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Brownfields Legal Issues

And

Cost Recovery

1. Environmental Case Law and Legislative Update
   - *State Auto Mut. Ins. Co. v Flexdar, Inc.* (Ind. 2012)
   - Statute of limitations Revisited

2. Ownership and Control of Brownfields
   - All Appropriate Inquiry

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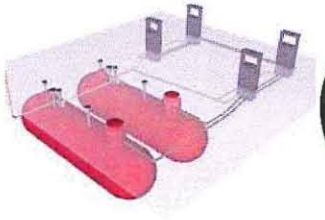
WHAT RECOVERY RIGHTS DO INDIANA PROPERTY OWNERS POSSESS FOR REMEDIATING CONTAMINATED SITES?



Underground Storage Tank ("UST") Act
I.C. 13-23-13-1, et.seq.
(1987)

Allows subsequent UST owners recovery against prior UST owners for remediation costs, including court costs and attorney fees, and if UST's are properly registered, after $35,000 deductible, recovery can be made against state's Excess Liability Fund (ELF).

American States Insurance Co. v. Kiger
662 N. E. 2d 945
(1996)

Enables recovery for contamination clean-ups against old CGL occurrence-based policies.

Shell Oil Co. v. Meyer

705 N.E. 2d 962
(1998)

Establishes, in interpreting the UST Act, the right to broadly recover costs and attorney fees, and finds subsequent landowner need not remediate first before filing suit.

Environmental Legal Actions
I.C. 13-30-9-1, et.seq.
(1997)

Provides, like UST Act, another statutory means for subsequent landowners to recover from prior landowners using "private prosecutorial" enforcement actions covering a broader range of contaminants than UST Act.

Brownfield Act

I.C. 13-25-5-8.5, et.seq.
(1997)

Creates the mechanisms for streamlining the methods and thus costs of cleanups, along with grants and other financial incentives for owners.

Allstate Insurance Co. v. Dana Corp.
759 N.E. 2d 1049
(2001)

Expands Kiger in finding that among several CGL carriers identified during a period of contamination, any one carrier can be held jointly & severally liable, thus freeing property owners from prolonged liability allocation battles.

State Auto. Mut. Ins. Co. v. Flexdar, Inc.,
2012 Ind. LEXIS 47
(2012)

Affirms Kiger decision and ability to recover costs for contamination clean-ups against more recent CGL occurrence based policies.

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The Pollution Exclusion in Indiana

May 25, 2012
by Monica Edwards

Indiana insureds seeking coverage for environmental claims have long been the beneficiary of court decisions favoring the insured by holding that pollution exclusions are unenforceable in the State of Indiana. In the March 2012 *State Auto. Mut. Ins. Co. v. Flexdar, Inc.*, 2012 Ind. LEXIS 47 (Ind. 2012) decision, the Indiana Supreme Court, applying a literal analysis of the pollution exclusion, found that practically all substances qualified as "pollutants" thus rendering the pollution exclusion in the policy meaningless. In the *Flexdar* dissenting opinion, it was noted that the majority's opinion further moved Indiana law toward the proposition that "all pollution exclusions are unenforceable."

The *Flexdar* decision relied on the precedent of prior Indiana case law (beginning with the Kiger decision in 1996) in reaching the conclusion that the pollution exclusion in the State Auto policy should be construed in favor of the insured. And, while we know that the pollution exclusion will continue to be tested by insurers and insureds alike, we do not know whether the next modification to the pollution exclusion will survive the Court's scrutiny thereby limiting an insured's right to recover. In an effort to avoid any limitation on an insured's rights, prospective commercial real estate buyers and sellers should accelerate their actions to address possible environmental issues, especially former gas station, industrial and dry cleaner sites. Otherwise, such property owners' recovery rights against their insurers may be limited.

If you have questions about an environmental matter, call on one of our experienced environmental law attorneys: **Monica Edwards**, **Kent Brasseale**, **Michael E. DiRienzo** or **Mike Schopmeyer**. Our attorneys take pride in professionally and cost-effectively steering our clients through the environmental remediation process. With most clients undergoing a remediation process, we succeed in obtaining the attorney and scientific fees incurred being paid by a funding from insurance, governmental or prior titleholders.

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In the
Indiana Supreme Court

No. 49S02-1104-PL-199

STATE AUTOMOBILE MUTUAL
INSURANCE COMPANY,

Appellant (Plaintiff below),

v.

FLEXDAR, INC. AND RTS REALTY,

Appellees (Defendants below).

Appeal from the Marion Superior Court No. F12
No. 49F12-0705-PL-018927
The Honorable Michael D. Keele, Judge

On Petition To Transfer from the Indiana Court of Appeals, No. 49A02-1002-PL-111

March 22, 2012

Rucker, Justice.

In this case we examine whether the language of a pollution exclusion in a commercial general liability policy is ambiguous. We hold that it is.

Facts and Procedural History

Flexdar, Inc. ("Flexdar") manufactured rubber stamps and printing plates at its Indianapolis facility (the "Site") from late 1994 or early 1995 through 2003. Flexdar's manufacturing process used a chemical solvent called trichloroethylene ("TCE"). In late 2003 and early 2004, Flexdar discovered that TCE was present in the soil and groundwater both on and off the Site. The Indiana Department of Environmental Management ("IDEM") informed Flexdar that Flexdar would be liable for the costs of cleanup. Flexdar maintained commercial general liability and umbrella insurance policies with State Automobile Mutual Insurance Company ("State Auto") for the period October 1, 1997 through June 2, 2002, and requested defense and indemnification from State Auto.[1] State Auto agreed to defend Flexdar against IDEM's claims under a reservation of State Auto's right to deny coverage and to file a declaratory judgment action to determine State Auto's obligations under the policies. State Auto then filed this declaratory judgment action, contending that coverage for the TCE contamination at issue was excluded pursuant to the pollution exclusion present in the policies. Both Flexdar and State Auto moved for summary judgment on the issue of coverage.

In support of its summary judgment motion, State Auto designated the insurance policies, highlighting the following "absolute pollution exclusion" language:

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[1] The policies list the named insured as "Flexdar, Inc." and "RTS Realty"; RTS is also named as a defendant in this action. See Appellant's App. at 15, 847. We refer to the defendants collectively as "Flexdar."

2. Exclusions.
This insurance does not apply to:

. . . .

f. Pollution
(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured;

. . . .

(2) Any loss, cost or expense arising out of any:
(a) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or
(b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Appellant's App. at 976-77. In further support of its argument, State Auto identified the Indiana "business operations" endorsement to the policies, which provides in pertinent part, "This Pollution Exclusion applies whether or not such irritant or contaminant has any function in your business, operations, premises, site or location." Appellant's App. at 989.

In support of its cross-motion for summary judgment, Flexdar argued the language of State Auto's pollution exclusion was ambiguous and therefore should be construed against State Auto and in favor of coverage. The trial court agreed and entered summary judgment in favor of Flexdar. The Court of Appeals affirmed, State Auto. Mut. Ins. Co. v. Flexdar, Inc., 937 N.E.2d 1203 (Ind. Ct. App. 2010), holding that the pollution exclusion is ambiguous and therefore must be construed in favor of coverage, and that the Indiana pollution exclusion endorsement language did not cure the ambiguity. We granted transfer. See Ind. Appellate Rule 58(A).

Standard of Review

When reviewing a summary judgment ruling, we use the same standard as the trial court. That is, "summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party." Ashby v. Bar Plan Mut. Ins. Co., 949 N.E.2d 307, 310 (Ind. 2011) (internal quotation marks and citation omitted). Interpretation of an insurance policy presents a question of law that is particularly suitable for summary judgment. See Cinergy Corp. v. Associated Elec. & Gas Ins. Servs., Ltd., 865 N.E.2d 571, 574 (Ind. 2007); Bosecker v. Westfield Ins. Co., 724 N.E.2d 241, 243 (Ind. 2000). "It is well settled that where there is ambiguity, insurance policies are to be construed strictly against the insurer and the policy language is viewed from the standpoint of the insured." Allstate Ins. Co. v. Dana Corp., 759 N.E.2d 1049, 1056 (Ind. 2001) (internal quotation marks omitted) (quoting Bosecker, 724 N.E.2d at 244). This is especially true where the language in question purports to exclude coverage. USA Life One Ins. Co. of Ind. v. Nuckolls, 682 N.E.2d 534, 538 (Ind. 1997). Insurers are free to limit the coverage of their policies, but such limitations must be clearly expressed to be enforceable. W. Bend Mut. v. Keaton, 755 N.E.2d 652, 654 (Ind. Ct. App. 2001), trans. denied. "Where provisions limiting coverage are not clearly and plainly expressed, the policy will be construed most favorably to the insured, to further the policy's basic purpose of indemnity." Meridian Mut. Ins. Co. v. Auto-Owners Ins. Co., 698 N.E.2d 770, 773 (Ind. 1998). Where ambiguity exists not because of extrinsic facts but by reason of the language used, the ambiguous terms will be construed in favor of the insured for purposes of summary judgment. See Cinergy, 865 N.E.2d at 574.

Discussion

The language of the pollution exclusion at issue in this case is no stranger to this Court. In fact, we have interpreted this or similar language on no fewer than three occasions, reaching the same result each time. We first confronted this language in American States Insurance Co. v. Kiger, 662 N.E.2d 945 (Ind. 1996). That case concerned coverage for environmental contamination caused by leakage of gasoline from a gas station's underground storage tanks.

We found language virtually identical to the language here to be ambiguous. Specifically, we held that because "the term 'pollutant' does not obviously include gasoline and, accordingly, is ambiguous, we . . . must construe the language against the insurer who drafted it." Id. at 949. We reached this conclusion notwithstanding the fact that "pollutant[ ]" was defined in the Kiger policy as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." Id. at 948. "Clearly," we concluded, "this clause cannot be read literally as it would negate virtually all coverage." Id. State Auto characterizes Kiger as limited to its facts – that is, as applying only to a gas station's claim for a gasoline leak under a garage policy. See Appellant's Pet. to Trans. at 5 (inferring that Kiger's conclusion that the term "pollutant" is ambiguous is "inextricably linked to this Court's concern that a garage policy covering a gas station's operations would exclude a major source of its potential liability without explicitly stating so").[2] We disagree with State Auto's reading of Kiger. The opinion itself did not suggest that it was narrowly limited to its facts. Indeed, less than two months after our decision in Kiger, we found an insurer had a duty to defend a solid waste disposer against an action by the United States Environmental Protection Agency. Seymour Mfg. Co. v. Commercial Union Ins. Co., 665 N.E.2d 891 (Ind. 1996). One of the policies at issue in Seymour excluded coverage for losses "arising out of pollution or contamination (1) caused by oil, or (2) caused by the discharge or escape of any other pollutants or contaminants." Seymour Mfg. Co. v. Commercial Union Ins. Co., 648 N.E.2d 1214, 1218 (Ind. Ct. App. 1995). Recognizing that Kiger found the word "pollutant" to be ambiguous, we again construed this language against the insurer and found a duty to defend. Seymour, 665 N.E.2d at 892.[3]

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[2] State Auto argues that its "business operations" endorsement addresses the concerns this Court expressed in Kiger by adding the language that the pollution exclusion applies "whether or not the irritant or contaminant has any function in your business, operations, premises, site or location." Br. of Appellant at 45. We agree with the Court of Appeals that this provision "takes effect only when the contaminant at issue has first been identified as a pollutant and the pollution exclusion has been determined to apply." Flexdar, 937 N.E.2d at 1212. As discussed below the exclusion itself is ambiguous and unenforceable, and therefore "the endorsement form does not come into play and is thus unavailing." Id.

[3] In apparent response to the holdings in Kiger and Seymour, the Indiana legislature passed a bill in 1997 more specifically defining the term "pollutant" in insurance policies. The definition included as a "pollutant" "any substance . . . subject to regulation" under certain state and federal environmental statutes. Governor Frank O'Bannon vetoed the bill, stating that the language "should be a private contractual matter between an insurer and its insured . . . . The insurance industry can address the

In 2002, we were again presented with a pollution exclusion like the one at issue here. See Freidline v. Shelby Ins. Co., 774 N.E.2d 37, 40 (Ind. 2002). In Freidline, owners of a commercial building claimed coverage after toxic carpet glue fumes released during the installation of new carpet injured employees who worked in the building. Id. at 39. Because carpet glue fumes were not specifically included in the policy's definition of pollutants, the Court of Appeals found the exclusion ambiguous and construed it against the insurer so as not to exclude the claimed coverage. Id. at 40. We unanimously "agree[d] and summarily affirm[ed] the Court of Appeals on this point." Id. We also rejected the insurer's attempt to distinguish Kiger and Seymour on the basis that they involved traditional environmental cleanup for businesses regularly handling toxic substances. See id. at 42 ("[W]e refute these contentions by summarily affirming the Court of Appeals on the pollution exclusion coverage issue . . . ."). In an effort to distinguish Freidline, State Auto points to our mention there of the pollution exclusion as an "evolving" area of the law. However, by this characterization we merely acknowledged the legitimacy – not the correctness – of the plaintiff's argument against coverage in the context of the defendant's bad faith claim. Freidline is not distinguishable on this basis.

In a 2005 case, we did not address pollution exclusions directly but recognized our previous declaration that under Indiana law, the definition of "pollutants" in such exclusions is ambiguous. We observed that our courts have "consistently construed the pollution exclusion against insurance companies." Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 975 (Ind. 2005).[4]

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problem by drafting a clear and unambiguous contractual pollution exclusion." Flexdar, 937 N.E.2d at 1210 (alteration in original) (citations omitted). We mention this solely to provide more background on the pollution exclusion in Indiana.

[4] The Court of Appeals has repeatedly and consistently applied this Court's precedent to find similar pollution exclusion language ambiguous. See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Standard Fusee Corp., 917 N.E.2d 170, 185 (Ind. Ct. App. 2009) ("[W]e find that the pollution exclusion is ambiguous and unenforceable under Kiger and the line of cases following Kiger . . . ."), rev'd on other grounds by 940 N.E.2d 810, 812 n.1 (Ind. 2010); Travelers Indem. Co. v. Summit Corp. of Am., 715 N.E.2d 926, 935 (Ind. Ct. App. 1999) ("We follow the lead of our supreme court and conclude that the pollution exclusion in the policies here is ambiguous and is construed against [the insurer] to not exclude coverage for the environmental claims made against [the insured].").

Here, State Auto drafted a policy excluding coverage for losses resulting from "pollutants." State Auto defined "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." Appellant's App. at 977. As we recognized in Kiger, "this clause cannot be read literally as it would negate virtually all coverage." Kiger, 662 N.E.2d at 948. In other words, practically every substance would qualify as a "pollutant" under this definition, rendering the exclusion meaningless. Accord MacKinnon v. Truck Ins. Exch., 73 P.3d 1205, 1216 (Cal. 2003) (recognizing that "the definitional phrase 'any irritant or contaminant' is too broad to meaningfully define 'pollutant'"). To avoid such a result, State Auto urges us to adopt what it describes as a "common sense approach" and apply the pollution exclusion in situations where, as here, the release would "ordinarily be characterized as pollution." See Appellant's Pet. to Trans. at 11 (citing Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037 (7th Cir. 1992) (applying Illinois and Missouri law)). This is appropriate, State Auto argues, because the purpose of the pollution exclusion is to exclude coverage for costs associated with government-ordered cleanup of pollution and not to exclude claims that do not involve "environmental contamination." See Appellant's Pet. to Trans. at 11. State Auto also points out that Indiana's interpretation of pollution exclusions differs from the interpretations of most other states.

Courts and commentators identify essentially two main views when it comes to interpreting these exclusions, namely: a "literal" approach and a "situational" approach. See Apana v. Tig Ins. Co., 574 F.3d 679, 682-83 (9th Cir. 2009). See also generally 9 Steven Plitt, et al., Couch on Insurance 3d § 127:6 (2008); Louis A. Chiafullo & David C. Kane, Application of the Absolute Pollution Exclusion to "Nontraditional" Pollution, 22 Envtl. Claims J. 287 (2010). Jurisdictions employing a "literal" view of the absolute pollution exclusion generally hold the exclusion to be unambiguous in all circumstances. Where a substance is acting in any manner as an "irritant or contaminant," damage caused thereby is excluded from coverage. As we noted in Kiger, the difficulty with this view is that it eliminates practically all coverage yielding, in our opinion, untenable results. See, e.g., Maxine Furs, Inc. v. Auto-Owners Ins. Co., 426 Fed. App'x. 687, 688 (11th Cir. 2011) (per curiam) (applying Alabama law and holding that the aroma of curry escaping from an Indian restaurant and damaging merchandise in an adjacent fur

salon was a "contaminant" under the pollution exclusion and the damage was therefore not covered); Noble Energy, Inc. v. Bituminous Cas. Co., 529 F.3d 642, 646-47 (5th Cir. 2008) (applying Texas law and finding no coverage for injuries from a truck explosion fed by combustible vapors released during unloading of the truck's oilfield waste cargo because the cargo and vapors constituted a "solid, liquid, gaseous or thermal irritant or contaminant including . . . fumes . . . and waste").

Jurisdictions applying a more "situational" approach look to factual context and typically uphold the exclusion only in cases of "traditional" environmental contamination. See, e.g., MacKinnon, 73 P.3d at 1218 (holding exclusion does not apply to landlord's negligent application of pesticide resulting in tenant's death). While this framework may be more palatable than the literal view, it can still be problematic because the concept of what is a "traditional" environmental contaminant may vary over time and has no inherent defining characteristics.[5] This leaves courts in the awkward and inefficient position of making case-by-case determinations as to the application of the pollution exclusion.

Indiana has gone in a different direction. Applying basic contract principles, our decisions have consistently held that the insurer can (and should) specify what falls within its pollution exclusion. In fact, State Auto has over the years promulgated an *Indiana* "business operations" endorsement, see supra p. 3, and an *Indiana* endorsement defining "pollutant," see infra p. 9. Where an insurer's failure to be more specific renders its policy ambiguous, we construe the policy in favor of coverage. Our cases avoid both the sometimes untenable results produced by the literal approach and the constant judicial substance-by-substance analysis necessitated by the situational approach. In Indiana, whether the TCE contamination in this case would "*ordinarily* be characterized as pollution," Appellant's Pet. to Trans. at 11 (emphasis

[5] TCE is an example of just such a substance. Over the years it has been used in applications including the manufacture of food products and in the medical field as an anesthetic. See U.S. Environmental Protection Agency, Status Assessment of Toxic Chemicals: Trichlorethylene 9 (1979). Today TCE is listed on both the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Priority List of Hazardous Substances and the Agency for Toxic Substances and Disease Registry ToxFAQs™. It is also notable that environmental cleanup statutes such as CERCLA are retroactive. That is to say, CERCLA imposes penalties for actions – such as the disposal of certain substances – that were perfectly legal at the time they occurred. See, e.g., Robin Kundis Craig et al., Toxic and Environmental Torts: Cases & Materials 471 (2011).

added), is, in our view, beside the point. The question is whether the language in State Auto's policy is sufficiently unambiguous to identify TCE as a pollutant. We are compelled to conclude that it is not.

State Auto maintains that "any reasonable policyholder would expect the release of chemical solvents into soil and groundwater [to constitute] pollution." Appellant's Pet. to Trans. at 12. It is true that we interpret policy terms "from the perspective of an ordinary policyholder of average intelligence." Bradshaw v. Chandler, 916 N.E.2d 163, 166 (Ind. 2009) (citation omitted). But Indiana precedent has consistently refused to apply a pollution exclusion like the one at issue in this case on grounds of ambiguity. It would thus appear that an ordinary policyholder of reasonable intelligence would interpret the language in State Auto's policy much differently than is advanced here. This is especially so because the language at issue in this case excludes coverage. Thus we must resolve any doubts against the insurer. See id. (citing Kiger, 662 N.E.2d at 947). After all, "[t]he insurance companies write the policies; we buy their forms or we do not buy insurance." Id. (citation omitted). By more careful drafting State Auto has the ability to resolve any question of ambiguity. And in fact it has done so. In 2005 State Auto revised its policies to add an "Indiana Changes – Pollution Exclusion" endorsement. The language more specifically defined the term "pollutants":

> "Pollutants" mean[s] any solid, liquid, gaseous, bacterial, fungal, electromagnetic, thermal or other substance that can be toxic or hazardous, cause irritation to animals or persons and/or cause contamination to property and the environment including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. Specific examples identified as pollutants include, but are not limited to, diesel, kerosene, and other fuel oils . . . carbon monoxide, and other exhaust gases . . . mineral spirits, and other solvents . . . tetrachloroethylene, perchloroethylene (PERC), trichloroethylene (TCE), methylene chloroform, and other dry cleaning chemicals . . . chlorofluorocarbons, chlorinated hydrocarbons, adhesives, pesticides, insecticides . . . and all substances specifically listed, identified, or described by one or more of the following references: **Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Priority List Hazardous Substances** (1997 and all subsequent editions), **Agency for Toxic Substances And Disease Registry ToxFAQs™**, and/or **U.S. Environmental**

Protection Agency EMCI Chemical References Complete Index.

Appellant's App. at 1323 (emphasis in original).[6]

Conclusion

Indiana decisions have been consistent in recognizing the requirement that language of a pollution exclusion be explicit. "To unsettle the law . . . would show scant respect for the principle of stare decisis." CSX Transp., Inc. v. McBride, ___ U.S. ___, 131 S. Ct. 2630, 2639-40 n.4 (2011). We see no reason to abandon settled precedent.

The judgment of the trial court is affirmed.

Dickson, J., concurs.
David, J., concurs in result.
Sullivan, J., dissents with separate opinion in which Shepard, C.J., joins.

[6] Becoming effective as of 2005, the "Indiana Changes – Pollution Exclusion" endorsement, was not a part of CGL insurance policies at issue in this case.

Sullivan, Justice, dissenting.

The Court holds that American States Insurance Co. v. Kiger, 662 N.E.2d 945 (Ind. 1996), demands that the pollution exclusion found in most general liability insurance policies be ignored. I respectfully dissent.

A few days ago, Judges Richard A. Posner, Diane P. Wood, and David F. Hamilton, joined in a decision enforcing a pollution exclusion in a case for all relevant purposes the same as this. Scottsdale Indem. Co. v. Vill. of Crestwood, Nos. 11-2385, 11-2556, 11-2583, 2012 U.S. App. LEXIS 5069 (7th Cir. Mar. 12, 2012). Their decision is worthy of review here, both for its clarity and applicability.

At issue in the Crestwood case was whether "the pollution exclusion . . . found in most general liability insurance policies" – essentially the same exclusion in essentially the same form policy at issue here – was triggered by tort complaints alleging contamination of a well by a substance called "perc" (perchloroethylene, also known as tetrachloroethylene). Id. at *1-2, 3.

Crestwood uses the hypothetical situation of a tanker truck crashing and spilling perc, upon which another vehicle skids and crashes. Although perc is a pollutant, the Court says, "it would be absurd to argue . . . that a claim arising from such an accident would be within the pollution exclusion, since in no reasonable sense of the word 'pollution' was the driver a victim of pollution." Id. at *6.

In Kiger, Justice DeBruler used the example of a gas station customer's slip on a gasoline or grease spill to make the same point: that the pollution exclusion could not deny "coverage for a large segment of the gas station's business operations." 662 N.E.2d at 948-49. This only makes sense because, as Crestwood says, "a literal reading of the pollution exclusion would exclude coverage for acts remote from the ordinary understanding of pollution harms and unrelated to the concerns that gave rise to the exclusion." 2012 U.S. App. LEXIS 5069 at *5 (citations omitted).

"The business of insurance is covering losses," the Seventh Circuit judges say in Crestwood, "but this is provided the company can estimate within a reasonable range the size of the losses that it is likely to be required to reimburse the policyholders for. Otherwise it can't set premiums that will be high enough to compensate it for the risk of having to reimburse the losses it's insuring, without being so high that no one will buy its policies." Id. at *7-8. "Environmental damage is often very difficult to detect until it has become extensive, let alone to predict, or estimate its likely extent, in advance; and the financial consequences can be horrific but again are unpredictable." Id. at * 10.

The pollution exclusion, therefore, allows a business to buy insurance to protect it from ordinary tort liability (the truck crash or the grease spill) without having to pay an additional premium amount necessary to provide coverage to those enterprises with a high risk of polluting in the ordinary sense – contaminating wells, for example.

All of this conforms to our jurisprudence – at least until today's case. Kiger dealt with the treatment of gasoline at a gas station under a garage policy. To hold gasoline a "pollutant" under the policy would have "provided no coverage for a large segment of the gas station's business operations." Kiger, 662 N.E.2d at 949. To the same effect were the toxic fumes from substances used to install carpet in an office building at issue in Freidline v. Shelby Insurance Co., 774 N.E.2d 37 (Ind. 2002). Like sickness caused by paint fumes or fumes leaking from a defective fluorescent light fixture, the harm in Freidline was "remote from the ordinary understanding of pollution harms and unrelated to the concerns that gave rise to the exclusion." Crestwood, 2012 U.S. App. LEXIS 5069 at *5 (citations omitted).

Here, by contrast, trichloroethylene (TCE) was discovered contaminating the soil and groundwater both on and off the site of Flexdar's rubber-stamp and printing-plate manufacturing facility in Indianapolis. This obviously meets "the ordinary understanding of pollution harms" and is clearly related "to the concerns that give rise to the exclusion." In point of fact, Flexdar's business is based on neither the sale nor the storage of trichloroethylene; enforcing the exclusion in no way deprives Flexdar of coverage for its exposure to the ordinary tort risks of its business.

Kiger has never before stood for the proposition that all pollution exclusions are unenforceable. Today's case moves Indiana law in that direction. The immediate consequence will be premium increases as insurers seek to charge for the increased risks that the Court today requires them to cover. Hoosier businesses who have little risk of being sued for polluting will face a Hobson's choice: paying higher premiums for coverage they don't need, thereby dissipating their financial resources, or going without coverage, thereby exposing themselves to risk of loss from ordinary tort liability.

I also observe that in addition to the factual differences between this case and Kiger, the policy language differs as well. The policy in this case (but not in Kiger) contains a "business operations endorsement," expressly providing that the pollution exclusion "applies whether or not such irritant or contaminant has any function in your business, operations, premises, site or location." Appellant's App. 989. In another case, the Seventh Circuit found that this endorsement "buttressed" its conclusion that a pollution exclusion was enforceable. W. Bend Mut. Ins. Co. v. U.S. Fid. & Guar. Co., 598 F.3d 918, 923 (7th Cir. 2010) (Indiana law).

I would reverse the trial court's decision and find in favor of the insurer.

Shepard, C.J., joins.

FOR PUBLICATION

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IN THE COURT OF APPEALS OF INDIANA

THE PENIEL GROUP, INC. and BEECH GROVE HOLDINGS, LLC,	)	
Appellants,	)	
vs.	)	No. 49A02-1201-PL-42
ELIZABETH BANNON, KENNETH G. SCHAEFER, LINDA A. SCHAEFER, NORMA THINNES, BETTY BENEFIEL, JANET BEELER, CHARLES DODSON and BETH DODSON,	)	
Appellees.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David J. Certo, Judge
Cause No. 49F12-0811-PL-53044

July 30, 2012

OPINION – FOR PUBLICATION

DARDEN, Senior Judge

STATEMENT OF THE CASE

The Peniel Group, Inc. ("Peniel") and Beech Grove Holdings, Inc. (collectively, "Beech Grove Holdings") appeal the trial court's entry of summary judgment in favor of Betty Benefiel, Kenneth G. and Linda A. Schaefer, Janet Beeler, and Charles and Beth Dodson (collectively, the "Appellees").

We affirm.

ISSUE

Whether the trial court properly granted the Appellees' cross-motions for summary judgment.

FACTS

Churchman Hill Plaza (the "Site") is a commercial retail center located in Beech Grove, Indiana. From approximately 1969 until 1996, a dry cleaning business, owned and operated by various individuals over that period of time, was one of the tenants at the Site. In 1981, Churchman Hill Associates obtained title to the Site.

In 1989, the Dodsons formed a partnership with two others called the Four Corners Group. On June 30, 1989, the partnership purchased the business assets of

Speed Queen Fabric Care, the dry cleaning business that operated at the Site, from David and Janet Beeler. The assets purchased from the Beelers included four coin-operated self-service dry cleaning machines, which used the chemical tetrachloroethene ("PCE"), a dry cleaning solvent. The PCE was stored in an above-ground storage tank at the Site.

On two occasions, either Charles Dodson or an employee spilled "a small" quantity of PCE as they were refilling the machines. (App. 118).[1] Concrete basins underneath the machines contained the spills. Occasionally "[s]mall amounts" of PCE leaked from the machines into the concrete basins when the rubber seals on the doors failed. (App. 121). Employees placed used PCE filters in containers before discarding them in a dumpster located at the Site. The partnership ceased using the dry-cleaning machines in 1996 or 1997.

On or about March 7, 1997, ATC Associates, Inc. ("ATC") conducted an environmental site assessment at the Site. Field samples obtained by ATC in the immediate vicinity of the dry cleaning business revealed the presence of the chemicals PCE and trichloroethene ("TCE") in the groundwater and PCE in the soil. ATC opined that "the source of contaminants is the on-site dry cleaner" and "likely related to the dry cleaning process." (App. 193).

ATC conducted a second assessment of the Site in 2000 and again found levels of PCE and TCE in the soil and groundwater. ATC presented its site assessment to Churchman Hill Plaza Associates, the Site's then-owner, on January 27, 2000. In 2001,

[1] Citations to the appendix are to Beech Grove Holdings's appendix.

LNR Churchman Hill Plaza, LLC, by LNR Partners, Inc., formerly known as Lennar Partners, Inc., purchased the Site.

In June of 2005, Bryan Phillips, as President of Lassiter Development Corporation ("Lassiter") entered into an agreement to purchase the Site from LNR Churchman Hill Plaza, LLC. As part of the sale, Lassiter received copies of the prior environmental assessments conducted at the Site. In September of 2005, Lassiter assigned the agreement for sale to Beech Grove Holdings, Inc., of which Phillips is a member. Peniel, which Phillips had started in 1999 as a real estate development and property management company, managed the Site on behalf of Beech Grove Holdings, Inc.

In 2005, Peniel retained American Environmental Corporation ("AEC") to conduct a third assessment of the Site. The assessment revealed levels of PCE and TCE above default closure levels[2] established by the Indiana Department of Environmental Management ("IDEM") under its Risk Integrated System of Closure ("RISC"), which is a "guidance manual that describes how to achieve consistent closure of contaminated soil and groundwater using existing IDEM programs." http://www.in.gov/idem/4198.htm (last visited June 26, 2012).

In November of 2005, AEC informed IDEM that there had been "[a] release of hazardous substances" at the Site. (App. 462). On or about September 15, 2006, IDEM sent a certified letter to Phillips, "requesting" that Peniel, as "a potentially responsible

[2] "'Closure' is IDEMs written recognition that a party has demonstrated attainment of specific investigative of remediation objectives for contaminants in a particular area." http://www.in.gov/idem/files/remediation_closure_guide_sect_01.pdf (last visited June 26, 2012).

person," "perform an investigation to characterize the nature and extent of the contamination," as provided by IDEM's RISC and pursuant to Indiana Code section 13-25-4-5. (App. 462).

Subsequently, AEC performed further site investigations at the behest of Peniel and provided its findings to IDEM. The findings again revealed levels of PCE above default closure levels. IDEM, however, did not compel remedial action, and Beech Grove Holdings took no such action.

On November 21, 2008, Beech Grove Holdings filed a complaint against the Appellees[3] pursuant to Indiana Code section 13-30-9-2, which provides:

> A person may, regardless of whether the person caused or contributed to the release of a hazardous substance . . . into the surface or subsurface soil or groundwater that poses a risk to human health and the environment, bring an environmental legal action against a person that caused or contributed to the release to recover reasonable costs of a removal or remedial action involving the hazardous substances . . . .

Beech Grove Holdings asserted that the Appellees, "[t]hrough their actions and/or inactions with respect to the chlorinated solvents located on the Site . . . caused and/or contributed to the release of a hazardous substance . . ." at the Site. (App. 36). Accordingly, pursuant to Indiana Code section 13-30-9-3, which provides for the allocation of the "costs of the removal or remedial action in proportion to the acts or omissions of each party" in an environmental legal action, Beech Grove Holdings sought a judgment against the Appellees for all costs related to the PCE and TCE contamination

[3] Beech Grove Holdings also named Elizabeth Bannon and Norma Thinnes as defendants. They, however, are not parties to this appeal.

of the Site, including, but not limited to, "investigation, assessment, remediation, corrective action, [and] consulting" costs. (App. 37).

The Dodsons filed their answer on February 20, 2009, wherein they denied liability and raised as an affirmative defense that Beech Grove Holdings's claims are barred by the applicable statute of limitations. The Dodsons also filed a cross-claim against their co-defendants.

Benefiel filed her answer on December 4, 2009. Benefiel denied ever operating a dry cleaning business at the Site and therefore asserted that she was not a proper party to either the Dodsons' or Beech Grove Holdings's actions. Benefiel, however, admitted that dry cleaning chemicals were used at the Site. She also raised as an affirmative defense that any claims were barred by the statute of limitations.

On August 11, 2010, Beech Grove Holdings filed a motion for partial summary judgment as to liability only. The Dodsons filed a cross-motion for summary judgment, asserting that the six-year statute of limitations provided by Indiana Code section 34-11-2-7 barred the complaint. The Dodsons argued that the statute of limitations began to run on February 28, 1998, when the Environmental Legal Action ("ELA") statutes found under Article 30 of Title 13 of the Indiana Code became effective. The Dodsons asserted that the claim accrued on that date because Beech Grove Holdings, or its predecessors, discovered, or could have discovered, that the Site had been contaminated prior to the effective date of the ELA. The Dodsons further argued that Beech Grove Holdings failed to designate evidence that the Dodsons "caused or contributed to the release of a

hazardous substance into the surface or subsurface soil or groundwater as required by the ELA." (App. 165).

On April 6, 2011, Benefiel filed a response in opposition to Beech Grove Holdings's motion for partial summary judgment. She argued that Beech Grove Holdings failed to designate evidence creating a genuine issue of material fact as to Benefiel's liability. Specifically, Benefiel asserted that "a dispute remains regarding the material fact of whether [she] operated a dry cleaning facility at the Site . . . ." (App. 467). She therefore argued that Beech Grove Holdings had failed to show that she caused or contributed to the release of a hazardous substance.

Subsequently, Benefiel and the Schaefers filed motions to join the Dodsons' cross-motion for summary judgment, which the trial court granted. Thereafter, on June 1, 2011, Beech Grove Holdings filed its response in opposition to the cross-motion for summary judgment. Beech Grove Holdings argued that the ten-year statute of limitations applied to its claim; the accrual date is not the date that the ELA was enacted; and the prior owners' knowledge of hazardous substance contamination, if any, at the Site cannot be imputed to Beech Grove Holdings. As to the Dodsons' liability, Beech Grove Holdings designated evidence in the form of the affidavit of expert witness Audrey Kortz, AEC's vice president, who had never visited the Site but opined that the spills of PCE during the Dodsons' operation of the dry-cleaning business "more likely than not reached the subsurface soil and groundwater at the Site." (App. 499).

The Dodsons filed their reply brief in support of their cross-motion for summary judgment on August 4, 2011. Therein, they argued the claim was barred by either a six-year or ten-year statute of limitations because Beech Grove Holdings's "predecessors in interest knew about the contamination since 1997 . . . ." (App. 521). Furthermore, they designated deposition testimony of Kortz and the affidavit of expert witness Andrew Gremos, an environmental consultant who had visited the Site, to refute that they caused or contributed to any contamination of the Site.

The trial court held a hearing on the parties' motions on August 8, 2011. On November 2, 2011, the trial court issued findings of fact and conclusions of law; found that the evidence did not establish that the Dodsons or Benefiel caused or contributed to the contamination of the Site's soil or groundwater; and entered summary judgment in favor of the Appellees.

DECISION

Beech Grove Holdings asserts that the trial court erred in granting summary judgment on the issue of the applicable statute of limitations. When reviewing a grant or denial of summary judgment, our well-settled standard of review is the same as it was for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. *Landmark Health Care Assocs., L.P. v. Bradbury*, 671 N.E.2d 113, 116 (Ind. 1996).

Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving

party deserves judgment as a matter of law. Ind. T.R. 56(C); *Blake v. Calumet Const. Corp.*, 674 N.E.2d 167, 169 (Ind. 1996). "A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue." *Scott v. Bodor, Inc.*, 571 N.E.2d 313, 318 (Ind. Ct. App. 1991).

All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996). However, once the movant has carried its initial burden of going forward under Trial Rule 56(C), the nonmovant must come forward with sufficient evidence demonstrating the existence of genuine factual issues, which should be resolved at trial. *Otto v. Park Garden Assocs.*, 612 N.E.2d 135, 138 (Ind. Ct. App. 1993). If the nonmovant fails to meet his burden, and the law is with the movant, summary judgment should be granted. *Id.*

"The fact that the parties make cross-motions for summary judgment does not alter our standard of review. Instead, we must consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law." *Indiana Farmers Mut. Ins. Group v. Blaskie*, 727 N.E.2d 13, 15 (Ind. Ct. App. 2000).

First, Beech Grove Holdings maintains that the trial court's order, granting summary judgment in favor of Benefiel, the Schaefers and Beeler, must be reversed as "the court did not decide the case on the issue of statute of limitations at all" and "failed

to show the existence of any factual development that could support summary judgment in favor of these cross-movants." Beech Grove Holdings's Br. at 13. We disagree.

> Where, as here, the trial court makes findings in rendering summary judgment, those findings aid in appellate review, but are not binding on this court. Thus, findings that accompany a grant of summary judgment do not alter the nature of our review. Rather, we will affirm a summary judgment order if it is sustainable upon any theory or basis found in the record.

Gagan v. Yast, 966 N.E.2d 177, 184 (Ind. Ct. App. 2012) (internal citations omitted). Thus, the fact that the trial court's findings do not specifically address the statute of limitations issue will not bar this court from determining whether the Appellees are entitled to summary judgment on that basis.

Next, Beech Grove Holdings argues that its claim under the ELA is a contribution action, and therefore, subject to a ten-year statute of limitations pursuant to Indiana Code section 34-11-1-2.[4] Beech Grove Holdings further argues that "[b]ecause a contribution

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[4] We note that regarding claims brought under Indiana Code section 13-30-9-2, Indiana Code section 34-11-2-11.5 (eff. May 10, 2011) provides:

> (b) Subject to subsections (c), (d), and (e), a person may seek to recover the following in an action brought on or after the effective date of this section under IC 13-30-9-2 or IC 13-23-13-8(b) to recover costs incurred for a removal action, a remedial action, or a corrective action:
>
> (1) The costs incurred not more than ten (10) years before the date the action is brought, even if the person or any other person also incurred costs more than ten (10) years before the date the action is brought.
>
> (2) The costs incurred on or after the date the action is brought.
>
> (c) Costs are eligible for recovery under subsection (b) regardless of whether any part of the costs is incurred before the effective date of this section.

action under the ELA is afforded a 10-year statute of limitation from the first dollar of environmental response costs incurred at the Site," which Beech Grove Holdings contends it incurred in 2005, Beech Grove Holdings asserts that its claim is timely. The Appellees, however, argue that the claim is subject to the six-year statute of limitations pursuant to Indiana Code section 34-11-2-7 as an action for damages against real property.

> Statutes of limitation seek to provide security against stale claims, which in turn promotes judicial efficiency and advances the peace and welfare of society. "The party pleading a statute of limitation bears the burden of proving the suit was commenced beyond the statutory time allowed." When application of a statute of limitation rests on questions of fact, it is generally an issue for a jury to decide.

Cooper Indus., LLC v. City of S. Bend, 899 N.E.2d 1274, 1279 (Ind. 2009) (internal citations omitted).

Again, Beech Grove Holdings argues that the ELA is a contribution scheme. Contribution involves the partial reimbursement of one who has discharged a common liability. *Small v. Rogers*, 938 N.E.2d 18, 22 (Ind. Ct. App. 2010). "Discharge" is defined as "[a]ny method by which a legal duty is extinguished; esp., the payment of a

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(d) This section does not permit a person to revive or raise new claims in an action brought under IC 13-30-9-2 or IC 13-23-13-8(b) that was finally adjudicated or settled before the effective date of this section.

(e) Any person that brought an action under IC 13-30-9-2 or IC 13-23-13-8(b) that was not finally adjudicated or settled prior to the effective date of this section may not amend that action, or bring a new action, under this section.

debt or satisfaction of some other obligation." BLACK'S LAW DICTIONARY 495 (8th ed. 2004).

In Indiana, there is a dearth of cases that address the applicable statute of limitations under the ELA. In *Cooper Indus., LLC v. City of South Bend*, 863 N.E.2d 1253, 1256 (Ind. Ct. App. 2007), *trans. granted, opinion vacated,* 878 N.E.2d 219 (Ind. 2007) and *vacated,* 899 N.E.2d 1274 (Ind. 2009), this court addressed whether South Bend's claim under the ELA was time-barred by the general six-year statute of limitations. The court determined that "[n]either Cooper nor the City challenge[d] the trial court's application of Indiana Code section 34–11–2–7, the general statute of limitations for injury to property other than personal property."

Upon transfer, however, the Indiana Supreme Court noted that "[t]he parties disagree over whether South Bend conceded the six-year property damage or the ten-year 'catch-all' statute of limitation applies at trial." *Cooper Indus., LLC v. City of South Bend*, 899 N.E.2d 1274, 1286 n.9 (Ind. 2009). Finding that "South Bend's ELA claim would survive under either proposed time period," our supreme court did not address the purported concession, but for the sake of argument, "adopt[ed] six years as the applicable time period."[5] *Id.* at 1286. *Cf. Pflanz v. Foster*, 888 N.E.2d 756, 758 (Ind. 2008) (finding that the parties agreed that the general ten-year statute of limitations applied to

[5] Our supreme court did recognize that the USTA provides "only a right of contribution, whereas the ELA does not so limit seeking cost recovery from another party." *Cooper* 899 N.E.2d at 1285. Furthermore, under section six of the ELA, "an action to recover costs related to a release from an underground storage tank may be brought under the ELA or the USTA" but not under both. *See id.* at 1282 (citing Indiana Code section 13-30-9-6).

the contribution claim asserted under Indiana's Underground Storage Tanks Act ("USTA"), which is a separate environmental provision). We therefore look to our federal district court for guidance.

In *Taylor Farm Ltd. Liab. Co. v. Viacom, Inc.*, 234 F. Supp.2d 950 (S.D. Ind. 2002), the district court addressed whether a complaint filed under the ELA is barred by the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), where the defendant Viacom had entered into a court-approved comprehensive settlement agreement with the Environmental Protection Agency ("EPA"), requiring it to clean up hazardous waste at a site that had been operated as a landfill. Viacom argued that the CERCLA's "contribution bar"[6] prevented Taylor from making a contribution claim against it, while Taylor argued that "because it did not contribute in any way to the original contamination," it was not suing Viacom for contribution. 234 F. Supp.2d at 962.

The *Taylor*-court found that the ELA "is not, on its face, a contribution scheme" because it "permits 'any person' to sue to 'recover the reasonable costs of a removal or remedial action.'" *Id.* (citing Indiana Code section 13-30-9-2). *But Cf. Bernstein v. Bankert*, No. 1:08-CV-0427-RLY-DML, 2010 WL 3893121, at *10 (S.D. Ind. Sept. 29, 2010) (citing to *Pflanz*, which, again, addressed the statute of limitations under the USTA not the ELA, in finding that the "ELA contains no provision for limitation of actions;

[6] Section 113(f)(2) of CERCLA provides: "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement."

therefore, the courts have applied Indiana's ten-year statute of limitations to ELA claims for contribution"). The *Taylor*-court explained that "[c]ontribution is an action among parties who have been found to be liable for at least some portion of the damages alleged in the underlying lawsuit," *id.*, and that "[u]nder the common law of contribution, only a defendant in a lawsuit, or a party who has already been found liable in a previous action may bring a claim for contribution." *Id.* at 972.

Here, we agree with the district court holding in *Taylor*. We cannot say that a claim brought under the ELA is a claim for contribution where it allows a plaintiff who is neither liable for the release of a hazardous substance nor has been found liable, to recover the costs of remediation from another party "without regard to the plaintiff's part in causation of the damage."[7] *See Cooper*, 899 N.E.2d at 1285. Accordingly, we find that the ELA is subject to the six-year statute of limitations pursuant to Indiana Code section 34-11-2-7(3) (providing that actions for injuries to real property must be commenced within six years after the cause of action accrues).

Having found that Beech Grove Holdings's claim is subject to a statute of limitations of six years, we now must address whether the claim is timely under Indiana Code section 34-11-2-7.

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[7] The "plain language" of Indiana Code section 13-30-9 makes it clear that the legislature did not intend the ELA to be a contribution-only statute, where its purpose clearly is meant to "shift the financial burden of environmental remediation to the parties responsible for creating contaminations" as "an incentive for potential [innocent] buyers of contaminated land who might be deterred by the substantial costs to clean up the land, thus preventing not only the cleanup but also redevelopment and economic renewal." *Cooper*, 899 N.E.2d at 1284.

> A cause of action accrues under this statute "when a claimant knows, or in the exercise of ordinary diligence should have known of the injury." "The determination of when a cause of action accrues is generally a question of law for the courts to determine. For claims to accrue, it is not necessary that the full extent of the damage be known or even ascertainable, but only that some ascertainable damage has occurred."

Martin Oil Mktg. Ltd. v. Katzioris, 908 N.E.2d 1183, 1187 (Ind. Ct. App. 2009) (internal citations omitted), *trans. denied*; *see also Cooper*, 899 N.E.2d at 1286 (stating that under the ELA "the statute of limitation will begin to run on the earlier date of actual discovery or when a reasonable person would discover the facts").

In this case, Beech Grove Holdings filed its complaint on November 21, 2008. Thus, we must determine if Beech Grove Holdings knew of, or reasonably could have discovered, the damage to the Site before November 21, 2002.

Beech Grove Holdings does not quarrel with the general rule of law that "parties are usually held accountable for the time which has run against their predecessors in interest." Beech Grove Holdings's Reply Br. at 6-7. *See Cooper*, 899 N.E.2d at 1279 ("Indiana adheres to the rule that 'third parties are usually held accountable for the time running against their predecessors in interest.'" (quoting *Mack v. Am. Fletcher Nat'l Bank and Trust Co.*, 510 N.E.2d 725, 734 (Ind. Ct. App. 1987), *trans. denied*)). Furthermore, Beech Grove Holdings concedes, and the designated evidence shows, that its predecessors-in-interest discovered or knew of the contamination at the Site as early as 1997. *See* Beech Grove Holdings's Reply Br. at 7.

Beech Grove Holdings, however, would not have had a cause of action until the ELA became effective on February 28, 1998, and therefore, "the statute of limitation could not have begun to accrue until that date" or after that date. *See Cooper*, 899 N.E.2d at 1285. According to the designated evidence, Churchman Hill Associates, the predecessor-in-interest, became aware of the contamination as early as 1997, and certainly no later than 2000, the year ATC prepared a second environmental assessment of the Site on behalf of, and reported the detection of PCE and TCE in soil and groundwater samples to, Churchman Hill Associates. Thus, Beech Grove Holdings's predecessor-in-interest knew of the contamination of the Site for at least eight years before Beech Grove Holdings commenced the action. We therefore find that Beech Grove Holdings is barred from bringing its claim under the ELA. Accordingly, the Appellees are entitled to summary judgment as a matter of law. Because this issue is dispositive, we need not address Beech Grove Holdings's argument that the trial court "erred in finding that no genuine issues of material fact remain regarding whether the Dodsons 'caused or contributed' to the release of the hazardous substance at the Site." Beech Grove Holdings's Br. at 18.

Affirmed.

NAJAM, J., and RILEY, J., concur.