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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CAROL JOHNSON et al., Plaintiffs and Respondents, v. CLARENDON NATIONAL INSURANCE COMPANY et al., Defendants and Appellants.	G039659 (Super. Ct. No. 05CC10891) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Di Cesare, Judge. Affirmed.

Berman, Berman & Berman, Spencer A. Schneider and Christine A. Roney for Defendant and Appellant, Constitution Insurance Company.

Robie & Matthai, Michael J. O'Neill and Natalie A. Kouyoumdjian for Defendant and Appellant, Clarendon National Insurance Company.

Law Offices of Robert K. Scott, Robert K. Scott and D. Scott Mohney for Plaintiffs and Respondents.

* * *

This case originated with a landlord's negligence in maintaining the walls and roof of a condominium unit, and in overwatering the yard around the structure. The combination of these acts caused water to leak inside the structure, which in addition to the typically warm California climate, and the presence of naturally-occurring airborne mold spores, caused toxic mold to grow in and around Carol Johnson's home. For several years, Carol Johnson and her family suffered from various mold-related medical ailments and they sued the landlord to recover damages.

The primary legal question raised in this appeal is whether airborne toxic mold spores, in the context of this case, qualify as a pollutant or contaminate, and if so, whether injuries caused by exposure to the mold are excluded from coverage under the landlord's insurance policies issued by Constitution Insurance Company (Constitution) and Clarendon National Insurance Company (Clarendon). Both policies contained essentially identical pollution exclusion clauses, denying coverage for any injuries arising from the introduction or "discharge, dispersal, seepage, migration, release or escape of 'pollutants.'"

The California Supreme Court has analyzed a similar pollution exclusion clause in the case of *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635 (*MacKinnon*). After considering the historical evolution of the pollutant clause, conflicting authority from other jurisdictions, and its own application of California contract law, the Supreme Court held the exclusion was intended to cover what is understood by the policyholder to be substances typically associated with pollution of the environment. It created a test for coverage as being dependent not only upon the type of pollutant, but also how it is released into the environment. (*Id.* at pp. 650-654.) Applying the *MacKinnon* test here, we conclude neither the dispersal of clean water nor the negligent building maintenance resulting in an isolated incident of mold growth would necessarily qualify as the escape or introduction of a conventional environmental

pollutant. Because the pollution exclusion does not plainly or clearly exclude mold-related injuries from coverage, it must be interpreted narrowly against the insurer. Accordingly, we affirm the judgment made in Johnson's favor.

FACTS

In 2002, Johnson, on behalf of herself and as guardian ad litem for her children, Taylor Godwin, Lexi Swearingen, and Nichole Swearingen (collectively referred to in the singular as Johnson), filed a complaint for damages arising from the exposure to mold in the condominium they leased from its owners, Jennifer and Joyce Gregg. Johnson sued the Greggs and Kellogg Terrace (Kellogg), which managed and controlled the condominium complex. They later added as defendants a landscaper, a general contractor, and a roofing contractor hired by Kellogg.

From 1998 to 2000, Clarendon insured Kellogg under two successive commercial policies (October 1998 to 1999, and October 1999 to 2000). From 2000 to 2002, Constitution insured Kellogg under two successive commercial polices (October 2000 to 2001, and October 2001 to 2002). The policies generally provided coverage for bodily injury and property damage that occurred during the policy periods. Kellogg tendered the Johnson lawsuit to Clarendon and Constitution for a defense and indemnity. The insurance firms advised Kellogg they had no duty to defend because their policies contained pollution/contamination exclusions that eliminated any potential coverage for Johnson's claims. Constitution also alleged the "discovered injury" exclusion barred its coverage because Johnson was injured several years before inception of Constitution's policy in October 2000.

The Clarendon policy's pollution exclusion provided, in relevant part, "This insurance does not apply to: "(1) The 'pollution' and/or 'contamination' of any 'environment' by 'pollutants' that are introduced at any time, anywhere, or in any way, or arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants'; or [¶] (2) Any 'bodily injury,' 'property damage,'

'personal injury' or 'advertising injury' arising out of such 'pollution' and/or 'contamination'; or [¶] (3) Payment for the investigation or the defense of any loss, injury, or damage, or for any cost, fine or penalty, or for any expense, claim or 'suit,' related to any of the above . . . ."

The policy defined pollution and contamination as "any unclean or unsafe or damaging or injurious or unhealthful conditions arising out of the presence of 'pollutants,' whether permanent or transient, in any 'environment.'" "Environment" was defined as "any man-made object or feature (including but not limited to buildings and other items of man-made property), and crop or vegetation, and land, any body of water or water course, any underground water or water table supply, any air, and any other feature of the earth or its atmosphere, whether or not altered, developed, cultivated, owned, rented, controlled, occupied or used by any 'insured[.]'" "Pollutants" was defined as meaning "any noise, solid, semi-solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fume, acid, alkali, chemical, biological and/or other etiological agent or material, electromagnetic and/or ionizing radiation and energy, genetically engineered agent or material, teratogenic, carcinogenic and/or mutagenic agent or material, and waste. Waste includes any material to be disposed of, recycled, reconditioned or reclaimed."

Similarly, the Constitution policy contained an endorsement barring coverage for any bodily injury or property damage arising out of "pollution" and/or "contamination" of any "environment" by "pollutants." The terms were essentially identical to those defined in Clarendon's policy.

Johnson settled with all the defendants except Kellogg before trial. With respect to Kellogg, the bench trial was held in November 2003. Kellogg did not present a defense and did not object to any of Johnson's evidence. The court entered judgment in Johnson's favor for $1,274,149.70, plus costs in the amount of $4,883. Kellogg assigned

its claim for breach of contract against the insurance companies to Johnson in exchange for a covenant not to execute on the judgment.

In October 2005, Johnson filed a breach of contract action against Clarendon and Constitution. The insurance company answered the complaint asserting the underlying action was excluded by their policies' pollution/contamination exclusion provisions. The insurance companies filed motions for summary judgment raising the same legal defense. The court denied the motions.

The matter was heard in a bench trial based on stipulated facts by the parties. The court concluded the pollution/contamination exclusion provisions did not apply to preclude a defense in the underlying action, and it entered judgment in favor of Johnson. The court concluded it was undisputed there was "no direct language in the [subject pollution] exclusion that excludes mold. There are no cases cited . . . that directly hold that the langue of the polices exclude mold. The exclusion is vague and ambiguous." It reasoned, "The definition of contamination or pollution in the insurance policy is any unclean or unsafe or damaging or injurious or unhealthful condition arising out of the presence of pollutants . . . in any environment. This discretion is arguably broad enough to encompass just about anything that is considered harmful but it is also vague and ambiguous which is construed against the insurer. Exclusions are to be narrowly interpreted in favor of the insured and liberally against the insurer [citation]. An exclusion in an insurance policy must be clear, plain and conspicuous in order to be effective [citation]."

The stipulated facts were as follows: Johnson alleged in the underlying action that the family was exposed to toxic mold in late 1998 and early 1999 when they moved into the premises. The mold resulted from water intrusion into the condominium unit. This was caused by the negligent maintenance of the common areas of the property maintained by Kellogg and its property management company. The negligent maintenance led to water intrusion through the roofs, windows, walls, sub-floors, and

other areas. Specifically, mold and fungi formed when Kellogg negligently: (1) failed to repair the rotted condition of the roof permitting water to leak into the structure; (2) placed rat poison in the walls; (3) overwatered the landscape permitting water to enter through inadequate moisture barriers; (4) failed to prevent water from entering through the vent piping at the roof sheafing; (5) failed to repair a significant leak adjoining the east wall of the utility room; and (6) installed roof, siding, and building paper.

In June 1998, Kellogg became aware of the mold on the external wall of Johnson's unit, but was not aware of the internal mold growth. In late 1998, Johnson and her family began experiencing various illnesses and heath problems. This continued to 2001, and the family experienced progressively severe illnesses, such as bronchitis, pharyngitis, asthma, acute upper respiratory infection (URI), sinusitis, shortness of breath, headaches, chest congestions, rashes, and coughs.

In February 2001, Johnson found extensive mold in one of the bedrooms when the carpet was pulled up. The family moved out later that month. Thereafter, Johnson obtained an evaluation by multiple environmental testing companies indicating the presence of elevated levels of molds and fungi in every area of the condominium except the front room. The molds discovered in the unit included aspergillus, penicillum, chaetomium, and stachybotrys. The fungi included aspergillus ochraceus, aspergillus restrictus, aspergillus pernicillinoides, aspergillus sydowii, and aspergillus ustus.

DISCUSSION

I. Standard of Review

We apply established appellate standards of review for a judgment following a bench trial. We begin with the settled principle that the interpretation of a contract generally presents a question of law for this court to determine anew unless the interpretation turns on the credibility of conflicting extrinsic evidence. (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 527; *Parsons v. Bristol Development Co*. (1965)

62 Cal.2d 861, 865 (*Parsons*).) When a contract is reasonably susceptible to different interpretations based on conflicting extrinsic evidence requiring the resolution of credibility issues, its interpretation evolves into a question of fact to which the reviewing court applies the substantial evidence standard of review. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266-1267.) Where the evidence is undisputed and the parties draw conflicting inferences, the reviewing court will independently draw inferences and interpret the contract. (*Id.* at p. 1267; *City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 71 (*City of El Cajon*); *Parsons, supra,* 62 Cal.2d at pp. 865-866, fn. 2.) The court endeavors to effectuate "the mutual intentions of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636; *City of El Cajon, supra,* 49 Cal.App.4th at p. 71.)

The trial court entered judgment in favor of Johnson based on its determination the pollution exclusion provisions found in the policies did not exclude coverage of claims arising from toxic mold injuries. Because interpretation of policy language is a question of law, and the evidence is undisputed, we must determine, de novo, whether the trial court properly interpreted the pollution exclusion.

II. Analysis

A. What is Toxic Mold?

"Mold is a fungus which is essentially everywhere. Almost every breath we take contains mold spores. Mold is essential for life on Earth; '[i]t breaks down dead plant matter [and] [w]ithout mold, we would live amid building-deep piles of dead trees instead of fields of rich soil.' . . . [¶] Mold can range from helpful to harmful. . . . Most molds are relatively harmless, and most people will not have a strong reaction to them, unless they are allergic." (Jarman-Felstiner, *Mold Is Gold: But, Will it be the Next Asbestos?* (2003) 30 Pepperdine L.Rev. 529, 532, fns. omitted (hereafter *Mold is Gold*).)

However, "[e]xposure to certain types of mold, known as toxic mold, allegedly may cause a severe reaction. 'Toxic mold refers to those molds capable of

producing mycotoxins, which are organic compounds capable of initiating a toxic response in vertebrates.' Toxic mold attacks through the air, the mold spores become airborne and produce the dangerous mycotoxins. . . . [¶] Toxic molds are known by such names as stachybotrys chartarum, aspergillus, penicillium, trichoderma, and helminthosporium. Plaintiffs allege these toxic molds cause a multitude of health problems ranging from simple clogged sinuses, sore throats, and minor skin problems to cancer, brain damage, chronic fatigue syndrome, asthma, pneumonia, respiratory tract infections, gastrointestinal maladies, vertigo, temporary hearing loss, migraines, malaise, depression, memory loss, other cognitive dysfunctions, and hemorrhaging." (*Mold Is Gold, supra,* 30 Pepperdine L.Rev. at pp. 532-533, fns. omitted.)

"Toxic mold generally occurs as a result of water inundation, from sources such as plumbing problems, floods, or roof leaks. Mold growth requires mold spores, relatively warm temperature, moisture, and a food source. . . . Mold growth can happen in carpets, drywall, acoustical ceiling tiles, upholstered furniture, and wall coverings." (*Mold Is Gold, supra,* 30 Pepperdine L.Rev. at p. 534, fns. omitted.)

B. An overview of pollution exclusion clauses under California Law.

In concluding the two pollution exclusion clauses were ambiguous as to whether mold qualifies as a pollutant, the trial court properly relied on the Supreme Court's analysis of the meaning and scope of a similar pollution exclusion clause in *MacKinnon, supra,* 31 Cal.4th at page 639. The Supreme Court discussed in great depth the history, purpose, and evolution of the exclusion clause. Simply stated, it concluded the clause was intended to exclude coverage for injuries resulting from events commonly thought as environmental pollution, not all injuries arising from toxic substances. (*Id.* at p. 653.)

In *MacKinnon*, a landlord hired a pest control company to exterminate yellow jackets in an apartment building. (*MacKinnon, supra,* 31 Cal.4th at p. 640.) The company treated the building for yellow jackets several times. An apartment tenant died,

and her parents filed a wrongful death action alleging their daughter died from pesticide exposure. (*Ibid*.) The landlord tendered the defense to his insurer, which denied a duty to defend or indemnify based upon the pollution exclusion clause in the comprehensive general liability (CGL) policy. The landlord filed an insurance coverage action against his insurer. (*Ibid.*)

The trial court granted the landlord's motion for summary judgment, concluding the tenant's death was caused by exposure to a pesticide, the pollution exclusion clause was clear and unambiguous, and it precluded coverage for the injuries. (*MacKinnon, supra*, 31 Cal.4th at pp. 640-641.) The Court of Appeal affirmed the trial court, but the Supreme Court reversed the judgment. (*Id*. at p. 656.)

The Supreme Court recognized that, up to that point, California courts had no clear or consistent position on how to interpret pollution exclusion clauses. To come to one, the court recounted the detailed history of the evolution of the pollution exclusion. (*MacKinnon, supra*, 31 Cal.4th at pp. 643-645, citing *American States Ins. Co. v. Koloms* (1997) 687 N.E.2d 72.) It noted that while the scope of the clause had "not received wide attention in this state . . . the scope of the exclusion has been litigated extensively in other jurisdictions. To say there is a lack of unanimity as to how the clause should be interpreted is an understatement." (*MacKinnon, supra*, 31 Cal.4th at p. 641.) The court summarized: "One camp maintains that the exclusion applies only to traditional environmental pollution into the air, water, and soil, but generally not to all injuries involving the negligent use or handling of toxic substances that occur in the normal course of business. These courts generally find ambiguity in the wording of the pollution exclusion when it is applied to such negligence and interpret such ambiguity against the insurance company in favor of coverage. The other camp maintains that the clause applies equally to negligence involving toxic substances and traditional environmental pollution, and that the clause is as unambiguous in excluding the former as the latter." (*Id*. at p. 642, fn. omitted.)

The *MacKinnon* court then examined the historical background and evolution of pollution exclusions in CGL policies. It determined the pollution exclusion was originally an effort by the insurance industry to avoid claims based on new environmental laws passed in the 1970's and 1980's. Congress' new laws "'for cleaning up the environment, posed greater economic burdens on insurance underwriters, particularly those drafting standard-form CGL policies. [Citation.] The insurer's burdens further increased with the . . . environmental disasters of Times Beach, Love Canal and Torrey Canyon. [Citations.] [¶] 'In the wake of these events the insurance industry became increasingly concerned that the 1966 occurrence-based policies were "tailor-made" to cover most pollution-related injuries. To that end, changes were suggested, and the industry proceeded to draft what was to eventually become the pollution exclusion . . . ." (*MacKinnon, supra*, 31 Cal.4th at p. 643.)

In 1970, the standard-form CGL policy provided in pertinent part, "'"[This policy shall not apply to bodily injury or property damage] arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental."'" (*MacKinnon, supra*, 31 Cal.4th at pp. 643-644, italics omitted.) The clause was designed to encourage the insured to take precautions against contaminating the environment.

Over the next 13 years, litigation was centered over the exact meaning of the words "sudden and accidental" and whether those words embraced injuries caused by gradual pollution. (*MacKinnon, supra*, 31 Cal.4th at p. 644.) The insurance companies responded to the controversy by drafting a new version of the exclusion. First appearing in 1985, the next standardized pollution exclusion (often referred to as the absolute pollution exclusion) no longer required "'the "sudden and accidental" release of pollution, and . . . [eliminated] the requirement that the pollution be discharged "into or

upon land, the atmosphere or any watercourse or body of water." [Citation.]' [Citations.] [¶] Even commentators who represent the insurance industry recognize that the broadening of the pollution exclusion was intended primarily to exclude traditional environmental pollution rather than all injuries from toxic substances." (*Ibid.*)

"Commentators have pointed as well to the passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, 42 U.S.C. § 9601 et seq.) in 1980 and the attendant expansion of liability for remediating hazardous wastes (see *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 815-816 . . .) as motivation for amending the exclusion. '[T]he available evidence most strongly suggests that the absolute pollution exclusion was designed to serve the twin purposes of eliminating coverage for gradual environmental degradation and government-mandated cleanup such as Superfund response cost reimbursement.' [Citation.]" (*MacKinnon, supra*, 31 Cal.4th at p. 645.)

The Supreme Court noted, "One of the primary arguments for a narrow interpretation of the pollution exclusion is based on the history reviewed above." (*MacKinnon, supra*, 31 Cal.4th at p. 645.) The history demonstrates the "'motivation in drafting an exclusion for pollution-related injuries was the avoidance of the "enormous expense and exposure resulting from the 'explosion' of *environmental* litigation." [Citations.] Similarly, the 1986 amendment to the exclusion was wrought, not to broaden the provision's scope beyond its original purpose of excluding coverage for environmental pollution, but rather to remove the "sudden and accidental" exception to coverage which, as noted above, resulted in a costly onslaught of litigation. We would be remiss, therefore, if we were to simply look to the bare words of the exclusion, ignore its *raison d'être*, and apply it to situations which do not remotely resemble traditional environmental contamination. The pollution exclusion has been, and should continue to be, the appropriate means of avoiding "'the yawning extent of potential liability arising from the gradual or repeated discharge of hazardous substances *into the environment.*'"

[Citations.] We think it improper to extend the exclusion beyond that arena.' [Citations.]" (*MacKinnon, supra*, 31 Cal.4th at p. 645, citing *American States Ins. Co. v. Koloms, supra,* 687 N.E.2d at pp. 81-82 [Illinois Supreme Court held carbon monoxide leak from apartment furnace not excluded].)

In addition, "Courts adopting a narrower interpretation of the exclusion have also maintained that an interpretation of 'pollutant' as applying literally to 'any contaminant or irritant' would have absurd or otherwise unacceptable results. '[T]here is virtually no substance or chemical in existence that would not irritate or damage some person or property.' [Citations.] [¶] Another argument for this camp focuses on the common meaning of the term 'discharge, dispersal, release or escape,' as implying expulsion of the pollutant over a considerable area rather than a localized toxic accident occurring in the vicinity of intended use. [Citations.] Other courts have viewed these words as terms of art describing environmental pollution. [Citations.]" (*MacKinnon, supra*, 31 Cal.4th at pp. 645-646.)

The *MacKinnon* court summarized that those courts finding the pollution exclusion not ambiguous and as including toxic-substances "outside the scope of traditional environmental pollution[]" to rely on broadly stated dictionary definitions of the key words contained in the exclusion. (*MacKinnon, supra*, 31 Cal.4th at pp. 646-647.) Those courts rejected the argument the words "discharge, dispersal, release or escape" were environmental law terms of art because they also appear in criminal statutes. (*Ibid.*)

After considering the history and purpose of the clause and evaluating it with the relevant principles of contract interpretation, the Supreme Court decided California should follow those jurisdictions having a narrower interpretation of the pollution exclusion. The court focused on the principle of California law that "insurance coverage is interpreted broadly so as to afford the greatest possible protection to the insured, [whereas] . . . exclusionary clauses are interpreted narrowly against the insurer.

. . . Thus, the burden rests upon the insurer to phrase exceptions and exclusions in clear and unmistakable language." (*MacKinnon, supra*, 31 Cal.4th at p. 648, internal citations and quotation marks omitted.)

The *MacKinnon* court reasoned the policy language did not clearly or plainly exclude the landlord's negligent use of pesticides in the context of the case. It rejected the insurer's argument "that the pollution exclusion, read literally, would plainly and clearly extend to virtually all acts of negligence involving substances that can be characterized as irritants or contaminants, that is, are capable of irritating or contaminating so as to cause personal injury." (*MacKinnon, supra*, 31 Cal.4th at p. 649.) It determined this contention is based "on a basic fallacy[]" that the meaning of the policy language can be discovered by citing the dictionary. (*Ibid.*) It explained that while dictionary definitions can be useful, "such examination does not necessarily yield the 'ordinary and popular' sense of the word if it disregards the policy's context. [Citation.]" (*Ibid.*) A court interpreting a policy provision "must attempt to put itself in the position of a layperson and understand how he or she might reasonably interpret the exclusionary language. [Citation.]" (*Ibid.*)

The Supreme Court stated the insurer's dictionary-based interpretation of the pollution exclusion clause would lead to absurd results because "[v]irtually any substance can act under the proper circumstances as an 'irritant or contaminant.'" (*MacKinnon, supra*, 31 Cal.4th at p. 650.) The court gave several examples, including chlorine, which contains irritating properties and "[i]ts dissemination throughout a pool may be literally described as a dispersal or discharge." (*Ibid.*) It stated, "Our research reveals no court or commentator that has concluded such an incident would be excluded under the pollution exclusion." (*Ibid.*)

The *MacKinnon* court concluded: "In short, because [the insurer's] broad interpretation of the pollution exclusion leads to absurd results and ignores the familiar connotations of the words used in the exclusion, we do not believe it is the interpretation

that the ordinary layperson would adopt." (*MacKinnon, supra*, 31 Cal.4th at p. 652.) The court held application of the pollution exclusion clause should be limited to "injuries arising from events commonly thought of as pollution, i.e., environmental pollution . . . ." (*Id.* at p. 653.) It explained this interpretation is consistent with the "'exclusion's historical objective—avoidance of liability for environmental catastrophes related to intentional industrial pollution.'" (*Ibid.*) And while the history and original purpose of the clause are "not determinative," the court may properly use these facts to "discern the meaning of disputed policy language." (*Ibid.*)

Consequently, the court insisted that instead of relying on vague definitions that would encompass virtually any substance, the focus should be on three pertinent guiding principles found in the exclusionary language. First, the court examined the connotations of the policy terms discharge, dispersal, release or escape "in the context of the present case." It concluded the terms "connote some sort of freedom from containment, and it would be unusual to speak of the normal, intentional, application of pesticides as a 'release' or 'escape' of pesticides." (*MacKinnon, supra*, 31 Cal.4th at pp. 650-651.)

Second, the *MacKinnon* court considered the importance of the magnitude of "discharge," "dispersal," "release," or "escape" when used in conjunction with the term pollutant. It reasoned the language implies the spreading of the pollution must be a substantial dissemination, wide "enough to cause its dissipation and dilution." (*MacKinnon, supra*, 31 Cal.4th at p. 651.) The court concluded the localized application of a pesticide "around an apartment building does not plainly signify to the common understanding" the discharge, dispersal, release, or escape of a pollutant. (*Ibid.*)

Third, the court determined the terms pollutant, irritant, or contaminant are commonly understood to mean "'something creating impurity, something objectionable and unwanted.'" (*MacKinnon, supra*, 31 Cal.4th at p. 654.) But the terms must be narrowly read as including only substances commonly thought of as pollution, i.e.,

environmental pollution, not every possible pollutant, irritant, or contaminant imaginable. It concluded the normal application of pesticide used to kill yellow jackets around an apartment building "would not comport with the common understanding of the word 'pollute[]'" and thus would not be excluded from coverage. It stated, "While pesticides may be pollutants under some circumstances, it is unlikely a reasonable policyholder would think of the act of spraying pesticides under these circumstances as an act of pollution." (*Ibid.*) Accordingly, the interpretation of the policy must be contextual, and whether a substance is pollution depends entirely on the circumstances of the case.

As later summarized by one appellate court, the test in *MacKinnon* is based "upon the type of pollutant and how it is released into the environment." (*American Casualty Co. of Reading, PA v. Miller* (2008) 159 Cal.App.4th 501, 516 (*American Casualty*).) Moreover, the *MacKinnon* court teaches interpretation of the exclusionary language must not lead to "absurd results," ignore "familiar connotations of the words used in the exclusion," or be out of line with "the interpretation that the ordinary layperson would adopt." (*MacKinnon, supra*, 31 Cal.4th at p. 652.)

C. Relevance of MacKinnon to this case

The legal question before the *MacKinnon* court is materially the same as the one before us now. Does a standard pollution exclusion clause apply to exclude coverage of an injury caused by an insured's negligent maintenance of his property. However, we recognize the specific facts and the policy language are not perfectly analogous. The landlord in our case did not negligently spray toxic mold into the walls and floors of Johnson's apartment. Our case is not that simple. Rather, the landlord's negligence permitted water intrusion into a structure, unintentionally triggering the growth of a crop of toxic mold. Because there are some obvious differences between the cases, it is instructive to consider the handful of California cases interpreting pollution exclusions after *MacKinnon*.

In *Garamendi v. Golden Eagle Ins. Co*. (2005) 127 Cal.App.4th 480, 485-486 (*Garamendi*), the court considered whether the release of silica-containing dust into the air fell under the pollution exclusion clause of a CGL insurance policy. The court recognized the fact silica "is found in many commonplace materials such as sand, glass, concrete and computer chips" and it, like almost anything else, maybe an irritant or contaminant in some circumstances. However, under *MacKinnon,* these facts are not dispositive. Unlike the residential use of pesticides used to kill insects, "the widespread dissemination of silica dust as an incident by-product of industrial sandblasting operations most assuredly is what is 'commonly thought of as pollution' and 'environmental pollution.'" (*Garamendi, supra,* 127 Cal.App.4th at p. 486, quoting *MacKinnon, supra,* 31 Cal.4th at pp. 653-654.) The *Garamendi* court explained: "Contrary to claimant's suggestion, there need not be 'wholesale environmental degradation, such as occurred at, for example, Love Canal, or the Stringfellow Acid Pits' to constitute pollution." (*Garamendi, supra,* 127 Cal.App.4th at p. 486.)

In *Ortega Rock Quarry v. Golden Eagle Ins. Corp*. (2006) 141 Cal.App.4th 969, (*Ortega*), the Ortega Rock Quarry placed fill dirt and rocks along an access road washed out in a rain storm. In response, the Environmental Protection Agency (EPA) issued an administrative order alleging the fill along the road resulted in the discharge of fill material into the Lucas Canyon Creek. (*Id*. at p. 973.) The EPA ordered Ortega to stop the discharge and submit an interim erosion plan and site restoration plan. (*Id.* at p. 974.) The EPA order alleged Ortega violated section 1311(a) of title 33 of the United States Code (the Clean Water Act), which made it unlawful for any person to discharge a pollutant into the United States waterways without a permit. (*Ibid.*)

Ortega was sued by its lessor, who claimed Ortega had damaged the creek and surrounding property. (*Ortega, supra,* 141 Cal.App.4th at p. 974.) Ortega's insurers denied his claim, asserting that rocks and dirt were pollutants subject to the policy's pollution exclusion. The court agreed, explaining the dirt and rocks were considered

pollutants within the meaning of the Clean Water Act. (*Id.* at p. 981.) It rejected Ortega's assertion that because dirt and rocks are naturally occurring, they are not pollutants. (*Ibid.*)

In *Cold Creek Compost, Inc. v. State Farm Fire & Casualty Co*. (2007) 156 Cal.App.4th 1469, 1472 (*Cold Creek*), plaintiffs filed an action for injunctive relief against a compost operator. They claimed the composting operations emitted, among other things, "'foul odors, disruptive noises, excessive dust, [and] airborne pathogens . . . .'" (*Ibid.*) The court held the odors qualified as pollution under the pollution exclusion in the compost operator's insurance policy. It reasoned, "The odors emanating from Cold Creek's facility were unquestionably an 'impurity, something objectionable and unwanted' in the air where the . . . plaintiffs lived; the odors 'polluted' the air, as the term 'pollute' is commonly understood. In the ordinary and popular sense of the words of the pollution exclusion, the odors were 'discharged' and 'released' by the composting and 'escaped' from the facility. The odors spread a mile and a half to the plaintiffs' homes—a 'substantial dissemination' to the point of 'dissipation and dilution' ordinarily understood as a 'dispersal of pollutants' into the environment. The . . . plaintiffs did not suffer a 'localized toxic accident' like the one in *MacKinnon*; they were harmed by a persistent by-product of Cold Creek's business operations, what *MacKinnon* called 'traditional environmental industrial pollution.'" (*Cold Creek, supra,* 156 Cal.App.4th at p. 1480; citing *MacKinnon, supra,* 31 Cal.4th at p. 641, fn. 1.) The court also rejected Cold Creek's argument the compost odors were not pollutants because they posed no significant health threats and caused no injuries. (*Cold Creek, supra,* 156 Cal.App.4th at pp. 1482-1483.) The court explained that in California, "a substance need not be 'toxic or particularly harmful' to be considered a 'pollutant' under the pollution exclusion. [Citations.]" (*Ibid.*)

In *American Casualty, supra,* 159 Cal.App.4th 501, a furniture stripping company released methylene chloride into the public sewer system and injured a worker

there. The court stated, "Applying the analysis of *MacKinnon* to this case, we consider how a reasonable insured might understand the pollution exclusion language at issue. Pollutants are defined in the policy as including, inter alia, chemicals. Methylene chloride is a chemical. Therefore, methylene chloride is a 'pollutant' under the policy definition. In addition, the '"word 'pollute' indicates that it is something creating impurity, something objectionable and unwanted."' (*MacKinnon, supra*, 31 Cal.4th at p. 654.) Certainly, a lay person would reasonably understand the release of this chemical into the public sewer system is something objectionable and unwanted." (*American Casualty, supra,* 159 Cal.App.4th at pp. 514-515.)

Additionally, the court reasoned, "The *MacKinnon* court noted that this type of pollution exclusion clause, called an 'absolute pollution exclusion,' was promulgated to eliminate insurance coverage for gradual environmental degradation and government-mandated cleanups under the Superfund legislation. [Citation.] A layperson would reasonably understand that the release of methylene chloride into a public sewer is a form of environmental degradation. This is not analogous to the normal, intentional application of pesticides in an apartment building." (*American Casualty, supra,* 159 Cal.App.4th at p. 515.) The release of methylene chloride into a public sewer could not qualify as a one time, ordinary, act of negligence.

D. Application of MacKinnon and its progeny to this case

The decisions in *MacKinnon* and its progeny support the verdict in favor of Johnson. Keeping in mind the historical evolution of pollution exclusion provisions, we consider the policy's language and the substance at issue under the circumstances of this case. Like the *MacKinnon* court, we first look at the policy terms excluding coverage for the "discharge, dispersal, release or escape of pollutants" in the context of the present case. It is undisputed the mold was neither released nor escaped into Johnson's apartment. The landlord discharged and dispersed ordinary water, not mold. It would be ridiculous to say the overwatering the yard outside the apartment qualified as a negligent

widespread dispersal of a pollutant. The clean water was dispersed for its intended use in a localized area.

Similarly, the negligent maintenance of the structure resulting in water intrusion does not sound remotely similar to the "discharge, dispersal, release or escape" of a pollutant. Not all water intrusions results in toxic mold. As noted earlier, in addition to water, mold growth requires the combination of spores, warm temperatures, and food. Certainly, once mold starts to grow, and its spores become airborne, producing mycotoxins, it could be considered a type of biological pollutant in some circumstances. But the test in *MacKinnon* is based not only on the type of pollutant, but also how it is released into the environment. The policy language implies an unintended but widespread dissemination of an environmental pollutant from a place of confinement. (*MacKinnon, supra,* 31 Cal.4th at pp. 650-651.)

Kellogg was a landlord of an apartment complex. It was not in the business of harvesting mold or interested in the scientific study of toxic mold. Kellogg was not responsible for keeping toxic mold spores contained or preventing their escape into the environment. Indeed, this case is quite unlike the widespread dissemination of the silica dust created at the industrial construction site in *Garamedi*, the mass amounts of road fill material dirtying the entire lake in *Ortega,* or the noxious odors smelled for miles in *Cold Creek.* The leakage of ordinary water into Johnson's walls and floors resulted in a localized toxic incident within the confines of the apartment. It is unlikely a reasonable policyholder would think failing to keep the walls repaired and dry was an act of environmental pollution.

The insurance companies argue their policies' pollution exclusion is distinguishable from the one in *MacKinnon* because it defines pollutant as a irritant or contaminant including "biological and/or other etiological agent[.]" They argue mold and fungi are biological materials and need not be further specified in the exclusion. We disagree. As noted above, the *MacKinnon* test is not so simplistic as the insurance

companies here suggest. Application of the exclusion depends not only on the type of pollutant, but also how it is released into the environment. The clause was designed to encourage the insured to take precautions against traditional environmental pollution. Thus, just as a pesticide may in some circumstances qualify as a pollutant but in the context of the *MacKinnon* case it was not, a release of toxic mold spores may in a different context certainly qualify as a biological pollutant excluded from coverage. As stated above, we conclude this case involving localized toxic accident would not comport with the common understanding of the word pollute.

In addition, the insurance companies try to distinguish *MacKinnon's* policy based on the argument their policies contain additional language excluding coverage even if the pollutant is not discharged or dispersed. True, in addition to the "discharge, dispersal, seepage, migration, release or escape" language, the policies in this case have the additional phrase excluding coverage for pollutants "that are introduced at any time, anywhere, or in any way[.]" The insurance companies submit this language should be read literally as extending the exclusion to virtually any substance simply existing in our environment that can be characterized as a pollutant, which would of course include any and all biological contaminants. We are not persuaded.

A similar argument was rejected in *MacKinnon,* where the insurance company read literally the pollution exclusion to apply to virtually any substance that acted as a irritant. The court determined this interpretation would lead to absurd results. It offered several hypotheticals: Should coverage be barred for injuries resulting from the misapplication of iodine, a person's allergic reaction to the pool's chlorine, or a child's accidental ingestion of a pesticide left in a soft drink bottle? (*MacKinnon, supra,* 31 Cal.4th at p. 650.) The Supreme Court determined that without some limiting principle, the pollution exclusion would extend far beyond its intended scope. (*Ibid.*)

Likewise, to bar coverage for every biological material "introduced any time, anywhere or any way" would lead to absurd results. In addition to mold, biological

pollutants also describe bacteria, mildew, viruses, animal dander, cat saliva, house dust, mites, cockroaches, pollen, and lots of other asthma triggers. (See U.S. Environmental Protection Agency, *Biological Pollutants*, <http://www.epa.gov/iaq/biologic.html> [as of January 8, 2009].) Would the pollution exclusion apply to a doctor who accidently spilled a blood or urine sample from one patient and negligently infected another? Does a policyholder pollute the environment by sneezing and passing a virus to their neighbor? A layperson would not reasonably interpret the exclusionary language to apply to the above scenarios.

Moreover, in this case, it cannot be said Kellogg "introduced" the mold "anytime, anywhere or any way" into the apartment. The landlord may have "introduced" some water by overwatering the yard. But it did not gather the spores and other necessary elements to cultivate toxic mold and then introduce the spores into the environment. Keeping in mind the history of the exclusion, *MacKinnon* and its progeny, the naturally-occurring substance at issue, and the contract principles calling for a narrow interpretation of exclusionary causes against the insurer, we hold the policy language is unclear as to whether the landlord's negligence "introduced" or dispersed any biological polluting substances. The exclusion must be interpreted in favor of coverage. (*MacKinnon, supra,* 31 Cal.4th at p. 648 [the clear and explicit meaning of the provisions are to be interpreted from their ordinary and popular sense].)

E. The "discovered injury or damage" exclusion

Constitution argues its policy's "discovered injury" exclusion precludes coverage for Johnson's injuries. The clause states, "The insurance provided under the [CGL] coverage part does not apply to 'bodily injury' . . . which occurred and was discovered before the inception date of this insurance stated in the policy declarations."

It added, "For purposes of this exclusion: [¶] (1) Injury or damage is 'discovered' when appreciable injury or damage is observed by anyone, whether an 'insured' or a non-'insured'; [¶] (2) Discovery of some injury or damage caused by an 'occurrence' or by a 'personal injury' or 'advertising injury' offense constitutes discovery of all injury or damage caused by the same 'occurrence' or offense." Finally, the policy provides, "This exclusion applies regardless of whether, as of the date of inception of this insurance, there was uncertainty about any of the following: [¶] (1) The extent of the injury or damage; [or] [¶] (2) whether the injury or damage will continue to occur or would progressively deteriorate; . . . ."

Constitution argues Johnson sought recovery for injury that occurred and was discovered in 1989, several years before the inception date of its policy with Kellogg in October 2000. It concludes that because some of Johnson's bodily injury occurred and was discovered before inception of the 2000 policy, the "discovered injury" exclusion applies to eliminate coverage for all damages resulting from the same occurrence—exposure to toxic mold.

However, as aptly noted by Johnson, the parties stipulated mold was not discovered until 2001. In making it ruling, the court noted the parties stipulated Johnson experienced "undefined illnesses health problems" from 1998 to 2001. It was also stipulated Kellogg discovered external mold in 1998. The court concluded, "The existence of external mold does not equate to the discovery of internal mold. 'Appreciable damage' is not defined in the policy and does not appear in the stipulated facts. The stipulated facts do not state they are appreciable injury, if it was one related to the occurrence. It has not been shown that the symptoms relate to a spot of mold outside of the building." The court reasoned the defense had not established an occurrence and the policy was ambiguous. We agree the subjective and vague phrase "appreciable damage" is what sets this case apart from the cases relied on by Constitution. To be effective, the exclusion needed to be clear, plain, and conspicuous.

For example, in *USF Ins. Co. v. Clarendon America Ins. Co.* (2006) 452 F.Supp.2d 972, 989 (*USF Ins.*), the discovery injury policy language made "a clear distinction between the 'occurrence,' which is the accident or exposure that causes damage to the claimant, and the resulting 'physical damage.' [Citation.]" The policies explicitly and clearly "require that both the *occurrence* and the *first* instance of property damage take place during the policy period. Additionally, they explicitly deem that all property damage caused contributed to by an occurrence takes place 'at the time of the first such damage.' This is so 'even though the nature and extent of such damage or injury may change and even though the damage may be continuous, progressive, cumulative, changing or evolving, and even though the occurrence causing such bodily injury or property damage may be continuous or repeated exposure to substantially the same general harm.' These provisions make clear that progressive property damage that starts before the insurers' policy period, but continues into the period, does not trigger coverage. Rather, the [policy] explicitly place[s] property damage of this type outside the scope of the insuring agreement." (*Id.* at p. 991.)

In the *USF Ins.* case, the court noted the insurance company was free to modify the standardized language, and distinguished the exclusion it was analyzing from the more broadly written one discussed in *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645 (*Montrose II*). In that case, the policy used the standard language found in CGL policies at the time. It provided the insurer would "'pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury, or . . . property damage to which this insurance applies, caused by an occurrence.'" (*Id.* at p. 656.) "Property damage" was defined as "'(1) physical injury to or destruction of tangible property *which occurs during the policy*

period, including the loss of use thereof at any time resulting there from . . . .'" (*Id*. at p. 668.) The policy defined "occurrence" as "'an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.'" (*Id*. at p. 656.) In short, the policy provided coverage so long as some bodily injury or property damage took place within the policy period, regardless of when the injury or damage began. (See *id*. at p. 675 ["The timing of the accident, event, or conditions *causing* the bodily injury or property damage, e.g., an insured's negligent act, is largely immaterial to establishing coverage; it can occur before or during the policy period. Neither is the date of discovery of the damage or injury controlling. . . . It is only the *effect*—the occurrence of bodily injury or property damage during the policy period, resulting from a sudden accidental event or the 'continuous or repeated exposure to conditions'—that triggers potential liability coverage"].)

Constitution's discovered injury exclusion is not as broad as the one in *Montrose II,* but it also is not as clearly defined as the one discussed in the federal *USF Ins.* case. Constitution's policy states it does not insure for bodily injury "which occurred and was discovered before the inception date," but then broadly defines "discovered" as when "*appreciable* injury or damage is observed[.]" It did not require the "first instance" of damage to take place during the policy period as was delineated in the *USF Ins.* case. The parties stipulated to the facts, and the trial court reasonably concluded a reasonable policyholder standing in Johnson's shoes would understand "appreciable injury" to mean more than the discovery of their "undefined" and vague medical ailments, such as rashes, coughs, and sinusitis. Appreciable injury or damage was not observed until the Johnsons pulled up the carpet and discovered their apartment was full of mold-releasing toxic spores.

DISPOSITION

The judgment is affirmed. The appellants' motion for judicial notice is granted. The Respondents shall recover their costs on appeal.

O'LEARY, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.