COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0072

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

TECUMSEH PRODUCTS COMPANY,

PLAINTIFF-APPELLANT,

V.

AMERICAN EMPLOYERS INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

THE TRAVELERS INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, HARTFORD ACCIDENT & INDEMNITY COMPANY, INSURANCE COMPANY OF NORTH AMERICA, FIRST STATE INSURANCE COMPANY, THE HOME INSURANCE COMPANY, MICHIGAN MUTUAL INSURANCE COMPANY, STONEWALL INSURANCE COMPANY, AFFILIATED FM INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, JEFFERSON INSURANCE COMPANY OF NEW YORK, UNITED STATES FIRE INSURANCE COMPANY, AND PURITAN INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Tecumseh Products Company appeals from a summary judgment in favor of American Employers Insurance Company (AEIC) based upon its pollution exclusion clause. Because there are no material factual issues in dispute, we affirm.

We review decisions on summary judgment by applying the same methodology as the trial court. *See* ***M & I First Nat'l Bank v. Episcopal Homes Management, Inc.***, 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995); *see* § 802.08(2), STATS. That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***id.*** at 496-97, 537 N.W.2d at 182.

In May 1990, Tecumseh filed a declaratory judgment action against numerous insurers, including AEIC, to recover damages for costs incurred and to be incurred by Tecumseh in connection with the study and remediation of contamination of the Sheboygan River due to the discharge of polychlorinated biphenyls (PCBs) used at Tecumseh's plant. Insurers other than AEIC received summary judgment on the question of whether they owed coverage to Tecumseh under their pollution exclusion clauses which afford coverage for sudden and accidental releases of pollutants. Tecumseh did not appeal from this February

1996 decision that the pollution exclusion clauses[1] in the moving insurers' policies precluded coverage because the release of pollutants was not "sudden" or "accidental" because Tecumseh intentionally placed PCBs into the environment by storing PCB-laden waste in a natural earthen pit behind its plant.

Thereafter, AEIC sought summary judgment claiming that the trial court's previous decision that the release of PCBs into the environment was not accidental meant that the release also was not an "occurrence" under AEIC's policy. The trial court considered AEIC's policy language and the analysis set forth in ***Arco Industries Corp. v. American Motorists Ins. Co.,*** 531 N.W.2d 168 (Mich. 1995), which equates "occurrence" with "accident," and held that Tecumseh intentionally released PCBs into the environment, thereby negating AEIC's coverage which would have existed had the release been accidental.[2]

Tecumseh, a Michigan corporation, purchased an aluminum diecasting plant along the Sheboygan River in 1966. From 1966 until 1972, the plant's diecasting machines used hydraulic fluid containing PCBs.[3] The diecasting machines would leak hydraulic fluid in normal operations or when a hydraulic hose failed. Cleanup of the PCB-laden hydraulic fluid entailed placing recoverable fluid into wheelbarrows. The remaining fluid on the plant floor would

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[1] The pollution exclusion clause interpreted by the trial court excludes coverage for property damage arising out of the discharge of a pollutant unless "such discharge, dispersal, release or escape is sudden and accidental." AEIC did not have a pollution exclusion clause in its policy.

[2] Although the trial court discussed Tecumseh's subjective intent to pollute the environment, *see* ***Arco Industries Corp. v. American Motorists Ins. Co.,*** 531 N.W.2d 168 (Mich. 1995), we conclude that this analysis was unnecessary in light of the trial court's conclusion that Tecumseh did not accidentally release contaminates into the environment.

[3] Since 1972, non-PCB hydraulic fluids have been used.

be covered with "oil dry," an absorbent material which would soak up the fluid. Once absorbed, the material would be shoveled into wheelbarrows and dumped into a natural earthen pit at the back of the plant. The pit was located in a flood plain a few hundred feet from the river. Some of the material stored in the pit moved toward the river as a result of plant additions and efforts to construct a dike along the floodplain to prevent water from reaching the plant during the spring thaw. Tecumseh concedes that its "own investigation, and discovery taken in this action, have revealed that the most likely source of the PCB contamination is releases of PCB-containing materials that were formerly stored in the back of Tecumseh's Sheboygan Falls, Wisconsin facility. These materials eroded, or were washed into, the Sheboygan River over a period of many years." Other hydraulic fluids were discharged directly into the river through out-fall pipes which were capped in August 1972. In 1970, pollution was discovered and the DNR issued a pollution abatement order. Due to erosion of the riverbank, high river flows and periodic flooding, PCB-laden material entered the river each year from 1966 to 1978.

We conclude that this case is controlled by the Michigan Supreme Court's decision in ***Arco.***[4] Arco's insurer, American Motorists Insurance Co. (AMICO), refused to indemnify Arco for costs incurred in defending an action brought by the Michigan Department of Natural Resources to compel Arco to address chemical contamination at its manufacturing plant. *See* ***id.*** at 170. The contamination occurred when volatile organic compounds used in the manufacturing process spilled onto the plant floor, were carried away by a floor

[4] The trial court's order that Michigan law applies to this case is not challenged on appeal.

drain to a trench drain system and ultimately contaminated a seepage lagoon and the groundwater. *See* ***id.*** at 171.

AMICO claimed that the contamination was not an "occurrence" within the meaning of its policy because the contamination was not an accident, as occurrence was defined in the policy and case law. *See* ***id.*** at 171-73. The trial court found that Arco neither anticipated the contamination nor intended to contaminate the environment and compelled AMICO to cover Arco under its policy. The supreme court affirmed the trial court and concluded that "Arco's employees did not intentionally release [contaminants] with the subjective intent or expectation to harm the environment." ***Id.*** at 172.

In analyzing whether AMICO owed coverage to Arco, the Michigan Supreme Court started with the language of the insurance policy which obligated AMICO to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages … caused by an *occurrence*." ***Id.*** at 172 (emphasis in original). The policy defined "occurrence" as "[an] accident, including … property damage, neither *expected nor intended from the standpoint of the insured.*" ***Id.*** at 172-73 (emphasis in original). The court found this language to be clear and unambiguous. The court then turned to whether an "accident" occurred and whether Arco expected or intended the contamination. *See* ***id.*** at 173.

Because the policy did not define "accident," the court relied upon previous cases construing the term to mean "'an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected.'" ***Id.*** (quoted source omitted). Whether an "accident" occurred is evaluated from the standpoint

of the insured, not the injured party. *See* ***id.*** The supreme court agreed with the trial court that the facts adduced at a bench trial indicated that there were unintentional, accidental releases of contaminants due to accidental spills into the floor drains and passage into the soil and the groundwater. *See* ***id.*** The court pointed to accidental spills of mop buckets containing contaminants, a punctured solvent drum which leaked onto the ground, drums tipping and spilling into drains, drums leaking at the back of the plant due to forklift punctures or shots from hunters, and spills of solvents being transferred from a drum to a holding tank. *See* ***id***. at 173-74. The supreme court found that this evidence amply demonstrated that the spills were accidents not anticipated and not naturally to be expected. *See* ***id.*** at 174.

Having held that the spills were accidents, the court addressed whether Arco intended or expected to contaminate the environment. The court announced a subjective standard, i.e., whether Arco's conduct, from its perspective, evidenced an intent to contaminate the environment and whether Arco was aware that harm was likely to follow from its conduct. *See* ***id.*** at 175.

AEIC's insurance policy contains the same definition of occurrence as the policy in ***Arco***. In order for AEIC to owe coverage to Tecumseh, an occurrence or accident must have taken place. Based on the summary judgment submissions, the trial court concluded that Tecumseh's placement of contaminates into the environment was the result of intentional dumping. We conclude that our analysis need only address the first part of the ***Arco*** analysis: whether Tecumseh's release of contaminants into the environment was an accident or intentional, as the trial court determined.

Our independent review of ***Arco*** and the summary judgment submissions confirms the trial court's conclusion. The undisputed facts on summary judgment are that Tecumseh routinely placed PCB-contaminated fluids and material in an earthen pit behind the plant. The placement of contaminated materials into the environment was not accidental; it was Tecumseh's usual manner of disposing of these materials. The DNR issued a pollution abatement order to Tecumseh in 1970; Tecumseh continued using PCB-containing hydraulic fluids until 1972. Where the release of contaminants is not accidental, there can be no occurrence under AEIC's policy. *See* ***City of Bronson v. American States Ins. Co.,*** 546 N.W.2d 702, 705-06 (Mich. Ct. App. 1996). Therefore, AEIC did not owe coverage to Tecumseh for liability arising from the release of contaminants. Because the first prong of the ***Arco*** analysis is not satisfied, we do not address the second prong: what Tecumseh subjectively expected or intended with regard to the release of the contaminants into the environment.

Tecumseh argues that there are numerous disputed facts relating to whether it subjectively intended or expected to contaminate the environment with PCBs as discussed in ***Arco***. We conclude that these disputed facts are not material to the resolution of this case.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.