[1]STATE OF MICHIGAN

COURT OF APPEALS

IMPERIAL OIL COMPANY, WEBB OIL COMPANY and LEWIS C. JOHNSON, INC.,

Plaintiffs-Appellants,

v

REMUS INDEPENDENT OIL COMPANY, a/k/a REMUS OIL COMPANY, WILLIAM J. WEBB, SR., WILLIAM WEBB, JR., ROBERT WEBB, MEGHANN WEBB, a Minor, KATIE WEBB, a Minor, ROBIN WEBB, a Minor, SALLY WEBB, RACHAEL WEBB, a Minor, DAVID WEBB, a Minor, and ERIC MARPLE,

Defendants-Appellees.

UNPUBLISHED
March 11, 1997

No. 187659
LC No. 92-009665-CE

Before: Markey, P.J., and Michael J. Kelly and M.J. Talbot,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's grant of summary disposition to defendants pursuant to MCR 2.116(C)(10) regarding plaintiffs' contribution, indemnification and contract claims for the cleanup costs incurred when they discovered environmental contamination on their property.

In 1986, plaintiffs bought defendant individual shareholders' corporation and corporate holdings, including a parcel containing a gas station. Defendant individual shareholders made representations and warranties regarding this and other properties purchased, stating that there was no basis for or exposure to liability existing on the demised premises. Subsequent excavation at the property revealed petroleum contamination on the site and the existence of two abandoned, underground storage tanks previously undisclosed to plaintiffs. As required by Michigan environmental law, plaintiffs began site remediation. Plaintiffs then sued defendant individual shareholders and the

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* Circuit judge, sitting on the Court of Appeals by assignment.

company from which these defendants had originally purchased the property, seeking contribution and indemnification for remediation costs.

Plaintiffs first argue that the trial court erred in dismissing plaintiffs' indemnification claim against the Webb individual shareholder defendants for lack of a genuine dispute of material fact because there existed a question of fact regarding whether these defendants were required by their stock purchase agreement to indemnify plaintiffs for plaintiffs' instant environmental liability. We agree and reverse. The Webb individual shareholder defendants agreed in the stock purchase agreement to indemnify plaintiffs in relevant part for "any and all damages . . . or deficiencies of any nature resulting from . . . breach of representation, or warranty contained in this agreement, [or] any material inaccuracy in any such . . . representation, . . . or warranty . . ." (Complaint and jury demand, 7/31/92, Exhibit B, ¶ 7.1). These defendants warranted in the agreement that they knew "of no existing or threatened fact or condition that might cause a material, adverse change in Company's business after the Closing". (Complaint and jury demand, 7/31/92, exhibit B, exhibit 4.00, ¶ 19).

Drawing reasonable inferences from expert affidavit testimony that the contamination at the site predated plaintiffs' purchase of the property, reasonable minds could differ regarding whether the Webb individual shareholder defendants knew of the contamination in 1986; ergo, it was not impossible for this claim to be supported by evidence at trial. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996); *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 705; 532 NW2d 186 (1995). Drawing reasonable inferences from expert affidavit testimony that the on-site contamination was degraded with age, that no existing pipes led to the contaminated tanks and that the on-site contamination predated 1986, reasonable minds could also differ regarding whether the contamination was an existing or threatened fact or condition in 1986. Further, although plaintiffs' instant liability arose due to a statutory change in the *Michigan Environmental Response Act*, MCL 299.601 et. seq.; MSA 13.32(1) et. seq.,[1] giving the above-quoted contract language a natural interpretation per *In re Loose*, 201 Mich App 361, 367; 505 NW2d 922 (1993), this Court notes that the soil and groundwater contamination present in this case could have caused a "material adverse change" in plaintiffs' business after 1986 even without this statutory change; this contamination could have migrated offsite or to the surface, engendering various tort claims against and treatment necessities for plaintiffs. At least, giving the benefit of reasonable doubt to plaintiffs, a record might be developed upon which reasonable minds could differ regarding whether the existence of the instant soil and groundwater contamination might have caused a material, adverse change in plaintiffs' business after 1986. Finally, giving the benefit of reasonable doubt to plaintiffs, a record might be developed upon which reasonable minds could differ regarding whether plaintiffs' liability arose from a material inaccuracy in the Webb individual shareholder defendants' representation that no such condition existed at plaintiffs' contaminated property in 1986.

Plaintiffs also argue that the trial court erred in dismissing plaintiffs' breach of warranty claim against the Webb individual shareholder defendants for lack of a genuine dispute of material fact, because there existed a question of fact regarding whether these defendants warranted in their stock purchase agreement that the instant contamination did not exist. We agree, and reverse. For the reasons set forth in the indemnification discussion above, there also existed a genuine issue of material

fact regarding whether a breach of the above-mentioned stock purchase agreement warranty occurred and whether this breach should have resulted in liability on the individual Webb shareholders' part to indemnify plaintiffs for plaintiffs' remediation costs.

Reversed.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ Michael J. Talbot

[1] To the extent that defendants claim that MERA may not be retroactively applied, we note that the retroactive application of MERA is not unconstitutional. *Kelley v EI du Pont de Nemours*, 786 F Supp 1268 (ED Mich, 1992); aff'd 17 F3d 836 (CA6, 1994)*; United States v RW Meyer, Inc*, 889 F2d 1497, 1506 (CA6, 1989); *US v Northeastern Pharmaceutical & Chemical Co*, 810 F2d 726, 732-733 (CA8, 1986), cert den 484 US 848; 108 S Ct 146; 98 L Ed 2d 102 (1987); *Kelly v Thomas Solvent Co*, 714 F Supp 1439, 1443-1445 (WD Mich, 1989). See also *Romein v General Motors Corp*, 436 Mich 515; 462 NW2d 555 (1990), aff'd 503 US 181; 112 S Ct 1105; 117 L Ed 2d 328 (1992); *Johnson v Harrischfeger Corp*, 414 Mich 102, 117-118; 323 NW2d 912 (1982); *Grieb v Alpine Valley*, 155 Mich App 484, 487; 400 NW2d 653 (1986)