**[J-4-1998]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

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| MADISON CONSTRUCTION COMPANY, | : | No. 21 E.D. Appeal Docket 1997 |
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| Appellant | : | Appeal from the Order of the Superior |
| | : | Court en banc reversing the order of the |
| | : | Court of Common Pleas of Chester |
| v. | : | County, Civil Division |
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| \` \` \` \` \` \` \` \` \` \` \` \` \` \` \` OLAS EZZI, | : | |
| BRIAN MURTAUGH, KELRAN ASSOCIATES, INC., AND EUCLID CHEMICAL COMPANY, | | |
| Appellees | | |

**DISSENTING OPINION**

**MR. JUSTICE CAPPY** **DECIDED: July 27, 1999**

I respectfully dissent. The term “arising out of” in the context of the absolute pollution exclusion is ambiguous, and therefore should be construed in favor of the insured. Moreover, I am concerned that the majority’s “plain meaning” approach in interpreting the pollution exclusion establishes a dangerous precedent which will yield absurd results.

We have long-recognized that “[w]here the provision of the policy is ambiguous, the policy provision is construed in favor of the insured and against the insurer, the drafter of the instrument.” Bateman v. Motorists Mut. Ins. Co., 590 A.2d 281, 283 (Pa. 1991). In construing the term “arising out of” in the context of the pollution exclusion, it is questionable whether the phrase requires merely a causal relationship (i.e., a “but for”

relationship) or a proximate cause relationship. Arguably, the release of fumes was incidental to Mr. Ezzi's physical injuries, for he would not have suffered those injuries had the construction site been properly protected. Thus, construing the phrase "arising out of" strictly against the insurer so as to require a proximate cause relationship, I would hold that the pollution exclusion does not bar coverage in this instance.

Relying on McCabe v. Old Republic Ins. Co., 228 A.2d 901, 903 (Pa. 1967), the majority finds that Mr. Ezzi's injuries "arose out of the release of irritating fumes at the construction site." However, McCabe does not control the instant case, as there we were not construing the term "arising out of" in the context of a pollution exclusion. In fact, we recognized that the determining factor is "the context in which the words were employed." Id.

Mr. Ezzi set forth several claims sounding in negligence, including failure to warn and protect others. He has not alleged that his injuries resulted from the "actual, alleged or threatened discharge, dispersal, seepage, migration release or escape of pollutants." Where, as here, the claims sound in negligence, the pollution exclusion should not bar coverage. See, e.g., Calvert Ins. Co. v. S&L Realty Corp., 926 F. Supp. 44, 47 (S.D. N.Y. 1996) (building employee injured due to exposure to fumes during application of floor cement; complaint alleged, inter alia, failure to inspect and failure to remedy a dangerous condition which was initially created by the fumes; court concluded that "injuries complained of may reasonably be found to have arisen from improper ventilation or the failure to provide proper protective devices."); Schumann v. State of New York, 610 N.Y.S. 2d 987, 989 (Ct. Cl. N.Y. 1994) (contractor's worker injured by toxic fumes from cutting lead-paint-coated steel; worker alleged that he had not been provided with respiratory or other protective gear; court concluded that "the failure to provide claimant with an appropriate protective device gives rise to exposure-covered by the policy and not excluded by the pollution exclusion clause."); Connor v. Farmer, 382 So.2d 1069, 1070 (La. Ct. App.

1980) (worker contracted silicosis; court "view[ed] the worker's injury in such a case as arising not from the discharge of sandblasting matter into the atmosphere but from the failure to provide the appropriate protective masks and other apparel. Liability (if any) for the injury arises not from polluting the atmosphere but from obliging others to work with inadequate protection in an atmosphere known to be polluted. . . . We do not construe the exclusion as applicable when the pollution is only one of two or more liability-imposing circumstances out of which the injury arises."). But see League of Minn. Cities Ins. Trust v. City of Coon Rapids, 446 N.W.2d 419 (Minn. Ct. App. 1989) (injuries resulting from build-up of nitrogen dioxide from Zamboni machine fall within pollution exclusion, despite allegations that build-up was due to failure to maintain the Zamboni machine, to adequately ventilate and test the arena and to warn injured parties of the health dangers).

I am also concerned that the majority's strictly literal interpretation of the terms of the policy will yield results which were not intended by the parties to the insurance contract. As noted by the Court of Appeals for the Seventh Circuit:

> Without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results. To take but two simple examples, reading the clause broadly would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution.

Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1043 (7th Cir. 1992).

I am persuaded by the reasoning of those cases which refuse to apply a literal interpretation of the pollution exclusion without regard to the circumstances of the alleged injury. See, e.g., American States Ins. Co. v. Koloms, 687 N.E.2d 72, 79 (Ill. 1997) ("[W]e agree with those courts which have restricted the exclusion's otherwise potentially limitless

application to only those hazards traditionally associated with environmental pollution."); Western Alliance Ins. Co. v. Gill, 686 N.E.2d 997, 999 (Mass. 1997) ("The exclusion should not reflexively be applied to accidents arising during the course of normal business activities simply because they involve a 'discharge, dispersal, release or escape' of an 'irritant or contaminant.' "), and cases cited therein. Accordingly, I conclude that the term "arising out of" in the context of this case is ambiguous and therefore, that the insurance contract at issue should be construed against the drafter, The Harleysville Mutual Insurance Company. Thus, I would reverse the holding of the Superior Court.