

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 15, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2485

Cir. Ct. No. 2002CV153

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

BULK PETROLEUM CORPORATION,

PLAINTIFF-COUNTERCLAIM-DEFENDANT-APPELLANT,

V.

ZURICH AMERICAN INSURANCE COMPANY,

DEFENDANT-COUNTERCLAIM-PLAINTIFF-RESPONDENT.

APPEAL from a judgment of the circuit court for Ozaukee County:
THOMAS R. WOLFGRAM, Judge. *Affirmed.*

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

¶1 PER CURIAM. Bulk Petroleum Corporation appeals from a judgment in favor of Zurich American Insurance Company. The circuit court dismissed Bulk's complaint after a trial to the court. We affirm.

¶2 At issue was whether Zurich's policy afforded coverage to Bulk for the cost of groundwater remediation at a Bulk-leased gasoline station in Michigan after a fuel discharge.¹ During a trial to the court, Bulk and Zurich presented expert testimony and other evidence. The court deemed more credible Zurich's expert who opined that the discharge, which occurred during Zurich's policy period, did not reach and contaminate the groundwater. Based upon that finding, the court concluded that Zurich did not owe coverage under its policy for groundwater remediation. Bulk appeals. Further facts will be stated as we analyze the appellate issues.

¶3 A substantial fuel discharge occurred on December 16, 1999. Immediate action was taken to recover the fuel, flush out the sewers, clean up a nearby creek and remove contaminated soil. The effort recovered more or less the amount of fuel that spilled. The discharge occurred during Zurich's policy period.

¶4 The circuit court found that the site had long-standing environmental problems and that there had been several fuel discharges at the site prior to 1999, including leaks from the underground storage tanks and associated piping, and a fuel tanker collision. Other than an intermittently operating pump-and-treat system used in the remediation of groundwater contamination, the discharges were not remediated, and the contaminated soil was not removed. Although the Michigan Department of Environmental Quality (MDEQ) directed Bulk to remediate the site, Bulk did not comply with that requirement.

¹ The December 1999 fuel discharge also contaminated the soil. Zurich paid to remove the contaminated soil. This dispute is limited to groundwater contamination and who will bear the costs of remediating the contamination.

¶5 The court found that the case came down to the credibility of the parties' experts: geologist Alan Hooper for Bulk and chemist Rena Pomaville for Zurich. The experts addressed the source of the groundwater contamination at the site. Hooper opined that the groundwater contamination occurred as a result of the December 1999 discharge. In Hooper's opinion, the clay site's vertical fractures, borings and horizontal sand seams permitted the 1999 discharge to reach the groundwater. Pomaville opined that the 1999 discharge had no effect on the existing groundwater contamination, i.e., the groundwater contamination pre-dated the effective date of Zurich's policy.

¶6 The circuit court found Pomaville's testimony more credible because the 1999 spill was promptly and largely removed and the area of the discharge was clay, which is not a very permeable substrata. The court accepted Pomaville's opinion that the groundwater contamination could not have been caused by the December 1999 discharge. Therefore, Zurich did not owe coverage for the groundwater remediation, and the court dismissed Bulk's complaint.

¶7 On appeal, Bulk argues that Hooper's opinion, based upon the geology of the site, that the 1999 discharge reached and contaminated the groundwater should have been controlling and Pomaville, a chemist, was not qualified to challenge Hooper's opinion as a geologist. However, Bulk ignores that it was for the circuit court to weigh and determine the credibility of the experts, *Micro-Managers, Inc. v. Gregory*, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988), and the court found that Pomaville's opinion was more credible under all of the facts and circumstances.

¶8 Pomaville has a doctoral degree in analytical chemistry and experience in evaluating contaminant concentrations and transport from leaking underground storage tanks. Pomaville is certified by the State of Michigan as an underground

storage tank professional, having demonstrated ten years of experience in all aspects of underground storage tank removal, identification, contaminant plumes and remediation. Pomaville noted that while she is not trained in geology, a certified underground storage tank professional is permitted to opine that remediation at a site is concluded. Pomaville testified that chemistry expertise is important when evaluating contaminant concentrations and transport.

¶9 Hooper has a bachelor's degree in geology and received his certification as an underground storage tank professional three years after the 1999 discharge and two years after he first inspected the site at Bulk's request.

¶10 Pomaville testified about prior fuel discharges at the site, including prior groundwater contamination, starting in 1981. Pomaville testified that the MDEQ records show that the groundwater was contaminated prior to the December 1999 discharge. The MDEQ ordered soil and groundwater remediation at the site in 1992. A subsequent discharge occurred after the MDEQ order, and a pump-and-treat² groundwater remediation system was installed, but it operated intermittently from April 1994 to March 1999. The MDEQ did not give final approval for the remediation at the site, and the groundwater treatment system ultimately shut down. In 1996, contaminated soil was used to backfill the underground storage tanks after the tanks were upgraded. In 1997, the tanks had a water leak. In 1998, Bulk's lack of compliance with the MDEQ was noted. In January 1999, further problems were noted by the MDEQ with the underground storage tanks.

² According to Pomaville, a pump-and-treat system pulls in groundwater and assists in keeping the contaminant plume on the site until the source of the contamination is treated.

¶11 In Pomaville's opinion, the groundwater pump-and-treat system was ineffective because the contaminated soil was not excavated and soil vapor extraction did not occur. Pomaville relied upon reports generated by hydrogeologists and geologists in reaching her conclusion that the concentration of contaminants in the groundwater resulted from the migration of contaminants that were present at the site in the late 1980s and early 1990s because these contaminant sources were never remediated. Pomaville opined that between a discharge left unremediated for twelve years (a 1986 discharge) and a discharge remediated in a few months (the December 1999 discharge), the groundwater contamination was more likely to occur from the leaching into the groundwater of the unremediated 1986 discharge. The history of the site and the chemistry compelled Pomaville's conclusion to a reasonable degree of scientific certainty that the 1999 discharge did not cause the groundwater contamination.

¶12 On cross-examination, Pomaville reiterated her opinion that the data did not support a finding that the contaminant levels in the groundwater were caused by the December 1999 discharge given the type of soil through which the discharge had to travel, the history of contamination at the site, and the amount of time that had elapsed since the December 1999 discharge. Pomaville conceded that not all of the prior discharges could be confirmed as discharges of fuel to the soil or groundwater and not all of the discharges were reported to MDEQ. However, none of the discharges was the subject of soil remediation, leaving contaminants in the soil.

¶13 We cannot say that Pomaville's testimony is in conflict with the uniform course of nature or with fully established or conceded facts. *See Chapman v. State*, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). When the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of witnesses and, where there is a conflict in the testimony or more than one

reasonable inference may be drawn, we are obliged to support the finding made by the circuit court. *Onalaska Elec. Heating, Inc. v. Schaller*, 94 Wis. 2d 493, 501, 288 N.W.2d 829 (1980).

¶14 The circuit court’s findings are not clearly erroneous. See *Micro-Managers*, 147 Wis. 2d at 512. The court did not err in relying upon Pomaville’s testimony to find that the 1999 discharge did not contaminate the groundwater, the groundwater contamination pre-dated the 1999 discharge and the effective date of Zurich’s policy, and Zurich did not owe coverage for groundwater remediation.

¶15 Bulk next argues that Zurich owes coverage for the groundwater remediation because the policy covers costs incurred by Bulk for “corrective action” Bulk was legally obligated to pay as a result of a “confirmed release” occurring after the policy’s effective date of April 20, 1999. The coverage clause provides:

To pay on behalf of an Insured Costs incurred by an Insured for Corrective Action that an Insured is legally obligated to pay as a result of a Confirmed Release provided the Confirmed Release commences after the Retroactive Date

¶16 The policy defines “release” as “spilling, leaking, emitting, discharging, escaping or leeching of one or more regulated substances from a storage tank system into groundwater, surfacewater or surface or subsurface soils.” A “confirmed release” is “a release that has been investigated and confirmed” The policy defines “corrective action” as “response, abatement, investigative and removal actions resulting from a confirmed release”

¶17 Bulk essentially argues that because there was a confirmed release in December 1999, Bulk is owed coverage for the corrective action costs it incurred

to address the groundwater contamination. However, this argument ignores the circuit court's finding that the December 1999 discharge did not cause the groundwater contamination. Therefore, whatever corrective action Bulk had to take vis-à-vis the groundwater as a result of MDEQ directives or otherwise, such corrective action was not a result of the December 1999 discharge.

¶18 Bulk's argument also impermissibly expands the policy's coverage by requiring Zurich to offer coverage for a discharge which did not cause the contamination for which costs were incurred. We do not rewrite insurance contracts by construction to impose contract obligations that the parties did not undertake. *Danbeck v. American Family Mut. Ins. Co.*, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150.

¶19 Finally, Bulk argues that coverage is not excluded by Zurich's policy. The policy excludes coverage for a release existing before the effective date of the policy if an appropriate representative of Bulk knew or could have reasonably foreseen that such release would have been expected to give rise to a claim. However, in disputing coverage, Zurich did not rely upon its exclusion clause. Rather, Zurich argued that the groundwater contamination did not fall within its coverage clause. The circuit court agreed, and we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

