2013 IL App (1st) 121263-U

FIRST DIVISION
March 11, 2013

No. 1-12-1263

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GREENWICH INSURANCE COMPANY and INDIAN HARBOR INSURANCE COMPANY, Plaintiffs-Appellants, v. JOHN SEXTON SAND & GRAVEL CORP., CONGRESS DEVELOPMENT COMPANY, ALLIED WASTE TRANSPORTATION, INC., and REPUBLIC SERVICES, INC., Defendants-Appellees.	))))))))))))	Appeal from the Circuit Court of Cook County No. 10 CH 21805 Honorable Mary L. Mikva, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court of Cook County did not err in denying partial judgment on the pleadings to the plaintiff insurance companies and entering partial summary judgment in favor of the insureds regarding the duty to defend in an environmental insurance coverage dispute.

¶ 2 Plaintiffs Greenwich Insurance Company (Greenwich) and Indian Harbor Insurance Company (Indian Harbor) appeal from an order of the circuit court of Cook County partially denying their motions for judgment on the pleadings and granting partial summary judgment to defendants, John Sexton Sand & Gravel Corp. (Sexton), Congress Development Company (Congress), Allied Waste Transportation, Inc. (Allied Transportation), Allied Waste Industries, Inc. (Allied Waste), and Republic Services, Inc. (Republic), in an insurance coverage dispute regarding plaintiffs' duty to defend. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 This case arises from various insurance policies plaintiffs issued to defendants related to the operation of a landfill in Hillside, Illinois. In particular, this appeal is concerned with two primary commercial lines policies (primary policies), two commercial excess and umbrella liability policies (excess and umbrella policies), and a pollution and remediation legal liability policy (pollution policy). Defendants did not cross-appeal the circuit court's ruling that other polices covering the period prior to June 1, 2005, did not apply to this case.

¶ 5 Greenwich issued the primary policies to Sexton and Congress for the policy periods of June 1, 2005 to June 1, 2006, and June 1, 2006 to June 1, 2007. The primary policies state that:

> "[Greenwich agrees to] 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 the duty to defend the insured against any 'suit' seeking those

damages ***."

The primary policies are modified by the following "absolute pollution exclusion" endorsement:

"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.

This exclusion does not apply to 'bodily injury' or 'property damage' arising out of heat, smoke or fumes from a 'hostile fire' unless that 'hostile fire' occurred or originated:

(a) At 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" are defined by the primary policies as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalais, chemicals and waste. Waste includes materials to be recycled reconditioned or reclaimed."

¶ 6 Indian Harbor issued the excess and umbrella policies to Sexton and Congress for the policy periods of June 1, 2005 to June 1, 2006, and June 1, 2006 to June 1, 2007. These policies state that Indian Harbor shall have the right and duty to defend any suit against the insured seeking damages covered by the policies, which provide two coverages. Coverage A provides "follow form" excess coverage, which means that, with exceptions not relevant here, the insurer

provides coverage on the same terms as the underlying primary policies for loss amounts exceeding the limits of the underlying primary policies. Coverage B provides umbrella coverage for damages not covered by the primary policies. However:

"Under Coverage B, this insurance does not apply to:

1. **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** arising out of the actual or threatened discharge, dispersal, seepage, migration, release or escape of **Pollutants** anywhere in the world;
2. any **Loss**, cost or expense arising out of any governmental direction or request that we, the Insured or any other person or organization test for, monitor, clean up, remove, contain, treat, detoxify, neutralize or assess the effects of **Pollutants**; or
3. any **Loss**, cost or expense, including but not limited to costs of investigation or attorney's fees, incurred by a governmental unit or any other person or organization to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize **Pollutants**." (Emphases in original.)

An endorsement to the excess and umbrella policy for the policy periods of June 1, 2005 to June 1, 2006, further states:

"This exclusion shall not apply to Bodily Injury or Property damage caused by heat, smoke or fumes from a hostile fire as used in this exclusion. A hostile fire means one which becomes uncontrollable and breaks out from where it was intended to be."

The excess and umbrella policy for the policy periods of June 1, 2006 to June 1, 2007, does not include this last exception.

¶ 7 Indian Harbor also issued a pollution policy to Republic for the period from July 30, 2009 to July 30, 2010. The pollution policy provides that Indian Harbor shall have the right and duty to defend an insured against a claim seeking damage for a loss or remediation expense. The policy also generally provides coverage for loss and related legal expenses resulting from any "pollution condition" on, at or migrating from any covered location, including the landfill at issue here. A "pollution condition" is defined as including the discharge, release, seepage, migration or escape of pollutants "into or upon land, or structures thereupon, the atmosphere, or any watercourse or body of water including groundwater ***." An endorsement to the pollution policy contains a "contamination exclusion," which states that the policy shall not apply to any loss, remediation expense or related legal expenses based on or "arising from" constituents including "[a]ll airborne contamination resulting in odors" or affecting the "[a]ir," where such constituents are "on, at, under or migrating from" the landfill.

¶ 8 On December 23, 2009, hundreds of neighbors of the landfill filed a complaint against Congress as owner of the landfill, Sexton and Allied Transportation as general partners of Congress, and Allied Industries[1] as a guarantor of Allied Transportation's obligations. In Amber v. Allied Waste Transportation, Inc., No. 09 L 15741 (Amber lawsuit), the neighbors generally alleged:

> "The invasion of noxious gases from the landfill, underground and into the air in the neighborhoods surrounding the Landfill, caused bodily injury to the Neighborhood Residents, caused them to incur repair and remedial costs, deprived them of the use of

[1] Allied Industries allegedly merged with Republic on December 5, 2008.

their properties and substantially diminished the value of their properties."

The complaint in the Amber lawsuit, as amended, ultimately asserted claims of bodily injury and property damage arising from negligence, trespass and nuisance on the part of the Amber defendants (who are also the defendants in this case). The complaint also asserted claims of wilful and wanton misconduct and survival claims.

¶ 9 The Amber complaint contains a number of allegations regarding fires at the landfill. The intrusion of air into the landfill's gas collections system allegedly caused two subsurface fires and one surface fire at the landfill in 2002. Ignition of the waste allegedly generated additional gas at the landfill. Portions of the waste allegedly continued to burn below the surface of the landfill. In 2004 and 2005, high temperature readings caused Congress to conclude there was a subsurface fire at the landfill. In 2006, an Illinois EPA memorandum noted that scans of the landfill cover from January and February showed "classic signs of an underground fire." The Amber complaint specifically alleges that Congress has been unable to extinguish the fire below the surface of the landfill.

¶ 10 The Amber complaint also alleged that, beginning in September 2005, gas from the landfill began escaping by traveling underground through a liner, allegedly due to high pressure at a well or wells at the landfill. In September or October 2005, the neighbors began to experience horrible odors in their homes and on their property. High pressure and temperature within the landfill allegedly turned leachate into steam. Beginning in about February 2006, 50 to 60-foot geysers of leachate caused leachate to drift in the air outside of the landfill, ultimately into the homes of the Amber plaintiffs. The Amber complaint further alleged that certain

substances at the landfill could become dangerous through combustion. For example, certain plastics may release dioxins that can cause nerve damage or cancer. The complaint also identifies mercury as a neurotoxin which can be gasified if combusted.

¶ 11 In addition, the Amber complaint alleged that underground tremors from explosions at the landfill caused structural damage to the Amber plaintiffs' properties. Following the geyser problems allegedly occurring between February and September 2006, Congress received permission to lower the leachate levels at the landfill. As of March 2007, Congress began pumping leachate into a treatment plant built on site at the landfill. Congress allegedly added flares to burn additional gas at the landfill. These flares allegedly caused several explosions sufficient to shake homes in the surrounding neighborhoods.

¶ 12 On May 20, 2010, plaintiffs filed their complaint for declaratory judgment against defendants in the circuit court, seeking a declaration that they had no duty to defend or indemnify defendants with respect to the Amber lawsuit under the primary, excess and umbrella policies. The next day, plaintiffs contacted defendants regarding the Amber lawsuit and issued their coverage determinations regarding the 2004-07 policies. On June 1, 2010, Indian Harbor issued a coverage determination to Republic, concluding there was no coverage under the pollution policy in part because the alleged loss from the tremors did not result from a covered pollution condition.

¶ 13 On June 1, 2010, Indian Harbor also filed a complaint for declaratory judgment against Republic, Allied Transportation, Allied Industries, and Congress in the United States District Court for the Northern District of Illinois, seeking a declaration that they had no duty to defend

or indemnify with respect to the Amber lawsuit under the pollution policy. On September 23, 2010, after the federal court granted a defense motion to dismiss on jurisdictional grounds in deference to this lawsuit, plaintiffs filed an amended complaint in the circuit court seeking a declaration that they had no duty to defend or indemnify with respect to the Amber lawsuit under the pollution policy.

¶ 14 On May 10, 2011, plaintiffs filed their motion for judgment on the pleadings. In that motion, plaintiffs argued that they had no duty to defend against the Amber lawsuit because each of the primary, excess and umbrella policies contained an absolute pollution exclusion. Plaintiffs also alleged that they had no duty to defend under primary, excess and umbrella policies for policy periods prior to June 1, 2005, because the Amber complaint alleged that the injury occurred beginning in September 2005. Lastly, plaintiffs argued that Allied Industries was not named as an insured under any of the policies.

¶ 15 On May 20, 2011, defendants filed their motion for partial summary judgment regarding the duty to defend. Defendants argued that the exclusions in the policies plaintiffs issued did not apply because the Amber lawsuit alleged facts falling within the hostile fire exceptions to those exclusions. Defendants also argued that the allegations of property damage caused by tremors fell outside the pollution exclusions in plaintiffs' policies.

¶ 16 On October 28, 2011, following briefing on both motions, the circuit court issued a memorandum opinion and order partially granting and partially denying both the motion for judgment on the pleadings and the motion for partial summary judgment on the duty to defend. The circuit court ruled that none of the allegations in the Amber lawsuit refer to bodily injury or

property damage for the policy periods of 2003-04 or 2004-05. The circuit court next ruled that the hostile fire exceptions to the pollution exclusions in the primary policies are not applicable to this case. However, the circuit court concluded that the hostile fire exception to the exclusion in Coverage B of the excess and umbrella policy issued for 2005-06 was applicable, based on the allegations of the Amber lawsuit. The circuit court further ruled that the allegations of property damage resulting from explosions at the landfill fell outside the pollution exclusions in the primary and excess and umbrella policies. Lastly, the circuit court ruled that the allegations of subsurface migration of contaminants fell outside the contamination exclusion in the pollution policy.

¶ 17 On December 22, 2011, plaintiffs filed a motion for a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), a certification of questions regarding the interpretation of their policies pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010), and a stay of enforcement of the circuit court's October 28, 2011 order pending appeal. On March 12, 2012, following briefing and a hearing, the circuit court issued a Rule 304(a) finding that there was no just reason to delay enforcement or appeal of the October 28, 2011 order, but declined to consider certification of questions regarding plaintiffs' policies. The circuit court also denied the request for a stay pending appeal. On April 4, 2012, plaintiffs filed a timely notice of appeal to this court.

¶ 18 ANALYSIS

¶ 19 On appeal, plaintiffs contend that the circuit court erred in partially denying their motion for judgment on the pleadings and partially granting summary judgment to defendants on the

issue of plaintiffs' duty to defend. "Any party may seasonably move for judgment on the pleadings" pursuant to section 2-615(e) of the Illinois Code of Civil Procedure. 735 ILCS 5/2-615(e) (West 2010). Judgment on the pleadings is proper when the pleadings disclose no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 385 (2005). It is similar to a motion for summary judgment, but is limited to the pleadings. *Intersport, Inc. v. National Collegiate Athletic Ass'n*, 381 Ill. App. 3d 312, 318 (2008). Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). Where cross-motions for summary judgment are filed in an insurance coverage case, the parties acknowledge that no material questions of fact exist and only the issue of law regarding the construction of an insurance policy is present. *American Family Mutual Insurance Co. v. Fisher Development, Inc.*, 391 Ill. App. 3d 521, 525 (2009). This case presents a largely similar situation. "The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law ***." *Konami (America), Inc. v. Hartford Insurance Co. of Illinois*, 326 Ill. App. 3d 874, 877 (2002). We review a court's order granting or denying a motion for judgment on the pleadings *de novo*. *McCall v. Devine*, 334 Ill. App. 3d 192, 198 (2002). A circuit court's entry of summary judgment is also subject to *de novo* review. *Virginia Surety Co. v. Northern Insurance Company of New York*, 224 Ill. 2d 550, 556 (2007). Accordingly, our review of all issues presented here is *de novo*.

¶ 20 Indeed, *de novo* review is particularly apt here, as the overarching issue in this appeal is whether plaintiffs have a duty to defend against the Amber lawsuit. "To determine whether the insurer has a duty to defend the insured, the court must look to the allegations in the underlying complaint and compare these allegations 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 underlying complaint alleges facts that fall "within or *potentially* within" the coverage of the policy, the insurer is obligated to defend its insured even if the allegations are "groundless, false, or fraudulent." (Emphasis in original.) *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991).[2] "An insurer may not justifiably refuse to defend an action against its insured unless it is *clear* from the face of the underlying complaints that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage." (Emphasis in original.) *Id*. "Moreover, if the underlying complaints allege several theories of recovery against the insured, the duty to defend arises even if only one such theory is within the potential coverage of the policy." *Id*. The threshold requirements that the complaint must satisfy to present a claim of potential coverage is minimal; the complaint need present only a possibility of recovery, not a probability of recovery. *Bituminous Casualty Corp. v. Gust K. Newberg Construction Co.*, 218 Ill. App. 3d 956, 960 (1991).

¶ 21 In determining whether the allegations in the underlying complaint meet that threshold requirement, both the underlying complaint and the insurance policy must be liberally construed

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[2] The duty to defend is broader than the duty to indemnify, which arises only if the facts alleged actually fall within coverage. *Crum and Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 398 (1993).

in favor of the insured. *Wilkin Insulation Co.*, 144 Ill. 2d at 73. "[T]he duty to defend does not require that the complaint allege or use language affirmatively bringing the claims within the scope of the policy." *International Insurance Co. v. Rollprint Packaging Products, Inc.*, 312 Ill. App. 3d 998, 1007 (2000). All doubts are resolved in the insured's favor. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 154 (1999) (citing *Wilkin Insulation Co.*, 144 Ill. 2d at 74). In construing an insurance policy, the court must ascertain the intent of the parties to the contract by construing the policy as a whole, with due regard to the risk undertaken, the subject matter that is insured and the purposes of the entire contract. *Outboard Marine Corp.*, 154 Ill. 2d at 108. Where the words in the policy are clear and unambiguous, "a court must afford them their *plain, ordinary, and popular meaning*." (Emphasis in original.) *Id.* However, if the words in the policy are susceptible to more than one reasonable interpretation, they will be considered ambiguous and will be strictly construed in favor of the insured and against the insurer who drafted the policy. *Id.*

¶ 22 Plaintiffs first contend that the circuit court erred in ruling that the contamination exclusion in the Indiana Harbor pollution policy does not apply to the Amber lawsuit. The circuit court relied on the Amber lawsuit's allegations that gas migrated from the landfill underground, as well as through the air. Plaintiffs argue that the pollution policy's contamination exclusion refers not only to constituents including "airborne contamination resulting in odors," but also specifies that such contamination is excluded when those constituents are "on, at, under or migrating from" the landfill. Plaintiffs maintain that the odors do not exist unless until the contaminants producing them become airborne, regardless of whether they first migrated

underground. Plaintiffs assert that "but for" causation should be applied in construing the contamination exclusion, because the exclusion bars coverage for loss and expenses "arising from" airborne contamination. See *Shell Oil Co. v. AC&S, Inc.*, 271 Ill. App. 3d 898, 906 (1995). However, *Shell Oil Co.* used the "arising from" language in granting coverage. In contrast, the phrase "arising out of" in an exclusionary clause of an insurance policy should be given a limited interpretation in favor of the insured. *Allstate Insurance Co. v. Smiley*, 276 Ill. App. 3d 971, 979 (1995) (citing *Oakley Transport, Inc. v. Zurich Insurance Co.*, 271 Ill. App. 3d 716, 721-22 (1995)).[3] "Under ordinary usage, the word 'arise' means '[t]o spring up, originate, to come into being or notice' (Black's Law Dictionary 108 (6th ed. 1990)), or 'to come into being,' 'to come about: come up: take place' (Webster's Third New International Dictionary 117 (1986))." *Smiley*, 276 Ill. App. 3d at 978.

¶ 23 In this case, the Amber lawsuit alleges that the neighbors suffered bodily injuries from inhaling *and otherwise being exposed* to the chemical compounds in the landfill gas, without limitation to contaminants producing odors. The alleged other types of exposure are not

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[3] Plaintiffs argue that the phrase is unambiguous and thus should not be construed liberally in favor of the insured. "The rule that policy provisions limiting an insurer's liability will be construed liberally in favor of coverage only applies where the provision is ambiguous." *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010). In this case, "arising from" is not categorically ambiguous, but where the insurer seeks to avoid coverage based upon an exclusion in the policy, the applicability of the exclusion must be clear and free from doubt. *Oakley Transport, Inc.*, 271 Ill. App. 3d at 721-22.

specifically limited to airborne contamination or odors. The Amber lawsuit also alleges that Congress, Allied Transportation and Sexton were liable for trespass and property damage simply by allowing the migration of the landfill gas, including underground, onto neighboring properties. Again, this damage may not be limited to airborne contamination or odors. Thus, liberally construing the complaint and the policy language in favor of the insured, the Amber lawsuit alleges facts that fall within, or potentially within, the coverage of Indian Harbor's pollution policy.[4]

¶ 24 Second, plaintiffs contend that the circuit court erred in ruling that the alleged damages resulting from underground tremors caused by explosions at the landfill fall outside the absolute pollution exclusions in the primary, excess and umbrella policies. The language of the exclusions at issue here are common in the insurance industry and "applies only to those injuries caused by traditional environmental pollution." *American States Insurance Co. v. Koloms*, 177

[4] Plaintiffs note that an affidavit from the senior claims counsel at XL Specialty Insurance company, which handled claims submitted under Indian Harbor's pollution policy, states that the exclusion was inserted into the policy after Indian Harbor paid the $10 million limits of a prior pollution policy lacking the exclusion. However, plaintiffs maintain that this affidavit, the sole piece of evidence plaintiffs specifically rely upon outside the pleadings and policies in this case, is not offered to alter the unambiguous language of the exclusion. Thus, this court, like the circuit court, mus merely compare the Amber complaint to the pollution policy language and apply the minimal requirements to trigger an insurer's duty to defend under Illinois law.

Ill. 2d 473, 494 (1997). Plaintiffs argue that the escape of noxious gases from the landfill is traditional environmental pollution and "but for" this pollution, the landfill operation would not have been using the flares that allegedly exploded.

¶ 25 "[A] primary factor to consider in determining if an occurrence constitutes 'traditional environmental pollution' and, thus, is not covered under an absolute pollution exclusion, rests upon 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.' " *Connecticut Specialty Insurance Co. v. Loop Paper Recycling, Inc.*, 356 Ill. App. 3d 67, 81 (2005). See also *Village of Crestwood v. Ironshore Specialty Insurance Co.*, 2012 IL App (1st) 120112, ¶ 18 (citing *Economy Preferred Insurance Co. v. Grandadam*, 275 Ill. App. 3d 866, 873 (1995)). In this case, the Amber lawsuit alleges that the flares were part of the landfill operation's on-site attempt to treat and mitigate the escape of gases. This part of the landfill operation was confined within its premises. Moreover, the explosions are hardly traditional environmental pollution as such. To extend "but for" causation to encompass the alleged explosions here would run contrary to the limitation of the exclusion to traditional environmental pollution adopted by our supreme court in *Koloms* and raise the potential for absurd results. See *Connecticut Specialty Insurance Co.*, 356 Ill. App. 3d at 79-80 (discussing *Koloms*). Accordingly, we conclude that the explosion-related allegations of the Amber lawsuit fall outside the absolute pollution exclusions in plaintiffs' policies.

¶ 26 In the alternative, plaintiffs argue that the policies issued for the period of June 1, 2005 to June 1, 2006, do not apply in this case because the explosions did not occur until 2007 at the

earliest. Plaintiffs maintain that the circuit court erred in ruling that the Amber complaint was unclear on whether the 2007 flares or all of the flares caused the tremors. Plaintiffs rely on the allegations that: odor complaints increased in 2007; "[a]s part of its response, Congress added additional flares to burn Landfill Gas"; and [t]he new flare had several explosions *** sufficient to shake homes in the surrounding neighborhoods." The circuit court relied on the Amber complaint's later, general allegation that "underground tremors from explosions in the flares at the Landfill caused many homes owned by the Neighborhood Property Damage Residents to shake, causing structural damage and further reducing the value of their properties." Resolving all doubt in favor of the insured, we conclude that the general allegation raises the possibility of explosions prior to those in the more specific allegations of the Amber complaint. Accordingly, the circuit court did not err in ruling that the Amber lawsuit triggered a duty to defend under the policies issued for the period of June 1, 2005, to June 1, 2006, as well as the later primary, excess and umbrella policies.

¶ 27 Third, plaintiffs argue that the circuit court erred in ruling that Indian Harbor had a duty to defend under Coverage B of the excess and umbrella policy issued for the policy period of June 1, 2005, to June 1, 2006. The circuit court's ruling was based on a hostile fire exception to the absolute pollution exclusion from that coverage. As a preliminary matter, plaintiffs maintain that the circuit court erred in ruling that the insureds did not have the burden of proving the exception applies. Plaintiffs argue that in Illinois, the insurer has the burden of proving a policy exclusion applies (*Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 454 (2009)) and this court should therefore adopt the general rule that the insured has a burden of proof regarding an

exception to an exclusion (See *Santa's Best Craft, LLC v. St. Paul Fire and Marine Ins. Co.*, 611 F.3d 339, 348 (7th Cir. 2010)). However, even assuming *arguendo* that this burden falls on the insureds, the case involves showing a mere possibility of coverage. *Bituminous Casualty Corp.*, 218 Ill. App. 3d at 960. Plaintiffs argue that placing the burden on the insureds makes it "clearer" that the exception does not apply, but never identify how the burden of proof would be decisive, given the particular facts of this case. Moreover, this issue does not involve the consideration of any evidence outside the pleadings and the policies. Thus, we conclude that the circuit court did not commit reversible error on this point in this case.

¶ 28 Plaintiffs next argue that, regardless of any burden of proof, the circuit court erred in ruling that the hostile fire exception to the absolute pollution exclusion from Coverage B in the 2005-06 excess and umbrella policy potentially applies in this case. The policy exception here specifically defines a hostile fire as "one which becomes uncontrollable and breaks out from where it was intended to be." In this case, the Amber lawsuit alleges that the intrusion of air into the landfill's gas collections system allegedly caused two subsurface fires and one surface fire at the landfill in 2002 and generated additional gas at the landfill. Portions of the waste allegedly continued to burn below the surface of the landfill. The Amber complaint also specifically alleges that Congress has been unable to extinguish the fire below the surface of the landfill. Plaintiffs assert that the fire is better described as "regulated," because it was "clearly contained to the premises" of the landfill. However, the allegations in the Amber complaint do not establish that the fire is contained, as opposed to simply continuing to feed on the materials at the landfill. Thus, the Amber complaint alleges facts potentially falling within the hostile fire

exception.

¶ 29 Plaintiffs cite cases from other jurisdictions in an attempt to further define the term. For example, in *Firemen's Insurance Co. of Washington, D.C. v. Kline & Son Cement Repair, Inc.*, 474 F. Supp. 2d 779 (E.D. Va. 2007) the court ruled that an identical exception " 'clearly applies to accidents that occur within a building and that do not result from what is commonly considered industrial environmental pollution.' " *Id*. at 797 (quoting *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1000 (4th Cir. 1998)). In *Indiana Lumbermens Mutual Insurance Co. v. West Oregon Wood Products, Inc.*, 268 F.3d 639, 645 (9th Cir. 2001) the hostile fire exception did not apply where "pollutants came about from 'Defendant's operation of its factory' in a dirty way." Lastly, plaintiffs cite *Noble Energy, Inc. v. Bituminous Casualty Co.*, 529 F.3d 642, 648 (5th Cir. 2008) in which the court ruled that the hostile fire exception applies where a fire causes the pollution, not vice versa. In this case, the Amber complaint alleges that additional gas was generated by a fire or fires that were not part of the intended operations of the landfill. Thus, the Amber complaint alleges facts potentially coming within the hostile fire exception, even with the judicial gloss plaintiffs would put on it.

¶ 30 Lastly, plaintiffs argue that the Amber complaint does not allege any injuries or damage "caused by heat, smoke or fumes" from the fire. Plaintiffs maintain that the Amber complaint does not allege that fire was required to produce the odors from the landfill. However, the Amber complaint alleges that the fire or fires produced additional landfill gas and that the neighbors suffered bodily injury from being exposed to landfill gas. Construing the Amber complaint and the policy language in favor of the insureds, it is possible that the alleged odors are

fumes injuring the neighbors and were directly caused by the fire or fires alleged in the Amber complaint. Accordingly, we conclude the circuit court did not err on this point.

¶ 31 CONCLUSION

¶ 32 In sum, we conclude that the circuit court of Cook County did not err in denying partial judgment on the pleadings in favor of plaintiffs or in granting partial summary judgment regarding the duty to defend in favor of defendants. Therefore, we affirm the judgment of the circuit court.

¶ 33 Affirmed.