STATE OF WISCONSIN
SUPREME COURT
APPEAL NO. 13-AP-1303

ACUITY, A MUTUAL INSURANCE COMPANY,

Third Party Plaintiff-Respondent-Petitioner,

v.

CHARTIS SPECIALTY INSURANCE COMPANY, sued as and f/k/a American International Specialty Lines Insurance Company,

Third Party Defendant-Appellant.

Appeal from a Final Judgment entered on May 8, 2013 by the Honorable J. Mac Davis in Consolidated Circuit Court of Waukesha County Case Numbers 09-CV-2478, 09-CV4611, 10-CV-1506, 11-CV-2087

BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER, ACUITY, A MUTUAL INSURANCE COMPANY

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STATEMENT OF THE ISSUES

1. When a pollution liability insurance policy covers all losses as a result of claims for bodily injury or property damage caused by "pollution[1] conditions," which are broadly defined as, *inter alia*, *any* escape of an irritant or contaminant, does such coverage also require that the contaminated nature of the escaped irritant or contaminant most proximately cause the property damage or bodily injury?

Third-Party Plaintiff-Respondent-Petitioner ACUITY, A Mutual Insurance Company ("Acuity") raised this issue extensively in its court of appeals brief, (Acuity Br. at 28-44); it was also argued at length by Appellant Chartis Specialty Insurance Company ("Chartis")—indeed, this was Chartis' principal argument on appeal (*see generally* Chartis Br). The court of appeals decision assumes the answer to this issue was "yes," given its statement that, based on its review of the complaints in the Underlying Lawsuits,[2] only the explosion and fire—both of which were themselves directly caused by the escape of natural gas, a known contaminant—can be

[1] Acuity's Petition for Review inadvertently used the word "polluting."
[2] Defined below.

deemed as "causing" the property damage and bodily injuries at issue. (Decision at ¶14; Appx. 1:6.)

2. Alternatively, if the underlying property damage or bodily injury for which insurance coverage is sought would not have occurred *but for* the contaminated nature of the natural gas—because, as alleged in the underlying complaints, the contaminated condition of the natural gas directly caused the explosion and fire at issue—does a pollution liability insurance policy written along the lines described in Issue 1 provide coverage for the claims at issue?

This issue was raised in Acuity's appellate brief (Acuity Br. at 40-43) and was expressly argued at length by Chartis (*see generally* Chartis Br.). The court of appeals' answer to this issue was "no," given its conclusion that it was dispositive that only the explosion and fire at issue—and not contact with the escaped natural gas itself—was alleged to have "caused" the property damage and bodily injury at issue. (Decision at ¶14; Appx. 1:6.)

3. Can an insurer refuse to defend or indemnify its insured when the wording in the grant of coverage

under the insurance policy would lead a reasonable insured to conclude that the underlying liability was covered by the policy?

Acuity raised this issue throughout its brief to the court of appeals, (*see* Acuity Br. at 17-18, 21, 25, 33-43 and 45), and Chartis responded to Acuity's arguments in this regard throughout its reply brief. Unfortunately, the court of appeals did not directly address this well-established legal principal in its Decision, save for it impliedly addressing it in its broader conclusion that it was not "fairly debatable that any of the complaints [in the Underlying Lawsuits] allege even one theory to trigger Chartis' duty to Defend." (Decision at ¶14; Appx. 1:6.)

4. Given the answers to the foregoing issues, did Chartis breach its duty to defend and indemnify its insured, Dorner, Inc. ("Dorner"), in the four underlying lawsuits?

This was the ultimate issue before the court of appeals and it was omnipresent in the parties' arguments in the appeal. Reversing the circuit court, which had answered this question in the affirmative, the court of appeals found that it was not even fairly debatable that the allegations in the

complaints in the Underlying Lawsuits were covered under Chartis' insurance policy, thereby finding that Chartis did not have any duty to defend or indemnify Dorner with respect to those claims.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Acuity would be happy to argue the issues before the Court if the Court so desires. However, Acuity respectfully submits that although oral argument may be helpful, oral argument is not essential to the development of the issues on appeal. The court of appeals' error is obvious and, as illustrated below, straight forward application of well-settled Wisconsin case law and the parties' briefs will fully present the issues and develop the theories and legal authorities concerning the same.

Acuity is requesting that the Supreme Court of Wisconsin decision be published. The appeal, though it involves no more than the application of well-settled principles of Wisconsin law to an undisputed factual record, will nevertheless clarify issues under Wisconsin insurance law, as there is no Wisconsin case directly on point.

STATEMENT OF THE CASE

I. INTRODUCTION

This appeal arises out of a dispute between Chartis and Acuity concerning the duties and obligations of Chartis, under the terms of a Contractor's Pollution Liability Policy ("Chartis CPL Policy") Chartis issued to Dorner, to defend and indemnify Dorner in relation to underlying claims of bodily injury and property damage arising from an explosion caused by the release of natural gas from an underground natural gas line resulting from the negligent operations of Dorner.

II. STATEMENT OF FACTS

A. The Consolidated Cases.

Dorner was named as a Defendant in the four consolidated circuit court cases underlying this appeal ("Underlying Lawsuits"). In the Underlying Lawsuits, the collective plaintiffs sought recovery for bodily injury and property damage allegedly resulting from an April 2, 2008 explosion in Oconomowoc, Wisconsin. The plaintiffs alleged that, at least in part, Dorner's acts and/or omissions caused the explosion and the plaintiffs' resulting damages.

On or about June 23, 2009, State Farm Fire & Casualty Co. ("State Farm") commenced the underlying circuit court

litigation, seeking to recover first-party property damage payments made to State Farm insureds in the area of the explosion. (R.I.1.; Appx. 10:57-62.)[3] On or about November 16, 2009, Church Mutual Insurance Company ("Church Mutual") filed the second of the Underlying Lawsuits. (R.II.1; Appx. 11:63-68.) Like State Farm, Church Mutual sued to recover for first-party property payments it made to its insured, First Baptist Church of Oconomowoc. (*Id.*)

On or about April 1, 2010, Ross Phillips and Dan Staffeldt ("Phillips and Staffeldt") filed the third of the Underlying Lawsuits. (R.III.1.; Appx. 12:69-82.) Phillips and Staffeldt were employed with Wisconsin Electric Power Company a/k/a WE Energies, Inc., at times material and sought to recover damages for bodily injury allegedly resulting from the explosion. (*Id.*)

Finally, on or about January 31, 2011, John M. Johnson, Leanne Johnson, Miranda L. Johnson, Paige A. Johnson, and Delanie R. Johnson (collectively, the "Johnsons") filed the last of the consolidated cases. (R.IV.1;

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[3] In this brief, Acuity will employ the same method of citation to the Record on Appeal as Chartis and Acuity used in their briefs in the court of appeals. Each of the four consolidated cases will be designated with its own Roman Numeral, I-IV, based on the chronological filing of each of the consolidated cases—*i.e.*, R.I. for 09CV2478, R.II. for 09CV4611, R.III. for 10CV1506 and R.IV. for 11CV2087.

Appx. 13:83-99.) The Johnsons' suit, like that of Phillips and Staffeldt, alleged bodily injury damages incurred in the explosion. (*Id.*)[4]

The collective plaintiffs in the Underlying Lawsuits alleged that, while performing excavation and related construction activities near the First Baptist Church of Oconomowoc, Dorner discovered and disturbed an underground natural gas line. (R.I.1 at ¶¶ 6-9, R.II.1 at ¶¶ 6-11, R.III.1 at ¶¶ 6-8, 30-32, R.IV.1 at ¶¶ 20-22; Appx. 10-13: 59, 64-65, 71, 77, 88.) The plaintiffs alleged that Dorner damaged the line and, in doing so, caused natural gas to escape. The plaintiffs specifically pled that:

> **State Farm Suit**
>
> 9. Based on their incorrect assumption that the pipe was abandoned, the Dorner employees attempted to push it out of the way with a backhoe bucket to make room for a storm sewer catch basin that they were installing.
>
> 10. During their attempt to push the 2" gas line out of the way, the Dorner employees damaged the line, causing natural gas to escape.

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[4] The Johnsons filed suit in Milwaukee County. On or about May 26, 2011, based on a stipulation among the parties, the Milwaukee County Circuit Court transferred the Johnsons' suit to Waukesha County. The Waukesha County Court consolidated the Johnsons' suit with the State Farm, Church Mutual, and Phillips and Staffeldt suits on or about June 2, 2011. (R.IV. 10-12.)

The circuit court consolidated the cases by orders dated April 27, 2010, September 10, 2010 and May 17, 2011. (R.I. 54, 72, R.II.8., R.IV.12; Appx. 7, 8, 15.)

Church Mutual Suit

11. Based on their mistaken assumption that it was not in use, the Dorner employees attempted to push the 2" black pipe down with a backhoe to make room for a storm sewer catch basin.

12. As they pushed the 2" black pipe down, the Dorner employees damaged it, causing natural gas to escape.

Phillips and Staffeldt Suit

8. On information and belief, on or about April 2, 2008, agents, servants or employees of the Defendant, DORNER, while in the process of excavating and performing construction activities struck and/or damaged a portion of the natural gas line system WE installed on or near Wisconsin Avenue and Worthington in the vicinity of the First Baptist Church, in the City of Oconomowoc, Waukesha County, Wisconsin.

Johnsons Suit

22. On information and belief, on or about April 2, 2008, agents, servants or employees of defendant Dorner, Inc., while in the process of excavating and performing construction activities struck and/or damaged a portion of the natural gas line system installed on or near Wisconsin Avenue and Worthington in the vicinity of the First Baptist Church, in the City of Oconomowoc, County of Waukesha, State of Wisconsin.

(R.I.1 at ¶¶ 9-10, R.II.1 at ¶¶ 11-12, R.III.1 at ¶ 8, R.IV.1 at ¶ 22; Appx. 10-13:29, 65, 71, 88.)

The plaintiffs alleged that the natural gas exploded, causing damage to nearby property and injury to nearby persons. Specifically, the plaintiffs alleged that:

State Farm Suit

11. Once the natural gas started to escape, Dorner employees called WE Energies emergency response office and informed WE Energies of the situation.

***

18. At 1:23 p.m., the natural gas that had leaked out of the 2" gas line exploded.

19. The explosion caused damage to property owned by the involuntary plaintiffs.

Church Mutual Suit

21. At or about 1:23 p.m., natural gas that had leaked out of the 2" black pipe sparked an explosion at the First Baptist Church, destroying the church and damaging two residential homes also owned by the church.

Phillips and Staffeldt Suit

9. DORNER'S actions caused a natural gas fueled explosion and fire.

***

11. As a result of the natural gas explosion and fire, ROSS PHILLIPS sustained serious injuries and damages, including, but not limited to, physical injuries, conscious pain and suffering, disability, mental distress and anguish, medical expenses, loss of earnings and benefits and will continue to suffer such losses into the future as well as other compensable injuries.

***

35. As a result of the natural gas explosion and fire, DAN STAFFELDT sustained serious injuries and damages, including, but not limited to, physical injuries, conscious pain and suffering, disability, mental distress and anguish, medical expenses, loss of earnings and benefits and will continue to suffer such losses into the future as well as other compensable injuries.

Johnsons Suit

> 23. The actions of defendant Dorner, Inc. caused a natural gas fueled explosion and fire which caused plaintiffs John M. Johnson, Leanne Johnson, Miranda L. Johnson, Paige A. Johnson and Delanie R. Johnson to sustain those injuries and damages hereinafter alleged and caused involuntary plaintiff Wisconsin Electric Power Company to sustain those injuries and damages as hereinafter alleged.

(R.I.1 at ¶¶ 11, 18-19, R.II.1 at ¶ 21, R.III.1 at ¶¶ 9, 11, 35, R.IV.1 at ¶ 23; Appx.10-13:59-60, 66, 71-72, 78, 88.)

Dorner and Acuity, as a Dorner insurer,[5] filed third-party actions against Chartis (sued as American International Specialty Lines Insurance Company) in the Underlying Lawsuits.[6] (R.I.2, R.II.2, R. III.4.) Acuity alleged that Dorner had tendered its defense and indemnification in the Underlying Lawsuits to Chartis and that, in response, Chartis refused each of the tenders. (*Id.*)[7] In the context of its third-party actions, Acuity sought a declaration from the Waukesha County Circuit Court that Chartis had a duty to defend and indemnify Dorner under the Chartis CPL Policy Chartis issued

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[5] Acuity issued a general liability policy to Dorner, which was in full force and effect at times material. (R. I.2, R. II.2, R.III.4.)

[6] Acuity filed third-party complaints in the State Farm, Church Mutual, and Phillips and Staffeldt suits. Acuity did not file a third-party complaint against Chartis in the Johnson suit. Rather, the attorneys for Acuity and Chartis stipulated that a third-party action would not be necessary and that the parties would adhere to a stipulated agreement regarding the parties' continued coverage dispute.

[7] In Chartis' appellate brief, it concedes that "[i]t is undisputed that Chartis denied coverage and declined Dorner's/ACUITY's tenders of defense in the Underlying Lawsuits." (*See* Chartis Br., at 1.)

to Dorner and, further, that Chartis was obligated to indemnify Dorner/Acuity in connection with Chartis' duties of defense and indemnity.[8]

B. The Chartis CPL Policy of Insurance.

Chartis issued a Contractor's Pollution Liability Policy to Dorner, with a policy term of December 15, 2007 to December 15, 2008. (R.I.11; Appx. 14:100-136.) The Chartis CPL Policy provides, as its initial insuring agreement, that:

> **I. INSURING AGREEMENT**
>
> **A. COVERAGE**
>
> The Company will pay on behalf of the **Insured** all sums that the **Insured** shall become legally obligated to pay as **Loss** as a result of **Claims** for **Bodily Injury**, **Property Damage** or **Environmental Damage** caused by **Pollution Conditions** resulting from **Covered Operations**. The **Pollution Conditions** must be unexpected and unintended from the standpoint of the **Insured**. The **Bodily Injury**, **Property Damage**, or **Environmental Damage** must occur during the **Policy Period**.
>
> * * *
>
> **B. DEFENSE**
>
> When a **Claim** is made against the **Insured** to which Section **I. INSURING AGREEMENT, A. COVERAGE** above applies, the Company has the right to appoint counsel and the duty to defend such **Claim**, even if groundless, false, or fraudulent.

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[8] Although Chartis filed a Motion to Bifurcate and Stay in the circuit court, the "preferred practice" for challenging coverage under Wisconsin law, *Fire Ins. Exch. v. Basten*, 202 Wis. 2d 74, 89-90, 549 N.W.2d 690 (1996), it did so only after denying coverage and forcing Dorner to sue Chartis.

(*Id.* Exh. A, Form 74985 (08/04) at 1-2 (R.I.11; Appx. 14:104-05).)

Chartis does not dispute that the complaints in the Underlying Lawsuits allege "claims" for "bodily injury" and "property damage" resulting from Dorner's "covered operations," as those terms are defined in the Chartis CPL Policy.[9] Rather, Chartis argues that neither the explosion nor

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[9] The Chartis CPL Policy also defines "bodily injury," "claim," "covered operations," and "property damage" in the following fashion:

Definitions

A. **Bodily Injury** means physical injury, or sickness, disease, mental anguish or emotional distress, sustained by any person, including death resulting therefrom.

B. **Claim** means a written demand received by an **Insured** seeking a remedy and alleging liability or responsibility on the part of the **Named Insured** for **Loss.**

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E. **Covered Operations** means those activities performed by the **Named Insured** at a **Job Site**. **Covered Operations** also includes those activities of others performed at a **Job Site** for which the **Named Insured** is legally obligated.

***

T. **Property Damage** means:

1. Physical injury to or destruction of tangible property of parties other than the **Insured** including the resulting loss of use thereof;

the resulting bodily injury or property damage constitutes a "pollution condition" as defined in the policy.

The Chartis CPL Policy defines "pollution conditions" in the following manner:

> **III. DEFINITIONS**
>
> ***
>
> **S. Pollution Conditions** means the discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant, including, but not limited to, smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste and waste materials into or upon land, or any structure on land, the atmosphere or any watercourse or body of water, including groundwater, provided such conditions are not naturally present in the environment in the amounts and concentrations discovered. **Pollution Conditions** shall not include **Microbial Matter**.

(*Id.* Exh. A, End. 7 (R.I.11; Appx. 14:125).)

C. Procedural Posture.

On or about October 28, 2010 and October 29, 2010, Acuity and Chartis filed cross-motions for summary judgment. (R.I.9-14) Acuity argued that Chartis breached its insurance contract by refusing to defend and indemnify Dorner; it also sought an order from the circuit court

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> 2. Loss of use of tangible property of parties other than the **Insured** that has not been physically injured or destroyed; or
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> 3. **Natural Resource Damage**.

(*Id.* Exh. A, Form No. 74985 (08/04) at 4, 7; Endorsement 6 (R.I.11; Appx. 14:107, 110, 124).)

requiring Chartis to defend and indemnify Dorner and awarding Dorner/Acuity amounts paid in settlement, costs and attorneys' fees incurred in Dorner's defense, and additional costs naturally flowing from Chartis' contractual breach. (R.I.9-11.) Meanwhile, Chartis argued that it had no duty to defend or indemnify Dorner, based on the terms of the Chartis CPL Policy. (R.I.12-14.)

At a hearing on January 14, 2011, the circuit court considered the arguments supporting and opposing the respective insurer's motions. At the hearing, the circuit court granted Acuity's summary judgment request, stating in pertinent part as follows:

> As the briefs have already set forth *the primary analysis is to look at the four corners of the complaints, plural in this instance, to look at the insurance contract involved, and that's the [Chartis] policy not the Acuity policy, and then take a view of a reasonable person reading the policy. And to take, construe an ambiguity in favor of coverage.* Some of the primary principles apply here.
>
> The fact pattern really is not in dispute as it applies to coverage.
>
> On April 2nd of 2008 Dorner is excavating on Worthington Street in Oconomowoc, they find a two-inch black pipe, a natural gas pipe.
>
> ***
>
> In any event, Dorner goes ahead and bends the pipe apparently rupturing or breaking it,

gas escapes, gas explodes, not surprisingly personal injury and property damage alleged.

So, [Chartis'] policy as a pollution conditions paragraph that is quoted in some of the briefs, and discusses what that means to a degree, talks about discharge or release of solid liquid gaseous or thermo irritants or contaminants to give us some definitional information, and specifically talks about such things that are not naturally present in the concentrations discovered.

Well, *certainly natural gas is gaseous, and it was released or discharged, and it's not naturally present in the concentrations discovered. It was a high enough concentration that along with whatever the oxygen concentration, presumably the ambient oxygen in the atmosphere when they mixed together and got ignited they blew up.*

So, the issue is as to whether this natural gas in the context of this fact pattern complained of is a pollution condition. It certainly qualifies under some of the description in the complaint, or pardon me in the insurance coverage contract. I guess we need to look at whether it is an irritant or a contaminant. Contaminant is probably the word that more appropriately might cover it. And we have to look at that from the point of view of a reasonable person and not from an insurance company point of view or some expert in some field's point of view.

And we can, you know, the dictionary has been pointed to, which is an appropriate way to try and evaluate the meaning of the language, obviously a contaminant generally speaking people think about something that doesn't belong there that might cause harm. That is certainly the case here, *natural gas doesn't belong floating around in the street, or in the church, or in the air around this area because it might blow up. So it's a contaminant in that sense, it's certainly dangerous.*

> But trying to analogize one thought that struck me is if someone spilled gasoline into a stream everybody considers that contamination. It's very similar. Gasoline is a liquid, it's a combustible fuel. Natural gas is a gaseous combustible fuel. You don't want either one of them loose in the environment, the general public's environment.
>
> Now I don't have anything deeper to say about it than that. As far as what a reasonable person might expect it's discussed in the briefs, it's discussed in the dictionary. But **it appears to me that a reasonable person would expect that a gas leak like this would be considered a contaminant; and, therefore, pollution.**

(R.I.29 at 13-15; Appx. 9:48-50.) (emphasis added).)

On January 28, 2011, the circuit court entered an order granting Acuity's summary judgment motion and denying Chartis' motion. (R.I. 27; Appx. 2:8-10.) In its order, the circuit court concluded that Chartis breached its duty to defend Dorner "based upon the allegations of the complaints" in the Underlying Lawsuits and ordered Chartis to defend Dorner under the Chartis CPL Policy. (*Id.*) In the order, the circuit court made no finding concerning the sharing of defense fees and costs and/or indemnity liability between Acuity and Chartis. (*Id.*)

Months later, at a hearing on April 24, 2012, the circuit court considered the insurers' requests for the allocation of

defense and indemnity payments. In an order dated May 25, 2012, the circuit court concluded that Acuity and Chartis should share Dorner's defense costs and indemnity settlements/judgments on a "50-50" basis. (R.I. 65; Appx. 3:11-13.)

As the Underlying Lawsuits neared their conclusion in the circuit court, Acuity and Chartis stipulated to the amount of attorneys' fees Acuity incurred in the defense of Dorner, as well as the amounts Acuity expended in indemnity payments to settle claims brought in the Underlying Lawsuits against Dorner. (R.I. 67; Appx. 4:14-19.) Based on the insurers' stipulation and in accordance with the circuit court's January 28, 2011, and May 25, 2012 orders, on May 2, 2013, the circuit court rendered judgment in favor of Acuity and against Chartis in the amount of $765,880.90, plus taxable costs in the amount of $905.75, along with statutory interest. (*Id.*) On May 8, 2013, the Clerk of the Circuit Court, Waukesha County, entered a money judgment in Acuity's favor in the amount of $766,786.65, plus statutory interest, in accordance with the circuit court's May 2, 2013, order. (R.I. 68; Appx. 5:20-23.)

Chartis appealed the January 28, 2011, May 25, 2012, and May 2013 orders of the circuit court. The court of appeals decided the matter on March 12, 2014 in an unpublished opinion. (Decision at ¶14; Appx. 1:6.)

In its decision, the court of appeals set forth some of the well-known general rules regarding the duty to defend analysis and summarized the Underlying Lawsuits' allegations as alleging property damage and bodily injury resulting from the natural gas explosion. (*Id.* at ¶¶ 9-13 Appx. 1:5-6.) It then confined its analysis to two terse paragraphs:

> The [circuit] court concluded that the natural gas was a pollution condition under the policy because, as a "gaseous combustible fuel" people do not want "loose in the environment," which exploded due to a chemical reaction, a reasonable person would consider "a gas leak like this . . . a contaminant[] and, therefore, pollution."
>
> Even assuming all reasonable inferences in the allegations and resolving any doubts as to the duty to defend in Dorner's favor, we are persuaded otherwise. The complaints allege significant property damage and personal injury due only to the explosion and fire, ***not to contact with the escaped natural gas itself because the gas intrinsically is an "irritant or contaminant" in the manner of "smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste and waste materials into or upon land," or "fungi, mold or mildew."*** It is the nature of the claim being asserted against the insured, not the merits, that determines the existence of the duty to defend. We do not deem it fairly debatable that any of the complaints allege

> even one theory to trigger Chartis' duty to defend.

(*Id.* at ¶¶ 13-14; Appx. 1:6.) (emphasis added; internal citation omitted).

On April 11, 2014, Acuity timely filed its Petition for Review in this Court. On September 18, 2014, the Court entered an order granting Acuity's Petition for Review.

D. Standard of Review.

This is an appeal from a grant of summary judgment. The standard for review is therefore *de novo*. *Hirschhorn v. Auto-Owners Ins. Co.*, 2012 WI 20, ¶ 20, 338 Wis. 2d 761, 809 N.W.2d 529. The issues before the Court turn solely on the interpretation of an insurance policy, which is a question of law the Court reviews *de novo*. *Id.*, ¶ 21.

ARGUMENT

Paying them but lip service, the court of appeals completely ignored the vast and well-established case law and rules of interpretation established for interpreting insurance contracts and determining the duty to defend set forth and applied by this Court and the court of appeals in prior decisions, including those interpreting pollution exclusions that contain language similar, if not identical, to the insuring agreement in the Chartis CPL Policy.

The crux of the court of appeals decision is that "[t]he complaints allege significant property damage and personal injury due only to the explosion and fire, not to contact with the escaped natural gas itself because the gas intrinsically is an 'irritant' or 'contaminant' . . . ." (Decision at ¶ 14; Appx. 1:6.) This conclusion apparently adopts Chartis' argument that the Chartis CPL Policy "provides coverage only if the claimant is seeking recovery for bodily injury or property damage caused by the ***contaminated nature*** of the substance involved in the injury." (Chartis Br. at 13 (emphasis added).) However, this holding has no support whatsoever because this language is not found ***anywhere*** within the Chartis CPL Policy and is not required by Wisconsin law.

The court of appeals reached its decision without citing a single Wisconsin (or any jurisdiction) case in which a court interprets a pollution exclusion (or grant of coverage for pollution liability) and defines "irritant" or "contaminant." Nor does the court of appeals cite a single case supporting its implicit adoption of Chartis' "contaminated nature" argument.

The court of appeals decision wholly ignored Acuity's arguments and made no finding as to whether or not Acuity's interpretation was reasonable — the hallmark of determining if a clause in an insurance policy is ambiguous.

As illustrated in more detail below, a decision devoid of precedent and application of Wisconsin law is the only saving grace that Chartis could have hoped for. Chartis has backed itself into the unenviable position where it must prove that not only is its interpretation of the Chartis CPL Policy a reasonable interpretation, but that its interpretation is the ***only*** reasonable interpretation and that Acuity's interpretation is ***unreasonable***.

It is Acuity's position that its interpretation is correct. However, even if the Court disagrees (which it respectfully should not) but determines that Acuity's interpretation is reasonable, then any other contrary reasonable interpretation advanced by Chartis creates an ambiguity that must be resolved against Chartis and in favor of coverage. As illustrated below, Acuity's interpretation applies the rules and methodical approach set out by this Court for both interpreting insurance contracts and when confronted with determining what the terms "irritant" or "contaminant" in an

insurance policy mean from the standpoint of a reasonable insured. Therefore, at a bare minimum, Acuity's interpretation is reasonable.

That Acuity's interpretation is reasonable only further highlights the fact that coverage was "fairly debatable" under the Chartis CPL Policy. Nonetheless, Chartis chose the riskiest course of action by denying coverage, abandoning its insured, and refusing to follow the clear requirement under Wisconsin law that it defend its insured under a reservation of rights and seek a judicial declaration of its coverage obligations where coverage is "fairly debatable." *See, e.g., Elliott v. Donahue*, 169 Wis. 2d 310, 316-18, 485 N.W.2d 403 (1992).

As established herein, and as the circuit court correctly concluded, Chartis breached its duty to defend and was required to indemnify Dorner with respect to the Underlying Lawsuits.[10]

[10] Although there are four issues presented in this case, these issues are so interrelated and connected that Acuity believes they are most logically addressed in the manner presented below.

I. THE CHARTIS CPL POLICY PROVIDES COVERAGE FOR THE UNDERLYING LAWSUITS AND CHARTIS BREACHED ITS DUTIES TO DEFEND AND INDEMNIFY.

A. General Principles of Insurance Policy Interpretation and Resolution of Ambiguous Policy Language.

This dispute revolves around interpretation of an insurance contract. This Court has set forth and stated the rules of insurance contract interpretation with such frequency and consistency that they are black letter law. These rules provide the backdrop and starting point from which to address and decide the issues before the Court.

A court's goal when interpreting an insurance policy is to "ascertain and carry out the parties' intentions." *Hirschhorn,* 2012 WI 20, ¶ 22. Determining whether there is coverage under a policy is a three step process: (1) the court first must determine if the matter at hand falls within the initial coverage grant of the policy; (2) if so, the court then must determine if any of the policy's exclusions apply to remove the matter from coverage; (3) finally, if an exclusion applies, the court must determine if an exception(s) to the exclusion is applicable bringing the matter back within

coverage. *Wadzinski v. Auto-Owners Ins. Co.*, 2012 WI 75, ¶ 14, 342 Wis. 2d 311, 818 N.W.2d 819.

The issue here is only whether the Underlying Lawsuits fall within the coverage grant of the Chartis CPL Policy.

A policy of insurance, like any other contract, is to be construed so as to give effect to the intentions of the parties. *Elliott*, 169 Wis. 2d. at 321. The words are to be construed in accordance with the principle that the test is not what the insurer intended the words to mean but what a reasonable person in the position of the insured would have understood the words to mean. *Wadzinski*, 2012 WI 75, ¶ 11. When interpreting policy language, the court must afford the policy language its plain, common, and ordinary meaning. *Id.*; *Hirschhorn*, 2012 WI 20, ¶ 22.

However, where words or phrases of an insurance policy are susceptible to more than one reasonable interpretation or construction, they are ambiguous. *Wadzinski*, 2012 WI 75, ¶ 11; *Hirschhorn*, 2012 WI 20, ¶ 23. An interpretation advanced by an insured must be "*reasonable*" and a court will not simply adopt any "grammatically plausible interpretation created by an insured

for purposes of litigation." *Hirschhorn*, 2012 WI 20, ¶ 23 (court's emphasis).

Where there is an ambiguity, the court is constrained by the doctrine of *contra proferentem* and must construe the ambiguity against the drafter (the insurer) and in favor of coverage. *Hirschhorn*, 2012 WI 20, ¶ 23. Thus, where there is an ambiguity in the language of a coverage grant, the language is construed broadly in favor of coverage. *Wadzinski*, 2012 WI 75, ¶ 12. Conversely, where there is an ambiguity in the language of an exclusion, the language is construed narrowly limiting the exclusion. *Id.*

This approach advances Wisconsin's public policy goal "favor[ing] finding coverage where the insurance policy terms permit it." *Kennedy v. Washington Nat'l Ins. Co.*, 136 Wis. 2d 425, 429, 401 N.W.2d 842 (Ct. App. 1986).

B. The Underlying Lawsuits Alleged that the "Bodily Injury" and "Property Damage" at Issue Were Caused by "Pollution Conditions" Because the Released Natural Gas is a "Contaminant."

Coverage under the Chartis CPL Policy is straight forward. The insuring agreement of the Chartis CPL Policy provides coverage for bodily injury or property damage claims caused by "pollution conditions" resulting from "covered

operations." The Chartis CPL Policy defines "pollution conditions" as:

> **III. DEFINITIONS**
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> **S. Pollution Conditions** means the discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant, including, but not limited to, smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste and waste materials into or upon land, or any structure on land, the atmosphere or any watercourse or body of water, including groundwater, provided such conditions are not naturally present in the environment in the amounts and concentrations discovered. **Pollution Conditions** shall not include **Microbial Matter**.

Chartis does not contest that the Underlying Lawsuits allege bodily injury and property damage that resulted from covered operations. Thus, the only interpretation issue here is whether the Underlying Lawsuits alleged that the bodily injury and property damage at issue were "caused by 'pollution conditions'" as that term is defined in the Chartis CPL Policy.

The interpretation of pollution exclusions within insurance policies has been before this Court at least three times in *Donaldson v. Urban Land Interests, Inc.*, 211 Wis. 2d 224, 564 N.W.2d 728 (1997), *Peace v. Nw. Nat'l Ins. Co.*, 228 Wis. 2d 106, 596 N.W.2d 429 (1999), and *Hirschhorn v. Auto-*

Owners Ins. Co., 2012 WI 20, 338 Wis. 2d 761, 809 N.W.2d 529. The court of appeals opinion and Chartis' appellate brief do not mention these cases at all and Chartis relegates *Peace* and *Hirschhorn* to a passing footnote in its Reply Brief. (Chartis Reply Br. at 5.)

In these cases, the Court was confronted with how to determine if the substance alleged to have caused the bodily injury and/or property damage was a "pollutant" and thus excluded from coverage by the pollution exclusions contained in the policies before the Court. In *Peace* and *Hirschhorn*, the Court applied the rules of insurance contract interpretation and illustrated a clear methodical approach to determining if a particular substance was an "irritant" and/or a "contaminant" and thus a "pollutant" and excluded from coverage. [11]

In *Peace* and *Hirschhorn*, the Court was required to determine if the definition of "pollutant" contained in the policies at issue (the "*Peace* Policy" and "*Hirschhorn* Policy" respectively) unambiguously included lead paint and bat guano. *Peace*, 228 Wis. 2d at 120; *Hirschhorn*, 2012 WI 20, ¶

[11] The *Donaldson* court was also confronted with defining the same terms. Its approach, not inconsistent with *Peace* and *Hirschhorn*, is discussed below.

26. More specifically, the Court determined that both lead paint and bad guano were "irritants" or "contaminants" within the definition of "pollutant" and therefore fell within the policies' pollution exclusions and were excluded from coverage. *Id.*

The *Peace* Policy excluded coverage for bodily injury or property damage "arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants." *Peace*, 228 Wis. 2d at 112. Similarly, the *Hirschhorn* Policy excluded coverage for any "loss resulting directly or indirectly from: . . . discharge, release, escape, seepage, migration or dispersal of pollutants." *Hirschhorn*, 2012 WI 20, ¶ 5.

The *Peace* Policy defined "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." *Peace*, 228 Wis. 2d at 112. The *Hirschhorn* Policy defined "pollutant" the same way but also included "liquids" and "gases" as examples of an "irritant" or "contaminant." *Hirschhorn*, 2012 WI 20, ¶ 27.

Like the Chartis CPL Policy at issue here, neither policy at issue in *Peace* and *Hirschhorn* defined "irritant" or

"contaminant." However, in both cases, the Court stated that where a term is not defined in the policy, it was "appropriate to look to the definitions of a non-legal dictionary." *Peace*, 228 Wis. 2d at 122. Looking to the *American Heritage Dictionary of the English Language* (3d. ed. 1992), the Court observed in both cases:

> A "contaminant" is defined as one that contaminates. "Contaminate" is defined as "1. To make impure or unclean by contact or mixture."
>
> An "irritant" is defined as the source of irritation, especially physical irritation. "Irritation" is defined, in the sense of pathology, as "A condition of inflammation, soreness, or irritability of a bodily organ or part.

Id. (internal citations omitted); *Hirschhorn*, 2012 WI 20, ¶ 31 (citing *Peace*).

In both *Peace* and *Hirschhorn*, the Court looked further to the additional examples, and their non-legal definitions, "include[ed]" in the definitions of "pollutant" to determine whether the substance at issue (lead or bat guano respectively) was an "irritant" or "contaminant."

The *Peace* Policy's definition of "pollutant" included the term "chemical" as an example of an "irritant" or "contaminant." *Peace*, 228 Wis. 2d at 122. The non-legal definition of "chemical" was noted by the Court as "'[a]

substance with a distinct molecular composition that is produced by or used in a chemical process.'" *Id.* Further, the Court noted that lead's non-legal definition was "a 'soft, malleable, ductile, bluish-white dense metallic element, extracted chiefly from galena and used in containers and pipes for corrosives, solder and type metal, bullets, radiation shielding, paints, and antiknock compounds.'" *Id.* at 123. Based on this, the Court concluded "'Lead' is a chemical element with particular properties. It may be 'used in a chemical process.' It clearly fits within the definition of 'chemical.'" *Id.*

The Court in *Peace* went on to describe the process of lead poisoning and illustrate the instances in which lead, lead paint, and lead paint chips could be solid, liquid, and gaseous irritants. *Id.* at 125. Based on this, the Court concluded that, "There is little doubt that lead derived from lead paint chips, flakes, or dust is an irritant or serious contaminant." *Id.* Thus, the Court found that lead was an "irritant" or "contaminant" and therefore a "pollutant" excluded by the policy. *Id.* at 130.

The Court followed the same approach in *Hirschhorn* and determined that bat guano was an "irritant" or

"contaminant" and therefore a "pollutant" excluded by the policy's pollution exclusion. The Court first outlined the analysis set forth in *Peace*. *Hirschhorn*, 2012 WI 20, ¶¶ 31-32. Using the definitions of "irritant" and "contaminant" adopted in *Peace*, the court stated:

> [W]e conclude that bat guano falls unambiguously within the term "pollutants" as defined by Auto-Owners' insurance policy. Bat guano, composed of bat feces and urine, is or threatens to be a solid, liquid, or gaseous irritant or contaminant. That is, bat guano and its attendant odor "'make impure or unclean'" the surrounding ground and air space and can cause "'inflammation, soreness, or irritability'" of a person's lungs and skin.

Id., ¶ 33 (internal citations omitted).

The Court found its conclusion bolstered by the fact that "waste" was one of the examples of an "irritant" or "contaminant" in the policy. *Id.*, ¶ 34. Noting that "waste" was defined as "'[t]he undigested residue of food eliminated from the body; excrement,'" the Court found that "a reasonable person in the position of the insured would understand bat guano to be waste." *Id.*

Applying these principles, it is clear that natural gas is a "contaminant" as that term is defined in the definition of "pollution conditions" in the Chartis CPL Policy.

As noted above, the Chartis CPL Policy provides coverage for bodily injury or property damage caused by "pollution conditions." Again, the Chartis CPL Policy defines "pollution conditions" as:

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> **S. Pollution Conditions** means the discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant, including, but not limited to, smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste and waste materials into or upon land, or any structure on land, the atmosphere or any watercourse or body of water, including groundwater, provided such conditions are not naturally present in the environment in the amounts and concentrations discovered. **Pollution Conditions** shall not include **Microbial Matter**.

This definition is essentially the same as the pollution exclusions and definitions of "pollutant" at issue in *Peace* and *Hirschhorn*. *Peace* and *Hirschhorn* devoted distinct stand-alone sections of analysis to determining whether the substance at issue was an "irritant" or "contaminant." Therefore, the same steps and analysis should apply to determining whether natural gas is an "irritant" or "contaminant" for the purposes of determining whether the Underlying Lawsuits alleged bodily injury and/or property

damage caused by "pollution conditions" under the Chartis CPL Policy.

There can be no reasonable dispute that natural gas is a "contaminant." A concentrated release of natural gas, such as the one at issue here, makes the air "impure or unclean by contact or mixture," and therefore constitutes a "contaminant." *Hirschhorn*, 2012 WI 20, ¶ 31; *Peace*, 228 Wis. 2d at 122. Further, the "pollution conditions" definition includes "fumes" as an example of a "contaminant." Looking to the same dictionary referenced in *Peace* and *Hirschhorn*, "fume" is defined as a "[v]apor, gas, or smoke, especially if irritating, harmful, or strong." *American Heritage Dictionary of the English Language* 734 (3d ed. 1992).

As its name prominently connotes, natural gas is a gas. And, as well-illustrated by the allegations of the Underlying Lawsuits, it is certainly harmful, defined as "[c]ausing or capable of causing harm; injurious." *Id.* at 825. Harm is defined as "1. [p]hysical or psychological injury or damage." *Id.*

Clearly, natural gas when contacted by an ignition source will explode and thus is capable of causing physical damage—that is exactly what was alleged to have happened

here. Thus, natural gas is "gas . . . especially if . . . harmful. . . ." Natural gas is therefore a "fume" which is a specific example of an "irritant" or "contaminant" in the definition of "pollution conditions" in the Chartis CPL Policy. Thus, natural gas satisfies the definition of "contaminant" as that term is used in the definition of "pollution conditions."

The application of the *Peace* and *Hirschhorn* approach to the policy language and facts here is illustrated in the table below:[12]

Peace	***Hirschhorn***	***Chartis***
Excludes Coverage For	Excludes Coverage For	Provides Coverage For
bodily injury or property damage arising out of the actual, alleged or threatened ***discharge, dispersal, release or escape of pollutants***	loss resulting directly or indirectly from ***discharge, release, escape,*** seepage, migration ***or dispersal of pollutants***	bodily injury or property damage caused by Pollution Conditions which means the ***discharge, dispersal, release or escape of . . .***
pollutant means ***any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste***	pollutant means ***any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals***, liquids, gases and **waste**	***any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis,*** toxic ***chemicals,*** medical waste and ***waste***
"When determining the ordinary meaning of words, it is appropriate to look to the definitions in a non-legal dictionary."[13]		
"A 'contaminant' is defined as one that contaminates. 'Contaminate' is defined as '1. To make impure or unclean by contact or mixture.'"[14]		

[12] Bolded words are common across all three cases.
[13] *Peace*, 228 Wis. 2d at 112.
[14] *Peace*, 228 Wis. 2d at 122; *Hirschhorn*, 2012 WI 20, ¶ 31-33 (quoting *American Heritage Dictionary of the English Language* (3d ed. 1992)).

"An 'irritant' is defined as the source of irritation, especially physical irritation. 'Irritation' is defined, in the sense of pathology, as 'A condition of inflammation, soreness, or irritability of a bodily organ or part."[15]		
The non-exhaustive list of contaminants and/or irritants included chemicals. Lead is a chemical that becomes both an irritant and a contaminant after it breaks down into chips, flakes, dust, or fumes. It is excluded from coverage by the pollution exclusion.[16]	The non-exhaustive list of contaminants and/or irritants included waste which is defined in part as "the undigested residue of food eliminated from the body; excrement." Bat guano is exactly that. It is excluded from coverage by the pollution exclusions.[17]	The non-exhaustive list of contaminants and/or irritants includes fumes which is defined as "Vapor, gas, or smoke, especially if irritating, harmful, or strong." Natural gas is a gas. Natural gas is harmful. It satisfies "pollution conditions" and is included within the Chartis CPL Policy coverage grant.

Natural gas is a "contaminant" as that term has been defined by this Court and therefore satisfies the "pollution condition" requirement of the coverage grant in the Chartis CPL Policy.

C. A Reasonable Insured in Dorner's Position Would Understand Natural Gas Released into the Environment to be a "Contaminant."

As noted above, a court interpreting an insurance policy must interpret the policy language from the perspective of a reasonable insured and must afford the policy language its plain, common, and ordinary meaning. *Wadzinski*, 2012 WI 75, ¶ 11; *Hirschhorn,* 2012 WI 20, ¶ 22. Section II.A., *supra*,

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[15] *Id.*
[16] *Peace*, 228 Wis. 2d at 122-126.
[17] *Hirschhorn*, 2012 WI 20, ¶ 34.

follows this rule as outlined by the *Peace* and *Hirschhorn* courts. Dorner's business operations provide even more perspective.

Dorner is a company that contracted with the Wisconsin Department of Transportation to perform road construction/improvements near the First Baptist Church in Oconomowoc. (R.IV.1 at ¶ 20; Appx. 13:88.) This work included/s underground excavation. (*Id.* at ¶ 22; Appx. 13:88.) It is common knowledge that all manner of different contaminant sources are found underground such as, for example, gas lines, sanitary sewer lines, and septic tanks.

Dorner's work required/s it to operate heavy machinery excavating near and around these sources of contamination. Thus, any reasonable insured would be concerned about possibly damaging or rupturing these contamination sources and then being liable for the bodily injury or property damage caused by the contaminants. Clearly a reasonable insured in Dorner's position would expect the Chartis CPL Policy, which it purchased to protect against such bodily injury and property damage, to provide coverage for property damage and bodily injury caused by the release of natural gas.

Thus, combined with the common and ordinary meaning analysis in Section II.A., *supra*, it is clear that the release of natural gas satisfies the definition of "pollution conditions" and the Underlying Lawsuits are covered under the Chartis CPL Policy.

D. The Specific Facts of the Underlying Lawsuits Require Coverage under the Chartis CPL Policy.

The fact that a court must apply the specific facts of the case when interpreting a pollution exclusion, which Acuity agrees is correct, appears to be the source of Chartis' "contaminated nature" argument apparently adopted by the court of appeals. However, Chartis drastically misreads Wisconsin case law because it does not require that a "pollutant's" "contaminated nature" cause (let alone proximately cause) the alleged bodily injury or property damage. None of the Chartis CPL Policy, Wisconsin case law, nor the cases Chartis cited in its appellate brief ever use the term "contaminated nature" or provide for this additional requirement.

Regardless, the specific facts and policy language at issue here require coverage under the Chartis CPL Policy.

In its court of appeals brief, Chartis based its "contaminated nature" argument on two cases from *other* jurisdictions: *Municipality of Mt. Lebanon v. Reliance Ins.*, 778 A.2d 1228 (Pa. Super. Ct. 2001) and *Barrett v. Nat'l Union Fire Ins. Co. of Pittsburgh,* 696 S.E.2d 326 (Ga. Ct. App. 2010). (Chartis Br. at 13-16.) These cases are simply not binding precedent, especially with the vast depth of Wisconsin precedent on the issue. Moreover, this would not be the first time this Court found a substance to be a "contaminant" where another court found the substance was not. *Compare Peace*, 228 Wis. 2d. at 130 (lead paint is a "pollutant") *with Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043-44 (7th Cir. 1992) ("There is nothing unusual about paint peeling off a wall. . . .").

Chartis then relied on the court of appeals decision *Guenther v. City of Onalaska*, 223 Wis. 2d 206, 588 N.W.2d 375 (Ct. App. 1998). (Chartis Br. at 17-18.) This reliance is questionable at best. The *Guenther* court explicitly based its decision on the *Peace* court of appeals decision[18] which had found that lead paint chips were not a "pollutant." *Id.* at 216 ("based on the reasoning in *Peace*. . . ."). The *Peace* court of

[18] *Peace v. Nw. Nat'l Ins. Co.*, 215 Wis. 2d. 165, 573 N.W. 2d. 197 (Ct. App. 1997).

appeals decision was later reversed and its analysis rejected by this Court. *Peace*, 228 Wis. 2d at 121-130.

Next, Chartis relied on the court of appeals decision *Beahm v. Pautsch*, 180 Wis. 2d 574, 510 N.W.2d 702 (Ct. App. 1993) (Chartis Br. at 18.) However, the *Beahm* court's analysis only further supports Acuity's arguments on appeal:

> Wilson Mutual argues that this clause unambiguously excludes coverage for Braskamp's liability for the injuries and deaths which occurred when he caused smoke to escape into the atmosphere. It argues syllogistically: Braskamp "discharge[d] . . . release[d] or [caused the] escape of smoke . . . into or upon the land, [or] the atmosphere. . . ."; the smoke directly or indirectly caused the deaths of and injuries to the plaintiffs; therefore, the clause excludes coverage for Braskamp's liability. Beahm argues the pollution exclusion is ambiguous and must be construed against Wilson Mutual.
>
> A contract is ambiguous if it is susceptible of more than one meaning. We conclude that a ***reasonably well-informed person could accept Wilson Mutual's syllogism, but an equally well-informed person could reject the syllogism*** and determine that the policy's pollution exclusion clause does not exclude coverage unless the harm or injury is caused by the toxic nature of the substance discharged into the atmosphere—an irritant, contaminant, or pollutant.

Id. at 580-81 (internal citations omitted).[19]

[19] In truth, to the extent the holding in *Beahm* is persuasive, its persuasive value is deminimis in light of *Donaldson*, *Peace*, and *Hirschhorn*. *Beahm* is not even mentioned in *Donaldson* and *Hirschhorn*, and mentioned only in a footnote in the *Peace* dissent.

Applying the above passage from *Beahm*, if the Court concludes that both Chartis' and Acuity's interpretation of the Chartis CPL Policy could be accepted by a reasonably well-informed person, it must find it ambiguous and construe it against Chartis and in favor of coverage. *Id.* at 579-80.

Acuity agrees that interpretation of a pollution exclusion, or in this case a "pollution conditions" coverage grant, is a fact specific endeavor. *Langone v. Am. Family Mut. Ins. Co.*, 2007 WI App 121, ¶ 15, 300 Wis. 2d 742, 731 N.W.2d 334 (quoting *Peace*, 228 Wis. 2d at 136-37). Apparent inconsistencies between various Wisconsin Supreme Court as well as court of appeals decisions can only be reconciled by recognizing the difference between the very specific facts in cases where the courts find similar pollution exclusions ambiguous in one instance and unambiguous in another. *Id.*

This Court and the court of appeals have found that from the standpoint of the insured, common pollution exclusions do not unambiguously exclude bodily injury resulting from exposure to carbon dioxide and carbon monoxide. *Donaldson*, 211 Wis. 2d at 227, 211; *Langone*, 2007 WI App 121, ¶ 20. These courts found that a under the

specific facts at issue, a reasonable insured would not expect carbon dioxide and carbon monoxide to be "pollutants." *Id.*

Carbon dioxide, carbon monoxide, and natural gas are each gases. Although it may be tempting to analogize the facts here to *Donaldson* and *Langone*, that would be a mistake. Both the specific policy language and facts at issue here clearly illustrate the stark difference between released natural gas from an industrial pipeline[20] and accumulations of carbon dioxide and carbon monoxide.

In *Donaldson*, tenants of an office building alleged that an inadequate air exchange ventilation system in their building caused an excessive accumulation of carbon dioxide in their work area causing the tenants to suffer bodily injuries such as headaches, sinus problems, upset stomach, asthma, and multiple other ailments. *Donaldson*, 211 Wis. 2d at 227. These tenants brought a lawsuit against the building manager, ULI, an insured under an insurance policy issued by Hanover, as well as Hanover. *Id.* Hanover moved for summary judgment that its policy did not provide coverage based on the pollution exclusion contained in its policy. *Id.* at 227-28.

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[20] Acuity is not suggesting or advoacting that pollution exclusions and CPL coverage grants only apply to industrial situations or to industrial-type pollutants. This Court has squarely rejected this position. *Hirschhorn*, 2012 WI 20 at ¶ 35; *Peace*, 228 Wis. 2d. at 142.

The Hanover policy's pollution exclusion was virtually identical to those at issue in *Peace* and *Hirschhorn* in that it excluded coverage for:

> "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
>
> * * *
>
> (2) . . . 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.

Id. at 228.

Noting that the pollution exclusion was meant to be broad, the court observed that the terms "irritant" and "contaminant" could be "virtually boundless" when viewed in isolation. *Id.* at 232 (quoting *Pipefitters*, 976 F.2d at 1043). The court ultimately determined that carbon dioxide was not a "pollutant":

> [I]nadequately ventilated carbon dioxide from human respiration would not ordinarily be characterized as a "pollutant." Exhaled carbon dioxide can achieve an injurious concentration in a poorly ventilated area, but it would not necessarily be understood by a reasonable insured to meet the policy definition of a "pollutant."
>
> * * *
>
> The plaintiff's injuries in the instant case also resulted from an everyday activity "gone slightly, but not surprisingly, awry." We conclude that the pollution exclusion clause is ambiguous because ULI could reasonably expect coverage on the facts of this case.

* * *

> It is also significant that, unlike the non-exhaustive list of pollutants contained in the pollution exclusion clause, exhaled carbon dioxide is universally present and generally harmless in all but the most unusual instances. In addition, the respiration process which produces exhaled carbon dioxide is a necessary and natural part of life. We are therefore hesitant to conclude that a reasonable insured would necessarily view exhaled carbon dioxide as in the same class as "smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

Id. at 232-34 (internal citations omitted).

Applying the analysis in *Donaldson*, the court of appeals in *Langone* held that the pollution exclusion before the court did not unambiguously include carbon monoxide within its definition of pollutant. *Langone*, 2007 WI App 121, ¶ 20. There, one tenant of a rental property died and another was seriously injured as the result of carbon monoxide poisoning. *Id.*, ¶ 2. The apartment the tenants rented had both a boiler and a fireplace to heat the unit. *Id.* When both were in use at the same time, the flue would reverse and cause carbon monoxide to accumulate at dangerous levels. *Id.*, ¶ 3. The injuries caused by the carbon monoxide poisoning led to a lawsuit against the landlord and its insurer. *Id.*, ¶ 1. The insurer contended that injuries caused by carbon monoxide were excluded by its pollution exclusion which was essentially the same as the exclusion at issue in *Donaldson*. *Id.*, ¶ 4.

The court found that the pollution exclusion and the definition of "pollutants" did not unambiguously include carbon monoxide. *Id.*, ¶ 20. The deciding factor for the court was ultimately determined by the context of the facts. *Id.*, ¶¶ 18-19. The court paid credence to the insurer's argument that society is aware of the dangers of carbon monoxide and that heating systems are designed to prevent the release of carbon monoxide and that it was common knowledge to not leave a car running in a garage. *Id.*, ¶ 18.

On the other hand, the court noted that people are exposed to various low levels of carbon monoxide every day. *Id.*, ¶ 19. Therefore, in the court's view, "the concentrated level of carbon monoxide in the Langones' apartment could be described as a normal condition gone awry." *Id.*

Finally, the court concluded:

> [T]hat the carbon monoxide poisoning here is more analogous to the *Donaldson* case involving carbon dioxide poisoning. American Family is correct in its assertion that most people are aware of the dangers of high levels of or extended exposure to carbon monoxide; however, people are exposed to low levels of carbon monoxide every day. Like *Donaldson*, this is a "sick building" case where an omnipresent substance became concentrated due to a ventilation defect. Carbon monoxide, like carbon dioxide, becomes harmful when levels are abnormally high or exposure is unusually extended. The adverse consequences to Christopher and Michael

> resulted from the "sick building." Accordingly, we hold that the extraordinary concentration of carbon monoxide in Boyer's rental property would not ordinarily be characterized as a "pollutant." Boyer could reasonably expect coverage for damages caused by an accumulation of a substance that is routinely present.

Id., ¶ 26.

The facts here are significantly different than the carbon dioxide and carbon monoxide in *Donaldson* and *Langone* and compel a different result.

Both *Donaldson* and *Langone* found it significant that at "everyday" levels, carbon dioxide and carbon monoxide are basically harmless. It is not until the two gases accumulate at "injurious" concentrations that they become dangerous. The Chartis CPL Policy, however, explicitly contemplated the scenario wherein a gas could be harmless at one concentration level, but harmful (a "pollution condition") at a higher concentration level:

> **Pollution Conditions** means the discharge, dispersal, release or escape of any . . . gaseous . . . irritant or contaminant, including, but not limited to, . . . fumes . . . upon land or any, or any structure on land, the atmosphere or any watercourse or body of water, including groundwater, ***provided such conditions are not naturally present in the environment in the amounts and concentrations discovered.*** (emphasis added).

Thus, the linchpin of *Donalson's* and *Langone's* analysis is wholly inapt here. The Chartis CPL Policy ***clearly*** contemplates that gases such as carbon dioxide, carbon monoxide, and natural gas are "irritants" or "contaminants" when they occur in concentrations above those "naturally found in the environment." There is not a single allegation that the natural gas leak caused by Dorner rupturing the 2" gas line was of the same concentration "naturally found in the environment." Among other things, the natural gas that was released into the environment was alleged to have sparked an explosion at the First Baptist Church significant enough to destroy the church and two residential homes also owned by the church.

Further, natural gas's dangers are simply different than carbon dioxide's and carbon monoxide's. Like carbon dioxide and carbon monoxide, natural gas can cause asphyxiation at high concentrations.[21] But, natural gas, as was illustrated by the facts in the Underlying Lawsuits, is extremely flammable and explosive. That is precisely why it is so highly regulated.[22]

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[21] *Material Safety Data Sheet: Natural Gas (2000), available at* http://www.we-energies.com/firstresponders/001728oh.pdf.

[22] *See, e.g.*, 40 C.F.R. Parts 60, 63, *Oil and Natural Gas Sector: New Source Performance Standards* and *National Emission Standards for Hazardous Air Pollutants Reviews.*

There is no requirement in the Chartis CPL Policy or Wisconsin law stating that the "contaminated nature" of a contaminant such as natural gas must cause (or, for that matter, proximately cause) the bodily injury or property damage at issue. Rather, if one inserts the definition of "pollution conditions" into the grant of coverage, it is clear that all that is required for the existence of coverage is that losses are a result of claims for bodily injury or property damage caused by, *inter alia*, any escape of an "irritant" or "contaminant."

Each of the complaints in the Underlying Lawsuits alleges that the actions of Dorner's employees caused a natural gas leak that ultimately resulted in an explosion or fire, causing bodily injury and property damage. If Chartis wanted the "contaminated nature" of an "irritant" or "contaminant" to be a condition of coverage, it could have easily done so by including this language in the Chartis CPL Policy. It did not. This Court is bound to apply the Chartis CPL Policy as written and will not "rewrite" it. *Hirschhorn*, 2012 WI 20, 24.

Thus, because there is no requirement in the Chartis CPL Policy or Wisconsin law that the "contaminated nature"

of an "irritant" or "contaminant" cause the bodily injury or property damage, there is likewise no requirement that the "contaminated nature" of an "irritant" or "contaminant" *proximately* cause the bodily injury or property damage. Yet that was the basis of the court of appeals' decision, which was clearly in error.

Because the Chartis CPL Policy explicitly contemplated coverage for the exact scenario where a gas (here, a very volatile gas) was released at a higher concentration than it naturally occurs at, the specific policy language and facts of this case undeniably lead to the conclusion that the Chartis CPL Policy provides coverage for the Underlying Lawsuits.

E. Alternatively, Acuity's Interpretation is Reasonable and the Chartis CPL Policy Coverage Grant Must be Interpreted Broadly in Favor of Coverage.

As established above, Acuity's interpretation of the policy language is correct. Acuity followed the method and approach set forth by the Court in *Peace* and *Hirschhorn* with respect to defining "irritant" or "contaminant." Acuity has illustrated how a reasonable insured in Dorner's position would expect coverage under the Chartis CPL Policy for bodily injury or property damage caused by a release of natural gas

and subsequent explosion. Acuity has shown how the Chartis CPL Policy explicitly contemplated natural gas as being "pollution conditions" when released at a concentrated level.

Nonetheless, even if the Court does not agree that Acuity's interpretation is correct, at the very minimum, the Court should find that Acuity's interpretation is ***reasonable***.

If Chartis likewise advances a reasonable interpretation, then it has by definition created an ambiguity. *Hirschhorn*, 2012 WI 20, ¶ 23 ("Words or phrases in an insurance policy are ambiguous if they are fairly susceptible to more than one reasonable interpretation.").

If the Chartis CPL Policy's language is ambiguous, then the language must be construed against the drafter, Chartis. *Id.* Moreover, because the ambiguous language is part of a coverage grant, the ambiguity is construed broadly in favor of coverage. *Wadzinski*, 2012 WI 75, ¶¶ 11-12.

II. AT A MINIMUM, CHARTIS BREACHED THE CHARTIS CPL POLICY'S DUTY TO DEFEND PROVISION.

As illustrated above, the Chartis CPL Policy in fact provides coverage for the property damage and bodily injury in the Underlying Lawsuits (or alternatively is ambiguous).

Thus, Chartis has breached its duty to defend and must indemnify Dorner pursuant to the Chartis CPL Policy.

Nonetheless, in the event the Court does not find that Chartis must indemnify Dorner, it must find that Chartis breached its duty to defend Dorner.

The basic rules applied to determine the duty to defend are well-settled and uncontroversial in this case:

> An insurer's duty to defend an insured is determined by comparing the allegations of the complaint to the terms of the insurance policy. "An insurer's duty to defend the insured in a third-party suit is predicated on allegations in the complaint which, if proven, would give rise to the possibility of recovery that falls under the terms and conditions of the insurance policy." The duty to defend is based solely on the allegations "contained within the four corners of the complaint," without resort to extrinsic facts or evidence.
>
> When comparing the allegations of a complaint to the terms of an insurance policy, the allegations in the complaint are construed liberally. The duty to defend is necessarily broader than the duty to indemnify because the duty to defend is triggered by arguable, as opposed to actual, coverage. We therefore "assume all reasonable inferences" in the allegations of a complaint and resolve any doubt regarding the duty to defend in favor of the insured."

Fireman's Fund Ins. Co. of Wis. v. Bradley Corp., 2003 WI 33, ¶¶ 19-20, 261 Wis. 2d 4, 660 N.W.2d 666.

Thus, "an insurer has a duty to defend as long as coverage is arguable or fairly debatable." *Sawyer v. West*

Bend Mut. Ins. Co., 2012 WI App 92, ¶ 10, 343 Wis. 2d 714, 821 N.W.2d 250. "The 'fairly debatable' standard defines the scope of an insurer's duty to defend by addressing whether there is arguable coverage. . . ." *Red Arrow Prods. Co. Inc. v. Employers Ins. of Wausau*, 2000 WI App 36, ¶ 18, 233 Wis. 2d 114, 607 N.W.2d 294. "A claim is fairly debatable where a genuine dispute over the status of the law or facts exists at the time of the tender of defense." *Id.*, ¶ 17. If there is any doubt about the duty to defend, it must be resolved in favor of the insured. *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 85, 264 Wis. 2d 60, 665 N.W.2d 257.

Here, there was no factual dispute. The dispute revolved/s around the legal issue of whether the nature of natural gas satisfies the definition of "pollution conditions" in a coverage grant. Acuity's search of Wisconsin case law reveals that the words "pollution" and "conditions" appear next to each other in only four cases. One of those cases is the unpublished court of appeals decision being appealed here. *Acuity v. Chartis Specialty Ins. Co.*, 2014 WI App 45, ¶¶ 1, 2, 8, 353 Wis. 2d 554, 846 N.W.2d 34. The other three cases have nothing to do with addressing "pollution conditions" in

an insurance policy. *See, e.g., Madison Metro. Sewerage Dist. v. Comm. on Water Pollution*, 260 Wis. 229, 232, 50 N.W.2d 424 (1951); *Am. Brass Co. v. Wis. State Bd. of Health*, 245 Wis. 440, 445, 15 N.W.2d 27 (1944); *State ex rel. Martin v. City of Juneau*, 238 Wis. 564,[23] 300 N.W.2d 187, 188 (1941). Thus, this is a novel issue in Wisconsin.

Moreover, no Wisconsin court has addressed whether natural gas is an "irritant" or "contaminant" when released into the environment with respect to traditional pollution exclusions. Because no Wisconsin appellate court had addressed whether natural gas released into the environment was an "irritant" or "contaminant," let alone satisfied the definition of "pollution conditions," this issue was *at a minimum* fairly debatable.

Because coverage was fairly debatable, Chartis was obligated to follow the protocol set forth in *Elliott v. Donahue.* However, Chartis did not agree to defend its insured under a reservation of rights and seek a judicial determination of its coverage obligations. Instead, it chose to sit on its hands and categorically rejected Dorner's tender. Chartis did so at its own peril. *Elliott*, 169 Wis. 2d at 321.

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[23] No Wisconsin Reports page numbers provided to pin cite to.

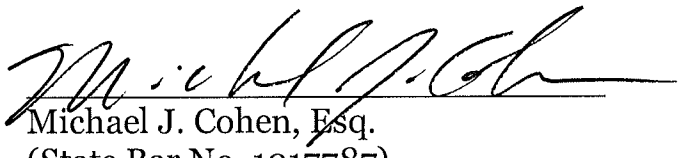
Because coverage was fairly debatable, Chartis owed Dorner a duty to defend. *Id.* at 316-18. Chartis chose the most risky course of action and never provided a defense and therefore breached its duty to defend. *Id.* at 321.

CONCLUSION

For all the above reasons, the court of appeals erred in reversing the circuit court which properly concluded that Chartis had both a duty to defend and to indemnify Dorner in the Underlying Lawsuits and that Chartis breached its duty to defend. Accordingly, the court of appeals decision should be reversed and the circuit court's orders affirmed.

Dated this 20th day of October, 2014.

Respectfully submitted,

By: 

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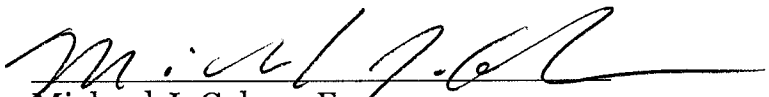
FORM AND LENGTH CERTIFICATION

I certify that this Brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,329 words.

Dated at Milwaukee, Wisconsin this 20th day of October, 2014.

By: 

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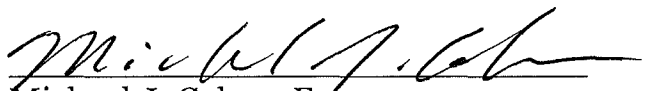
CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this Brief, excluding the Appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic Brief is identical in content and format to the printed form of the Brief filed as of October 20, 2014. A copy of this certificate has been served with the paper copies of this Brief and Appendix filed with the Court and served on all parties.

Dated at Milwaukee, Wisconsin this 20th day of October, 2014.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of Brief of Plaintiff-Respondent-Petitioner ACUITY, A Mutual Insurance Company, and Appendix are being hand delivered to counsel for the Third-Party Defendant-Appellant by messenger on October 20, 2014 at the address listed below.

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I further hereby certify that the requisite number of original and copies of Brief of Plaintiff-Respondent-Petitioner ACUITY, A Mutual Insurance Company, and Appendix are being hand delivered to the Supreme Court of Wisconsin on October 20, 2014 at the address listed below.

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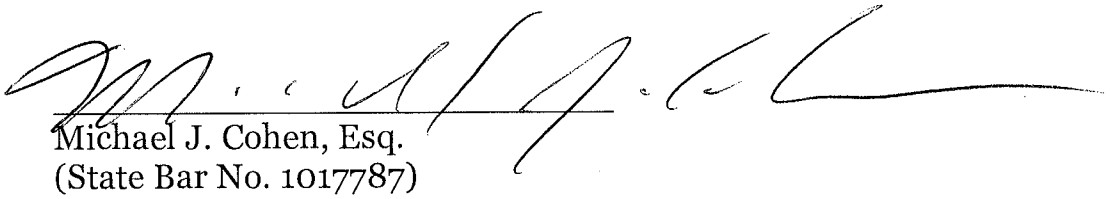

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