STATE OF MICHIGAN

COURT OF APPEALS

AUTO OWNERS INSURANCE COMPANY,

Plaintiff/Counter Defendant-Appellant/Cross-Appellee,

v

FERWERDA ENTERPRISES, INC., d/b/a HOLIDAY INN EXPRESS LUDINGTON,

Defendant/Counter Plaintiff-Appellee/Cross-Appellant,

and

DARYL BRONKEMA, Next Friend of JACKSON THOMAS BRONKEMA, CALEB ANDREW BONKEMA, and SAVANNAH JOY BRONKEMA, and DARYL BRONKEMA and MELISSA BRONKEMA,

Defendants-Appellees.

FOR PUBLICATION
April 9, 2009

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

Advance Sheets Version

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

O'CONNELL, P.J. (*dissenting*).

I respectfully dissent.

The majority determines that the endorsement to the Holiday Inn's insurance policy is ambiguous. I disagree. In my opinion, the endorsement is well written and perfectly clear. The endorsement provides coverage for bodily injury caused by smoke or fumes from equipment used to heat a building. All parties to this action agree that the boiler and the attachments to the boiler were used to heat the pool building. The parties also agree that smoke, fumes, or vapor from this heating unit and its attachments may have been responsible for the bodily injury sustained by the individual defendants. Applying the endorsement language to the facts of this

case, it is clear that insurance coverage exists for fumes or vapor emanating from this heating unit.[1] I would affirm and adopt as my own the learned decision of the trial court.

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[1] One issue presented to this Court is whether cleaning agents such as chlorine, muriatic acid, bleach detergents, drain cleaner, or other types of disinfectants are pollutants within the meaning of the Holiday Inn's commercial insurance policy. I conclude that this issue is not outcome-determinative in this case and its resolution is best left for another day. However, I agree with the majority's statement in footnote three and the indication that to date no court has classified chlorine as a pollutant when it has been used to clean swimming pools. I concur with the majority's opinion that the context in which a product is used may be useful in determining whether the product is a pollutant. Stated another way, the use of a product may make the terms of an insurance contract ambiguous to the ordinary reader.

The conceptual difficulty that bedevils presentation of this issue in the present case is attributable to the use of the term pollutant in the insurance policy and the common understanding of that term among most people in our society. In particular, the use of this term in the contract leads to a deceptively simple question: "What is a pollutant?" In this case, the insurance policy provides a definition: "pollutants" are "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." But this definition merely requires us to re-pose our original question and ask, "What is an irritant or a contaminant?"

Years ago, this Court, referencing an opinion by the United State Supreme Court, stated:

> The phenomenon of identical words meaning different things, even in a single document, such as an insurance contract or statute, let alone in two separate documents, is neither unique to the case at bar nor to the elasticity and inherent limitations of the English language. *Nat'l Organization for Women, Inc v Scheidler*, [510] US [249, 258]; 114 S Ct 798; 127 L Ed 2d 99, 109 (1994) (recognizing that the statutory term "enterprise" in 18 USC 1962 [a] and [b] does not import an economic motive that is required in conjunction with the term "enterprise" in 1962[c] because "enterprise" was used in two different senses in the different subparagraphs). [*Cavalier Mfg Co v Employers Ins of Wausau*, 211 Mich App 330, 341; 535 NW2d 583 (1995).]

The fact that one word may have multiple meanings depending on its use only adds to the confusion. Moreover, lower courts have been instructed to discern the meaning of a word by examining it carefully in its proper context. In *Tyler v Livonia Pub Schools*, 459 Mich 382, 390-391; 590 NW2d 560 (1999), our Supreme Court stated:

> Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis*: "[i]t is known from its associates," see Black's Law Dictionary (6th ed), p 1060. This doctrine stands for the principle that a word or

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phrase is given meaning by its context or setting. *State ex el Wayne Co Prosecutor v Diversified Theatrical Corp*, 396 Mich 244, 249; 240 NW2d 460 (1976), quoting *People v Goldman*, 7 Ill App 3d 253, 255; 287 NE2d 177 (1972).[9]

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[9] United States Supreme Court Justice Antonin Scalia has clarified the meaning of this rule by the example he uses in his recent book, *A Matter of Interpretation*. We repeat it here: "If you tell me, 'I took the boat out on the bay,' I understand 'bay' to mean one thing; if you tell me, 'I put the saddle on the bay,' I understand it to mean something else." (Princeton, New Jersey: Princeton University Press, 1997), p 26.

The idea of a word meaning something different in light of the surrounding language relates closely to the issue raised by this case: In what context is a chemical a pollutant? By defining a pollutant as an irritant or a contaminant, the insurance policy links a chemical's status as a pollutant with its desirability in a particular context. But this definition leads to yet another question: Is it possible to define a product as a pollutant for some purposes and as a non-pollutant for other purposes? The insurance policy precludes insurance coverage if "the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor." But is a chemical that is brought to the premises for a desired purpose a "pollutant"? When does a chemical become a pollutant?

I offer this example. Under some insurance policies, fluoride would be considered a pollutant. If fluoride were dumped in large quantities into a stream, lake, or unapproved landfill, state and federal agencies would complain, the guilty party would be prosecuted, and any insurance policy would exclude coverage for the resulting harm to the environment. In this case, fluoride would be a contaminant. However, if a city or municipality were to add fluoride to its municipal water system, few people would claim that the city or municipality had polluted the drinking water supply, even though cities are prohibited from adding pollutants to drinking water. In certain amounts and among certain populations, the addition of this chemical into the water serves a purpose (preventing tooth decay) and is desired. Flouride, in this situation, would not contaminate the water supply and would not be a pollutant.

A similar situation exists in this case. The Holiday Inn typically added chlorine to pool water to serve as a disinfectant. The chlorine did not contaminate the water, because its presence served a purpose and was desirable. However, if water containing the same concentration of chlorine were served to guests to drink, that water would be considered contaminated and, therefore, polluted, because it contained a substance that was not desired for the water's intended purpose, namely, drinking. The question whether this water is contaminated and, therefore, polluted depends on the surrounding circumstances. Accordingly, the term "pollutant" is ambiguous under the terms of this policy.

I. Endorsement Language

The Holiday Inn's insurance 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 provision 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.

II. Facts

As the majority states in its opinion,

> 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. [*Ante* at 2.]

III. Conclusion

Endorsement f(1)(a) of the modified pollution exclusion provision clearly provides coverage if bodily injury is "caused by smoke, fumes, vapor or soot from equipment used to heat a building at such premises, site or location." The facts indicate that the boiler and attachments used to heat the pool constituted the sole heating unit for the pool building and, therefore, was "equipment used to heat [the] building." In my opinion, the endorsement provided coverage for this unfortunate occurrence.[2]

I would affirm the orders of the trial court.

/s/ Peter D. O'Connell

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[2] Plaintiff also argues that subsection f(1)(d)(i) excludes coverage under the facts of this case because the Holiday Inn brought chlorine and muriatic acid, which it claims are both "pollutants," onto the hotel premises for operational purposes. Although these chemicals add a different dimension to the equation, their presence is not outcome-determinative to this issue. All parties appear to agree that if smoke, vapor, or fumes had emanated from a traditional heating unit (such as a regular boiler or furnace) instead of a boiler used to heat a pool, coverage would exist under the policy. In my opinion, this is a distinction without a difference. Both the furnace and the boiler require either gas or fuel oil to operate efficiently. This endorsement would nullify itself if plaintiff were allowed to disclaim coverage because the Holiday Inn brought gas or fuel oil (which could also be considered pollutants) onto the hotel premises for operational use. The chemicals did not cause the injury; rather, the fumes emanating from the heating unit did.

Also, I note that if an endorsement is in conflict with an exclusion, the terms of the endorsement prevail. As the majority states in its opinion:

> [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. When a conflict arises between the terms of an endorsement and the form provisions of an insurance contract, the terms of the endorsement prevail. [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. [*Ante* at 6 (quotation marks and citations omitted).]

In my opinion, the endorsement prevails over the exclusion in subsection f(1)(d)(i).