IN CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

KUHLMAN ELECTRIC CORPORATION, et al., **PLAINTIFFS**

vs. **CAUSE NO. 251-07-549 CIV**

THE TRAVELERS INDEMNITY COMPANY, et al.,

DEFENDANTS

ORDER GRANTING DEFENDANT FEDERAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT BASED ON THE ABSOLUTE POLLUTION EXCLUSION

The issue presented is Federal's motion for summary judgement based on its three primary policies' pollution exclusions ("Pollution Exclusions").

Legal Standard

No citation of authority is necessary for the well-settled and well-understood test for reviewing a M.R.C.P. 56 motion for summary judgement. It also is well-settled that "The interpretation of an insurance policy is a question of law, not one of fact,"[1] and thus is the responsibility of the court. And

> [w]here there is doubt as to the meaning of an insurance contract, it is universally construed most strongly against the insurer, and in favor of the insured and a finding of coverage.[2]

---

[1] ***Mississippi Farm Bureau Cas. Ins. Co. v. Hardin***, 323 So.3d 1034, 1037 (2021) (internal citations omitted).

[2] ***Universal Underwriters Ins. Co. v. Buddy Jones Ford Lincoln-Mercury, Inc.***, 734 So.2d 173, 176–77 (Miss. 1999).

But it also is true and well-settled that "insurance companies must be able to rely on their statements of coverage, exclusions, disclaimers, definitions, and other provisions, in order to receive the benefit of their bargain and to ensure that rates have been properly calculated."[3]

The Special Master

This court appointed Paul H. Stephenson, III to serve as a Special Master and provide the court his report and recommendations ("R&R) as to several pending motions including Federal's motion. The Special Master filed his R&R on July 19, 2021 wherein he recommended the court grant Federal's motion.

According to the Special Master , KEC's appreciation of the question to be decided is as follows:

> KEC contends the exclusion in the Primary Policies "only precludes coverage for pollution-related 'bodily injury and property damage.'" KEC points to "personal injury" coverage which affords coverage for "wrongful entry into premises." According to KEC, personal injury coverage exists here because the Underlying Claims include private citizens' tort lawsuits (the "Individual Tort Actions") alleging "wrongful entry" in the form of trespass and nuisance.[4]

However, recognizing that KEC's position failed to account for the Federal policies' broad definition of "property damage," the Special Master stated:

> Federal's Primary Policies broadly define "property damage" to include not only "physical injury" to property but also "loss of use" of the property associated with claims of trespass and nuisance. Rights entitling a property owner to recover for interference with the use and enjoyment of property are personal rights "derivative of and incidental to the ownership of property."[5]

---

[3]***Noxubee Cnty. Sch. Dist. v. United Nat'l Ins. Co.***, 883 So. 2d 1159, 1166 (Miss. 2004) (citing ***U.S. Fid. & Guar. Co. v. Knight***, 882 So. 2d 85, 92 (¶ 32) (Miss. 2004)).

[4]Special Master at 3-4.

[5]R&R at 30, *citing* language from ***Great Northern Nekoosa Corp. v. Aetna Cas. and Sur. Co***., 921 F. Supp. 401 (N.D. Miss. 1996)).

Federal echoed and restated the Special Master's observation in its response to KEC's objections to the Special Master's R&R:

> The Special Master concluded that the underlying allegations of trespass and nuisance were not sufficient to invoke PIL coverage because they were part and parcel of the claims for pollution property damage excluded by the APE.

Great Northern Nekoosa Corp. v. Aetna

According to its brief, KEC "does not dispute that [the Pollution Exclusion] precludes coverage for pollution-related . . . "property damage," as [that term is] defined in the Federal Primary Policies."[6] However, KEC cites ***Great Northern Nekoosa Corp. v. Aetna Cas. and Sur. Co***., 921 F. Supp. 401 (N.D. Miss. 1996) for the proposition that Federal's inclusion of "wrongful entry" in its policies' definitions of "personal injury" triggers personal injury coverage because "most of the complaints in the Underlying Claims include specific counts of nuisance and trespass," which are analogous to "wrongful entry" for purposes of "personal injury.

Property damage definition

It is true that, as here, the Aetna policy in ***Great Northern*** excluded coverage for "bodily injury" and "property damage," but not for "personal injury." However, it is unclear what definition of "property damage" applied in ***Great Northern***'s policy. Neither the ***Great Northern*** opinion nor KEC's briefing and argument before the Special Master on October 23, 2020 informs us of any Aetna policy definition of "property damage." By contrast, the Federal policies in this case do define "property damage;" and given the undisputed exclusion of coverage for "property damage," it should be self-evident that if coverage for "property damage" is excluded, it follows that the policies' definition of that term also is excluded.

---

[6]KEC Brief at 4. As will be seen, since "property damage" includes "loss of use" of the property, KEC's admission precludes its own claim.

The Federal policies' definition of "Property Damage" includes "loss of use of tangible property that is not physically injured." (emphasis added). The term "tangible property" includes the real estate of the plaintiffs in the underlying tort actions.[7] So, by ignoring the irrelevant descriptive phrase "that is not physically injured," removing the term "property damage," and substituting its definition, the relevant portion of the pollution exclusion may fairly be read as excluding coverage for the "[loss of use of [real estate] arising out of [pollution]." The Special Master found this precisely to be the "personal injury" damages sought by the plaintiffs in the underlying tort lawsuits.

At the October 23 hearing, the inclusion of "loss of use" within the broad definition of "property damage" was not squarely addressed by either party or the Special Master. However, in presenting slides to the Special Master, Federal pointed out:

> Even in the nuisance allegations they talk about, and I've highlighted the language here, "the hazardous contamination of the soils on their premises have interfered with their ability to use the property and dangerously contaminated their property with toxic waste."[8]

Upon receiving the briefing and hearing the parties' respective arguments, the Special Master issued a well-reasoned and meticulously researched recommendation that focused directly on the issue and addressed and distinguished the ***Great Northern*** case cited by KEC:

> Given the broad policy definition of "property damage," the Special Master concludes the Pollution Exclusion precludes personal injury coverage for the personal possessory interests considered by the court in ***Great Northern Nekoosa***. KEC, as the insured, cannot reasonably expect personal injury coverage of such interests associated with claims of trespass and nuisance where the Pollution

[7]*See e.g.* Miss. Code Ann. § 27-9-19 (2022) ("For the purpose of this tax, all tangible property, real, personal or mixed, located within the State of Mississippi at the date of decedent's death shall be deemed property within this state and shall be reported unless otherwise exempt.")

[8]Transcript at 172.

> Exclusion plainly excludes coverage for all "loss of use" damages. Any personal possessory interest damages associated with claims of trespass or nuisance in this case are tethered to and not sufficiently distinct from the injuries and damages excluded by the Pollution Exclusion.[9] (emphasis added).

The Special Master went on to address emotional distress, opining:

> Similarly, the simple allegation of "emotional distress" in this matter is not sufficiently distinct from injury or damage excluded by the Pollution Exclusion to be separately covered under the personal injury coverage. The allegation of emotional distress caused by private nuisance is part and parcel of the alleged interference with personal property use and enjoyment which falls within the Primary Policies' definition of "property damage." While Mississippi law concerning the necessity of physical bodily injury to recover emotional distress damages has varied over the years and remains unclear, any distinction between emotional distress as a personal injury and bodily injury defined in the Primary Policies as "bodily injury, sickness, or disease" is not sufficient to invoke personal injury coverage under the facts in this case. The ***Great Northern Nekoosa*** court addressed emotional distress only in the context of its being a separately enumerated tort under the personal injury coverage. And if a claim of emotional distress is considered here as a separate tort, either negligent or intentional, the tort is not an enumerated offense within personal injury coverage and is therefore not covered.

As stated above, KEC's arguments have been grounded in its observation that the Federal policies include coverage for "personal injury" which, in turn, includes "wrongful entry" in their respective definitions of "personal injury." And according to KEC, "wrongful entry" triggers coverage because "most of the complaints in the Underlying Claims include specific counts of nuisance and trespass," which are analogous to "wrongful entry" for purposes of "personal injury."

The court finds this to be a categorical syllogism, and categorical syllogisms do not always hold true.[10] While it is true that the Federal policies do not categorically exclude

---

[9]R&R at 30-31.

[10]Birds fly. Airplanes fly. Therefore, birds must be airplanes.

"personal injury" coverage, Federal was not prohibited from excluding coverage for certain "personal injury" damages that flow from certain causes such as pollution. Insurance policies commonly exclude certain losses that fall within covered categories.

Restating for emphasis the Special Master's suggestion,

> KEC, as the insured, cannot reasonably expect personal injury coverage of such interests associated with claims of trespass and nuisance where the Pollution Exclusion plainly excludes coverage for all "loss of use" damages.[11]

KEC's position also is belied by the underlying tort actions' specific articulation of the claims of loss under private nuisance and trespass. Specifically, as set forth in the R&R, the "private nuisance" and "trespass" claims in the underlying tort actions allege:

> **COUNT FOUR – PRIVATE NUISANCE**
>
> Defendants' acts and omissions described herein have and continue to interfere with Plaintiffs' **property interests and use, enjoyment, and peaceful occupation of Plaintiffs' properties**. Plaintiffs **cannot engage in their customary activities** such as vegetable and flower gardening, landscaping, and similar activities due to the hazardous contamination of the soils on their premises. Plaintiffs must **restrict outdoor activities in contaminated areas**, including residential yards, to reduce and/or avoid exposure to the hazardous wastes that have and continue to invade Plaintiffs' properties. Plaintiffs can no longer fish in Lake Chautauqua as the lake and the fish in the lake are dangerously contaminated by the Defendants' toxic wastes. Plaintiffs can no longer consume crawfish from Lake Chautauqua or the creek that flows from the Kuhlman facility to Lake Chautauqua for fear that the crawfish have been contaminated by the Defendants' toxic pollution. Plaintiffs suffer great emotional distress caused by having to live on contaminated property and in such close proximity to the Kuhlman facility. Defendants' ongoing **interference with Plaintiffs' use and enjoyment of property** is intentional and unreasonable in that Defendants are aware of the locations and concentrations of contamination originating from the Kuhlman facility but have failed to remediate locations where contamination exceeds regulatory levels. Defendants' past **interference with Plaintiffs' use and enjoyment of property** was either intentional or so grossly negligent and reckless and/or abnormally dangerous as to constitute intentional interference with Plaintiffs' property rights. Accordingly, Plaintiffs are entitled to damages for

[11] Special Master at 31.

private nuisance resulting from Defendants' conduct.

COUNT SIX – TRESPASS

> Defendants have caused toxic pollutants, including PCBs, to escape the Kuhlman facility through, inter alia, stormwater runoff, by spraying transformer oils for dust control, by excavation and transportation of contaminated soils and dust from the Kuhlman site and subsequent deposition of those soils on Plaintiffs' properties and/or properties located near Plaintiffs' properties. This has caused a physical invasion of Plaintiffs' land, **interfering with the exclusive use of their property** by Plaintiffs that continues to this day. The damages to Plaintiffs' properties are solely, directly, and proximately caused by a trespass by the Defendants and each of them, and Plaintiffs are entitled to recover damages from said Defendants.[12]

In its response to KEC's objections to the Special Master's recommendations, Federal pointed out:

> The Special Master's conclusion is easily confirmed by reference to the underlying complaints. The trespass and nuisance claims in those complaints alleged that KEC's pollution of their properties interfered with the "use, enjoyment, and peaceful occupation of [their] properties" and that the claimants could not "engage in their customary activities . . . due to the hazardous contamination of the soils on their premises."[13]

THE COURT'S DECISION

Upon review of the Special Master's R&R, and after considering the briefs and arguments of counsel, the court finds as follows:

Federal's Pollution Exclusions

It is clear and uncontested that, absent the applicability of an exclusion from coverage, Federal's primary policies provide indemnity and defense-cost coverage for some of KEC's claims. The coverage excluded by the relevant portions of the Pollution Exclusions is for

---

[12]R&R at 7-8.

[13]Federal Brief [MEC #867 at 5-6] *citing* R&R at 7.

> **bodily injury** or **property damage** arising out of the actual, alleged, or threatened discharge, dispersal, release, or escape of pollutants . . . at or from premises which are or were at any time owned or occupied by, or rented or loaned to, any insured; . . .

KEC correctly points out that these exclusions do not mention "personal injury."

Generally, insurance policies may include three categories of exclusions:

- for certain causes of harm. For instance, "this policy provides no coverage for windstorm;"
- for certain types of harm or damage, no matter the cause. For instance, "this policy provides no coverage for damages to outbuildings."
- for certain types of harm or damage, but only when they are the result of certain causes of the harm. For instance, "this policy provides no coverage for damage to outbuildings when caused by windstorm."

Here, KEC correctly points out that the Federal policies cover "personal injury" which includes "wrongful entry into the premises." But where, as here, the "wrongful entry" is caused by pollution, the pollution exclusion comes into play. And here, the pollution exclusion excludes property damage which the policy defines *inter alia* as "loss of use," where the property itself is not damaged.

So whether the Federal policies fall in the third category depends on whether there are personal injuries that may be occasioned by pollution, other than loss of use. If so, then KEC correctly claims that the Federal policies do not include "absolute" pollution exclusions. If not, then Federal correctly claims its pollution exclusions are "absolute pollution exclusions." But that question is not before this court because either way, the policies do exclude "loss of use" damages occasioned by pollution.

KEC's arguments center around its view of the ordinary meaning of "property damage," ignoring in its briefing and argument before the Special Master the fact that "property damage" is

defined in the contract to include "loss of use of tangible property that is not physically injured."

Specifically, KEC argues:

> Had Federal wanted to exclude personal injury claims arising out of pollution, it easily could have, by simply including personal injury with property damage and bodily injury in its pollution exclusion, or by stating that exclusion applies to all coverage provided by the policies rather than just certain coverages.[14]

And specifically objecting to the Special Master's reasoning, KEC goes on to state:

> The Special Master appears to be troubled by the notion of excluding bodily injury or property damage caused by pollution, and yet allowing personal injury coverage for other types of losses (e.g., loss of use or enjoyment) arising from the same general conditions.[15]

Missing from KEC's argument is the recognition that Federal was free to provide coverage for personal injury losses except those that its policies excluded. Unfortunately for KEC, Federal's policies exclude coverage for the particular type of personal injury damage it seeks to recover. While "wrongful entry" and "loss of use" of property very well may be categorized as personal injury, that does not end the inquiry. The policy includes "loss of use" of property as part of its definition of "property damage," which, in turn, is excluded under the pollution exception.

Federal was free to include "loss of use" in its definition of "property damage." It is hornbook law that "[i]n construing a written contract the words employed will be given their ordinary and popularly accepted meaning, in the absence of anything of show that they were used in a different sense."[16] One of the primary reasons for including definitions within contracts is

---

[14]KEC Objection to R&R at 4.

[15]Id. at 5

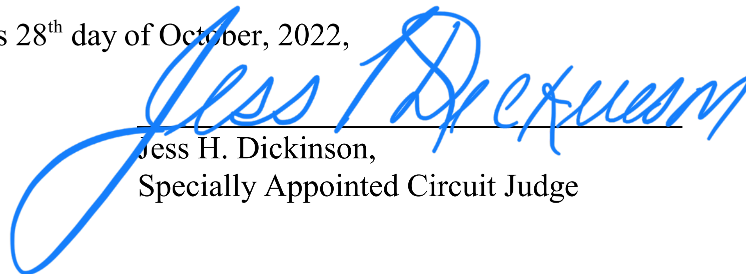
[16]***Miller v. Fowler***, 200 Miss. 776, 28 So. 2d 837 (Miss. 1947).

that words and phrases in the contract will have meaning that is different from their ordinary meaning. While the loss of use of property may not ordinarily be thought of as "property damage," it clearly is defined that way in the Federal policies.

The only claims at issue here are KEC's claims under Federal's three primary policies.[17] The court accepts and adopts the Special Master's findings and recommendations [MEC #863], including all of his reasons for recommending that Federal's motion should be granted. So, for all the reasons provided by the Special Master, as well as those stated herein, the court finds that Federal Insurance Company's Motion for Summary Judgment Based on the Absolute Pollution Exclusion should be granted, and that all claims of Kuhlman Electric Corporation and ABB Inc. against Federal Insurance Company should be dismissed with prejudice.

It is therefore ORDERED that summary judgment is hereby GRANTED to Federal Insurance Company, and all claims herein against it are hereby dismissed with prejudice.

SO ORDERED this 28th day of October, 2022,



Jess H. Dickinson,
Specially Appointed Circuit Judge

---

[17]According top KEC's counsel: "We're addressing only the personal injury coverage. We're not contending that MDEQ or the City of Crystal Springs incurred personal injury and therefore Mr. Walsh's reliance on that second prong of the exclusion is not impacted. I mean it applies. We're not defending that we're entitled to coverage for that. Our focus is entirely on the personal injury." *See* Transcript before Special Master at 175.