STATE OF MICHIGAN

COURT OF APPEALS

JOAN GRAHAM, JAMES C. NEFF and SARA M. NEFF, as Successor Co-Trustees of the ELIZABETH GRAHAM TRUST,

Plaintiffs-Appellants,

v

PROVIDENCE WASHINGTON INSURANCE COMPANY, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY, FEDERAL INSURANCE COMPANY and INSURANCE COMPANY OF NORTH AMERICA,

Defendants-Appellees,

and

ST. PAUL FIRE & MARINE INSURANCE COMPANY and UNITED STATES FIRE INSURANCE COMPANY,

Defendants.

UNPUBLISHED
August 4, 1998

No. 211718
Oakland Circuit Court
LC No. 94-471774 CK

ON REMAND

Before: Sawyer, P.J., and Kelly and MacKenzie, JJ.

PER CURIAM.

Pursuant to the Michigan Supreme Court's order of April 27, 1998, *Graham v Providence Washington Ins Co*, 457 Mich 856; ___ NW2d ___ (1998), this case returns for reconsideration in light of *Gelman Sciences, Inc v Fidelity & Casualty Co*, 456 Mich 305; 572 NW2d 617 (1998).

This appeal of right originated from an order for summary disposition, in which the circuit court ruled that one of these defendant insurers, Providence Washington Insurance Company, was on the risk for all environmental degradation for which these plaintiffs were or might be held liable in proceedings

under the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA), 42 USC 9601 *et seq.*, and the Michigan Environmental Response Act, MCL 299.601 *et seq.*; MSA 13.32(1) *et seq.* (now MCL 324.2101 *et seq.*; MSA 13a.2101 *et seq.*), based on use of the "manifestation theory" as to when insurance coverage is triggered under a standard comprehensive general liability insurance policy of the "occurrence" type which covers environmental pollution for which the insured may be responsible only when the release of contaminants was "sudden and accidental." In *Gelman, supra*, the Michigan Supreme Court held that the manifestation theory is inappropriate, and that the injury-in-fact test is the appropriate one. 456 Mich at 319-320. Under an injury-in-fact test, not only the insurer on the risk when the first environmental degradation occurred, but insurers on the risk when such contamination continued, may be liable either jointly and severally or on a pro-rata basis. 456 Mich at 324-325.

Here, summary disposition was granted before discovery commenced, but there is no reliable, let alone conclusive proof in this record as to when environmental contamination first occurred—exactly as the Supreme Court prognosticated in *Gelman*, where it recognized that proving the date of injury in fact with any degree of certainty may be difficult if not impossible. As this is a declaratory judgment action in which trial by jury is not permissible as of right, on motion for summary disposition the trial court might have ordered immediate trial to resolve any such disputed issue of fact. MCR 2.116(I)(3). However, no trial has been conducted and the parties should be given an opportunity for discovery before any such factfinding occurs. The record as it presently stands establishes that an issue of fact is presented and therefore affirmance of the summary disposition decision is precluded. We reject the argument made on remand by Federal Insurance Company that, even assuming arguendo that environmental contamination occurred before inception of its policy term, it is thereby immunized from liability. To the contrary, if there was any incremental environmental degradation during the term of Federal's policy, it too may be properly held liable, jointly and severally or pro rata, for damage occurring while its policy was in force. 456 Mich at 329.

The Oakland Circuit Court's order of December 23, 1994, granting summary disposition is reversed, and the cause is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Barbara B. MacKenzie