COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2039 **Cir. Ct. No. 2012CV476**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

CARMEN RAMOS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROY HAUG,

PLAINTIFF-APPELLANT,

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,

INVOLUNTARY-PLAINTIFF,

V.

THE CHARTER OAK FIRE INSURANCE COMPANY AND TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,

DEFENDANTS-RESPONDENTS,

ABC INSURANCE COMPANY,

DEFENDANT.

APPEAL from an order of the circuit court for Sauk County: PATRICK J. TAGGART, Judge. *Reversed and cause remanded for further proceedings*.

Before Kloppenburg, P.J., Sherman, and Blanchard, JJ.

¶1 BLANCHARD, J. The Estate of Roy Haug alleges that a foundry negligently allowed bacteria to be dispersed or released into the air, that Haug inhaled some of these bacteria while he was near the foundry, and that this resulted in illness causing bodily injury. Based on these allegations, the Estate filed this direct action against two insurers for the foundry: primary carrier Charter Oak Fire Insurance Company and excess liability carrier Travelers Property Casualty Company.

¶2 Charter Oak moved to dismiss, and then moved for summary judgment, on the grounds that its policy contains the standard pollution exclusion that is common to many commercial general liability insurance policies ("the standard pollution exclusion"), and that the standard pollution exclusion bars coverage for Haug's injuries. The circuit court granted summary judgment to the insurers on the grounds advanced by Charter Oak.

¶3 On our de novo review of the evidence submitted on summary judgment, we have discovered that the Charter Oak policy does not contain the standard pollution exclusion, but instead, through an endorsement, contains a pollution exclusion that is considerably more detailed. The added language in the endorsement limits the scope of the exclusion.

¶4 We apply legal authority and interpret the policy language in a manner that we reference in this opinion, but that we primarily explain in an

separate opinion that we also release today in a highly similar case, ***Connors v. Zurich Am. Ins.***, No. 2014AP2990, slip op. (WI App Oct. 15, 2015) (recommended for publication).[1] For the reasons we explain in ***Connors***, we conclude that the pollution exclusion applicable here is ambiguous on the question of whether the bacteria are "pollutants" in the context of the occurrence alleged. *See* ***id.***, ¶¶2, 57. The exclusion is ambiguous in this context because the bacteria are not obviously in the nature of the commercial or industrial products or byproducts specified in the pollution exclusion, and therefore a reasonable insured could expect coverage. Accordingly, we reverse the summary judgment and remand for further proceedings.

¶5 In the operative complaint, the Estate alleges on behalf of the now-deceased Haug that, in or around June-July 2009, Haug "regularly walked on or in close proximity to" the property of Grede Foundries in Reedsburg, Wisconsin. During these walks, Haug allegedly "was exposed to unsafe levels of the *Legionella pneumophila* bacterium and thereby contracted Legionella pneumonia or Legionnaire[s'] Disease," resulting in injuries to Haug. *See* ***Connors***, ¶¶3 n.2, 5. As pertinent here, the complaint alleges negligence on the part of the foundry in maintaining its premises and in failing to conduct operations "so as to prevent the growth and dispersal of" the bacteria.

[1] Like this case, ***Connors*** involves a claim for injuries allegedly arising from a case of Legionnaires' disease resulting from infection of the lungs following inhalation of mist or vapor-borne *Legionella* bacteria dispersed or released from the Grede Foundries during the summer of 2009. *See* ***Connors v. Zurich Am. Ins.***, No. 2014AP2990, slip op. (WI App Oct. 15, 2015) (recommended for publication).

¶6 On appeal, as occurred in proceedings before the circuit court, the parties operate from the premise that the question is whether the standard pollution exclusion contained in many commercial general liability policies applies in the context of an occurrence of the type alleged here. However, this is a false premise, because the Charter Oak commercial general liability policy issued to the foundry, which Charter Oak submitted to the court as part of its summary judgment motion, contains an endorsement to the policy, entitled "Indiana Changes—Definition of Pollutants," which replaces the definition of "pollutants" in the standard pollution exclusion with a different, more specific, definition. We will refer to this as "the endorsement."[2]

¶7 In ***Connors***, we quote the provisions of the standard pollution exclusion and those of the pollution exclusion in the Charter Oak policy, and detail significant differences between the language in the two exclusions. *See* ***Connors***, No. 2014AP2990, ¶¶7-12, 27-57. We will not repeat that discussion here. In sum, the standard pollution exclusion uses broad language, while the endorsement in contrast begins with the same broad language, but then lists four categories of substances that are defined as "pollutants" and uses additional provisions to further clarify the definition of pollutants. *See* ***id.***, ¶¶7-12.

[2] The Travelers commercial excess liability (umbrella) policy issued to the foundry contains the standard pollution exclusion and not the endorsement. However, the same attorney who represents both Charter Oak and Travelers in this appeal does not suggest that the language of the umbrella policy could make a difference in resolving the question of whether the pollution exclusion relieves Charter Oak of liability based on the primary policy, and it is not readily apparent to us how the umbrella policy could make a difference to any issue raised in this appeal. Therefore, we do not refer to the umbrella policy again in this opinion.

¶8 Charter Oak moved the circuit court to dismiss the complaint on the grounds that there was no coverage due to the pollution exclusion, or, in the alternative to bifurcate issues of coverage and liability. The court granted Charter Oak's motion to bifurcate the proceedings to resolve the coverage issue before resolving liability, if necessary.

¶9 Significantly, Charter Oak consistently argued as though the policy contains the standard pollution exclusion language, without reference to the endorsement language. Similarly, the Estate also failed to call the court's attention to the endorsement language.

¶10 Both the Estate and Charter Oak identified experts, who submitted affidavits and testified on topics that included the prevalence of *Legionella* bacteria in both water-based and air-based settings, mechanisms by which the bacteria are transmitted to people, and how infection can cause Legionnaires' disease.

¶11 Relying on its expert's testimony, the Estate moved for declaratory judgment on the coverage issue, contending that the *Legionella* bacteria are not "within the scope of the [standard] pollution exclusion." In the alternative, the Estate argued that the standard pollution exclusion is "ambiguous as applied to this case," and therefore must be construed against the insurers and in favor of coverage. The insurers moved for summary judgment on the ground that the standard pollution exclusion bars coverage.

¶12 The circuit court concluded that the insurers established a prima facie case for summary judgment based on a plain language interpretation of the pollution exclusion, *as though it contained the standard pollution exclusion*, and that the affidavits and other proof submitted on summary judgment failed to reveal

a genuine issue as to any material fact or to reveal a reasonable conflicting inference from the undisputed facts. This was so, the court determined, because the only "reasonable understanding" of an insured is that *Legionella* bacteria are "pollutants" under the standard pollution exclusion. On this basis, the court concluded that the pollution exclusion unambiguously bars coverage for Haug's alleged injuries, and dismissed the complaint. The Estate appeals.

¶13 We need not recite the legal standards or our analysis in any detail, because the facts in this case are for all relevant purposes identical to those in ***Connors***, ***Connors*** was briefed to this court in a procedural posture identical to this case, and we fully set forth our reasoning in ***Connors***. *See* ***Connors***, No. 2014AP2990. To cite only one example of the many ways in which the two cases tightly overlap, in each case Charter Oak relies on the same medical school professor as an expert, in making the same points.

¶14 The only difference we can discern that could matter between the two appeals involves the oddity that here, unlike in ***Connors***, the parties and the circuit court (a different circuit court judge than in ***Connors***) all operated under the inaccurate premise that the insurance policy contained the standard pollution exclusion and did not contain the endorsement. However, we do not see this oddity as creating any unfairness to Charter Oak in our resolution of this appeal.

¶15 First, while we do not know why the endorsement language was not brought to the attention of the circuit court in this case, in contrast to the approach taken by the parties in ***Connors***, the endorsement language is in the policy at issue, and Charter Oak had an opportunity to address the language in the circuit court. Second, this has remained true on appeal, with the policy being an exhibit in the summary judgment record. Third, our review is de novo. Fourth, in ***Connors***,

Charter Oak has taken advantage of its opportunity on appeal to attempt to persuade us that the pollution exclusion in the policy, including the endorsement language, excludes coverage. Charter Oak is represented by the same appellate counsel in both cases, and filed its appellate briefs in ***Connors*** and in this case only about one month apart. We can imagine no reason that Charter Oak would make different or additional arguments in this appeal regarding the endorsement language from the arguments on this topic that it has presented to us in ***Connors***. For all these reasons, we see no unfairness in resolving the issues in this case based on our reasoning in ***Connors***, taking into account all arguments that Charter Oak advances in ***Connors*** related to the endorsement language.

¶16 With that background, we conclude, for the reasons stated in ***Connors***, that the pollution exclusion language here is ambiguous on the question of whether the bacteria are "pollutants" in the context of the alleged occurrence, and we reject the contrary arguments that Charter Oak makes in its briefing in ***Connors***.

¶17 This conclusion necessarily disposes of all arguments that Charter Oak presents in this appeal. For example, Charter Oak argues that it is entitled to summary judgment based solely on what the Estate alleges based on the "four corners of the contract," meaning the terms of the policy, without considering what Charter Oak calls "extrinsic evidence," such as the undisputed testimony of experts. This argument is flawed because it rests entirely on an interpretation of the standard pollution exclusion, and ignores the endorsement language.

¶18 For these reasons, we reverse the summary judgment and remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.