2023 IL App (2d) 220234
No. 2-22-0234
Opinion filed June 8, 2023

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

LM INSURANCE CORPORATION and LIBERTY INSURANCE CORPORATION, Plaintiffs and Counterdefendants-Appellees, v. THE CITY OF SYCAMORE and JENNIFER CAMPBELL and JEREMY PENNINGTON, Individually and on Behalf of All Others Similarly Situated, Defendants (The City of Sycamore, Defendant and Counterplaintiff-Appellant).	)	Appeal from the Circuit Court of De Kalb County. No. 21-CH-48 Honorable Bradley J. Waller, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court, with opinion.
Justices Jorgensen and Kennedy concurred in the judgment and opinion.

OPINION

¶ 1 This case involves an insurance coverage dispute. Jennifer Campbell and Jeremy Pennington, residents of the City of Sycamore (Sycamore), filed a putative class action complaint against Sycamore alleging that Sycamore's failure to maintain its water mains had harmed Sycamore's residents by providing them with unsafe drinking water and damaging the equipment that used water in their homes. Sycamore tendered the claim to its insurers, LM Insurance Corporation and Liberty Insurance Corporation (collectively, Liberty), seeking coverage. Liberty

denied coverage and filed an action for declaratory judgment, asserting that the policies it had issued to Sycamore did not provide coverage. The circuit court of De Kalb County agreed and granted Liberty judgment on the pleadings. Sycamore appeals from that order. We reverse and remand for additional proceedings.

¶ 2 I. BACKGROUND

¶ 3 Liberty issued two commercial general liability insurance policies and two umbrella policies to Sycamore for the period from December 1, 2018, to December 1, 2020. The policies provided that Liberty would pay those sums that Sycamore became legally obligated to pay as damages because of "bodily injury" or "property damage" to which the insurance applied. The policies further provided that Liberty would have the right and duty to defend Sycamore against any suit seeking those damages. The policies indicated that damages due to "pollution" were excluded from coverage.

¶ 4 On October 30, 2020, Campbell and Pennington filed a complaint in federal court for a purported class action on behalf of all people who resided in Sycamore from January 1, 2000, to October 30, 2020. The complaint alleged that Sycamore residents had suffered physical injuries and property damage due to allegedly contaminated water that Sycamore supplied. The complaint described a widespread "water problem" that had been caused by Sycamore's reckless deferred maintenance as it had "avoided replacing century-old water mains *** for decades." The complaint further alleged that the issue was not just limited to the age of the water main piping but also that the mains sat in highly corrosive soils that "react with construction materials and eat away at the iron water mains, leading them to disintegrate and crumble underground."

¶ 5 According to the complaint, during the years that Sycamore had allowed the water pipes to decay, contamination of the water supply had occurred in multiple ways threatening the health and

safety of Sycamore residents. The contamination included contamination from iron, lead, and bacteria. This contaminated water was then dispersed throughout Sycamore's water system, including into the homes of Sycamore residents. The complaint asserted that Sycamore residents had informed Sycamore about problems with its contaminated water supply, but Sycamore refused to do anything about it. The complaint sought both compensatory and punitive damages.

¶ 6 Following the filing of the complaint, Sycamore tendered a claim to Liberty for coverage of the underlying action. After an investigation, Liberty denied coverage.

¶ 7 On February 18, 2021, Liberty filed a complaint for declaratory judgment, asserting that it did not owe Sycamore a defense or indemnity related to the policies that it issued to Sycamore that covered the period from December 1, 2018, to December 1, 2020. On October 28, 2021, Liberty filed an amended complaint for declaratory judgment. Liberty asserted that the policies provided coverage for only an "occurrence," which the policies defined as an "accident." Liberty argued that Sycamore's ongoing failure to maintain its water system over a period of years or decades did not constitute an "occurrence." Liberty further argued that coverage was precluded due to the policies' pollution and lead exclusions. Liberty maintained that the pollution exclusion applied because the alleged damages would not have occurred but for Sycamore's use of a polluted water source and its dispersal of that polluted water to the residents' homes. Liberty asserted that the lead exclusion applied because the claims in the plaintiffs' underlying suit arose from their exposure to lead.

¶ 8 On November 12, 2021, Sycamore filed its answer, affirmative defenses, and counterclaims. In count I of its counterclaims, Sycamore alleged that Liberty had breached its contract by failing to accept coverage or defend Sycamore in connection with the underlying

lawsuit. In count II, Sycamore asked the court to declare that Liberty had a duty to defend Sycamore against the underlying complaint.

¶ 9 On December 13, 2021, Liberty filed a motion for judgment on the pleadings. On January 25, 2022, Sycamore filed a motion for judgment on the pleadings as to count II of its counterclaims, seeking a declaration that Liberty had a duty to defend the underlying lawsuit.

¶ 10 On April 12, 2022, the trial court denied Liberty's motion for judgment on the pleadings and granted Sycamore's motion for judgment on the pleadings as to count II of its counterclaims. Liberty filed a motion to reconsider.

¶ 11 On June 10, 2022, upon reconsideration, the trial court found that the allegations in the underlying complaint alleged an "occurrence" that triggered Liberty's duty to defend Sycamore. However, the trial court found that the "Total Pollution Exclusion" and the "Pollution" exclusion in the commercial general liability (CGL) and the umbrella policies, and the lead exclusion in the CGL policies, applied. As such, the trial court held that Liberty had no duty to defend Sycamore and entered judgment in Liberty's favor. Sycamore thereafter filed a timely notice of appeal.

¶ 12 II. ANALYSIS

¶ 13 On appeal, Sycamore argues that the trial court erred in interpreting insurance contract between Liberty and Sycamore and determining that Liberty did not owe a duty to defend and indemnify it regarding the underlying complaint. Sycamore contends that the pollution and lead exclusions in Liberty's policies do not negate Liberty's duty to defend it in the underlying lawsuit. Sycamore argues that the pollution exclusion applies only to "traditional environmental pollution," which it insists is not what the underlying complaint is alleging.

¶ 14 At the outset, we note that an insurer's duty to defend is determined by comparing the allegations in the underlying complaint to the relevant provisions of the insurance policy.

Outboard Marine Corp. v. Liberty Mutual Insurance Co., 154 Ill. 2d 90, 107-08 (1992). If the facts alleged in the complaint fall within, or potentially within, the language of the policy, the insurer's duty to defend arises. *Id.* at 108. Because an insurance policy is a contract, the rules applicable to contract interpretation govern the interpretation of an insurance policy. *Nicor, Inc. v. Associated Electric & Gas Insurance Services Ltd.*, 223 Ill. 2d 407, 416 (2006). Our primary function is to ascertain and give effect to the intention of the parties, as expressed in the policy language. *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010). If the language is unambiguous, the provision will be applied as written, unless it contravenes public policy. *Id.* The rule that policy provisions limiting an insurer's liability will be construed liberally in favor of coverage applies only where the provision is ambiguous. *Id.*

¶ 15 Judgment on the pleadings is proper only when the pleadings disclose no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 385 (2005). When ruling on a motion for judgment on the pleadings, the court considers only those facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the record. *Id.* We review *de novo* the court's order granting or denying a motion for judgment on the pleadings. *St. Paul Fire & Marine Insurance Co. v. City of Waukegan*, 2017 IL App (2d) 160381, ¶ 25.

¶ 16 The "total pollution exclusion" at issue states that the policies do not apply to " '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." Our supreme court first addressed the scope of this exclusion in *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 476 (1997). In *Koloms*, carbon monoxide was released from a faulty furnace located in a two-story commercial building, saturating the air inside the

building. *Id.* As a result, those on the premises became ill and filed suit. *Id.* The insurer of the building denied the insured's tendered defense, arguing that, because carbon monoxide was a pollutant, there was no coverage under the policy's absolute pollution exclusion. *Id.*

¶ 17 On appeal, the insured argued that the insurer's proffered interpretation of the "absolute pollution exclusion" was too broad. *Id.* at 483-84. The supreme court agreed. *Id.* at 489. The supreme court cited two examples where a broad reading of that term would lead to the "absurd" result of noncoverage: (1) " 'bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano' " and (2) " 'bodily injury caused by an allergic reaction to chlorine in a public pool.' " *Id.* at 484 (quoting *Pipefitters Welfare Educational Fund v. Westchester Fire Insurance Co.*, 976 F.2d 1037, 1043 (7th Cir. 1992)).

¶ 18 In reviewing the historical events that led to the insurance industry's adoption of the absolute pollution exclusion, the supreme court determined the exclusion's purpose was to avoid the " 'enormous expense and exposure resulting from the "explosion" of environmental litigation.' " (Emphasis omitted.) *Id.* at 492 (quoting *Weaver v. Royal Insurance Co. of America*, 674 A.2d 975, 977 (N.H. 1996), quoting *Vantage Development Corp. v. American Environment Technologies Corp.*, 598 A.2d 948, 953 (N.J. Super. Ct. Law Div. 1991)). In other words, the exclusion was intended to shield insurers from " ' "the yawning extent of potential liability arising from the gradual or repeated discharge of hazardous substances *into the environment*." ' " (Emphasis in original.) *Id.* at 493 (quoting *West American Insurance Co. v. Tufco Flooring East, Inc.*, 409 S.E.2d 692, 699 (N.C. Ct. App. 1991), quoting *Waste Management of Carolinas, Inc. v. Peerless Insurance Co.*, 340 S.E.2d 374, 381 (N.C. 1986)).

¶ 19 Thus, the *Koloms* court held that, in order for the absolute pollution exclusion to apply, there must be "traditional environmental pollution" (*id.* at 494), which includes "any 'discharge,

dispersal, release, or escape' of a pollutant *** into the environment" (*id.* (quoting *Tufco*, 409 S.E.2d at 700)). Applying this rule to the facts before it, the court held that, because the exclusion "applies only to those injuries caused by traditional environmental pollution," and because the accidental release of carbon monoxide that is contained inside a building is not a release of pollutants into the environment, the exclusion did not apply to bar coverage. See *id.*

¶ 20 Since *Koloms*, our courts have determined that a primary factor to consider in determining if an occurrence constitutes "traditional environmental pollution" is whether the injurious "hazardous material" is confined within the insured's premises or, instead, escapes into "the land, atmosphere, or any watercourse or body of water." (Internal quotation marks omitted.) *Connecticut Specialty Insurance. Co. v. Loop Paper Recycling, Inc.*, 356 Ill. App. 3d 67, 81 (2005). The reason for this distinction has been explained as follows:

> "A pollutant contained within the premises of the insured, while certainly harmful to those that come in contact with it, does not pose the same threat, both to the public at large and the pocketbooks of insurance companies, that a pollutant released on or into 'the land, atmosphere, or any watercourse or body of water' poses." *Id.* at 82.

¶ 21 In 2012 and 2013, two cases arising from the same facts addressed whether the dispersal of contaminated water constituted traditional environmental pollution. See *Scottsdale Indemnity Co. v. Village of Crestwood*, 673 F.3d 715, 716 (7th Cir. 2012); *Village of Crestwood v. Ironshore Specialty Insurance Co.*, 2013 IL App (1st) 120112, ¶ 1. In those cases, "perc" (PCE—perchloroethylene, also known as tetrachloroethylene), a carcinogen and a solvent used in dry cleaning, had leaked into the groundwater tapped by a well. *Scottsdale*, 673 F.3d at 716. Crestwood's officials were aware that the groundwater was contaminated with perc, yet they decided to distribute the water to its residents anyway. *Id.* After Crestwood's residents learned of

the water contamination, hundreds of them sued Crestwood and its past and present officials. See *Ironshore*, 2013 IL App (1st) 120112, ¶ 1; *Scottsdale*, 673 F.3d at 716. Crestwood responded by tendering the claims to its insurers. *Scottsdale*, 673 F.3d at 716. The insurers refused to defend or indemnify Crestwood, based on the absolute pollution exclusion in the policies. Both the district court in *Scottsdale* and the trial court in *Ironshore* granted the insurers summary judgment based on the pollution exclusion. *Scottsdale*, 673 F.3d at 716; *Ironshore*, 2013 IL App (1st) 120112, ¶ 1.

¶ 22 On appeal, the *Scottsdale* court affirmed the district court's decision. *Scottsdale*, 673 F.3d at 721. The *Scottsdale* court noted that the Illinois Supreme Court in *Koloms* had held that pollution exclusions in insurance policies were limited to harms arising from "traditional environmental pollution." *Id.* at 717. The *Scottsdale* court explained that the supreme court's phraseology meant that pollution exclusions were limited to " 'pollution harms as ordinarily understood.' " *Id.* This was logical because, otherwise, the exclusions would exclude coverage for things that the parties to insurance contracts clearly did not intend to exclude—such as asbestos particles escaping during the installation or removal of insulation or someone being injured by paint drifting off the mark during a spray-painting job. *Id.*

¶ 23 The *Scottsdale* court determined that the dispersal of contaminated water constituted environmental pollution. *Id.* at 720-21. The court stated that it was irrelevant whether Crestwood originated the contamination, because "[t]he exclusion is of liability for harms resulting from the 'dispersal,' 'migration,' or 'release' of contaminants, not their creation or just their first distribution." *Id.* at 720. The court further explained that, so long as Crestwood had actual or constructive notice of the groundwater contamination at its well, it would be liable in tort for having caused the pollution. *Id.*

¶ 24 In *Ironshore*, 2013 IL App (1st) 120112, the Illinois Appellate Court, First District, reached the same conclusion as the *Scottsdale* court, holding that the pollution "exclusion [was] unqualified and absolute and entirely preclude[d] coverage for bodily injuries or property damage arising out of the discharge, dispersal, release, or escape of pollutants." *Ironshore*, 2013 IL App (1st) 120112, ¶ 20. The court further expounded "that an absolute pollution exclusion is not limited to intentional torts or any other particular theory of liability." *Id.* ¶ 21.

¶ 25 Based on the above authorities, we believe that the dispositive question is whether the iron, lead, and bacteria that Sycamore allegedly distributed to its residents constituted "traditional environmental pollution" or "pollution harms as traditionally understood." We hold that it did not. The *Ironshore* court identified the facts therein—perc escaping into the ground, contaminating the groundwater, and being distributed to the community—as the "textbook example" of "traditional environmental pollution." *Id.* ¶ 19; see *Danbury Insurance Co. v. Novella*, 727 A.2d 279, 281 n.6 (Conn. Super. Ct. 1998) (describing oil spilling into a harbor and contaminating the water as unquestionably an example of traditional environmental pollution). The facts that the plaintiffs in the underlying lawsuit alleged here involve neither a "textbook" nor an "unquestionable" example of "traditional environmental pollution." The plaintiffs alleged that Sycamore did not repair for decades century-old water mains that sat in highly corrosive soils that ate away at the iron water mains, "leading them to disintegrate and crumble under underground." The disintegrating water mains then led to iron, bacteria, and lead being distributed to members of the Sycamore community. Unlike the "traditional environmental pollution" cases described above, there was no release, discharge or escape of a pollutant into the ground that caused the groundwater to become contaminated. Rather, the complaint alleged that the water did not become contaminated until it was already in Sycamore's water pipes. Although the complaint clearly alleged that the plaintiffs

were harmed by pollutants, this is not equivalent to asserting that they were harmed by "traditional environmental pollution." *Country Mutual Insurance Co. v. Hilltop View, LLC*, 2013 IL App (4th) 130124, ¶ 41 (the fact that something "may now constitute pollution pursuant to statute does not mean it also constitutes 'traditional environmental pollution' "); see also *Keggi v. Northbrook Property & Casualty Insurance Co.*, 13 P.3d 785, 790 (Ariz. Ct. App. 2000) ("[m]any courts that have considered the purpose of the standard absolute pollution exclusion clause have concluded that the clause is intended to preclude coverage for environmental pollution, not for 'all contact with substances that can be classified as pollutants' ").

¶ 26 We further note that Liberty points to no cases in which degrading water mains that cause lead, iron, and bacteria to be distributed to the community constitute "traditional environmental pollution." Indeed, the cases that have most closely addressed this issue have determined that this type of pollution does *not* constitute environmental pollution. See *Netherlands Insurance Co. v. Butler Area School District*, 256 F. Supp. 3d 600, 612 (W.D. Pa. 2017) (exclusion "does not apply to a substance such as lead that is a component of a product that degrades over time"); *Auto-Owners Insurance Co. v. Potter*, 105 F. App'x 484, 496 (4th Cir. 2004) (contaminated water that was supplied to residents' homes did not constitute "traditional environmental pollution"). As the allegations in the complaint do not indicate the plaintiffs were harmed by "traditional environmental pollution," the "total pollution" and "pollution" exclusions in Liberty's policies were not applicable to this case and were not a proper basis on which to award Liberty judgment on the pleadings.

¶ 27 We next address the trial court's determination that the lead exclusion in the policies was a basis on which to award Liberty judgment on the pleadings. The lead exclusion in the CGL policies states that the policies do not apply to:

"1. Any actual or alleged liability, damages, loss or injury that results directly or indirectly from the ingestion, inhalation, exposure to or absorption of lead in any form or to any claims or 'suits' arising from lead; [or]

2. Actual or alleged 'property damage' and 'resulting directly or indirectly from' lead or the exposure to lead in any form or to any claims or 'suits' arising from lead."

¶ 28 Terms such as "arising from" and "resulting directly or indirectly from," when used in insurance policy exclusions, must be given a limited interpretation in favor of the insured. *Allstate Insurance Co. v. Smiley*, 276 Ill. App. 3d 971, 978 (1995). An exclusion negates an insurer's duty to defend only if the alleged injuries could not have occurred but for the excluded cause or claim. *Continental Casualty Co. v. McDowell & Colantoni, Ltd.*, 282 Ill. App. 3d 236, 243-44 (1996); see *Roman Catholic Diocese of Springfield in Illinois v. Maryland Casualty Co.*, 139 F.3d 561, 565 (7th Cir. 1998) ("[T]he possibility that not all of the injuries complained of in the complaint may be covered does not obviate the duty to defend; so long as at least some injuries potentially fall within the scope of the policy, the insurer must defend the insured.").

¶ 29 Here the underlying complaint alleged that Sycamore had allowed its cast iron mains to deteriorate, which "allowe[d] large amounts of iron particulate to enter the City's water supply. This iron particulate then enter[ed] people's homes, staining tubs, dishes, and other personal items, while also negatively impacting the taste and appearance of the water." The complaint also asserted that, "more importantly, the iron interferes with treatments that the City adds to the water to protect the residents. *** Without this protection, lead from solder, joints, service lines, and plumbing have contaminated water throughout Sycamore's system, leading to high lead levels in homes." The complaint further alleged that the iron interacted with the chlorine treatments, allowing

bacteria to flourish. The "waterborne bacteria [then] seriously threatens the health of the residents, allowing harmful—and possibly even fatal—diseases."

¶ 30 Based on these allegations, it is apparent that the underlying plaintiffs were complaining of iron, lead, and bacteria pollution, not just lead pollution. The allegations do not suggest that all the plaintiffs' problems arose from exposure to lead. (If any one thing was the cause of all the problems the plaintiffs suffered, the allegations suggest that the cause was iron, as that in turn caused the problems with the lead and the bacteria). As the underlying complaint does not indicate that all of the problems at issue arose from the plaintiffs' exposure to lead, the lead pollution exclusion is not a basis on which to determine that Liberty did not owe Sycamore a duty to defend or indemnify. See *McDowell & Colantoni*, 282 Ill. App. 3d at 243-44.

¶ 31 Liberty also asks that we affirm on the alternate basis that there was never an occurrence in this case. Liberty points out that the insurance contract provided coverage only if there were an "occurrence." The policies define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Illinois courts have defined "accident" as an unforeseen occurrence, usually of an untoward or disastrous character or an undesigned, sudden, or unexpected event of an inflictive or unfortunate character. *Westfield National Insurance Co. v. Continental Community Bank & Trust Co.*, 346 Ill. App. 3d 113, 117 (2003).

¶ 32 In determining whether a complaint alleges a potential "occurrence," the focus is on whether the insured allegedly expected or intended the injury, not whether the acts allegedly were performed intentionally. See *USAA Casualty Insurance Co. v. McInerney*, 2011 IL App (2d) 100970, ¶ 15. "[I]t should be the 'rare' case that [a court is] so confident that the allegations could not possibly be described as 'negligent' conduct *** that [it] can say that the allegations in an

underlying complaint could not even potentially fall within the coverage of a policy." (Emphasis omitted.) *Country Mutual Insurance Co. v. Dahms*, 2016 IL App (1st) 141392, ¶ 54.

¶ 33 Some courts have also stated that the "natural and ordinary consequences of an act do not constitute an accident." See *Atlantic Mutual Insurance Co. v. American Academy of Orthopaedic Surgeons*, 315 Ill. App. 3d 552, 561 (2000); see also *Hutton v. States Accident Insurance Co.*, 267 Ill. 267, 270 (1915) ("An effect which is the natural and probable consequence of an act or course of action cannot be said to be produced by accidental means."); *Lyons v. State Farm Fire & Casualty Co.*, 349 Ill. App. 3d 404, 408-09 (2004) (same). The real question, however, is whether the party performing the acts leading to the result intended or expected the result. *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 77-78 (1991). If the party did not intend or expect the result, then the result was the product of an accident or an "occurrence." *Id.*

¶ 34 In arguing that Sycamore's actions constituted a "nonoccurrence" that never triggered Liberty's duty to defend or indemnify, Liberty points to the above principle that the "natural and ordinary consequences of an act do not constitute an accident." Liberty asserts that the natural and ordinary consequences of Sycamore's decision to defer maintenance on its water mains for decades is that those mains would deteriorate and cause problems for its residents. Since that is what the underlying complaint alleged happened in this case, Liberty insists that it owed no duty to defend or indemnify Sycamore.

¶ 35 Liberty points to no case where a court has held that deferred maintenance has constituted a nonoccurrence. Rather, the cases Liberty relies upon that invoke the "natural and ordinary consequences" principle involve (1) acts clearly intended to injure, such as intentional fraud, assaults, and arson and (2) damages due to the insured's defective work or product. See *State Farm Fire & Casualty Co. v. Martin*, 186 Ill. 2d 367, 369 (1999) (arson); *State Farm Fire & Casualty*

Co. v. Young, 2012 IL App (1st) 103736, ¶ 3 (intentional assault); *Stoneridge Development Co. v. Essex Insurance Co.*, 382 Ill. App. 3d 731, 753 (2008) (no occurrence where cracks that developed in claimant's home were the natural and ordinary consequences of insured's defective workmanship); *Allstate Insurance Co. v. Lane*, 345 Ill. App. 3d 547, 549 (2003) (deliberate fraud).

¶ 36 Generally, courts have interpreted what constitutes an occurrence very broadly. See *Dahms*, 2016 IL App (1st) 141392, ¶ 54. Indeed, both cases discussed extensively earlier—*Scottsdale* and *Irondale*—did not question whether an occurrence had occurred therein. As those cases involved more egregious facts—the Village of Crestwood knowingly distributed previously contaminated water—and yet the courts still determined there was an occurrence, it cannot be said that the facts herein reflect the rare case in which the court can confidently say that there was no occurrence. *Id.* Accordingly, determining that there was a nonoccurrence in this case is not an alternative basis on which to affirm the trial court's decision.

¶ 37 III. CONCLUSION

¶ 38 For the foregoing reasons, the judgment of the circuit court of De Kalb County is reversed and the case is remanded for additional proceedings.

¶ 39 Reversed and remanded.

***LM Insurance Corp. v. City of Sycamore*, 2023 IL App (2d) 220234**

Decision Under Review:	Appeal from the Circuit Court of De Kalb County, No. 21-CH-48; the Hon. Bradley J. Waller, Judge, presiding.
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