

STATE OF MICHIGAN
COURT OF APPEALS

TOWNSHIP OF MACOMB,

Plaintiff-Appellant,

v

SOUTH MACOMB DISPOSAL AUTHORITY,
CITY OF WARREN, CITY OF ROSEVILLE,
CITY OF ST. CLAIR SHORES, CITY OF
CENTERLINE, and CITY OF EASTPOINTE,

Defendants-Appellees,

and

CITY OF FRASER and CITY OF STERLING
HEIGHTS,

Defendants.

UNPUBLISHED

August 3, 2004

No. 244542

Macomb Circuit Court

LC No. 94-003486-CE

Before: Sawyer, P.J., and Gage and Owens JJ.

PER CURIAM.

Plaintiff Township of Macomb (the Township) appeals as of right the order granting summary disposition in favor of defendant South Macomb Disposal Authority (SMDA)¹ and defendant cities Centerline, Roseville, Eastpointe, St. Clair Shores, and Warren (member cities). We affirm.

This appeal involves claims arising from two landfills in the Township, commonly known as sites 9 and 9a. SMDA acquired site 9 in December 1967, and Township residents obtained the right to use the landfill. SMDA used site 9 from 1971 to 1975. SMDA acquired

¹ Defendant South Macomb Disposal Authority (SMDA) is a municipal corporation formed by its member cities to provide waste disposal service to them and other Macomb County municipal entities.

site 9a, which is adjacent to site 9, in 1970 and used it from 1971 to 1975. In February 1975, SMDA conveyed site 9 to the Township.

There were continuing environmental problems with the landfills. In 1983, people who lived near the landfills sued SMDA, the Township, the Michigan Department of Natural Resources (MDNR), and the Michigan Department of Public Health (MDPH)² in *Bielat v SMDA*, seeking equitable relief and damages for various injuries allegedly caused by groundwater contamination from the landfills. The State quickly settled with the individual plaintiffs and filed a cross-claim against SMDA and the Township, alleging violations of various environmental statutes and requesting remediation of the landfills.

Trial on the equitable portion of *Bielat v SMDA* began in June 1998. Shortly thereafter, the Township entered into a consent judgment with the State, agreeing to install an alternative water supply (AWS) for the area surrounding the landfill. The Township provided bottled water to residents in the area until the AWS was completed. The trial court issued an opinion in April 1991 and found that the landfills were contaminating groundwater, that SMDA had violated the Michigan Environmental Protection Act (MEPA) and several provisions of the Water Resource Commission Act, and that the individual plaintiffs did not have a cause of action against the Township under the MEPA.

Shortly after the above opinion was issued, the U.S. Environmental Protection Agency (EPA) released its findings and recommendations from its investigation of the landfills. The EPA found that the landfills were contaminating groundwater, and that the Township was a potentially responsible party (PRP). As a PRP, the Township was assessed a portion of the investigation's cost.

In June 1994, the Township sued SMDA and its member cities, seeking contribution for response costs under the Michigan Environmental Response Act (MERA), MCL 299.601 *et seq.*³ The Township alleged that it was entitled to contribution for the AWS, bottled water, engineering fees, expert witness fees, and interest. The Township amended its complaint in May 1995 to include a contribution claim and cost recovery claim under MCL 299.612.

After several motions that are not at issue in this appeal, litigation in the instant action stopped for several years as SMDA and its member cities negotiated a resolution of *Bielat v SMDA*. In June 2002, the State settled its claims against SMDA and its member cities in a consent decree. Paragraph 22 of the consent decree, entitled "Contribution Protection," states as follows:

Pursuant to Section 20129(5) of the [Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.*,]⁴ and Section 9613(f)(2) of the

² The MDNR and MDPH will be collectively referred to as "the State."

³ MERA was repealed and reenacted by the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, MCL 324.101 *et seq.*

⁴ We note that the sections of MERA and NREPA relevant to the issues at hand are identical.

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 USC 9601 *et seq.*, and to the extent provided in Section [24] (Covenant Not to Sue by [the State]), [SMDA and its member cities] shall not be liable for claims for contribution for the matters set forth in Paragraph 19.1 of this [d]ecree.

Paragraph 19.1(e) states that the covenant not to sue and, thus, contribution protection apply to the “[p]erformance of response activities related to the release at the site, other than those response activities specifically required by this [d]ecree. . . .” Moreover, Paragraph 26 provides that the “[d]ecree shall be effective upon the date the [trial court] enters [the decree,]” which was June 26, 2002.

In July 2002, SMDA and its member cities moved for summary disposition to dismiss, with prejudice, the Township’s contribution claim. Granting the motion, the trial court found that the Township’s contribution claims are addressed in the consent decree, that the consent decree provides SMDA and its member cities with contribution protection against those claims, that the contribution protection is effective, and that the Township cannot maintain a cost recovery action because it is a PRP.

I

The Township argues that the costs for which it seeks contribution are not addressed in the consent decree, and that its contribution claim is not barred by the consent decree. SMDA and its member cities did not argue summary disposition standards under MCR 2.116(C)(8) and 2.116(C)(10), and the trial court did not specify whether it was granting their motion under subrule (C)(8) or (10). Review under subrule (C)(8) is appropriate here; the factual record in this case is limited to the record made before the trial court, and there is nothing in the record indicating that the trial court reviewed matters outside the pleadings. See *Spiek v Michigan Dep’t of Transp.*, 465 Mich 331, 338; 572 NW2d 201 (1998).

We review de novo a trial court’s ruling on a motion for summary disposition pursuant to MCR 2.116(C)(8). *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). Summary disposition under MCR 2.116(C)(8) is warranted if the nonmoving party has failed to state a claim upon which relief can be granted. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts, and construed in the light most favorable to the nonmoving party. *Adair, supra*, 470 Mich 119.

A consent decree is a contract, and interpretation of a contract is a question of law that we review de novo. See *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004); *Michigan Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 484; 637 NW2d 232 (2001). The primary goal of contract interpretation is to enforce the parties’ intent. *Burkhardt, supra*, 260 Mich App 656. When the language of the contract is clear and unambiguous, interpretation is limited to the actual words used. *Id.*

Paragraph 22 of the consent decree provides SMDA and its member cities contribution protection for matters set forth in Paragraph 19.1, and MCL 324.20129(5) similarly provides SMDA and its member cities with contribution protection for matters addressed in the consent

decree. The response activity costs for which the Township seeks contribution are matters addressed in Paragraph 19.1(e) of the consent decree. The matters addressed in Paragraph 19.1(e) are the “[p]erformance of response activities related to the release at the [f]acility, other than those response activities specifically required by this [d]ecree. . . .” The Township is seeking contribution for the AWS, bottled water, EPA investigation, engineering fees, expert witness fees, and interest. These response activities were undertaken as a result of the groundwater contamination at sites 9 and 9a and, thus, are related to the release at the landfills.

Moreover, the Township’s response activities are not specifically required by the consent decree. None of the provisions in the consent decree required the Township to install an AWS, provide bottled water, or pay a portion of the cost for the EPA investigation. The Township is not a party to the consent decree and, hence, was not bound by it to perform response activities. Also, the Township’s response activities were undertaken before entry of the consent decree and, thus, were not done in accordance with it.

The Township argues that its response activities are not addressed in Paragraph 19.1(e) and reasons that the term “past response activities” in Paragraph 19.1(e) refers to “past response activity costs,” which is defined in Paragraph 4.9 to mean “those costs incurred and paid by [the State] prior to March 1, 2001.” The Township’s interpretation ignores the clear language of the consent decree and the intent of the parties to the consent decree. See *Burkhardt, supra*, 260 Mich App 656; *Busch, supra*, 256 Mich App 7-8. Paragraph 19.1(e) uses the term “past response activities,” not “past response activity costs.” Paragraph 19.1(c), on the other hand, addresses “past response activity costs.” Thus, the language of Paragraphs 19.1(c) and 19.1(e) shows that the parties to the consent decree intended for Paragraph 19.1(e) to refer to “past response activities,” not “past response activity costs.”

The Township further maintains that, if the parties to the consent decree had intended to provide SMDA and its member cities with contribution protection from the Township’s claims, they would have addressed those claims in the consent decree. This assertion ignores the broad and unambiguous language of Paragraph 19.1(e). See *Burkhardt, supra*, 260 Mich App 656. By using general language, the parties to the consent decree provided SMDA and its member cities with protection against contribution suits brought by any third party.

The Township also argues that, if the consent decree provided broad contribution protection against claims by others, Paragraph 4.9 would have included the Township and any other parties that incurred response costs at the landfills. This argument ignores the clear and unambiguous language of Paragraph 19.1(e). See *Burkhardt, supra*, 260 Mich App 656. Paragraph 4.9 defines the term “past response activity costs” and is not relevant to Paragraph 19.1(e), which uses the term “past response activities.” Thus, the response costs for which the Township seeks contribution are addressed in Paragraph 19.1(e) of the consent decree.

Because the Township’s response costs are addressed in Paragraph 19.1(e), Paragraph 22 of the consent decree and MCL 324.20129(5) provide SMDA and its member cities with protection against claims for contribution for those costs. Relying on *Attorney General v Richfield Ironworks, Inc*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2001, (Docket No. 219654), the Township argues that SMDA and its member cities do not have contribution protection against its claims. We distinguish *Richfield Ironworks, Inc*, as the Township’s claims are addressed in the consent decree, giving SMDA and its member

cities contribution protection with respect to those claims. Moreover, an unpublished opinion is not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1). Thus, SMDA and its member cities have contribution protection against the Township's claims, and the Township has failed to state a claim upon which relief can be granted.

II

The Township argues that, if SMDA and its member cities have contribution protection against the Township's claims, such protection does not take effect until SMDA obtains a certificate of completion of remedial action, which has not yet occurred. We note that the Township does not cite any authority to support its arguments and point out that it is not enough for the Township to simply announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for its claims, or unravel and elaborate its arguments, and then search for authority either to sustain or reject its position. See *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 343-344; 675 NW2d 271 (2003), applying *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). We nonetheless review the Township's arguments below.

As is discussed *supra*, review under MCR 2.116(C)(8) is appropriate and is de novo. See *Adair, supra*, 470 Mich 119; *Spiek, supra*, 465 Mich 338. As is also discussed *supra*, interpretation of a consent decree is governed by the legal principles applicable to the construction and interpretation of contracts and is reviewed de novo. See *Burkhardt, supra*, 260 Mich App 646; *Michigan Mut Ins Co, supra*, 247 Mich App 484; *Mikonczyk, supra*, 238 Mich App 349.

The clear and unambiguous language of Paragraphs 22 and 26 indicate that the contribution protection afforded to SMDA and its member cities became effective upon the trial court's entry of the consent decree. See *Burkhardt, supra*, 260 Mich App 656. Paragraph 26 makes the provisions of the consent decree and, thus, Paragraph 22 effective "upon the date that the [trial court] enters [the decree]." Unlike Paragraph 19 (the State's covenant not to sue), Paragraph 22 does not mention or even suggest that contribution protection becomes effective at a different time.

MCL 324.20129(5) also makes clear that contribution protection took effect upon the trial court's entry of the consent decree. SMDA and its member cities resolved their liability to the state in a judicially approved consent decree, making them no longer liable for claims for contribution regarding matters addressed in the decree. See MCL 324.20129(5).

Reading Paragraph 22 in conjunction with Paragraph 19 and, more specifically, Paragraph 19.2, the Township argues that contribution protection does not take effect until SMDA obtains a certificate of completion of remedial action. This assertion is contrary to the clear and unambiguous language of Paragraph 22. See *Burkhardt, supra*, 260 Mich App 656. Paragraph 22 refers to Paragraph 19 to establish the extent of contribution protection, not the time at which contribution protection becomes effective. While Paragraph 22 refers to Paragraph 19.1 to establish the matters to which contribution protection applies, it does not refer to or even mention Paragraph 19.2. Thus, we decline to follow the Township's interpretation, as doing so would force us to look beyond the clear language of the consent decree. See *Burkhardt, supra*, 260 Mich App 656.

The Township also contends that Paragraph 26 simply means that SMDA's obligations to remedy sites 9 and 9a began on the date the trial court entered the decree. Such an interpretation ignores the clear and unambiguous language of Paragraph 26. See *Burkhardt, supra*, 260 Mich App 656. The consent decree establishes more than SMDA's obligations to remedy sites 9 and 9a; for instance, it establishes indemnification for the State and contribution protection for SMDA and its member cities. Paragraph 26 clearly states that the consent decree "shall be effective upon the date the [trial court] enters [it]," making the entire consent decree, not just SMDA's obligations to remedy sites 9 and 9a, effective on that date. Thus, the contribution protection afforded to SMDA and its member cities is effective. We conclude, therefore, that the Township has failed to state a claim upon which relief can be granted.

III

The Township argues that its private party claim for recovery of response costs is not barred by the consent decree. Review under MCR 2.116(C)(10) is appropriate here, as it is clear that the trial court reviewed matters outside the pleadings. *Spiek, supra*, 456 Mich 337. We review de novo a trial court's ruling on a motion for summary disposition. *Id.* Summary disposition under MCR 2.116(C)(10) may be granted when, except to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). The moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 455. The burden then shifts to the nonmoving party to establish a genuine issue of material fact. *Id.* If the nonmoving party fails to meet this burden, the motion should be granted. *Id.*

The Township argues that the trial court misinterpreted *Pitsch v ESE Michigan, Inc*, 233 Mich App 578; 593 NW2d 565 (1999). *Pitsch*, however, is not controlling here. The issue in *Pitsch* was whether MERA created a private cause of action, not whether a PRP may recover response costs from other PRPs. *Id.* at 589-596. Thus, *Pitsch's* brief discussion about whether a PRP may recover response costs from other PRPs is obiter dicta and does not constitute a holding to which the binding principles of stare decisis apply. See *Dressel v Ameribank*, 468 Mich 557, 568 n 8; 664 NW2d 151 (2003).

Michigan law is not determinative of the issue at hand, and NREPA was modeled after CERCLA. *Genesco, Inc v MDEQ*, 250 Mich App 45, 50; 645 NW2d 319 (2002), citing *Flanders Industries, Inc v Michigan*, 203 Mich App 15, 21; 512 NW2d 328 (1993). It is therefore appropriate to rely on federal court interpretation of CERCLA when interpreting NREPA. See *State Employees Ass'n v Dep't of Mgt and Budget*, 428 Mich 104, 117; 404 NW2d 606 (1987); *Pitsch, supra*, 233 Mich App 593-596. PRPs are precluded from bringing a cost recovery action under section 9607(a) of CERCLA. *Centerior Serv Co v Acme Scrap Iron &*

Metal Corp, 153 F3d 344, 356 (CA 6, 1999).⁵ To maintain a cost recovery action under CERCLA, a plaintiff must demonstrate that it is not a PRP by showing that it has either undertaken a voluntary cleanup of the site or that it is a truly innocent owner. *Id.* at 354.

The Township is a PRP that may not bring cost recovery action under NREPA. Township residents had the right to use the landfills. The Township was identified by the EPA as a PRP and never protested its status as a PRP or its obligation to pay for a portion of the EPA investigation. See *id.* at 351-352. Moreover, the Township does not claim to be an innocent owner or user of the landfills and did not perform response activities voluntarily, but did so as part of a consent judgment with the State in *Bielat v SMDA*. See *id.* at 354.

The Township argues that it was not found responsible for the environmental contamination at the landfills in *Bielat v SMDA*. The trial court's decision in *Bielat v SMDA*, however, does not adequately address the issue before this Court. The decision came before the EPA investigation. The issue was whether the "conduct of the [Township] ha[d], or [was] likely to pollute, impair or destroy the air, water or other natural resources," not whether Township is a PRP, which is ultimately at issue here. Lastly, the decision only addressed the Township's liability to the individual plaintiffs and did not address the Township's liability to the state. The Township, therefore, has failed to demonstrate a genuine issue of material fact with regard to its status as a PRP. Accordingly, we conclude that the trial court did not err in granting SMDA and its member cities summary disposition on the Township's cost recovery claim.

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Donald S. Owens

⁵ We note that, in addition to the Sixth Circuit, the First, Third, Seventh, Ninth, Tenth, and Eleventh Circuits have all held that PRPs are precluded from bring a cost recovery action under section 9607(a) of CERCLA. See *Pinal Creek Group v Newmont Mining Corp*, 118 F3d 1298, 1301 (CA 9, 1997), cert den 524 US 937; 118 S Ct 2340; 141 L Ed 2d 711 (1998); *New Castle Co v Halliburton NUS Corp*, 111 F3d 1116, 1120 (CA 3, 1997); *Redwing Carriers, Inc v Saraland Apartments*, 94 F3d 1489, 1496 (CA 11, 1996); *United States v Colorado & Eastern RR Co*, 50 F3d 1530, 1535 (CA 10, 1995); *United Technologies Corp v Browning-Ferris Indus, Inc*, 33 F3d 96, 101 (CA 1, 1994), cert den 513 US 1183; 115 S Ct 1176; 130 L Ed 2d 1128 (1995); *Akzo Coatings, Inc v Aigner Corp*, 30 F3d 761, 764 (CA 7, 1994). While the Fifth and Eighth Circuits have not directly confronted the issue, they too have indicated that PRPs are limited to actions for contribution. See *Control Data Corp v SCSC Corp*, 53 F3d 930, 936 (CA 8, 1995); *Amoco Oil v Borden, Inc*, 889 F2d 664, 668 (CA 5, 1989).