

IN THE SUPREME COURT OF TEXAS

No. 97-0926

KELLEY-COPPEDGE, INC., PETITIONER

v.

HIGHLANDS INSURANCE COMPANY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

Argued on April 28, 1998

JUSTICE SPECTOR delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE ENOCH, JUSTICE ABBOTT and JUSTICE HANKINSON joined. JUSTICE GONZALEZ filed a dissenting opinion, in which JUSTICE HECHT, JUSTICE OWEN and JUSTICE BAKER joined.

In this case, we consider whether Kelley-Coppedge, Inc. (KCI), an independent contractor, “occupied” the easement on which it was performing operations, thereby invoking the pollution exclusion clause of a commercial general liability policy. The court of appeals held that KCI did occupy the easement and therefore rendered summary judgment that KCI take nothing. 950 S.W.2d 415. We reverse and render judgment for KCI.

I

While laying pipe along an easement, KCI, an oil and gas pipeline contractor, inadvertently struck a Mobil Oil pipeline causing the release of 1600 barrels of crude oil. The spill damaged a third party’s land upon which the easement was located.

At the time, Highlands Insurance Co. covered KCI under a commercial general liability

policy. After the spill, KCI notified Highlands, took steps to mitigate potential damage, and entered into agreements with Mobil and the adjoining landowner to clean up the soil in accordance with Texas Railroad Commission standards. Highlands eventually paid to repair the Mobil pipeline and for the lost oil. When KCI presented Highlands with the cleanup costs, however, Highlands denied the claim.

KCI then sued Highlands for a declaratory judgment on Highlands's coverage obligations, breach of insurance contract, and attorneys' fees. Both parties moved for summary judgment. Finding that the insurance contract's pollution exclusion clause did not exclude KCI's cleanup costs, the trial court granted summary judgment for KCI and overruled Highlands's motion. The trial court later granted KCI summary judgment on damages for \$435,000.

The court of appeals reversed and rendered summary judgment for Highlands. 950 S.W.2d at 419. Relying on *Tri County Service Co. v. Nationwide Mutual Insurance Co.*, 873 S.W.2d 719, 729 (Tex. App.—San Antonio 1993, writ denied), the court held that because KCI had the right to be on the easement to perform operations, it occupied the easement for the purposes of the insurance policy. 950 S.W.2d at 419. Because section f.(1)(a) of KCI's policy excluded coverage for the release of pollutants from premises it "owned or occupied," the court held that KCI could not recoup its cleanup costs from Highlands. *Id.* We granted KCI's petition for review and now reverse and render judgment for KCI.

II

The issue we must resolve is whether the pollution exclusion clause contained in KCI's

insurance policy with Highlands excluded coverage for KCI's cleanup costs. The relevant portions of the pollution exclusion clause are subsections f.(1)(a), f.(1)(d), and f.(2)(a). Exclusion f.(1) of the policy excludes coverage for:

“Bodily injury” and “property damage” arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

(a) At or from any premises, site or location which is or was at any time owned or *occupied by*, or rented or loaned to, any insured;

* * *

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:

(i) if the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor;

Exclusion f.(2) excludes coverage for:

Any loss, cost or expense arising out of any

(a) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants (emphasis added).

This dispute turns on whether or not the term “occupied by” in the policy encompasses KCI's activities on the easement. Highlands contends that “to occupy” is simply “to take up significant parts of an occupied space” or “to be there.” KCI contends that something more than mere presence is needed, and that Highlands's interpretation of section f.(1)(a) renders section f.(1)(d) meaningless and the insurance contract ambiguous as a whole.

A

Initially, we note that we interpret insurance policies in Texas according to the rules of

contract interpretation. *Balandran v. Safeco Ins. Co. of America*, __ S.W.2d __, __ (1998); *National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995); *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994). In *CBI*, we set forth guidelines courts are to follow when interpreting insurance contracts:

The primary concern of a court in construing a written contract is to ascertain the true intent of the parties as expressed in the instrument. If a written contract is so worded that it can be given a definite or certain legal meaning, then it is not ambiguous. Parol evidence is not admissible for the purpose of creating an ambiguity.

If, however, the language of a policy or contract is subject to two or more reasonable interpretations, it is ambiguous. Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered. Only where a contract is first determined to be ambiguous may the courts consider the parties' interpretation, and admit extraneous evidence to determine the true meaning of the instrument.

907 S.W.2d at 520 (citations omitted). *See also Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996) (observing that when construing unambiguous instruments “[w]e give terms their plain, ordinary, and generally accepted meaning . . .”). We must also attempt to give effect to all contract provisions so that none will be rendered meaningless. *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 158 (Tex. 1951); *see also* Michael Sean Quinn, *Liability Insurance Contracts: A Primer*, 34 TEX. J. BUS. L. 2, 19–20 (1997). We proceed with these principles as our guide.

Each party argues an alternate meaning for the term “occupy” as used in the policy. An ambiguity does not arise, however, merely because the parties advance conflicting contract interpretations. *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 458 (Tex. 1997). Only when, after applying the applicable rules of construction, a contract term is susceptible of two or

more reasonable interpretations will the term be ambiguous. *Glover v. National Ins. Underwriters*, 545 S.W.2d 755, 761 (Tex. 1977). We find no ambiguity in this contract.

Highlands contends that the plain meaning of “to occupy” is “to take up space.” Thus, KCI’s mere presence on the easement constitutes “occupation” as contemplated by the pollution exclusion clause. Because section f.(1)(a) excludes coverage for any pollutant discharge from any premises the insured “occupied,” KCI cannot recover its cleanup costs. In support of its definition of “occupy,” Highlands cites *Tri County*, 873 S.W.2d at 720, the only Texas case to consider this issue.

Tri County was a paving subcontractor working under contract to pave an H.E.B. parking lot. Tri County began its operations in September 1990 and finished them in December 1990. After Tri County sprayed oil on the parking lot, heavy rains washed the oil into a nearby creek. H.E.B. then removed the oil from the creek and docked Tri County for the cost of cleanup. Tri County claimed this loss under its commercial general liability (CGL) policy with Nationwide. Nationwide later denied coverage, invoking a pollution exclusion clause identical to that at issue here. Tri County then sued Nationwide.

Tri County argued that it never “occupied” the parking lot because it held no property interest in the site. After holding that the clause was unambiguous, the court of appeals held that the plain, ordinary meaning of “occupied” did not necessarily mean ownership, and was broad enough to encompass Tri County’s operations. *Id.* at 721. Highlands argues that we should reach the same conclusion as the *Tri County* court and hold that KCI “occupied” the easement.

KCI, however, contends that accepting Highlands’s definition of occupy would render exclusion f.(1)(d) meaningless. KCI argues that if any presence, no matter how transitory, is

occupancy under section f.(1)(a), then this section excludes *all* operations of the insured, including those performed by contractors or subcontractors, regardless of whether the insured owns the property or not. Thus, section f.(1)(d)'s provision excluding coverage for the insured's operations on another's land would be surplusage. In support of this argument, KCI cites *United States Fidelity & Guaranty Co. v. B&B Oil Well Service, Inc.*, 910 F. Supp. 1172 (S.D. Miss. 1995).

In that case, B&B, an oil well contractor, had contracted to rework some oil wells. A number of landowners on whose land the oil wells were located sued B&B alleging that the landowners' property had been contaminated by pollutants from B&B's operations. USF&G, which insured B&B under a CGL policy nearly identical to that between KCI and Highlands, sought a declaratory judgment that under the contracts of insurance issued to B&B, B&B had no coverage for the contamination. *Id.* at 1175.

While the court ultimately held that another provision excluded coverage, the court also held that because B&B was not an "occupier" of the premises, section f.(1)(a) of the insurance contract did not bar coverage. *Id.* at 1178-81. As here, the insurer relied on *Tri County* in arguing that the insured occupied the premises. However, the court distinguished the case from *Tri County* by framing the question before it as: "Does occasional, limited work performed by a subcontractor, such as B&B, at a well site operated and controlled by another amount to occupancy?" *Id.* at 1178. Answering the question in the negative, the court stated that "if any sort of occupancy, 'no matter how transitory or for whatever purpose,' were deemed sufficient to invoke subsection (a) of this pollution exclusion, 'the remaining subsections, (b) through (d), would be meaninglessly superfluous.'" *Id.* (quoting *Schumann v. New York*, 610 N.Y.S.2d 987, 991 (Ct. Cl. 1994)). "In the court's view, . . . each aspect of the 'occupancy' definition suggests

something other than a transient, nonpossessory relation to the property. Subsection (a) is thus inapplicable.” *Id.* (footnote omitted). Thus, *B&B Oil Well Service* held that a well contractor reworking a well was not an occupier because its presence was too transient and nonpossessory to be occupancy.

Highlands, the court of appeals, and the *Tri County* court all rely on our decision in *Hernandez v. Heldenfels*, 374 S.W.2d 196, 200 (Tex. 1963), to support their definitions of “occupy.” They contend we set forth a definition of “occupy” broad enough to cover the contractor’s activities in *Tri County* and the contractor’s activities in the case at hand.

In *Heldenfels*, however, we implied that an “occupier” is one who has “exclusive control” of premises. *See id.* at 198. We stated:

The thesis of the appellate court is that as Heldenfels was the occupier of the premises — the roadway in question — and Hernandez had no business with Heldenfels and was not engaged in furthering Heldenfels’ interest in any way, he was necessarily a licensee. Had Heldenfels been entitled as a matter of right to an exclusive possession of the premises as against the owner, this theory might be tenable. However, as we view the record, there is no evidence that Southwestern, as the owner, granted to . . . Heldenfels an exclusive right. Heldenfels Brothers had the right to occupy such portions of the roadway as were necessary for them to use in carrying out the obligations which they had assumed as a subcontractor, but they did not have the right to bar the owner and its employees therefrom. . . . Both Heldenfels and Hernandez were using the roadway because the interests of Southwestern as the owner required such use. Both, in a sense, were invitees of the owner and . . . [e]ach owes a duty to prevent injury to the other through negligence.

Id. at 198–99. In sum, we suggested that for a contractor to be an “occupier” of premises, it must have an exclusive right of possession to that premises.

In *Heldenfels*, however, the meaning of “occupied” was not at issue, and the passage that the *Tri County* court quoted was merely a recitation of the assumed fact that the subcontractor had

“the right to occupy such portions of the roadway as were necessary” for the performance of its work. Thus, the *Tri County* court incorrectly stated that *Heldenfels* “articulated a definition” of “occupy.” Moreover, the language quoted above suggests, like *B&B Oil Well Service*, that we intended something more than mere presence for a subcontractor to “occupy” premises.

Both parties cite *Gregory v. Tennessee Gas Pipeline Co.*, 948 F.2d 203 (5th Cir. 1991), as support for their position. In *Gregory*, the city of Natchitoches, Louisiana, created a lake to provide for the city’s drinking water supply. A gas company maintained a facility next to the lake and allegedly discharged chemicals into the lake. As a result, several landowners sued the gas company and the city. The city then filed a third-party complaint against its insurer, seeking coverage. Claiming that the city “occupied” the lake under exclusion (a) (the same as KCI’s section f.(1)(a)) and was therefore excluded from coverage, the insurer denied coverage. The city claimed that, while it did own the bed of the lake, it did not own “the waters, fish, flora, or fauna of the lake.” *Id.* at 205. Thus, the issue before the court was whether the city “occupied” the lake as that term was used in the insurance contract. *Id.* at 204–06.

Because the city “created the lake, owns at least a large portion of the bed, and maintains and uses the lake and its waters for a drinking water supply,” the court held that the city did occupy the lake. *Id.* at 207. The court defined “occupy” as “to keep or hold for use.” *Id.*¹

We agree with KCI that if the court of appeals was correct that any presence, no matter how transitory, constitutes occupancy under section f.(1)(a), then section f.(1)(d) is rendered

¹ At least one state court’s holding is in line with *B&B Oil Well Service* and *Gregory*. See *C.O. Falter, Inc. v. Crum & Forster Ins. Cos.*, 361 N.Y.S.2d 968, 974 (Sup. Ct. 1974) (“Construed in its ordinary sense and given its intended meaning, the word ‘occupy’ suggests . . . continued physical presence [on the premises]. This exclusion is intended to deprive an insured from the benefit of coverage for damages it causes while ‘occupying’ the [premises]. Plaintiff’s occasional trips to the [premises] to make minor improvements do not suggest that it ‘occupied’ the damaged property within the intent of the exclusion and at the time of the loss.”).

meaningless. Subparagraph (a) applies to releases at or from premises owned or controlled by the contractor. Subparagraph (d) broadens the scope of the exclusion to include releases at or from premises owned by a third party at which the contractor is performing operations, **but only if** the contractor brings the pollutants onto the site. By negating coverage for a contractor's entire operations at a job site, the court of appeals' interpretation leaves section f.(1)(d) nothing to exclude. Under the court of appeals' interpretation, there would be absolutely no reason to include (d) since (a) already excludes all of the contractor's operations, whether or not the contractor owns or controls the premises on which it is performing operations. Under that reading, a contractor's off-premises coverage is completely eliminated.

A reading that does give meaning to both provisions is that section f.(1)(a) refers to operations on premises owned or controlled by the contractor, while section f.(1)(d) refers to operations taking place on a third-party's premises. This reading is consistent with the plain, ordinary, and generally accepted meaning of "occupied" when read in context with the other terms in the clause, "owned," "rented," and "loaned." In short, we agree with *Gregory* that to "occupy" means "to hold or keep for use," and we conclude that KCI's interpretation of the word "occupy" in section f.(1)(a) is the only reasonable interpretation. We therefore hold that section f.(1)(a) unambiguously does not apply to exclude coverage for KCI's cleanup costs.²

² Highlands also claims that exclusion f. is an "absolute pollution exclusion." Nevertheless, the cases Highlands cites for support concern policies with much broader pollution exclusion clauses. *See National Union Fire Ins. Co.*, 907 S.W.2d at 519 (policies excluding coverage for the "discharge, dispersal, release or escape of pollutants, *anywhere in the world*" and "*however caused and whenever occurring*") (emphasis added).

Even the secondary authorities cited by Highlands indicate that coverage is available under exclusion f. in certain instances, including "off-site pollution releases." Most telling, however, is that in Highlands's own policy with KCI is an endorsement entitled "Total Pollution Exclusion." This endorsement is a substitute for exclusion f. in the policy and would exclude all pollution coverage. However, by its own terms, the endorsement does not apply in the state of Texas. Because this endorsement does not apply in Texas, Highlands cannot claim that exclusion f. is an absolute pollution exclusion clause.

B

Finally, Highlands argues that section f.(2)(a) explicitly excludes KCI from coverage for its cleanup costs. Nevertheless, Highlands waived reliance on this portion of the policy because it asserted its applicability for the first time in its motion for new trial. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 (Tex. 1993) (holding that an issue not presented in a response to a motion for summary judgment cannot later be raised on appeal); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 676 (Tex. 1979). As a result, exclusion f.(2)(a) does not operate to exclude KCI from recovering its cleanup costs. We express no opinion on whether KCI's costs would have been excluded had Highlands not waived reliance on this section.

III

We hold that the term “occupied by” in this insurance policy’s pollution exclusion clause does not encompass KCI’s operations on a third-party’s premises. The provision unambiguously excludes costs for pollution spillage from or on the insured’s own premises. We therefore reverse the court of appeals and render judgment for KCI.

Rose Spector
Justice

OPINION DELIVERED: November 12, 1998