STATE OF MICHIGAN

COURT OF APPEALS

AUTO-OWNERS INSURANCE COMPANY,

Plaintiff/Counterdefendant-Appellant/Cross-Appellee,

v

FERWERDA ENTERPRISES, INC., doing business as HOLIDAY INN EXPRESS LUDINGTON,

Defendant/Counterplaintiff-Appellee/Cross-Appellant,

and

DARYL BRONKEMA, Individually and as Next Friend of JACKSON THOMAS BRONKEMA, CALEB ANDREW BRONKEMA, and SAVANNAH JOY BRONKEMA, minors, and MELISSA BRONKEMA,

Defendants-Appellees.

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No. 277574
Mason Circuit Court
LC No. 05-000436-CZ

Advance Sheets Version

Before: O'Connell, P.J., and Bandstra and Gleicher, JJ.

GLEICHER, J.

In this insurance contract dispute, plaintiff appeals as of right from a circuit court order granting defendant Ferwerda Enterprises, Inc. (Holiday Inn), summary disposition of plaintiff's declaratory judgment action. The circuit court also granted Holiday Inn summary disposition with respect to its claim that plaintiff owed it a duty to defend and indemnify against the underlying personal injury lawsuit of defendants Daryl Bronkema, individually and as next friend of Jackson T., Caleb A., and Savannah J. Bronkema, minors, and Melissa Bronkema. The circuit court then awarded Holiday Inn damages and awarded Holiday Inn and the Bronkemas attorney fees, costs, and penalty interest. We reverse the circuit court's orders with regard to these matters and remand to the circuit court for further proceedings consistent with this opinion.

Holiday Inn cross-appeals as of right from the circuit court's order dismissing its counterclaims based on waiver and estoppel. We affirm the circuit court's order dismissing these claims.

I. Underlying Facts and Procedure

The Holiday Inn Express Ludington offers its guests the use of a swimming pool, located in a building attached to the hotel. The equipment used to operate the pool includes a water pump, polyvinyl chloride (PVC) lines that carry pool water to and from the water pump, a boiler that heats the pool water, and a device called a Rola-Chem that dispenses chemicals into the pool water. The pump propels pool water through the PVC lines into the filter and then into the boiler, which heats the water. From the boiler, the warmed water travels to the Rola-Chem, which injects chlorine and muriatic acid, and the pump then pushes the warmed, chemically treated water back into the pool. An affidavit signed by Jeffrey Curtis, Holiday Inn's general manager, describes the mechanical equipment as "an integrated system that filters, heats, and sanitizes the indoor pool water."

The boiler used to heat the pool water serves as the primary source of heat for the entire pool building. Curtis's affidavit explains, "There are no heat ducts from any source in the pool pump room. The sole source of heat for the pump room is the heat given off by the integrated pipe and boiler system." Gerald Gregorski, a mechanical engineer, also supplied an affidavit, which attested that the pool "lose[s] heat through the processes of convection and evaporation," and as a result heats the air space in the building housing the pool. Gregorski's affidavit continues, "Because of heat loss through convection and evaporation, pools require the use of a heater to maintain a constant water temperature. A system that pumps pool water into a boiler to heat the water and pumps the heated water back into the pool heats the building where the pool is located." Plaintiff retained engineer Michael T. Williams to inspect the Holiday Inn's pool equipment. At his deposition, Williams conceded that "the only source of heat for the pool building at issue in this litigation in the Holiday Inn Express that requires the use of equipment is the heating of the pool water by the boiler in the utility room." Williams expressed that apart from solar heat entering the pool room's windows, he did not know of any source of heat besides the boiler.

On April 9, 2004, an elbow in the PVC line "blew out." A Holiday Inn maintenance man repaired it, but did not turn off the Rola-Chem "feeder system" while completing the repair. Gases created by the continuously flowing chlorine and muriatic acid formed in the PVC lines. When the maintenance man successfully repaired the elbow and powered the system back on, a cloud of the gas traveled through the PVC lines, entered the pool area, and injured the Bronkema family.

Plaintiff filed a declaratory judgment action seeking a determination whether Holiday Inn's insurance policy with plaintiff covered the Bronkemas' claims for personal injuries.[1]

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[1] Plaintiff initially paid about $10,000 toward the Bronkemas' medical bills. But after the parties ultimately failed to reach a settlement, the Bronkemas commenced a tort action against Holiday
(continued…)

Holiday Inn filed a counterclaim alleging breach of contract, estoppel, and waiver, and requesting attorney fees and penalty interest. Pursuant to MCR 2.116(C)(10), plaintiff moved for summary disposition, contending that Holiday Inn's policy did not cover the Bronkemas' injuries. Holiday Inn then filed a cross-motion for partial summary disposition under MCR 2.116(C)(8), (9), and (10), on the basis that an endorsement to the policy's building heating equipment exclusion afforded coverage for the Bronkemas' personal injuries.

The circuit court determined as a matter of law that the Bronkemas' personal injury claims fell within the scope of Holiday Inn's policy with plaintiff, specifically the "heating equipment exception" to the policy's pollution exclusion, and thus granted summary disposition of the declaratory judgment action in favor of Holiday Inn. Ultimately, after multiple summary disposition and other hearings, the circuit court entered a final judgment awarding Holiday Inn nearly $529,000 on its breach of contract claim, granting Holiday Inn more than $186,000 in attorney fees and costs, awarding the Bronkemas more than $71,000 in attorney fees and costs, and granting all defendants "penalty interest pursuant to [MCL 500.2006]."

II. Standard of Review and Governing Legal Principles

Because the circuit court considered documentation beyond the pleadings in granting Holiday Inn summary disposition, it appears that the court ruled under MCR 2.116(C)(10), which tests a claim's factual support. This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, *supra* at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, *supra* at 183.

"Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). This Court applies to insurance contracts the same contract construction principles that govern any other type of contract, and thus begins by considering the language of the parties' agreement to determine their intent. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 714; 706 NW2d 426 (2005).

> Accordingly, an insurance contract should be read as a whole and meaning should be given to all terms. The policy application, declarations page of policy,

(…continued)

Inn. When plaintiff received the Bronkemas' lawsuit, it concluded that their claims were excluded from coverage pursuant to the policy's pollution exclusion. Plaintiff mailed Holiday Inn a letter containing its opinion that the policy did not cover the Bronkemas' claims, Holiday Inn expressed its disagreement, and plaintiff filed the declaratory judgment action.

and the policy itself construed together constitute the contract. The contractual language is to be given its ordinary and plain meaning. An insurance contract must be construed so as to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory. [U]nless a contract provision violates law or one of the traditional [contract] defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written. [T]he judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of "reasonableness" as a basis upon which courts may refuse to enforce unambiguous contractual provisions. A provision in a contract is ambiguous if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning. [*Id*. at 715 (citations and quotation marks omitted).]

III. The Insurance Policy

Holiday Inn's form "Commercial General Liability" insurance policy, issued by plaintiff, included the following pollution exclusion:

This insurance does not apply to:

* * *

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

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured;

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom you may be legally responsible; or

(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; or

(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.

* * *

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.

Holiday Inn's policy included an endorsement entitled "Amendment of Pollution Exclusion—Exception for Building Heating Equipment." Prefacing the title appear the words, "This endorsement changes the policy. Please read it carefully." Below the title, the endorsement states, "This endorsement modifies insurance provided under the COMMERCIAL GENERAL LIABILITY COVERAGE FORM." The endorsement deleted subparagraph f(1)(a) of the pollution exclusion, and replaced it with the following language:

Under SECTION I—COVERAGES, COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions, exclusion f., subparagraph (1)(a) is deleted and replaced by the following:

This insurance does not apply to:

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

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to any insured. However, this subparagraph, (a), does not apply to "bodily injury" if sustained within a building at such premises, site or location and caused by smoke, fumes, vapor or soot from equipment used to heat a building at such premises, site or location.

IV. Analysis

A. The Building Heating Equipment Exception

The circuit court ruled as a matter of law that the building heating equipment endorsement unequivocally provided coverage under the policy. In *McGuirk Sand & Gravel, Inc v Meridian Mut Ins Co*, 220 Mich App 347, 354; 559 NW2d 93 (1996), this Court construed an "absolute pollution exclusion" similar to the instant pollution exclusion and observed, "There is a definite national trend to construe such exclusions as clearly and unambiguously precluding coverage for claims arising from pollution. . . . Most courts that have examined similar exclusions have concluded that they are clear and unambiguous and are just what they purport to be—absolute."

Holiday Inn's policy's definition of the term "pollution" contributes to the absolute character of the exclusion, given that it includes any "irritant or contaminant," in liquid, solid, or

gaseous form. This broad definition expands the reach of the pollution exclusion well beyond traditional environmental pollutants and includes an enormous variety of substances.[2] However, the instant policy's building heating equipment exception renders the pollution exclusion less "absolute" because it excises the pollution exclusion from the form policy when a person in the insured's building suffers bodily injury "caused by smoke, fumes, vapor or soot from equipment used to heat a building at such premises . . . ." The building heating equipment exception thus serves to resurrect coverage otherwise unavailable under the broad pollution exclusion.

"[E]ndorsements often are issued to specifically grant certain coverage or remove the effect of particular exclusions. Thus, such an endorsement will supercede the terms of the exclusion in question." 4 Holmes' Appleman on Insurance (2d ed), § 20.1, p 156. "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). "[E]ndorsements by their very nature are designed to trump general policy provisions, and where a conflict exists between provisions in the main policy and the endorsement, the endorsement prevails." *Nationwide Mut Ins Co v Schmidt*, 307 F Supp 2d 674, 677 (WD Pa, 2004).

The building heating equipment endorsement extends coverage for bodily injury arising from the discharge or dispersal of pollutants where vapor, smoke or fumes generated by building heating equipment cause an injury. The circuit court determined that the harmful gases in this case emanated from the integrated mechanical system that heated the pool building. Plaintiff endeavors to avoid application of the endorsement by contending that the "chlorine injector (i.e. the Rola-Chem feeder), *not* the pool water heater, was the source of the toxic fumes." (Emphasis in original.) But the evidence, viewed in the light most favorable to Holiday Inn, gives rise to a genuine issue of material fact concerning whether the gases formed within the PVC lines, not within the Rola-Chem feeder, and dispersed only after the maintenance man repowered the entire pool filtration and heating system; when heated water eventually flowed into the pool, the toxic gas accompanied the water.

The circuit court further found that because the pool building's heat derived from the heated water delivered to the pool through the equipment that leaked the chlorine gas, the pollutant emanated from "equipment used to heat a building." We recognize, as plaintiff maintains, that the building heating equipment endorsement usually applies to pollution occurrences emanating from a furnace. But plaintiff does not dispute that in this case the pool's heating equipment provided the only mechanical source of heat for the pool room. And under the circumstances presented in this case, we find equally plausible that the building heating equipment endorsement applies to the lone mechanical source of heat in Holiday Inn's pool

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[2] In *Western Alliance Ins Co v Gill*, 426 Mass 115, 118-120; 686 NE2d 997 (1997), the Supreme Judicial Court of Massachusetts presents a comprehensive list of the nontraditional "pollutants" that courts have examined under the pollution exclusion, including fumes from new carpeting, odors from cement used to install a plywood floor, and photographic chemicals.

room, specifically the integrated heat, filtration, and treatment system demonstrated by some evidence supplied by Holiday Inn.

In summary, we conclude that in this case the language of the entire contract of insurance, including the building heating equipment endorsement, fairly admits an interpretation that the building heating equipment language encompasses the apparently integrated heating, filtration, and treatment system in Holiday Inn's pool room and an interpretation that it does not. *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982); *Royal Propy Group*, *supra* at 715. Because an ambiguity exists with respect to whether the building heating equipment endorsement encompasses the heating, filtration, and treatment system in Holiday Inn's pool room, the parties' insurance contract qualifies as ambiguous, and a fact-finder should ascertain its meaning. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003).

B. Insurance Policy Subsection f(1)(d)(i)

Plaintiff also urges that subsection f(1)(d)(i) excludes coverage under the facts of this case, in which Holiday Inn brought chlorine and muriatic acid, both "pollutants," onto hotel premises for operational purposes. Subsection f(1)(d)(i) excludes coverage for bodily injury arising from 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 pollution exclusion defines "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

According to plaintiff, the fact that the insured brought the liquid chlorine and muriatic acid onto the premises in connection with the operation of the swimming pool brings into operation the pollution exclusion in subsection f(1)(d)(i). Deposition testimony did support that Holiday Inn purchased large containers of liquid chlorine and muriatic acid to clean its pool. This evidence reasonably tends to establish that Holiday Inn brought to its premises chemicals within the broad policy definition of "pollutants" that ultimately injured the Bronkemas. This situation gives rise to a reasonable inference that the exclusion in f(1)(d)(i) precludes recovery for the Bronkemas' bodily injuries.

Whether substances such as chlorine and muriatic acid generally qualify as pollutants remains a subject of debate in caselaw construing absolute pollution exclusions.[3] But, in this case, a reasonable position also exists that neither chlorine nor muriatic acid, the liquid "pollutants" that Holiday Inn brought onto its premises, injured the Bronkemas. Some evidence presented to the circuit court reasonably tends to establish that a toxic combination of the two chemicals inside PVC piping yielded a harmful gas that dispersed into the swimming pool area. Under this view of the evidence, the gas or vapor constituted the "pollutant" that caused bodily injury to the Bronkemas.

In summary, a rational person viewing the circumstances of this case in light of the policy language in subsection f(1)(d)(i) could reasonably conclude either that no coverage exists because the Bronkemas suffered injury from pollutants that Holiday Inn brought onto its premises, or that plaintiff owes coverage because Holiday Inn did not import onto its premises the toxic gas cloud that injured the Bronkemas. In this situation, a fact-finder must make the relevant determination regarding the scope of coverage. *Klapp*, *supra* at 469.

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[3] For example, in *Pipefitters Welfare Ed Fund v Westchester Fire Ins Co*, 976 F2d 1037, 1043 (CA 7, 1992), the United State Court of Appeals for the Seventh Circuit explored the notion that chlorine could be fairly characterized as a pollutant:

> 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.

In *MacKinnon v Truck Ins Exch*, 31 Cal 4th 635, 650; 3 Cal Rptr 3d 228; 73 P3d 1205 (2003), the California Supreme Court observed, "Virtually any substance can act under the proper circumstances as an 'irritant or contaminant.'" Regarding the "absurd results" postulated in *Pipefitters*, the California Supreme Court commented:

> The hypothetical allergic reaction to pool chlorine, proposed by the *Pipefitters* court, illustrates this absurdity. Chlorine certainly contains irritating properties that would cause the injury. Its dissemination throughout a pool may be literally described as a dispersal or discharge. Our research reveals no court or commentator that has concluded such an incident would be excluded under the pollution exclusion. [*Id.*]

V. Cross-Appeal by Holiday Inn

Holiday Inn contends that the trial court erred by dismissing its estoppel and waiver counterclaims against plaintiff. We consider de novo the application of legal doctrines such as waiver and estoppel. *Madison Dist Pub Schools v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001).

Waiver signifies "a voluntary and intentional abandonment of a known right." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). Holiday Inn contends that in denying coverage plaintiff waived any potential reliance on any pollution exclusions apart from subsection f(1)(a), and any right to challenge the applicability of the building heating equipment endorsement. Holiday Inn's argument focuses on a letter written by plaintiff on August 17, 2005, which denied a coverage obligation, specifically quoting pollution exclusion subsections f(1)(a) and (d)(i); advised Holiday Inn that if it disagreed with plaintiff's denial, plaintiff would initiate "a declaratory judgment action"; and concluded with the following language:

> *All rights, terms, conditions and exclusions in your policy are in full force and effect and are completely reserved.* No action by any employee, agent, attorney, or other person on behalf of Auto-Owners Insurance Company; or hired by Auto-Owners Insurance Company on your behalf; shall waive or be construed as having waived any right, term condition, exclusion or any other provision of the policy. [Emphasis added.]

Plaintiff's letter explicitly referenced pollution exclusion subsection f(1)(d)(i), which the circuit court addressed. Furthermore, the clear and unambiguous language emphasized above reflects plaintiff's express reservation of its rights under all provisions of Holiday Inn's policy, and Holiday Inn presented no evidence suggesting that plaintiff ever retreated from this position. We thus reject Holiday Inn's waiver claim as lacking merit.

Holiday Inn lastly suggests that the circuit court should have deemed plaintiff estopped from denying coverage for the Bronkemas' bodily injury claims. Holiday Inn emphasizes on appeal that plaintiff initially paid bodily injury benefits to the Bronkemas and insists that plaintiff undisputedly "failed to give reasonable notice of its defense that the [building heating equipment] Endorsement was inapplicable."

> For equitable estoppel to apply, the [party raising the defense] must establish that (1) the [other party's] acts or representations induced the [party raising the defense] to believe that the pollution exclusion clause would not be enforced and that coverage would be provided, (2) the [party raising the defense] justifiably relied on this belief, and (3) the [party raising the defense] was prejudiced as a result of its reliance on its belief that the clause would not be enforced and coverage would be provided. [*Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 204; 702 NW2d 106 (2005) (opinion by Cavanagh, J.).]

Estoppel usually does not expand an insurance policy's express coverage absent egregious, inequitable action by the insurer. *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 594; 592 NW2d 707 (1999).

In light of plaintiff's clear and unambiguous explanation of the bases for its denial of coverage and its reservation of rights with respect to other policy provisions, we reject that Holiday Inn can establish any reasonable reliance in this case. The August 2005 letter clearly placed Holiday Inn, from the outset of this litigation, on notice of plaintiff's belief that the pollution exclusion provisions precluded recovery arising from the Bronkemas' bodily injuries. Furthermore, plaintiff's initial payment of the Bronkemas' medical bills does not alter our analysis because "[t]he fact that an insurer has paid some benefits to an insured party does not preclude it from later asserting that it owes nothing" when a lawsuit over coverage arises. *Calhoun v Auto Club Ins Ass'n*, 177 Mich App 85, 89; 441 NW2d 54 (1989).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Bandstra, J., concurred.

/s/ Elizabeth L. Gleicher
/s/ Richard A. Bandstra