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Minn. Stat. § 480A.08, subd. 3 (2006).

STATE OF MINNESOTA
IN COURT OF APPEALS
A07-976, A07-977, A07-979

Robert M. Larson, et al.,
plaintiffs/judgment creditors,
Appellants (A07-976),

Martha Jacobson, et al.,
plaintiffs/judgment creditors,
Appellants (A07-977),

Daniel J. Sletten, et al.,
Plaintiffs/Judgment Creditors (A07-977),

Ralph E. Sletten, et al,
Plaintiffs/Judgment Creditors (A07-979),

Ronald J. Brzinski, et al.,
plaintiffs/judgment creditors,
Appellants (A07-979),

vs.

Composting Concepts, Inc.,
Defendant/Judgment Debtor,

and

Farm Bureau Mutual Insurance Company,
defendant/garnishee,
Respondent.

Filed May 13, 2008
Affirmed
Shumaker, Judge

Ramsey County District Court
File Nos. C3-01-8748, C5-01-6421, C9-01-5580

Gary A. Van Cleve, John J. Steffenhagen, Larkin Hoffman Daly & Lindgren, Ltd., 1500 Wells Fargo Plaza, 7900 Xerxes Avenue South, Bloomington, MN 55431; and

Robert A. Hill, Robert Hill & Associates, Ltd., 12700 Anderson Lakes Parkway, Eden Prairie, MN 55344 (for appellants)

Scott B. Lundquist, Lundquist Law Offices, P.A., 510 Grain Exchange Building, 400 South Fourth Street, Minneapolis, MN 55415 (for respondent)

Considered and decided by Shumaker, Presiding Judge; Willis, Judge; and Poritsky, Judge.*

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

SHUMAKER, Judge

In these consolidated appeals from final judgment discharging garnishment proceedings, appellants challenge the district court decision that a pollution exclusion applied and that respondent insurer did not have a duty to defend or indemnify its insured, the underlying tortfeasor. Because the terms of the pollution exclusion are unambiguous and the plain meaning of "pollutants" includes the dispersal of living organisms from the composting site, and because the applicable exclusion does not contain an exception for an additional insured, we affirm.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

FACTS

Composting Concepts, Inc. operated a compost site in the city of Maplewood under contract with Ramsey County from June 22, 1994, through September 25, 1996. Appellants, residents in the vicinity of the site, sued Composting Concepts in 2001 on theories of nuisance, negligence, and intentional infliction of emotional distress, alleging that they suffered personal injuries and property damage from living organisms, mold, bacteria, and bioaerosols generated by the compost materials.

During its operation of the site, Composting Concepts was insured by respondent Farm Bureau Mutual Insurance Company under policies of commercial general liability (CGL) insurance policies.

In 2004, appellants and Composting Concepts entered into a *Miller-Shugart* settlement under which judgment of $3 million was entered against Composting Concepts and appellants agreed to satisfy the judgment from proceeds of Farm Bureau's CGL policies. Relying in part on the pollution exclusion in its policies, Farm Bureau denied coverage.

Appellants brought garnishment actions against Farm Bureau to enforce the settlement, and a bench trial was held. The district court concluded that the pollution exclusion applied to preclude coverage and that appellants did not qualify as additional insureds who might otherwise receive coverage under the policy. It discharged the garnishment proceedings, and these consolidated appeals followed.

D E C I S I O N

"The interpretation of an insurance contract is a question of law as applied to the facts presented. We review questions of law de novo." *Auto-Owners Ins. Co. v. Hanson*, 588 N.W.2d 777, 779 (Minn. App. 1999) (citations omitted), *review denied* (Minn. Apr. 20, 1999). "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).

Farm Bureau's CGL policy provides coverage to the insured for damages for which the insured is liable because of applicable "bodily injury" or "property damage." The district court ruled that appellants showed that they suffered applicable harm, and Farm Bureau does not dispute this determination. At issue here is whether Farm Bureau established that the pollution exclusion applied to preclude coverage as a matter of law.

The CGL policy at issue[1] lists 14 paragraphs of exclusions to coverage, including a pollution exclusion found in paragraph 2(f)(1)(b). It provides, in relevant part, that the insurance does not apply to:

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

[1] The relevant language in appellants' policies from 1994 to 1996 was identical and unchanged; thus we refer to a single policy language.

> 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;
>
> . . . .
>
> *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.

(Emphasis added.) The only dispute is whether the living organisms, mold, bacteria, and bioaerosols that appellants alleged were dispersed from the composting site fall within the policy's definition of "pollutants."

We must first determine whether the definition of "pollutants" in the policy is ambiguous. When a policy has a "pollution exclusion [that] is plainly designated as such," the terms of the exclusion are to be construed "in accordance with the usual rules of interpretation governing insurance contracts. 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." *Bd. of Regents of Univ. of Minn. v. Royal Ins. Co. of Am.*, 517 N.W.2d 888, 891 (Minn. 1994) (addressing comprehensive general liability policy).

Whether a policy term is ambiguous is a question of law reviewed de novo. *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32, 34 (Minn. 1979). "If the language of the policy is reasonably subject to more than one interpretation, there is ambiguity. If it is not reasonably subject to more than one interpretation, there is no ambiguity." *Id.* (citation omitted). A court must give the terms in the policy "their plain,

ordinary, and popular meaning." *Id.* (quoting *Ostendorf v. Arrow Ins. Co.*, 288 Minn. 491, 495, 182 N.W.2d 190, 192 (1970)). A court should not read an ambiguity into the plain language of the policy just to find coverage. *Id.*

The terms of a pollution exclusion are to be construed under a plain-meaning analysis, rather than by using a technical analysis that assumes the reader has knowledge of "terms of art" relating to environmental law. *Hanson*, 588 N.W.2d at 779 (construing version of pollution exclusion almost identical to one at issue in present case using a plain-language analysis); *see Royal Ins. Co.*, 517 N.W.2d at 890-93 (construing an earlier version of a pollution exclusion using a plain-language analysis). Guided by previous cases that have found policy terms unambiguous, we will apply a plain-language analysis here. *See, e.g., Milbank Ins. Co. v. Johnson*, 544 N.W.2d 56, 59 (Minn. App. 1996) (stating this proposition as to terms of an exclusion in automobile insurance policy). Consequently, as the district court did, we will give the terms of the pollution exclusion at issue here their plain-language meaning.

Appellants first cite extrinsic evidence from the trial in support of their argument that, from the point of view of the reasonable insured, the living organisms are not pollutants within the meaning of the policy. But such extrinsic evidence may be considered only if the terms to be interpreted are ambiguous. *Apple Valley Red-E-Mix, Inc. v. Mills-Winfield Eng'g Sales, Inc.*, 436 N.W.2d 121, 123 (Minn. App. 1989), *review denied* (Minn. Apr. 26, 1989). We do not consider extrinsic evidence in analyzing the plain language of the policy.

Next, appellants cite a "Fungi or Bacteria Exclusion," drafted by the Insurance Services Offices (ISO),[2] but not adopted by Farm Bureau. They assert that this creates an ambiguity in the pollution exclusion at issue here because the ISO exclusion demonstrates that the pollution exclusion does not encompass living organisms. *See Orren v. Phoenix Ins. Co.*, 288 Minn. 225, 229, 179 N.W.2d 166, 169 (1970) (holding that when policy language is ambiguous, evidence as to subsequently adopted language illustrating ambiguity is admissible as written admission); *Am. Cas. Co. v. Bank of Mont. Sys.*, 675 F. Supp. 538, 543-44 (D. Minn. 1987) (concluding policy language was ambiguous, and to underscore ambiguity of policy, citing fact that some insurers revised policies to remove ambiguous language). *Orren* is distinguishable because the revised policy language there had been adopted by the insurer and was used to illustrate policy language that the court determined was ambiguous. 288 Minn. at 229, 179 N.W.2d at 169. *Am. Cas. Co.* is distinguishable because it cited the revised policies of other insurers after the relevant policy was deemed ambiguous. 675 F. Supp. at 544. As the district court ruled in this case, the "Fungi or Bacteria Exclusion" is not part of the insurance policy at issue and is extrinsic evidence that, under *Apple Valley Red-E-Mix*, should be used only to interpret ambiguous terms.

Appellants also rely on their characterization of the pollutants as living organisms to argue that the pollution exclusion applies only to inorganic substances. They contend that, because the policy's definition of pollutants identifies several inanimate substances

[2] ISO drafts insurance policy language that insurance carriers contracting with ISO may adopt.

as pollutants but does not refer to living organisms, the doctrine of expressio unius est exclusio alterius applies. They also cite the doctrine of ejusdem generis. But "resort to the maxims of contract construction is not available to create ambiguity." *Colangelo v. Norwest Mortgage, Inc.*, 598 N.W.2d 14, 18 (Minn. App. 1999), *review denied* (Minn. Oct. 21, 1999); *see also Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 857 (Minn. 1998) (addressing the application of maxims in context of ambiguous language). Further, as the district court noted, the fact that the policy exclusions in *Royal Ins. Co.* and *Hanson* did not specifically refer to asbestos or lead did not preclude a determination that those substances were included within the ordinary meaning of pollutants. *See Hanson*, 588 N.W.2d at 781 (citing *Royal Ins. Co.*, 517 N.W.2d at 893-94, for the proposition that "a failure to specify [a substance] was not fatal or dispositive to the insurer's claim").

Having rejected appellants' arguments and determined that the policy term is unambiguous, we now apply a plain-language approach. "Pollutants" are defined in the policy as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." Appellants do not claim that the living organisms, mold, bacteria, and bioaerosols were dispersed in other than a gaseous state or fumes. "Gaseous" is defined as "[o]f, relating to, or existing as a gas." *The American Heritage Dictionary of the English Language* 749 (3d ed. 1992). "Gas" is defined as "[t]he state of matter distinguished from the solid and liquid states . . . . A substance in the gaseous state . . . . A gaseous asphyxiant, irritant, or poison." *Id.* "Fume" is defined as "[v]apor, gas, or smoke, especially if irritating, harmful, or strong." *Id.* at 734. The term "contaminant" means "[o]ne that contaminates." *Id.* at 406. In turn,

"contaminate" means "[t]o make impure or unclean by contact or mixture." *Id.* Similarly, "irritant" is defined as "[c]ausing irritation, especially physical irritation." *Id.* at 954. And "irritation" is "[a] condition of inflammation, soreness, or irritability of a bodily organ or part." *Id.*

As the district court noted, appellants are alleging that their homes and bodies were infiltrated with the living organisms, mold, bacteria, and bioaerosols dispersed from the composting site. As it concluded, "It is difficult to imagine a more clear-cut scenario where a substance could be classified as a contaminant." We agree. The essence of appellants' claim is that the living organisms dispersed from the composting site contaminated or irritated their bodies and homes. Further, there is no basis in the policy language for distinguishing organic from inorganic contaminants; they are both contaminants.

In *Royal Ins. Co.*, the supreme court stated that it "would be doing a disservice to the English language if we were to say that asbestos fibers, which are a health hazard because of their irritant effects on the human body, were not an irritant." 517 N.W.2d at 892. In *Hanson*, this court followed *Royal Ins. Co.* and concluded that lead in paint was a pollutant. 588 N.W.2d at 779. The parties also cite a number of cases from other jurisdictions to support their arguments. Most significant, of course, are those few that have specifically addressed dispersals from composting sites and that also apply a plain-language, rather than a technical, analysis to the pollution exclusion. *City of Spokane v. United Nat'l Ins. Co.*, 190 F. Supp. 2d 1209, 1219 (E.D. Wash. 2002) (holding that "[m]igration of odors from a solid waste facility clearly constitutes contamination, or

pollution, of the environment."); *see also Cold Creek Compost, Inc. v. State Farm Fire & Cas. Co.*, 68 Cal. Rptr. 3d 216, 223-28 (Cal. Ct. App. 2007) (applying the ordinary meaning of the words of the policy, citing *City of Spokane*, and holding that the odors at issue "polluted" the air as the term "pollute" is commonly understood, *review denied* (Cal. Feb . 20, 2008). *Royal Ins. Co.* and *Hanson*, as well as the cases from the foreign jurisdictions that apply a plain-language analysis, support the determination that the dispersals from the composting site constitute pollutants under the plain meaning of the policy language.

Appellants argue, however, that *Hanson* and *Royal Ins. Co.* are distinguishable. First, they argue that the substances deemed to be pollutants in those cases had been regulated and well-known to be harmful, so that the court's determinations that the substances constituted pollutants "is unsurprising." In *Hanson*, this court ruled that under a plain-meaning analysis, lead in paint qualified as a pollutant and was subject to the pollution exclusion. 588 N.W.2d at 780. Appellants argue that before *Hanson*, lead was considered to be a pollutant because lead-based paint has long been regulated by state and federal law. *See, e.g.,* 16 C.F.R. § 1303.1(a) (banning paint containing lead in excess of prescribed amount); Minn. Stat. §§ 144.9501-.9509 (2006) (Lead Poisoning Prevention Act). Appellants also argue that *Royal Ins. Co.*, 517 N.W.2d at 892-93, in which the supreme court ruled that asbestos fibers were an irritant within an earlier pollution exclusion, is distinguishable because the dangers inherent with the inhalation of asbestos were well known. *See, e.g.*, Minn. Stat. §§ 326.70-.81 (2006) (Asbestos Abatement Act).

Composting, however, is also subject to regulation. The Minnesota Pollution Control Agency has promulgated rules governing the owner and operator of yard-waste compost facilities. Minn. R. 7035.2836, subpts. 1-3 (2007). These rules provide, in relevant part, that the compost "must be produced by a process that includes turning of the yard waste on a periodic basis to aerate the yard waste, maintain temperatures, and *reduce pathogens*." *Id.*, subpt. 3(B) (emphasis added); *see Sletten v. Ramsey County*, 675 N.W.2d 291, 294-97 (Minn. 2004) (addressing immunity claims in appeal involving same underlying facts and describing Ramsey County's "permit-by-rule" approval letter from MPCA and its conditional use permit issued by city).

Next, appellants cite this court's language in *Hanson* that "there must be a limit to the construction of what constitutes an irritant or contaminant, or the exclusion renders the policy illusory." 588 N.W.2d at 781. *Hanson* gave examples of items that would not be considered pollutants, including "scalding water . . . , spoiled food, and trash on a stairway." *Id.* Similarly, appellants contend that mold and other living organisms are not in themselves harmful substances, unless manufactured, incubated, and dispersed in massive quantities, as appellants allege occurred at the compost site. Contending that the living organisms fit within the limiting principles in *Hanson*, appellants argue that the pollution exemption does not apply.

The district court rejected this argument, stating it was "satisfied" that the dispersal of living organisms from a composting site does not fall within the limitations set out in *Hanson*. Further, as respondent points out, *Hanson* did not find it significant "that lead in paint affixed to the wall and not released might not be harmful and thus not

considered a pollutant." *Id.* Instead, this court stated that "[i]t is not so much less a pollutant as it is then a pollutant in a dormant state." *Id.* This court noted the argument was similar to a claim "that because gas in an underground tank is not a pollutant, the gas is not a pollutant when it seeps into the ground," which it also rejected. *Id.* We agree that the facts here do not fall within the *Hanson* limits to the pollution exclusion, and instead fall within the plain meaning of pollutants. Consequently, the pollution exclusion precludes coverage.

Finally, appellants argue that there is coverage under an exception to the pollution exclusion that exists when an "additional insured" is added to the policy. This exception is found in paragraph 2(f)(1)(a) of the pollution exclusion and was added in 1999. Because there is no similar exception to paragraph 2(f)(1)(b) of the pollution exclusion at issue here, appellants' argument is a non sequitur, as there is no basis for holding that the "additional insured" language applies.

While respondent makes an additional argument that the "actual injury trigger rule" determines which policies may be at issue, the district court did not address the issue. Consequently, it is not properly before this court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that an appellate court will generally address only those matters raised and considered by the district court). Further, respondent did not file a notice of review under Minn. R. Civ. App. P. 106. This court will not address issues raised by a respondent who fails to file a notice of review. *City of Ramsey v. Holmberg*, 548 N.W.2d 302, 305 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996).

Affirmed.