz and Brewster were taken to a hospital and treated for carbon-monoxide poisoning. An investigation revealed that the boiler caused the high levels of carbon monoxide and that the carbon-monoxide detector was not connected to a power source.

In January 2007, Bartz had hired respondent Michael Wolters to construct the residence, which was designed to have radiant heating in the floor. Wolters subcontracted the plumbing and electrical work, and he purchased the materials for the heating system from a local supplier for the plumber to install. Wolters testified at his deposition that he

told the supplier that he needed a boiler designed to use liquid-propane fuel. But he was sold a boiler that was compatible only with natural gas and was clearly marked "for natural gas only." The plumber installed the boiler and Wolters connected it to a liquid-propane fuel line designed to connect to a propane tank. Wolters never tested the boiler because Bartz had not yet purchased the propane tank by the time Wolters's work was completed in October 2007.

Wolters also instructed the electrician to install the carbon-monoxide detector. Wolters testified that he tested the fire and carbon-monoxide detectors before completing the job and that they were working at that time. But the engineering firm hired to investigate the incident reported that the carbon-monoxide detector was not connected to the electric wires in the ceiling that were supposed to supply power and that the back-up battery was installed backwards.

Bartz and Brewster sued Wolters for negligence and breach of express and implied warranties. Wolters was insured under an artisan-contractor commercial general liability (CGL) policy from appellant Midwest Family Mutual Insurance Company from April 2007 until April 2008, and he tendered his defense. Midwest appointed defense counsel for Wolters and also commenced a declaratory-judgment action, claiming that it has no duty to defend or indemnify Wolters under the policy. Midwest moved for summary judgment in the declaratory-judgment action, which the district court denied. The district court then entered summary judgment in favor of respondents at Midwest's request to allow for appeal.

D E C I S I O N

When reviewing an appeal from summary judgment, we determine whether any genuine issues of material fact exist and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Because the facts are undisputed here, we must decide only whether either party is entitled to judgment as a matter of law. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

"The interpretation of an insurance policy, including the question of whether a legal duty to defend or indemnify arises, is one of law which this court reviews de novo." *Auto-Owners Ins. Co. v. Todd*, 547 N.W.2d 696, 698 (Minn. 1996). "While the insured bears the initial burden of demonstrating coverage, the insurer carries the burden of establishing the applicability of exclusions." *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006). Exclusions "are construed narrowly and strictly against the insurer, and, like coverage, in accordance with the expectations of the insured." *Id.* (citation omitted). "[O]nce the insurer shows the application of an exclusion clause, the burden of proof shifts back to the insured because the exception to the exclusion 'restores' coverage for which the insured bears the burden of proof." *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 314 (Minn. 1995), *rev'd on other grounds by Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910 (Minn. 2009).

We interpret insurance policies using the general principles of contract law. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002). "In interpreting insurance contracts, [this court] must ascertain and give effect to the intentions of the parties as reflected in the terms of the insuring contract." *Jenoff, Inc. v. N.H. Ins. Co.*,

558 N.W.2d 260, 262 (Minn. 1997). An insurance policy "must be construed as a whole, and unambiguous language must be given its plain and ordinary meaning." *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn. 1986). Language in a policy is ambiguous if it is susceptible to two or more reasonable interpretations. *Medica, Inc. v. Atl. Mut. Ins. Co.*, 566 N.W.2d 74, 77 (Minn. 1997).

I.

Wolters's CGL policy provides coverage for costs of "bodily injury" or "property damage" for which the insured becomes liable. But this coverage is subject to several express exclusions, including a pollution exclusion, which states:

> 9. We do not pay for bodily injury or property damage:
>
> a. arising wholly or partially out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:
>
> . . .
>
> 4) at or from any premises where you or any contractor or subcontractor, directly or indirectly under your control, are working or have completed work:
>
> a) if the pollutant is on the premises in connection with such work, unless the bodily injury or property damages arise from the heat, smoke or fumes of a fire which becomes uncontrollable or breaks out from where it was intended to be; or
>
> b) if the work in any way involves testing, monitoring, clean-up, containing, treating or removal of pollutants.

"Pollutant" is defined in the policy to include "any solid, liquid, gaseous, thermal, electrical emission (visible or invisible) or sound emission pollutant, irritant or contaminant." Because the exclusion no longer includes an exception for sudden and

accidental dispersal of pollutants, it is known as an absolute pollution exclusion. 22 *Minnesota Practice* § 5:9 (2d ed. 2010).

The district court concluded that the absolute pollution exclusion should be limited to traditional environmental pollutants, reasoning that Minnesota courts' past interpretations of the exclusion to include interior contamination from ordinary negligence is against public policy. Although the concerns expressed by respondents and the district court appear valid, precedent compels an interpretation of the pollution exclusion to include interior pollutants, and any policy-based expansion of that exclusion is beyond our authority.

We have taken a "non-technical, plain-meaning approach" to interpreting the pollution exclusion. *Auto-Owners Ins. Co. v. Hanson*, 588 N.W.2d 777, 779 (Minn. App. 1999) (citing *Bd. of Regents of Univ. of Minn. v. Royal Ins. Co. of Am.*, 517 N.W.2d 888, 891 (Minn. 1994)). Under this approach, carbon monoxide constitutes a pollutant under the policy definition. The definition includes "any . . . gaseous . . . emission . . . pollutant, irritant or contaminant." Carbon monoxide is a highly poisonous gas that was emitted by the improperly functioning boiler. Moreover, the federal government classifies carbon monoxide as a pollutant and regulates its concentration under the Clean Air Act. 40 C.F.R. § 50.08 (2010).

Minnesota courts have concluded that changes to the language of the pollution exclusion have broadened its scope. *Royal*, 517 N.W.2d at 890, 893-94 (concluding that a policy excluding coverage for damages "arising out of the discharge, dispersal, release or escape of . . . irritants, contaminants or pollutants into or upon land, the atmosphere, or

any water course or body of water" did not exclude coverage for damage from release of asbestos fibers inside a building but that a policy excluding coverage for "contamination or pollution of land, water, air, or real or personal property" did); *Hanson*, 588 N.W.2d at 780 (concluding that "the scope of the exclusion is in its broadest form" in a policy with no reference to the object polluted).

We recognize that Minnesota's interpretation is not shared by a majority of other jurisdictions. 22 *Minnesota Practice* § 12.21(2d ed. 2010) (stating that a majority of jurisdictions limit exclusion to traditional environmental pollution). But we have rejected "a technical rather than an ordinary reading of the exclusion, ascribing to the reader a knowledge of 'terms of art' in environmental law." *Hanson*, 588 N.W.2d at 779. And we have concluded that the exclusion is unambiguous. *Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co.*, 480 N.W.2d 368, 377 (Minn. App. 1992) (interpreting the exclusion in the context of environmental pollution), *review denied* (Minn. Mar. 26, 1992). *Compare, e.g., Am. States Ins. Co. v. Koloms*, 687 N.E.2d 72, 82 (Ill. 1997) (concluding that provision was ambiguous in context of interior pollution and that exclusion was limited to traditional environmental pollutants based on drafting history and retention of environmental terms-of-art, e.g. "discharge, dispersal, release or escape"); *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 948-49 (Ind. 1996) (finding ambiguity based on expansive scope of exclusion and construing against drafter); *Doerr v. Mobile Oil Corp.*, 774 So.2d 119, 126-28, 135 (La. 2000) (finding ambiguity and limiting exclusion to traditional environmental pollution based on history of provision); *W. Alliance Ins. Co. v. Gill*, 686 N.E.2d 997, 999-1000 (Mass. 1997) (limiting exclusion to traditional environmental

pollution based on terms-of-art); *Weaver v. Royal Ins. Co. of Am.*, 674 A.2d 975, 977-78 (N.H. 1996) (concluding that exclusion is ambiguous based on use of terms-of-art and construing against drafter).

Consequently, the pollution exclusion encompasses carbon monoxide released in a residence. *See, e.g.*, *Royal*, 517 N.W.2d at 893 (concluding that asbestos fibers, released inside a building are a pollutant); *Hanson*, 588 N.W.2d at 779 (concluding that lead paint in apartment is a pollutant); *League of Minn. Cities Ins. v. City of Coon Rapids*, 446 N.W.2d 419, 421-22 (Minn. App. 1989) (concluding that nitrogen dioxide released from Zamboni is a pollutant), *review denied* (Minn. Dec. 15, 1989); *see also Am. States Ins. Co. v. Tech. Surfacing, Inc.*, 50 F. Supp. 2d 888, 890-91 (D. Minn. 1999) (concluding that xylene fumes from floor sealant in a grocery store is a pollutant under Minnesota law); *Cont'l Cas. Ins. Co. v. Advance Terrazzo & Tile Co.*, No. Civ. 03-5446MJDJSM, 2005 WL 1923661 (D. Minn. Aug. 11, 2005) (concluding that carbon monoxide emitted by contractor's grinders in a school is a pollutant under Minnesota law).

II.

Because the pollution exclusion includes the release of carbon monoxide in a home, we must next determine if the particular circumstances of the emission fall within the policy exclusion. The policy excludes coverage for damages arising out of the discharge or escape of pollutants at or from any premises where the insured or any subcontractor under the insured's control are working or have completed work if the pollutant is on the premises in connection with such work. Bartz and Brewer argue that the language "if the pollutant is on the premises in connection with such work" is

ambiguous and should be construed against the drafter. They rely on language in other versions of the pollution exclusion which only excludes coverage if the pollutants "are brought on or to the premises . . . in connection with" the contractor's operations. *Advance Terazzo*, 2005 WL 1923661, at *2.

But "[a] court may not read an ambiguity into the plain language of a policy in order to provide coverage." *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32, 34 (Minn. 1979) (quotation omitted). The phrase "in connection with" is not susceptible to an interpretation that requires a contractor to bring the pollutant onto the premises for the exclusion to apply and is not ambiguous. *See Medica, Inc. v. Atl. Mut. Ins. Co.*, 566 N.W.2d at 77 (stating that ambiguity exists when term is susceptible to two or more reasonable interpretations).

The discharge of carbon monoxide occurred at Bartz's home, where Wolters had worked, because the boiler Wolters purchased was not compatible with the liquid-propane fuel source Wolters connected it to. Thus, the injuries occurred in connection with Wolters's work. *See Arndt v. Am. Family Mut. Ins. Co.*, 380 N.W.2d 885, 889 (Minn. App. 1986) (stating that the phrase "in connection with" "has a much broader meaning than 'arising out of'"), *rev'd in part on other grounds by*, 394 N.W.2d 791 (Minn. 1986); *Roth v. W. Assurance Co.*, 308 F.2d 771, 773-74 (8th Cir. 1962) (concluding that injury suffered when ladder broke at an excluded premises was "in connection with" the excluded premises and therefore not covered).

Respondents next argue that, even if the pollution exclusion applies to the emission of carbon monoxide in this instance, coverage is restored by the hostile-fire

exception to the exclusion. The pollution exclusion does not apply if the injury or damages "arise from the heat, smoke or fumes of a fire which becomes uncontrollable or breaks out from where it was intended to be." This exception is referred to as the hostile-fire exception and has historically been required in commercial general liability (CGL) policies in Minnesota. *Hawkins Chem., Inc. v. Westchester Fire Ins. Co.*, 159 F.3d 348, 351 (8th Cir. 1998) (stating that Commerce Commissioner denied 1993 request to eliminate exception, "citing the Department's longstanding policy that general pollution exclusions must make exceptions for hostile fire").

Bartz and Brewster's assertion that the exception applies if the fumes of fire become uncontrollable or break out from where they are intended to be is without merit. The provision includes the singular verbs "becomes," "breaks out," and "was," and the singular pronoun "it," not "they," in the dependent clause. Consequently, the clause modifies the singular "fire" not the plural subject "fumes." *Cf. Schmid v. Fireman's Fund Ins. Co.*, 97 F. Supp. 2d 967, 970 (D. Minn. 2000) (specifically defining the term "hostile fire" in a CGL policy as "one which becomes uncontrollable or breaks out from where it was intended to be"); *Great N. Ins. Co. v. Greenwich Ins. Co.*, No. CV-05-635, 2007 WL 2458477, at *10 (W.D. Pa. Aug. 24, 2007) (same).

The district court applied caselaw interpreting the hostile-fire exception in first-party fire-insurance policies and concluded that the carbon monoxide was the result of a hostile fire. We hold that this caselaw is inapplicable when interpreting the specific and unambiguous language in the CGL policy.

The cases on which the district court relied involved fire insurance. The language of these policies generally covered an insured against all loss or damage by fire originating from any cause. *Fiorito v. Cal. Ins. Co.*, 262 Minn. 340, 340, 114 N.W.2d 661, 662 (1962). Courts routinely interpreted fire-insurance coverage to exclude damages from "friendly" fires, as held by English common law from 1815. *L.L. Freeberg Pie Co. v. St. Paul Mut. Ins. Co.*, 257 Minn. 244, 246-47, 100 N.W.2d 753, 754-55 (1960). The rationale of the exclusion is that the insurer should not assume the risk for a fire that was intentionally ignited and remained confined where intended. *See id.* at 247, 100 N.W.2d at 755 (quoting 29 Am. Jur. Ins. § 1016). Consequently, courts have had to define a "hostile" fire, which is outside the judicially created exclusion for "friendly" fires. *Id.* at 247-251, 100 N.W.2d at 755, 757.

In contrast, the pollution exclusion in the CGL policy is clearly marked and the exception for hostile fires is defined by the policy terms to include only a fire "which becomes uncontrollable or breaks out from where it was intended to be." The engineering report stated that the boiler was "significantly over-fired" because of the use of propane instead of natural gas and that this caused production of high levels of carbon monoxide and pressurization of the boiler cabinet, which allowed the gas to escape. There is no evidence that the fire in the boiler could not have been extinguished and became uncontrollable. *See Schmid*, 97 F. Supp. 2d at 973 (concluding that a boiler that produced excessive amounts of carbon monoxide was not uncontrollable "because the flame was capable of being turned off"). Nor is there evidence that the flame in the boiler was not where it was intended to be. *Cf. id.* (concluding that fire broke out from

where it was intended to be as the result of a deformed burner pan). Consequently, under the plain meaning of the policy language, we conclude that the fire in the boiler was not hostile and coverage was not restored.

III.

Next, Midwest argues that the district court erred by concluding that Wolters was not monitoring or testing for pollutants by installing a carbon-monoxide detector and was therefore not excluded from coverage by this provision of the pollution exclusion. We agree.

First, we have said that "once the pollutant was introduced into the occurrence, coverage [is] properly denied." *City of Coon Rapids*, 446 N.W.2d at 421-22. We reasoned that "the insured could always contend some intervening factor is a 'covered' peril, which would be tantamount to reading the pollution exclusion clause out of the policy altogether." *Id.* at 421 (quotation omitted). Thus, because damages caused by the release of a pollutant in connection with Wolters's work are excluded under the first part of the pollution exclusion and the exclusion applies to "an entire area of coverage," *id.* (quotation omitted), Wolters cannot rely on coverage for the intervening factor of his alleged negligent installation of the detector to defeat the exclusion.

Second, even if Wolters could rely on a "covered peril," damages arising out of his installation of the carbon-monoxide detector would be excluded by the policy language that excludes damages from work that "in any way involves testing, monitoring, clean-up, containing, treating or removal of [sic] pollutants." The phrase "in any way involving" is not inherently ambiguous and under the plain meaning of the phrase, the

installation of a carbon-monoxide detector involves monitoring and testing for carbon monoxide—a pollutant. *See id.* at 422 (concluding that damages from the city's failure to test and ventilate the arena were independently excluded from coverage by a similar provision).

IV.

Finally, Wolters argues that concluding that the CGL policy does not cover damages in this case defeats his reasonable expectations when he purchased the policy. Wolters did not raise this argument before the district court and it is therefore inappropriate to review. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that an appellate court will not generally consider matters not argued to and considered by the district court).

Moreover, the pollution exclusion was clearly designated in the exclusions section of the policy and the doctrine of reasonable expectations is inapplicable. *Royal*, 517 N.W.2d at 891 (distinguishing case in which major exclusion was hidden in definitions section and stating that the "reasonable expectation test is not a license to ignore the pollution exclusion . . . nor to rewrite the exclusion solely to conform to a result that the insured might prefer."). Wolters paid $560 for a CGL policy that covered certain risks and excluded others; his reasonable expectations were not defeated.

In sum, we conclude that the pollution exclusion is not limited to environmental pollutants under Minnesota law and that damages resulting from Wolters's installation of a boiler incompatible with propane and improper installation of a carbon monoxide detector are excluded from insurance coverage. Consequently, Midwest does not have a

duty to defend or indemnify Wolters in the underlying action, and we reverse the district court's decision. We remand for the district court to vacate summary judgment in favor of respondents and enter summary judgment in favor of Midwest.

Reversed and remanded.