

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR CHARLOTTE COUNTY, FLORIDA**

**THE ESTATE OF RANDALL LEE TAYLOR
by and through its personal representative
MARCIA TAYLOR,
Plaintiff,**

Case No.: 20000393CA

vs.

**FLORIDA FARM BUREAU CASUALTY
INSURANCE COMPANY,
Defendant.**

_____ /

ORDER ON DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

This cause comes before the Court on Defendant Florida Farm Bureau Casualty Insurance Company’s Motion for Summary Judgment. Plaintiff filed a Response to the Motion. For the reasons explained below, the Motion is denied.

I. Background

Defendant issued a homeowners’ policy with policy number 8571100 (“Policy”) which provided coverage for the subject property located at 25460 State Road 70 East, Myakka City, FL 34251 (“Property”). On or about November 12, 2018, Mr. Randy Taylor, an owner the of the Property, died. Thereafter, on or about November 22, 2018, Mrs. Marcia Taylor, personal representative of Plaintiff, and wife of Mr. Taylor, found Mr. Taylor deceased at the Property. Mrs. Taylor then contracted with Accident Cleaners & Restoration, LLC (“Accident Cleaners”) and Biosweep to perform mitigation services at the Property. Both entities were paid in full for their services by Mrs. Taylor acting on behalf of Plaintiff.

Following the cleanup and mitigation of the Property, RJM inspected the Property and prepared a damage estimate for the restoration of damaged areas of the Property. Then Mrs. Taylor, as personal representative of the Plaintiff, filed a claim with Defendant and Defendant assigned

claim number 09P00845069. On or about January 8, 2019, Defendant denied the claim asserting that “loss due to pollutants is not covered on [the Policy]” and cited the Pollution Exclusion in the Policy:

We do not insure, however for loss:

2. Caused by:

e. Any of the following:

(5) Discharge, dispersal, seepage, migration, release or escape of pollutants unless the discharge, dispersal, seepage, migration, release or escape is itself caused by a Peril Insured Against under Coverage C of this policy.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed;

Policy at Form FHO 00 03 04 91 pg. 8 of 20.

On or about May 11, 2020, Plaintiff filed its Complaint for Breach of Contract and Declaratory Relief and on March 2, 2021, Defendant filed the instant Motion for Summary Judgment. Therein, Defendant argued that Plaintiff does not have standing to bring the lawsuit and the aforementioned Pollution Exclusion precludes coverage under the Policy. Plaintiff filed a Response arguing that Plaintiff has standing to bring the suit, the Pollution Exclusion does not apply to the facts of this case and the Policy provides Additional Coverage for “” Fungi”, Wet Or Dry Rot, Or Bacteria” (Policy at Form FHO 04 32 04 02) which is applicable to the claim.

II. Legal Standard

On a motion for summary judgment, the burden is on the movant to show that there is no genuine dispute of any material fact and that it is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510(a). Upon amending Rule 1.510, the Florida Supreme Court sought to “align Florida’s summary judgment standard with that of the federal court and of the supermajority of states that have already adopted the federal summary judgment standard.” In re Amends. to Fla. Rule of Civ.

Pro. 1.510, 309 So. 3d 192, 192 (Fla. 2020). Additionally, Florida’s summary judgment standard is to be “construed and applied in accordance with the federal summary judgment standard.” Fla. R. Civ. P. 1.510(a). As such, Florida adheres to the principles established in what is known as the Celotex trilogy of cases and, more generally, the case law interpreting Federal Rule of Civil Procedure 56.

Moreover, the Florida Supreme Court has clarified that “the correct test for the existence of a genuine factual dispute is whether “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” In re Amends. to Fla. Rule of Civ. P. 1.510, SC20-1490 (Fla. Apr. 29, 2021) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). Summary judgment ultimately serves as a vehicle to determine “whether the evidence presents a sufficient disagreement to require submission to a jury” and not so one-sided that, as a matter of law, only one party could prevail. Id. at 6 (quoting Anderson, 477 U.S. at 251-53). On an issue where the non-moving party carries the burden of proof at trial, summary judgment is not proper if the non-moving party can make a sufficient showing of an essential element of their claim such that a jury could reasonably find for the non-moving party based on the evidence put forth. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson, 477 U.S. at 253.

Nonetheless, even if a party does not have the burden of proof at trial with respect to an issue for which it seeks summary judgment, the moving party still bears the initial burden of demonstrating to the court the basis for its motion and identifying those portions of the record it believes demonstrates an absence of a genuine issue of material fact. Celotex Corp v. Catrett, 477 U.S. 317 at 323 (1986). The core principle of summary judgment remains true—it is not a substitute for a trial on disputed factual issues. In re Amends. to Fla. R. Civ. P. 1.150, 309 So. 3d at 194. The Court’s role is not to supplant that of the jury and weigh the evidence to determine the truth but, instead, to simply determine whether a genuine dispute remains for trial. Anderson, 477

U.S. at 249. “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [the non-movant’s] favor.” *Id.* at 254. The summary judgment rule must be applied “with due regard . . . for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury.” *In re Amends. to Fla. R. Civ. P. 1.150*, 309 So. 3d at 194 (quoting *Celotex*, 477 U.S at 327).

III. Analysis

a. Standing

Plaintiff has standing to bring this litigation. Defendant argued that Plaintiff lacks standing to bring this suit as Mrs. Taylor executed an assignment of benefits for services provided by Accident Cleaners. However, the uncontested evidence shows that: (1) Mrs. Taylor, on behalf of the Plaintiff, has paid out of pocket for the services performed by Accident Cleaners and Biosweep; (2) after it was paid in full, Accident Cleaners executed an Affidavit stating, “Accident Cleaners relinquished and rescinded any rights it had under the aforementioned assignment of benefits and or the [Policy]”; and (3) Plaintiff seeks damages for mitigation services performed not only by Accident Cleaners, but by Biosweep, as well as restoration of the Property by RJM. Based on the foregoing, Defendant’s argument is moot.

b. The Pollution Exclusion

Defendant asks this Court to enter an Order finding that Mr. Randell Lee Taylor’s remains are pollutants. This is an issue of first impression for the Court. The dictionary definition of the term pollutant is: “(1) something that pollutes. (2) any substance, as certain chemicals or waste products, that renders the air, soil, water or other natural resource harmful or unsuitable for a specific purpose.” Dictionary.com/browse/pollutant. An ordinary reasonable person likely would

not understand his or her bodily remains to be a pollutant under this definition. Defendant has not proffered any cases or evidence to demonstrate otherwise.

In its Motion, Defendant argued that the Policy's definition of Pollutant means an irritant or contaminant. The Policy states:

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed;

(Policy at Form FHO 00 03 04 91 pg. 8 of 20; Exhibit "D") "[P]olicy terms 'should be given their plain and unambiguous meaning as understood by the 'man-on-the-street.'" Harrington v. Citizens Property Ins. Corp., 54 So. 3d 999, 1001 (Fla. 4th DCA 2010), *citing* State Farm Fire & Cas. Co. v. Castillo, 829 So. 2d 242, 244 (Fla. 3d DCA 2002).

Defendant further asked the Court to construe the undefined term "contaminant" as "a substance that can harm living organisms." If the Court accepted Defendant's definition, practically all substances, including air and water, could be considered contaminants. This finding would open the flood gates to the denial of countless meritorious claims.

While cleaning up a body may be distasteful, human remains are not reasonably thought of as an irritant or contaminant as described in the Pollution Exclusion. A reasonable reading of the Pollution Exclusion by an ordinary lay person would be to eliminate coverage typically for inorganic substances such as those expressly enumerated in the Policy definition; ie. solid, liquid gaseous or thermal irritants or contaminants, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. (see generally Westport Ins. Corp. v. VN Hotel Group, LLC, 761 F.Supp.2d 1337 (M.D. Fla. 2010) Indeed, these expressly enumerated items are those that an ordinary lay person would reasonably associate with the Policy term "Pollutants." On the other hand, an ordinary lay person would not reasonably associate organic substances such as human remains

with the term “Pollutants.” Hence, if the Defendant truly intended human remains to be included, it would have expressly enumerated the same in the Policy definition as it did with the logically associated inorganic substances.¹

While not dispositive, the court in Nicholson v. Allstate Ins. Co., 979 F. Supp. 2d 1054 (E.D. Cal. 2013) provides an instructive opinion for the application of a homeowner’s policy’s pollution exclusion to a decaying carcass. The court found that the carrier failed to show that the standard pollution exclusion in the homeowner’s policy would be understood by a reasonable policyholder to apply to decaying bat carcasses. Further,

The court found that an expansive interpretation of these clauses may lead to an unreasonable interpretation. “Without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope and lead to some absurd results.” Id. at 650, 3 Cal.Rptr.3d 228, 73 P.3d 1205 (quoting Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1043 (7th Cir.1992)). For example, the court found that a reasonable policy holder would not understand such a clause to exclude any irritant, but instead would interpret the policy to exclude irritants commonly thought of as pollution. Id. at 652–53, 3 Cal.Rptr.3d 228, 73 P.3d 1205.

Id. at 1065. Based on the foregoing, this Court finds that Mr. Taylor likely would not have understood his bodily remains to be a pollutant under the Policy and that this Policy Exclusion is at best ambiguous and not supportive of summary judgment.

Further, Defendant has not identified the “disputed substance” it claims triggers the

¹ During the hearing on the Motion, Defendant, for the first time, argued that Florida Statute §381.0098 defining Biomedical Waste controls the definition of “waste” in the Policy’s definition of Pollutant. Defendant failed to timely present this supporting factual position at the time of filing the Motion in violation of Fla. R. Civ. P. 1.510(c)(5); thus, this argument is not ripe for determination here. Regardless, the Statute does not apply to this case. The statutory definition of a statutory term (Biomedical Waste) does not control the distinctive definition of “waste” contained in a homeowner’s insurance policy issued to an ordinary lay person unless it is referenced as such therein. “Waste” in the Policy “includes materials to be recycled, reconditioned or reclaimed.” Mr. Taylor’s remains do not meet those criteria. Finally, the Statute (“Biomedical Waste”) was enacted for purposes of Public Health, not for the purposes of defining the Policy here. The Statute defines Biomedical Waste as “solid or liquid waste which may present a threat of infection to humans.” Defendant did not present any documents or testimony to demonstrate that the remains of Mr. Taylor that were removed from the Property did in fact present a threat of infection to humans.

Pollution Exclusion. In the Motion Defendant states that Mrs. Taylor contracted with Accident Cleaners for “Biohazard Remediation.” Defendant has not provided evidence of what “Biohazard Remediation” was conducted or the specific substances that Accident Cleaners or Biosweep were addressing through their services. Defendant made a blanket statement that “Plaintiff ‘remediated’ the home ... by removing Mr. Taylor’s decomposing body and cleaning bodily tissue, bone fragments, blood spray and/or other bodily matter and fluids from the insured home.” (Motion pg. 7) However, Defendant has not identified or cited to any evidence to support its contention that: (1) those specific items or substances were removed from the Property; (2) what the state of the bodily remains were at the time of removal; or (3) the portions of the Property that were purportedly contaminated.

In sum, an ordinary lay person would reasonably understand that bodily remains should be cleaned up. However, such person would not reasonably equate the same with “Pollutants” including irritants, contaminants or waste, nor as materials to be recycled, reconditioned or reclaimed. Regardless, Defendant has not presented evidence to conclusively find that Mr. Taylor’s remains were “Pollutants” as defined by the Policy.

c. Additional Coverage for “Fungi”, Wet Or Dry Rot, Or Bacteria

The Policy provides Additional Coverage for “‘Fungi’, Wet Or Dry Rot, Or Bacteria.” (Policy at Form FHO 04 32 04 02) Plaintiff presented the uncontested Affidavit of Andrew S. Bagg, M.D. which stated: “Bacteria was present in Mr. Taylor’s body both pre and postmortem; and Bacteria was present in the bodily fluids that departed Mr. Taylor’s body postmortem.” (Affidavit of Andrew S. Bagg, M.D.) During the hearing on the Motion, both parties acknowledged that Mr. Taylor’s remains were removed from the Property by Accident Cleaners. Defendant did not present evidence or argument suggesting that the mitigation services performed by Accident Cleaners and/or Biosweep did not remove bacteria from the Property.

Further, the Pollution Exclusion cited by Defendant does not apply to bacteria. Specifically, the Middle District of Florida in Westport previously held:

The Policy does not explicitly define “contaminant, but the words modifying “contaminant” and the stated examples of “pollutants” unambiguously show that Legionella bacteria are not “pollutants.” ... Unlike Legionella bacteria, all of the enumerated examples of “pollutants” are non-living and readily described as either “solid, liquid, gaseous or thermal irritants or contaminants.” Although Legionella bacteria may be contaminants in the abstract,³ they are living organisms and not readily classified as “solid, liquid, gaseous, or thermal” substances, which are the only contaminants defined as “pollutants” under the Pollution Exclusion. *See Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 199 Ariz. 43, 13 P.3d 785, 789 (Ariz.Ct.App.2000) (reasoning that the breadth of the terms “contaminant” and “irritant” prompted modifiers such as “solid,” “liquid,” and “gaseous” and noting that water- borne bacteria defy description as solid, liquid, gaseous, or thermal irritants or contaminants). The distinction between Legionella bacteria and “pollutants” is confirmed by the existence of separate exclusions for pollution and for bacteria. *See Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938, 941 (Fla.1979) (“Every provision in a contract should be given meaning and effect and apparent inconsistencies reconciled if possible.”)....

Even if living organisms are properly classified as “solids,” the explication of “pollutants” in [Nova] would permit any living organism with a contaminating effect—including bacteria, insects, rodents, and the like—to be “pollutants” triggering the Pollution Exclusion. The broad realm of “pollutants” under [Nova] is too far afield from the enumerated examples of “pollutants”—smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste—to support adoption of [Nova]’s reasoning. (Policy at 15); *see* § 627.419(1), Fla. Stat. (“Every insurance contract shall be construed according to the entirety of its terms and conditions....”). Accordingly, Legionella bacteria are not “pollutants,” and the Pollution Exclusion is inapplicable.

Id. at 1343-44. Additionally, even if bacteria would have otherwise been excluded under the Pollution Exclusion, here the Additional Coverage endorsement would supersede the exclusion. Based on the foregoing, the Additional Coverage for “Fungi”, Wet Or Dry Rot, Or Bacteria” provides coverage for damages claimed by Plaintiff.

Based on the foregoing, it is ordered as follows:

1. Defendant’s Motion for Summary Judgement is hereby **DENIED**;
2. Plaintiff has standing to bring the instant action;

3. Based on the evidence presented to date, Defendant has not conclusively demonstrated that the Policy Exclusion for Pollution applies to the damages complained of in this case; and

4. Based on the uncontested evidence presented to date, the Additional Coverage for “Fungi”, Wet Or Dry Rot, Or Bacteria (Policy at Form FHO 04 32 04 02) provides coverage for damages claimed by Plaintiff.

DONE and ORDERED



eSigned by: CENITILE, CESI FREY H in 20000393CA
on 07/12/2021 16:13:01 Mn9aTJ0K

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