

STATE OF MICHIGAN
COURT OF APPEALS

WOLVERINE WORLD WIDE, INC.,

Plaintiff-Appellant,

v

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant,

and

ONEBEACON INSURANCE COMPANY f/k/a
CGU INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

March 8, 2007

No. 260330

Kent Circuit Court

LC No. 01-011763-CK

Before: O’Connell, P.J., and White and Markey, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I concur with the majority’s general statements of the applicable law. I do not agree, however, that there are no questions of material fact regarding its proper application. The policies are triggered by an “occurrence,” defined as an event or exposure resulting in actual injury during the policy period. The time-on-risk method of allocation requires that there be an “occurrence,” or actual injury, during each year over which the risk is allocated. On this record, there are genuine issues regarding whether actual injury occurred after the landfills were closed. The mere fact that remediation was required does not mean that environmental injury was actually occurring on an ongoing basis. Plaintiff submitted an expert affidavit supporting that injury was not ongoing, and that remediation was required to prevent possible future human contact with the waste.¹ If injury was not continuing, plaintiff was wrongly considered to be “on the risk” during those periods.

¹ I note that plaintiff’s lawyer is not an expert regarding environmental science and his opinions in that regard are irrelevant.

Further, separate and apart from the “all sums” argument properly rejected by the majority, there is the question how many “occurrences” there were during the policy period, based on the policy definition of occurrence.

The policy provides:

The term “occurrence” shall mean . . . (b) an event, or continuous or repeated exposure to conditions, which results during the policy period, in . . . property damage, . . . neither expected nor intended from the standpoint of the Insured. With respect to Coverages I (a) and I (b) [property damage], . . . all personal injury and property damage (either alone or in combination) arising out of one event or continuous or repeated exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed to be one occurrence. . . .

III. POLICY PERIOD: -- TERRITORY: This policy applies only to occurrences, as herein defined, which happen during the policy period; provided, however, if any occurrence happens during the policy period of this policy which results in personal injury, property damage or advertising liability of the type which would be insured under the provisions of this policy and if personal injury, property damage or advertising liability resulting from that same occurrence has also happened during the policy period of any similar policy of insurance issued by the company to any Named Insured hereunder prior to the policy period of this policy, that policy issued by the company which is in force at the time the first claim is made against the Insured which could result in ultimate net loss payable thereunder shall constitute the only policy of the company which shall apply to such occurrence and to all personal injury, property damage and advertising liability (either alone or in combination) at any time resulting from such occurrence, regardless of the number of similar policies of insurance issued by the company which could otherwise apply in the absence of this agreement.

Under other circumstances, the parties might each be putting forward the other’s interpretation of the policy. In any event, these policy provisions were not present in *Arco Industries Corp v American Motorists Ins Co (On Second Remand)*, 232 Mich App 146; 594 NW2d 61 (1998), aff’d 462 Mich 896; 617 NW2d 330 (2000), or in *Gelman Sciences, Inc v Fidelity & Cas Co of NY*, 456 Mich 305; 572 NW2d 617, amended 456 Mich 1230; 576 NW2d 168 (1998), and their proper application requires factual findings by the trier of fact.

I would reverse and remand for further proceedings regarding these issues, as well as the issue whether defendant was prejudiced by plaintiff’s failure to comply with the policy provisions regarding notice and voluntary payment.

/s/ Helene N. White