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IN THE COURT OF APPEALS OF INDIANA

Gene DeVane and Gladys DeVane, Husband and Wife,

Appellants-Plaintiffs,

v.

Arch Wood Protection, Inc., a Lonza Company, Osmose, Inc.,

October 11, 2022

Court of Appeals Case No. 22A-CT-233

Appeal from the Monroe Circuit Court

The Honorable Geoffrey J. Bradley, Judge

n/k/a Koppers Performance Chemicals Inc., Chemical Specialties, Inc., n/k/a Venator Materials PLC,

Appellees-Defendants

Trial Court Cause No. 53C01-2008-CT-1504

Vaidik, Judge.

Case Summary

[1] Gene and Gladys DeVane own a home built in 1991 with decks constructed of wood treated with arsenic to protect it from termites and other pests. In 2020, they sued for "equitable remediation" against three companies that had manufactured arsenic for use in treated wood. The DeVanes claim they recently discovered that there is arsenic in the decks and that the arsenic makes the decks inherently dangerous. They seek an order requiring the defendants to replace their decks.

[2] The defendants moved to dismiss, arguing the action is one for product liability and is therefore subject to Indiana's Product Liability Act and its statute of repose, which provides that no such action can be commenced more than ten years after the product is delivered to the initial user or consumer. The trial court agreed and dismissed the complaint with prejudice.

[3] The DeVanes appeal, arguing their action is not one for product liability and is not subject to the statute of repose because the Product Liability Act governs only actions for "physical harm" to a person or to property other than the product itself and they are not claiming any existing or past physical harm, only the risk of future physical harm.

[4] We agree that this is not a product-liability action, so the product-liability statute of repose does not apply. Even so, we affirm the dismissal of the DeVanes' complaint because they have failed to establish that "equitable remediation" is a valid cause of action, rather than simply a type of remedy.

Facts and Procedural History

[5] This case began in August 2020, when the DeVanes filed a "Complaint for Equitable Remediation of Arsenic Treated Wood Decks" against Arch Wood Protection, Inc., Koppers Performance Chemicals Inc. f/k/a Osmose, Inc., and Chemical Specialties, Inc. n/k/a Venator Materials PLC ("the Defendants"). Appellants' App. Vol. II pp. 18-44. The DeVanes alleged the following: (1) they own a house in Monroe County that was built in 1991 with decks made of wood treated with a pesticide called chromated copper arsenate (CCA), which is meant to kill "termites and other destructive organisms"; (2) the arsenic in CCA is "highly toxic, poisonous, and deadly," making the decks themselves dangerous to humans and the environment; (3) the production of CCA-treated wood for residential use stopped in 2003; (4) from 1977 to 2003, the Defendants were the only manufacturers of the arsenic used in CCA; (5) the Defendants

have long been aware of the dangerous nature of CCA-treated wood but have worked to conceal it, including by failing to warn consumers and the use of "deceptive" labeling and marketing (e.g., "salt-treated wood"); (6) due to the Defendants' concealment, the DeVanes only "recently discovered" that there is arsenic in the decks and that the arsenic makes the decks "inherently dangerous"; (7) the decks present "an imminent threat of endangerment to human health and the environment"; and (8) the decks are "uninsurable" and must be listed as a "defect" in the Indiana Seller's Residential Real Estate Sales Disclosure. *Id.* The DeVanes requested "equitable remediation" of the decks: replacement of the decks (which they estimate will cost $40,000) and proper disposal of the arsenic-treated wood.

[6] The Defendants moved for dismissal under Indiana Trial Rule 12(B)(6) for failure to state a claim upon which relief can be granted. They argued that the DeVanes' action is one for product liability and is therefore subject to and barred by Indiana's Product Liability Act (Ind. Code art. 34-20) and its statute of repose, which provides that no such action may be commenced more than ten years after "the delivery of the product to the initial user or consumer." Ind. Code § 34-20-3-1(b)(2). The trial court agreed and granted the Defendants' motions.

[7] The DeVanes then filed an "Amended Complaint for Equitable Remediation of Arsenic Treated Wood Decks and Emergency Provision for Cautionary [Permanent] Labels." Appellants' App. Vol. II pp. 129-67. The amended complaint includes all the allegations from the original and adds many others,

including many claims that the Defendants "fraudulently concealed" the dangerous nature of CCA-treated wood and other relevant information. Together with "equitable remediation" of the decks, the DeVanes sought the installation of a "cautionary label" on each of the existing decks until remediation is completed.

[8] The Defendants again moved for dismissal under Trial Rule 12(B)(6) based on the product-liability statute of repose, which the trial court again granted. The DeVanes filed a motion to correct error, which was denied.

[9] The DeVanes now appeal.[1]

Discussion and Decision

[10] The DeVanes contend the trial court erred by dismissing their amended complaint under Trial Rule 12(B)(6). A civil action may be dismissed under that rule for "failure to state a claim upon which relief can be granted." A 12(B)(6) motion "tests the legal sufficiency of the plaintiff's claim, not the facts supporting it." *Residences at Ivy Quad Unit Owners Ass'n, Inc. v. Ivy Quad Dev., LLC*, 179 N.E.3d 977, 981 (Ind. 2022) (quotation omitted). To overcome a 12(B)(6) motion, the complaint must allege facts that show the "possibility of relief." *Id.* at 980. We review a 12(B)(6) dismissal de novo. *Id.* at 981. We take

[1] We held oral argument at Notre Dame Law School on September 23, 2022. We thank counsel for their helpful presentations and the staff and students for their warm hospitality.

the facts alleged in the complaint as true, consider all complaint allegations in the light most favorable to the nonmoving party, and draw every reasonable inference in that party's favor. *Id.*

[11] The trial court dismissed the DeVanes' amended complaint based on the product-liability statute of repose, which provides that no such action may be commenced more than ten years after "the delivery of the product to the initial user or consumer." I.C. § 34-20-3-1(b)(2). The DeVanes argue their action is not one for product liability and therefore not subject to the product-liability statute of repose. The Product Liability Act applies only to actions "for physical harm caused by a product":

> This article governs all actions that are:
>
> (1) brought by a user or consumer;
>
> (2) against a manufacturer or seller; and
>
> (3) **for physical harm caused by a product**;
>
> regardless of the substantive legal theory or theories upon which the action is brought.

I.C. § 34-20-1-1 (emphasis added); *see also* I.C. § 34-6-2-115 ("'Product liability action', for purposes of IC 34-20, means an action that is brought: (1) against a manufacturer or seller of a product; and (2) for or on account of physical harm; regardless of the substantive legal theory or theories upon which the action is

brought."). "Physical harm" is defined as "bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property." I.C. § 34-6-2-105(a). The DeVanes contend they "did not bring their action for physical harm caused by the products of the defendants" but rather for remediation of arsenic-treated decks that pose a risk of future physical harm. Appellants' Br. p. 11.

[12] In their brief, the Defendants argue the DeVanes' action is one for product liability because they have

> alleged their CCA-treated wood deck has caused, or will cause, damage beyond the deck itself, namely, damage to their health and the environment, as well as economic damages in the form of the alleged uninsurability of the decks for personal injury and property damage loss claims, and the purported loss in value of the home from listing the decks as a "defect" in the Indiana Seller's Real Estate Sales Disclosure Form. That puts [the DeVanes'] claims squarely within the IPLA because 'physical harm,' as used in Ind. Code § 34-20-1-1, includes any type of damage beyond that to the product itself, i.e., other than simply to the wood.

Appellees' Br. p. 13 (citations omitted). Contrary to the Defendants' claim, the DeVanes have not alleged that the arsenic in their decks "has caused" physical harm beyond the decks themselves. At most, they have alleged that the arsenic **might** cause physical harm to person or property in the future. And the other "damage" mentioned by the Defendants—"economic damages in the form of the alleged uninsurability of the decks" and "the purported loss in value of the home"—is not "physical harm."

[13] The Defendants cite no case holding that an action alleging only the possibility of future physical harm is a product-liability action. They cite several cases for the proposition that product-liability claims must be treated as such even if they are given a different label, but those cases all involved claims of past or existing personal injury. *See Payton v. Johnson & Johnson*, No. 4:20-cv-257, 2021 WL 1923799 (S.D. Ind. May 13, 2021); *Cavender v. Medtronic, Inc.*, No. 3:16-CV-232, 2017 WL 1365354 (N.D. Ind. Apr. 14, 2017); *Lyons v. Leatt Corp.*, No. 4:15-CV-17-TLS, 2015 WL 7016469 (N.D. Ind. Nov. 10, 2015); *Ryan ex rel. Est. of Ryan v. Philip Morris USA, Inc.*, No. 1:05 CV 162, 2006 WL 449207 (N.D. Ind. Feb. 22, 2006).

[14] Because the DeVanes have alleged no past or existing physical harm, their action is not one for product liability, and the trial court erred by dismissing it based on the product-liability statute of repose.

[15] That said, we may affirm a 12(B)(6) dismissal if it is sustainable on any basis in the record. *Ward v. Carter*, 90 N.E.3d 660, 662 (Ind. 2018), *cert. denied*. At oral argument, when asked what legal authority supports a claim or cause of action for "equitable remediation," the DeVanes' attorney offered only vague references to the law of equity. Oral Argument Video at 11:32-13:10. A Westlaw search of all state and federal cases for the phrase "equitable remediation" yields just nineteen results. None of the cases involved a claim anything like the one here, and the general takeaway is that "equitable remediation" is—as the name suggests—a type of remedy, not a cause of action. *See, e.g.*, *Barngrover v. City of Columbus*, 739 S.E.2d 377, 379 (Ga. 2013)

(discussing "equitable remediation" as a remedy in a lawsuit for inverse condemnation, nuisance, and trespass); *Maine People's All. v. Mallinckrodt, Inc.*, 471 F.3d 277, 297 (1st Cir. 2006) (discussing "equitable remediation" as a remedy in a lawsuit under the citizen-suit provision of the federal Resource Conservation and Recovery Act).

[16] The DeVanes have not established that "equitable remediation" is a valid cause of action, nor have they identified any other statutory or common-law cause of action that might be viable here. On this alternative ground, we affirm the dismissal of their amended complaint.

[17] Affirmed.

May, J., and Tavitas, J., concur.