

STATE OF MICHIGAN
COURT OF APPEALS

CORDUROY RUBBER COMPANY, CADILLAC
MOLDED RUBBER, INC., and CORDUROY
RUBBER COMPANY STOCKHOLDERS
LIQUIDATING TRUST,

UNPUBLISHED
May 23, 1997

Plaintiffs-Appellants/Cross-Appellees,

v

No. 191846
Kent Circuit Court
LC No. 93-84516-CR

THE HOME INDEMNITY COMPANY and THE
HOME INSURANCE COMPANY,

Defendants-Appellees/Cross-Appellants,

and

WOLVERINE INSURANCE COMPANY, AETNA
CASUALTY AND SURETY COMPANY, and
TRANSAMERCIA INSURANCE COMPANY,

Defendants-Appellees.

Before: Griffin, P.J., and Doctoroff and Markman, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the grant of summary disposition in favor of defendants. The Corduroy Rubber Company (“CRC”) owned and operated a mechanical rubber manufacturing facility in Grand Rapids from approximately 1919 through December 1986. As part of the manufacturing process, CRC utilized trichloroethylene (“TCE”) as a degreasing agent. In 1978, CRC acquired the Cadillac Molded Rubber Company (“CMR”) facility located in Cadillac, which also used TCE as a degreasing agent. In 1986, the assets of CRC, including both the Grand Rapids and Cadillac facilities, were sold to Hutchinson, S.A., pursuant to an asset purchase agreement, and the assets were conveyed to Paulstra CRC, a wholly owned subsidiary of Hutchinson. Under the asset purchase, CRC and CMR remained responsible for any environmental liability caused before December 4, 1986. The remaining

assets and liabilities of CRC and CMR were ultimately transferred to the Corduroy Rubber Company Stockholders' Liquidating Trust in order to wind-up the affairs of the companies.

In the early 1990s, environmental remediation litigation erupted with regard to both the Grand Rapids and Cadillac sites as the result of alleged TCE contamination. This case arises from plaintiffs' action seeking a declaratory judgment that the five defendant insurance carriers have a duty to defend and/or indemnify plaintiffs in those environmental remediation actions.

I.

With regard to the Cadillac site, the trial court granted summary disposition in favor of the Home Indemnity Company based on a finding that plaintiffs destroyed Home Indemnity's subrogation rights, thus excusing Home Indemnity's obligation to pay. On appeal, plaintiffs contend that their alleged interference actually pertained to a separate and distinct matter, and thus could not have affected Home Indemnity's subrogation rights. We disagree.

The following background facts are undisputed. On August 2, 1984, an above-ground TCE tank collapsed while it was being filled at the Cadillac facility, causing a large spill of TCE. In June 1986, CRC and CMR filed an action against Haviland Products Company, Transport Services Company and Plymouth Tank of West Michigan Inc., the parties responsible for the manufacture, sale and installation of the TCE tank. The lawsuit sought recovery of remediation costs that resulted from the TCE spill (*Corduroy Rubber Company v Haviland Products Company, et al*, Kent Circuit Court No. 86-51232-CE). In consideration of \$103,400, CRC and CMR (plaintiffs in this case) settled their claims and executed full releases in favor of the *Haviland* defendants.

In 1991, the State of Michigan brought an action against certain property owners alleging ground water contamination in violation of CERCLA and MERA (*State of Michigan v Kysor, et al*, File No. 5:91-CV-45 (WD Mich)). This contamination allegedly resulted from operations at the Cadillac Industrial Park site. In December 1992, one of the *Kysor* defendants filed a third-party claim against "Paulstra CRC f/k/a Cadillac Molded Rubber Company," claiming that Paulstra was the liable party as a result of the release of hazardous substances into the environment.

Under the Paulstra CRC asset purchase of CRC and CMR, plaintiffs remained responsible for any environmental contamination caused before December 4, 1986. Based on this provision, plaintiffs assumed responsibility for defending the *Kysor* claim because plaintiffs were potentially responsible parties under CERCLA and MERA. On October 27, 1994, the Federal District Court granted summary disposition in favor of Paulstra CRC. Therefore, in this case, plaintiffs sought only reimbursement of their defense costs with respect to the Cadillac site.

"Subrogation is the right of the insurer to be put in the position of the insured in order to pursue recovery from third parties legally responsible to the insured for a loss paid by the insurer." Couch on Insurance, 2d (Rev ed), § 61:1. An insurance policy is much the same as any other contract; it is an agreement between the parties. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). The contractual language is to be given its ordinary and plain meaning, and technical and

constrained constructions should be avoided. *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 71 n 1; 467 NW2d 17 (1991). If an insurance contract's language is clear, its construction is a question of law for the court. *Taylor v Blue Cross*, 205 Mich App 644, 649; 517 NW2d 864 (1994). The following provisions contained in the relevant Home Indemnity policies are implicated in this issue:

5. Action against company: No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

* * *

7. Subrogation: In the event of any payment under this policy, the company shall be subrogated to all of the insured's rights of recovery therefore against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. *The insured shall do nothing after loss to prejudice such rights.* [Emphasis Added.]

This Court has found that such a provision requires the insured to protect the subrogation rights of the insurer as a condition precedent to the insurer's performance under the policy. *Stolaruk v Central National Ins Co of Omaha*, 206 Mich App 444, 449; 522 NW2d 670 (1994).

The trial court did not err in granting summary disposition in favor of Home Indemnity with respect to the Cadillac site. It is clear from the record that the *Haviland* and the *Kysor* litigations arose from the same contamination event -- the August 2, 1984 TCE tank explosion. At the hearing on the motion for summary disposition, counsel for plaintiffs stated, "It is undisputed that the basis of that claim and the conduct for which the third parties sought indemnity arose out of that 1984 explosion." In other words, but for the 1984 TCE explosion, Paulstra CRC would not have been sued in the *Kysor* litigation. As a result, plaintiffs argument that the two claims are unrelated is without merit; it is clear that Home indemnity's subrogation rights under the contract were affected by the previous settlement.

Because the claim against Paulstra was dismissed on summary disposition, plaintiffs did not have a potential claim for contribution or indemnification against the parties to the *Haviland* settlement. However, plaintiffs did have a potential claim against the *Haviland* defendants for the attorney fees they incurred in defending the *Kysor* litigation. *Poynter v Aetna Casualty & Surety Co*, 13 Mich App 125, 128; 163 NW2d 716 (1968) (An insurer is entitled to be subrogated only to those rights which the insured may have against the tortfeasor). Generally, attorney fees are not recoverable in litigation, either as costs or as an item of damages, unless expressly permitted by statute or court rule. *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 468; 487 NW2d 807 (1992). However, an exception to this rule permits a plaintiff to recover as damages from a third party the attorney fees the plaintiff incurred in a prior lawsuit the plaintiff was forced to defend due to the wrongful acts of the third party. *Id.* In this case, plaintiffs would have had a claim against the *Haviland* defendants for attorney fees

expended in the *Kysor* litigation because plaintiffs were forced to defend the *Kysor* litigation due to the *Haviland* defendants' wrongful acts that resulted in the rupture of the TCE tank.

Pursuant to the insurance policy, plaintiffs were required to protect Home Indemnity's subrogation rights as a condition precedent to Home Indemnity's performance under the policy. *Stolaruk, supra* at 449. Moreover, plaintiffs breached the condition precedent by absolutely releasing potential tortfeasors from liability associated with the rupture of the TCE tank. *Id.* at 450. Having breached the condition precedent, Home's subrogation rights were destroyed, and thus, plaintiffs are barred from pursuing a cause of action on the insurance policy. *Id.* See also *Poynter, supra* at 128-130. Therefore, the trial court properly granted summary disposition to Home Indemnity regarding claims relating to the Cadillac site.

II.

In granting summary disposition in favor of defendants with respect to the Grand Rapids site, the trial court relied on the manifestation theory to determine the trigger for insurance coverage. Plaintiffs argue that the manifestation trigger did not apply to this situation. We disagree.

In adopting the manifestation theory in the context of environmental contamination, this Court relied on the rationale of the Fourth Circuit in *Mraz v Canadian Universal Ins Co, Ltd*, 804 F2d 1325 (CA 4, 1986):

The general rule is that the time of the occurrence of an accident within the meaning of an indemnity policy is not the time when the wrongful act was committed but the time when the complaining party was actually damaged. Often, these cases involve a wrongful act that produces no harm for a period of time and then suddenly manifests itself in a burst of damage.

There are situations however, in which the existence or scope of damage remains concealed or uncertain for a period of time even though damage is occurring. The leakage of hazardous wastes as in this case is a clear example. Determining exactly when the damage begins can be difficult, if not impossible. In such cases, we believe that the better rule is that the occurrence is deemed to take place when the injuries first manifest themselves.

Therefore, we hold that in hazardous waste burial cases such as this one, the occurrence is judged by the time at which the leakage and damage are first discovered. Applying that rule, it is quite clear that the . . . complaint does not allege an occurrence. [*Gelman Sciences v Fidelity Casualty Co*, 214 Mich App 560, 567-568; 543 NW2d 38 (1995), quoting *Mraz, supra* at 1328, citations omitted.]

This Court further stated in *Arco Industries Corp v American Motorists Ins Co (On Remand)*, 215 Mich App 633; 546 NW2d 709 (1996):

[I]n environmental contamination cases involving a lengthy interval between the act that actually causes the damage and the discovery of the damage, courts should apply the so-called “manifestation trigger.” Under the manifestation trigger, coverage is triggered at the time the damage is discovered. [*Id.* at 637, citations omitted.]

Plaintiffs seeks to distinguish *Gelman* and *Arco* from the instant case. According to plaintiffs, the manifestation theory was applied in those cases because the continuous nature of the exposure made it difficult to determine when the injury occurred. Plaintiffs claim that there is no need to rely on the manifestation theory in this case to determine when the “occurrence” or injury occurred because the contamination took place at discrete times and was not the result of continuous exposure. Plaintiffs cite three potential sources of contamination at the Grand Rapids site -- two accidental spills and the application of treated waste oil as a dust suppressant on CRC’s unpaved parking lot for about a decade.

First, plaintiffs claim that there was an accidental spill of TCE from an above-ground TCE storage tank in the late 1970s. Plaintiffs admit that they believed that all or most of the TCE was recovered or evaporated, but maintain that the sudden and accidental event may nevertheless have contributed to the contamination at the site. The record indicates that the spill took place when a delivery truck was filling the TCE tank which was situated on top of a paved parking lot. According to all of the available evidence, the spill was minor, the TCE evaporated quickly from the pavement, and little or no contamination occurred. Furthermore, there was no evidence that the MDNR was informed of the spill, nor did CRC disclose this spill to Paulstra at the time of the asset purchase, despite an intent to fully disclose all environmental events.

A second potential source of environmental contamination listed by plaintiffs was an accidental spill of fuel oil in the winter of 1977 in the area of the Grand Trunk Railroad siding used by CRC for unloading bulk supplies. According to plaintiffs, the MDNR was informed and the contaminated soil was removed; nevertheless, traces of fuel oil may also have contaminated the groundwater. However, fuel oil, not TCE, was the subject of the investigation and remediation that took place as a result of that spill. Furthermore, when the property was sold to Paulstra in 1986, CRC disclosed the fuel oil spill and stated that the ground was frozen, so it was unlikely that the oil from the spill migrated through the soil and into the groundwater.

Finally, plaintiffs claim that from approximately the late 1960s through the late 1970s, CRC applied treated waste oil as a dust suppressant on its unpaved parking lot. Before the application, TCE was removed from the waste oil by boiling and injecting steam, but plaintiffs now believe that trace amounts of TCE may have remained in the waste oil despite the treatment. Plaintiffs claim that each application was a discrete event of contamination that resulted in property damage and, thus, was still a discrete “occurrence” under the insurance policies in effect at the time of the application.

This Court may decline to apply the manifestation trigger when there is a single, identifiable event of contamination and the damage is not discovered until several years later. See, e.g., *Inland Waters Pollution Control, Inc v National Union Fire Ins Co*, 997 F2d 172, 179-189 (CA 6,

1993). However, that is not the case here. Contrary to plaintiffs' claims, the contamination at the Grand Rapids site was gradual and involved a lengthy interval between the acts that actually caused the damage and the discovery of the damage. The evidence indicated that the contaminants present at the Grand Rapids site were released over a significant period of time, potentially from the 1950s to the 1980s. The expert testimony was consistent with plaintiffs' admitted application of TCE-contaminated waste oil on an unpaved parking lot for a period of at least ten years. Even assuming that the two other alleged spills occurred, the evidence suggests that those spills were very minor and did not likely contribute to the contamination at the Grand Rapids site.

Moreover, plaintiffs have failed to draw a meaningful distinction between the contamination that took place in *Gelman* and *Arco*, and the contamination that occurred in this case. *Gelman* and *Arco* involved regular discharges of dioxane/VOCs into treatment ponds/seepage lagoons, followed by the gradual migration of contaminants into the soil and groundwater. In this case, there were regular applications of TCE-contaminated waste oil on the parking lot, followed by the gradual migration of TCE into the soil and groundwater. Similarly, the existence and scope of the damage to the soil and groundwater at the Grand Rapids site remained concealed and uncertain for a long period of time; plaintiffs admit that the contamination was not discovered until 1987. Therefore, the trial court properly concluded that the manifestation trigger should be applied in this case.

Under the manifestation theory, coverage is triggered at the time damage is discovered. *Arco, supra* at 637; *Gelman, supra* at 568. It is undisputed that the damage was discovered in 1987; therefore, coverage was triggered only under policies in effect at that time. The only policy in existence in 1987 was the 1987-1988 Home Indemnity policy. The trial court granted summary disposition to Home Indemnity with regard to that policy on the basis that the policy apparently did not cover the property in question. In addition, the 1987-1988 policy included an absolute pollution exclusion. Plaintiffs do not challenge either of these factual determinations on appeal.

As noted by this Court in *Arco, supra* at 636, the duty to defend is essentially tied to the availability of coverage. The duty to defend arises in instances in which coverage is even arguable, though a claim may be groundless or frivolous. *Polkow v Citizens Ins Co of America*, 438 Mich 174, 178; 476 NW2d 382 (1991); see also *Auto-Owners Ins Co v City of Clare*, 446 Mich 1, 15; 521 NW2d 480 (1994). Consistent with this premise, if coverage is clearly not possible under a policy, then the insurer is not responsible for providing a defense. *Id.* Furthermore, in both *Arco* and *Gelman*, once this Court determined that the policies at issue expired before the manifestation trigger, the Court held that the insurers were not obligated to defend or indemnify the insureds. In this case, all of the insurance policies at issue expired before the discovery of the contamination at the Grand Rapids site in 1987 (except the 1987-1988 Home Indemnity policy). Applying the manifestation trigger, it would be impossible for the underlying environmental claim to come within any of the policies; thus, there is no duty to defend or indemnify.

Because summary disposition was properly granted to defendants for the reasons stated above, we need not address the cross-appeal filed by Home Indemnity and Home Insurance.

Affirmed. Defendants being the prevailing parties, they may tax costs pursuant to MCR 7.219.

/s/ Richard Allen Griffin

/s/ Martin M. Doctoroff

/s/ Stephen J. Markman