IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

DON D. POLLEY and SANDRA A. POLLEY, Plaintiffs, vs. AMERISURE INSURANCE COMPANY and CASTLE GROUP, L.L.C. and SCHAEFFER HOMES, INC., Defendants.	)	Cause Number: 10SL-CC00272 Division 17

JUDGMENT

This cause came before the court for hearing on Defendant Amerisure Insurance Company's (hereinafter "Amerisure") Motion for Summary Judgment on the issue of whether the commercial general liability policy of insurance issued by Amerisure to Defendants Castle Group, LLC (hereinafter "Castle") and Schaeffer Homes, Inc. (hereinafter "Schaeffer") provides coverage for a consent judgment entered into by Castle and Schaeffer in favor of the Plaintiffs Don D. Polley and Sandra A. Polley (hereinafter "Plaintiffs"). The parties argued the Motion to the court on January 21, 2011, and the court took the matter under submission.

FINDINGS OF UNCONTROVERTED FACTS

This is an equitable garnishment action wherein Plaintiffs seek coverage pursuant to a commercial general liability policy of insurance issued by Amerisure (hereinafter the "Policy") and under which Schaeffer and Castle were named insureds. The Policy provides the following coverage:

> COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY
> 1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result …

(*Exhibit B, Form CG 00 01 10 01, p. 1 of 14*)[1].

The policy also provides for exclusions of coverage. The exclusion relied upon by Amerisure in the case at bar provides as follows:

2. Exclusions

This insurance does not apply to: …

f. Pollution

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

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(*Exhibit B, Form CG 00 01 10 01, p. 1-2 of 14*).

SECTION V – DEFINITIONS of the Policy sets forth the following definition:

15. "Pollutants" mean 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.

(*Exhibit B, Form CG 00 01 10 01, p. 13 of 14*).

[1] All Exhibits are attached to *Amerisure's Statement of Uncontroverted Material Facts.*

Endorsement CG 71 11 05 00 of the Policy, identified as the "Missouri -- Total Pollution Exclusion," purports to modify the coverage and provides in pertinent part as follows:

> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> Exclusion f. Pollution under Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury and Property Damage Liability is replaced by the following:
>
> This insurance does not apply to:
> f. Pollution
> (1) "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time …
> (3) This Pollution Exclusion applies even if such irritant or contaminant has a function in your business, operations, premises, site or location
> ******
>
> (*Exhibit B, Form CG 71 11 05 00*).

Plaintiffs point out, however, that the Policy contains an exception to the Total Pollution Exclusion that provides as follows:

> This exclusion does not apply to: …
>
> (c) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor
>
> (*Exhibit B, Form CG 71 11 05 00*).

Plaintiffs filed a Verified Petition on August 4, 2006, against Schaeffer, Castle, Duckett Creek Sanitary District and Environment-One Corporation seeking damages for trespass, negligence, and nuisance arising out of the installation and operation of a low pressure sewer system resulting in both bodily injury and the diminution of the value of their property. (*Exhibit A, ¶ 6; Exhibit C ¶¶ 23-36*). Plaintiffs further alleged that the low pressure sewer system collected wastewater from in excess of fifty (50) homes in an adjoining subdivision and discharged it into a manhole on Plaintiffs' property such that Plaintiffs began to experience foul odors emanating from the sewer caused by hydrogen sulfide and other particulates. (*Exhibit A, ¶¶ 6-7; Exhibit C, ¶¶ 9, 10, 14, 16, 17, 20*). (*Exhibit A, ¶¶ 6-7; Exhibit C, ¶ 14*). Specifically, Plaintiffs alleged, "[a]s a result of the ***noxious fumes***, Plaintiffs have suffered from, among other things, nausea, headaches, loss of sleep and appetite, runny noses and watery and itchy eyes." (*Exhibit C, ¶ 14*) [Emphasis Added}. Moreover, Plaintiffs alleged that the fumes emanating from the sewer interfered with Plaintiffs' right to exclusively possess their property and deprived them of their rightful use and enjoyment of the property. (*Exhibit C, ¶¶ 20, 21*

On December 26, 2007, Amerisure denied insurance coverage to its insureds Schaeffer and Castle because the cause of action asserted by Plaintiffs against the insureds arose "as a result of the exposure to sewer gases" which were specifically excluded under the Policy. (*Exhibit D*). Thereafter, Plaintiffs, Schaeffer and Castle entered into a settlement agreement whereby Castle and Schaeffer consented to the entry of a judgment against them and in favor of Plaintiffs pursuant to §537.065 RSMo in the amount of $750,000.00. (*Exhibit E*). On November 10, 2009, the Circuit Court of St. Charles County entered a Consent Judgment against Schaeffer and Castle in favor of Plaintiffs pursuant to the settlement agreement. (*Exhibit F).*

Plaintiffs' retained Walter Shifrin, P.E., as an expert witness, who testified that it was his opinion that the sewer system produced anaerobic conditions which released hydrogen sulfide from the manhole on Plaintiff's property that was generated from the sewage that was discharged from the adjoining subdivision. (*Exhibit G; p. 75, ll. 2-14*). Additionally, he testified that hydrogen sulfide is a breakdown product of wastewater that is released as a gas that has the odor of rotten eggs. (*Exhibit G, p. 41, l. 21 – p. 42, l. 8*).

CONCLUSIONS OF LAW

A. STANDARD OF REVIEW

Summary judgment is designed to permit the court to enter judgment, without delay, where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo.banc 1993). Summary judgment proceeds from an analytical predicate that, where the facts are not in dispute, a prevailing party can be determined as a matter of law. *Id*. Rule 74.04 of the Missouri Rules of Civil Procedure establishes a step-by-step procedure by which such cases can be identified and resolved. *Id*.

To demonstrate that summary judgment is proper, a defending party may: (1) present facts negating any element of the plaintiff's cause of action; (2) show that the non-movant has not, nor cannot, produce evidence of the existence of any of those elements; or (3) show there is no genuine issue of fact necessary to support the defending party's affirmative defense. *Id*. at 381; *Tonkovich v. Crown Life Insurance Co.*, 165 S.W.3d 210, 214 (Mo.App. E.D. 2005); *Highfill v. Hale*, 186 S.W.3d 277, 280 (Mo.banc 2006).

Once the defending party has made a prima facie showing, the burden shifts to the plaintiff to set forth reasons for which summary judgment is not proper. If the non-movant cannot contradict the showing of the movant, judgment is properly entered against the non-movant because the movant has already established a right to judgment as a matter of law. *ITT Commercial Finance Corp.*, 854 S.W.2d at 381.

The interpretation of the meaning of the insurance policy is a question of law. *Boulevard Inv. Co. v. Capitol Indem. Corp.*, 27 S.W.3d 856, 858 (Mo.App. E.D.2000). Where an issue can be decided as a matter of law, summary judgment is proper. *Moore v. Commercial Union Ins. Co.*, 754 S.W.2d 16, 18 (Mo.App.W.D. 1988).

The general rules for interpretation of contracts apply to insurance policies. *Heringer v. Am. Family Mut. Ins. Co.*, 140 S.W.3d 100, 102 (Mo.App.W.D. 2004)(citing *Peters v. Employers Mut. Cas. Co.*, 853 S.W.2d 300, 301-02 (Mo.banc 1993)). If an insurance policy is unambiguous, it is enforced as written absent a statute or public policy requiring coverage. *Heringer*, 140 S.W.3d at 102. If the language of the policy is ambiguous, it is construed against the insurer. *Id.* at 102-03. An ambiguity exists when there is duplicity, indistinctness, or uncertainty in the meaning of words used in the contract. *Id.* "The language of an insurance policy is ambiguous when it is reasonably and fairly open to different constructions." *Kellar v. Am. Family Mut. Ins. Co.*, 987 S.W.2d 452, 455 (Mo.App.W.D. 1999)(quoting *Kastendieck v. Millers Mut. Ins. Co. of Alton*, 946 S.W.2d 35, 39 (Mo.App.W.D. 1997)). To test whether the language used in the policy is ambiguous, the language is considered in the light in which it would normally be understood by the lay person who bought and paid for the policy. *Id.* Where an insurer seeks to avoid coverage under a policy exclusion, it has the burden of proving the

applicability of the exclusion. *Am. Family Mut. Ins. Co. v. Bramlett ex rel. Bramlett*, 31 S.W.3d 1, 4 (Mo.App.W.D. 2000).

Generally, if a term is defined in an insurance policy, a court will look to that definition and nowhere else. *Heringer* at 103 (citing *Hobbs v. Farm Bureau Town & Country Ins. Co.*, 965 S.W.2d 194, 197 (Mo.App. E.D.1998)). If a term within an insurance policy is clearly defined, the policy definition controls. *Id.* If a conflict arises between a technical definition of a term and the meaning of the term which would reasonably be understood by the average lay person, the lay person's definition will be applied, unless it is obvious the technical meaning was intended. *Id.*

B. THE POLLUTION EXCLUSION UNAMBIGUOUSLY DENIES LIABILITY COVERAGE TO THE INSUREDS

The Pollution Exclusion contained in the policy, standing alone, unambiguously denies coverage for:

> "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time … *See supra*.

Pollutants are defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, ***fumes***, acids, alkalis, chemicals and ***waste***." *See supra* [Emphasis Added]. The policy further states that "This Pollution Exclusion applies even if such irritant or contaminant has a function in your business, operations, premises, site or location." *See supra.*

Amerisure relies on the case of *Casualty Indemnity Exchange v. City of Sparta*, 997 S.W.2d 545 (Mo. App. S.D. 1999). In *Casualty Indemnity*, the court held that a pollution

exclusion barred coverage for claims arising from sewer sludge that migrated onto the plaintiff's farm and caused damage to the plaintiff's dairy cows. In an effort to obtain coverage, the plaintiff argued that sewer sludge was not a hazardous material under the federal definition of such, and, therefore, was not a pollutant under the pollution exclusion at issue. The pollution exclusion in that case provided that there was no coverage for claims for damages that would not have occurred but for a "pollution hazard," and the subject policy went on to define "pollution hazard" as "an actual exposure or threat of exposure to the corrosive toxic or other harmful properties of any sold, liquid, gaseous or thermal pollutants, contaminants, irritants or toxic substances, including smoke, vapors, soot, fumes, acid, or alkalis, and waste materials consisting of or containing any of the foregoing." *Id*. at 547. The Court of Appeals found that the federal toxic substance definition was irrelevant to the policy's pollution exclusion. Instead, the Court focused on the allegations contained in the petition and determined that the substances alleged to have been involved constituted a "pollution hazard" as defined in the policy pollution exclusion such that coverage was denied. *Id*. at 549. The Court found it unnecessary to determine whether the sludge was first an irritant or contaminant, because the pollution exclusion barred coverage for claims arising from "toxic substances," which is exactly what the plaintiff had pled in the petition. Because the allegations of the pleading fell directly into the definition of a pollution hazard under the subject policy, the court held that the exclusion unambiguously applied to the claims asserted. *Id*. at 551.

Amerisure also relies on the opinion of *Heringer v. American Family Mut. Ins. Co.*, 140 S.W.3d 100(Mo. App. W.D. 2004). In *Heringer*, the Cooks hired Ms. Heringer as an independent contractor to assist with the renovation of a home. Part of her duties required her to

scrape paint that contained lead. During the process of using a heat gun to assist in removing the lead-based paint, Ms. Heringer was exposed to toxic quantities of lead. As a result of her exposure to lead-based paint, she suffered from lead poisoning and sustained injuries. The Cooks were insured under a policy of liability insurance issued by American Family. *Id*. at 101.

American Family denied coverage to the Cooks on the basis of its pollution exclusion. Thereafter, Ms. Heringer and the Cooks entered into an assignment and settlement agreement pursuant to Missouri Statute Section 537.065 and agreed to a trial on the damages. The trial court entered judgment against the Cooks in the amount of $1,000,000.00. *Id.* In an equitable garnishment action filed against American Family seeking to satisfy her judgment, the trial court found that the policy was unambiguous and that the pollution exclusion operated to exclude coverage for Ms. Heringer's claims for bodily injury because lead was a pollutant defined in the policy. The court of appeals refused to limit the pollution exclusion to incidents of wide-spread environmental pollution and upheld the trial court's denial of coverage. *Id*. at 105-06.

In *Boulevard Investment*, 27 S.W.3d 856 (Mo. App. E.D. 2000), the court held that grease and other waste were pollutants within the meaning of the pollution exclusion; therefore, the exclusion barred coverage of property loss allegedly caused by blockage of a plumbing system from various forms of waste released into the system. The definition of "pollutants" at issue in *Boulevard Investment* was the same definition contained in the case at bar. *Id.* at 858. The court consulted the standard English dictionary to find the meaning of the term, "waste." *Id*. Waste was defined as "refuse from places of human or animal habitation: as (1) GARBAGE, RUBBUSH … EXCREMENT … SEWAGE." *Id*., citing Webster's Third new International Dictionary 2580 (4th ed.1976). Accordingly, the court concluded that the pollution exclusion

endorsement barred coverage because grease and other kitchen waste constituted "waste" within the ordinary meaning of the word. *Id.*

Additionally, in the case of *Cincinnati Ins. Co. v. German St. Vincent Orphan Ass'n, Inc*., 54 S.W.3d 661, 665 (Mo.Ct.App. E.D. 2001) the court held that asbestos-containing dust released into air within a building in the process of removing vinyl flooring resulted in contamination and was a pollutant as a reasonable person would understand that word. *Id.* at 665. The court, however, found that there was an ambiguity contained in the policy because a floor scraper was used to remove the vinyl flooring. Under the terms of the policy, the scraper was deemed to be a vehicle and there was a provision that extended coverage to damage caused by a vehicle. *Id.* at 666-67. Accordingly, the court held that the "vehicle provision" controlled over the "pollution exclusion."

In response, the Plaintiffs rely on *Sargent Const. Co., Inc. v. State Auto. Ins. Co.*, 23 F.3d 1324 (8th Cir. 1994) to argue that the definition of "pollutant" is ambiguous.[2] *Sargent*, however, was addressed and dismissed by the court in *Casualty Indem. Exch. v. City of Sparta*, 997 S.W.2d 545, 550 (Mo.App. S.D. 1999), *supra.* The court in *Casualty Indem.* concluded that it was unnecessary to determine whether fumes or waste are first an irritant or contaminant, because the Pollution Exclusion expressly barred coverage for claims arising from "fumes" and "waste," both of which were included in the definition of "pollutant." Moreover, the court noted

[2] In the unreported case of *Cont'l Ins. Co. v. Shapiro Sales Co.*, 2005 WL 2346952 (U.S. Dist. Ct. E.D. Mo. 2005) the court found that the holding in *Sargent Const. Co., Inc. v. State Auto. Ins. Co.*, 23 F.3d 1324 (8th Cir. 1994) was contrary to Missouri case law. *Id*. at *15. It held that "the scope of the pollution exclusion was governed by the expectations of a reasonable policyholder," and that a reasonable policyholder would expect that property damage caused by alkali seepage would not be covered by insurance because "alkali" was defined as a pollutant in the in the pollution exclusion. *Id.* at *16-17.

that the Plaintiffs specifically pled that "the sludge contained substances toxic to humans and animals, which caused [plaintiffs] damage." *Id.* at 550. Likewise in the case at bar, the Plaintiffs have pled that sewer "waste" generated "noxious fumes" that caused the Plaintiffs to suffer both personal injury and property damage. The Policy at issue defines pollutants as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, ***fumes***, acids, alkalis, chemicals and ***waste***." Consequently, the Plaintiffs' claims are unambiguously excluded from coverage.

Where a defined term in a policy is clear and unambiguous, Missouri courts are obligated to give effect to the definition and enforce it as written. *State Farm Fire & Cas. Co. v. Berra,* 891 S.W.2d 150 (Mo.App. 1995). Because the Total Pollution Exclusion in the Policy *sub judice* clearly and unambiguously bars coverage for damages caused by "waste" and "fumes," the court is duty-bound to enforce it. Moreover, there is a consistent line of judicial precedent established by Missouri courts in the cases of *Heringer v. American Fam. Mut. Ins. Co.*, 140 S.W.3d 100, 104 (Mo.banc 2004); *Casualty Indem. Exch. v. City of Sparta*, 997 S.W.2d 545, 550 (Mo.App. S.D. 1999); *Boulevard Inv. Co. v. Capitol Indem. Corp.,* 27 S.W.3d 856, 858 (Mo.App. E.D.2000) and *Cincinnati Ins. Co. v. German St. Vincent Orphan Ass'n, Inc*., 54 S.W.3d 661, 665 (Mo.Ct.App. E.D. 2001), *supra,* that enforce pollution exclusions that are either identical to or very similar to the one contained in Amerisure's Policy and have been construed to deny coverage in very similar circumstances as presented to this court. Consequently, the court is compelled to grant the summary judgment motion filed by Amerisure.

C. THERE IS NO AMBIGUITY CREATED BY A PROVISION IN THE POLICY THAT OVERRIDES THE POLLUTION EXCLUSION WHEN THE INSURED BRINGS

"MATERIALS …INTO [A] BUILDING" THAT ARE USED IN CONNECTION WITH THE INSURED'S OPERATIONS AND WHICH CAUSE THE "RELEASE OF GASES, FUMES OR VAPORS" IN A BUILDING

The policy also expressly states that the pollution exclusion does not apply to:

> "Bodily injury" or "property damage" sustained within a building and caused by ***the release of gases, fumes or vapors from materials <u>brought</u> into that building in connection with operations being performed by you or on your behalf*** by a contractor or subcontractor. See supra [Emphasis added]

At first blush, it would seem that this provision gives back what the pollution exclusion seems to take away. Nevertheless, a careful reading of the plain language of the provision leads to the inescapable conclusion that it applies strictly to:

1. Injuries or property damage sustained "within a building;"
2. Caused by gases, fumes or vapors from "materials brought into the building;"
3. And such materials are used in connection with the operations preformed by the insured or on behalf of the insured.

In the case at bar, Plaintiffs have alleged that they sustained personal injury and property damage to both their home (a building) and their real property from a sewer system located outside their home. Moreover, Plaintiffs have not claimed that the insureds under the Policy brought materials used in connection with their operations into Plaintiffs' home and that such materials caused the release of fumes in the home as required by the plain reading of the provision in question. Rather, their claim is that the installation and operation of a low pressure sewer system by the insureds caused ***waste*** to accumulate within the sewer system located on or

near the real property of Plaintiffs and this waste generated hydrogen sulfide ***fumes*** which drifted onto their property and into their home from the exterior of the building. Consequently, a reasonable person would not interpret this provision to apply to the exterior sewer condition that Plaintiffs contend caused them to suffer injury.

The court believes that this provision would provide coverage under circumstances where the insureds brought a generator into a building to power tools and, as a result, the occupants of the building became ill due to carbon monoxide exposure caused by the exhaust of the generator. Such a situation is clearly distinguishable from the factual scenario pled by Plaintiffs in the case at bar. The mere fact that this provision provides limited coverage for damage caused by fumes that are generated from material that the insured brings into a building does not render the pollution exclusion ambiguous. Accordingly, it is reasonable to exclude coverage for pollution yet at the same time extend coverage for the limited circumstances described in the provision under scrutiny. The 2 provisions taken together do not render either one ambiguous so as to require this court to construe them against the insurer and in favor of coverage. They are not inherently contradictory.

D. AMERISURE HAD NO DUTY TO DEFEND BECAUSE THE TERMS OF THE POLICY UNAMBIGUOUSLY DENIED COVERAGE FOR THE CAUSE OF ACTION ASSERTED BY THE PLAINTIFFS AGAINST THE INSUREDS

As noted in Section B, *supra,* the pollution exclusion unambiguously denies insurance coverage for the claim brought by the Plaintiffs against the insureds. Accordingly, Amerisure had neither a duty to defend nor indemnify.

Plaintiffs correctly state that the duty to defend is broader than the duty to indemnify, i.e.

an insurance company may well have to defend its insured in an action where ultimately it is determined that it does not have a legal obligation to indemnify the insured due to an exclusion in the coverage. *Truck Ins. Exchange v. Prairie Framing, LLC*, 162 S.W.3d 64, 79 (Mo.App. W.D. 2005). In the case at bar, Amerisure denied coverage without the benefit of a declaratory judgment and, therefore, it lost the right to control the defense. Consequently, the insureds were free to and did, in fact, enter into a consent judgment with the Plaintiffs pursuant to §537.065 RSMo. Plaintiffs seem to contend that somehow this is tantamount to forfeiting the right to legally challenge its obligation to indemnify and they are, therefore, entitled to garnish the policy at will. To the extent that they advance such argument they are wrong. An insurance company that refuses a defense may potentially be liable for damages caused by its broad failure to defend, i.e. attorney's fees and expenses of litigation, however, that issue is not before the court. In the case at bar, the court finds that Amerisure did not forfeit its right to assert an unambiguous exclusion in order to justify its denial of coverage in this garnishment action.

ORDER, JUDGMENT & DECREE

In accordance with the foregoing:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that a Summary Judgment be and is hereby entered in favor of Defendant Amerisure and against Plaintiffs, with court costs to be taxed to Plaintiffs.

SO ORDERED:

_____

Judge Joseph L. Walsh, III, Division 17

Dated: _____

Copies mailed to attorneys for the parties.

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