STATE OF MICHIGAN

COURT OF APPEALS

CORDUROY RUBBER COMPANY, CADILLAC MOLDED RUBBER, INC., AND CORDUROY RUBBER COMPANY STOCKHOLDERS LIQUIDATING TRUST,

Plaintiffs-Appellants/Cross-Appellees,

v

THE HOME INDEMNITY COMPANY and THE HOME INSURANCE COMPANY,

Defendants-Appellees/Cross-Appellants,

WOLVERINE INSURANCE COMPANY, TRANSAMERICA INSURANCE COMPANY, and AETNA CASUALTY & SURETY COMPANY,

Defendants-Appellees.

UNPUBLISHED
March 12, 1999

No. 191846
Kent Circuit Court
LC No. 93-084516 CK

ON REMAND

Before: Griffin, P.J., and Doctoroff and Markman, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court. This case arose from plaintiffs' action seeking a declaratory judgment that the five defendant insurance carriers had a duty to defend and/or indemnify plaintiffs in two environmental remediation actions involving plaintiffs' Cadillac and Grand Rapids sites. In part I of our original opinion we affirmed the trial court's conclusion that plaintiffs destroyed defendant Home Indemnity Company's subrogation rights and, therefore, could not bring an action against Home Indemnity based on the policy. In part II of our original opinion we held that the trial court properly applied a manifestation trigger of coverage to determine which policies entitled plaintiffs to coverage. We therefore affirmed the trial court's grant of summary disposition in favor of defendants. Plaintiffs applied for leave to appeal.[1] In lieu of granting leave to appeal, our Supreme Court vacated part I of our original opinion and remanded for our fuller consideration, as on rehearing granted, of the arguments plaintiffs set forth in their motion for rehearing with respect to the

subrogation issue. The Court also vacated part II of our original opinion and remanded for reconsideration in light of *Gelman Sciences, Inc v Fidelity & Casualty Co,* 456 Mich 305; 572 NW2d 617 (1998). We now reverse the trial court's grant of summary disposition in favor of Home Indemnity with respect to the subrogation issue. We also reverse the trial court's grant of summary disposition in favor of defendants with respect to the trigger of coverage issue, and remand for further proceedings.

I.

We first turn to plaintiffs' argument that the doctrine of impairment of subrogation does not bar their claim for recovery of costs incurred in defending the *Kysor* litigation under the Home Indemnity policy. The pertinent sections of the Home Indemnity policy provide:

> 5. Action against company: No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.
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> 7. Subrogation: In the event of any payment under this policy, the company shall be subrogated to all of the insured's rights of recovery therefore against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

Plaintiffs first argue that the subrogation clause does not apply to their claim for defense costs because Home Indemnity never made a payment under the policy. Plaintiffs assert that this Court erred in interpreting the subrogation clause by ignoring the first sentence of the clause. We do not agree with plaintiffs' position.

In considering whether plaintiffs destroyed Home Indemnity's subrogation rights with respect to the recovery of defense costs by releasing the *Haviland* defendants from any further liability, we look to this Court's opinion in *Stolaruk Corp v Central National Ins Co of Omaha,* 206 Mich App 444; 522 NW2d 670 (1994). In *Stolaruk,* the plaintiff sold certain property to a purchaser in 1986. *Id.* at 446. Litigation regarding the transaction ensued, and the parties thereafter entered into a consent judgment that included a general release from liability relating to then known or future causes of action. *Id.* at 446-447. In 1989, the Michigan Department of Natural Resources directed the plaintiff to remediate contamination on the property. *Id.* at 447. The plaintiff sought insurance coverage for the remediation costs from its general liability insurance provider, the defendant. *Id.* When the defendant denied coverage, the plaintiff initiated an action against the defendant seeking a declaration of the rights of the parties under the insurance contract. *Id.* The trial court granted summary disposition in favor of the defendant on the ground that the plaintiff had prejudiced the defendant's rights to subrogation by

executing the general release in the 1986 consent judgment, and this Court agreed. *Id.* at 448. The insurance policy contained a subrogation clause identical to the clause at issue in the present case. *Id.* at 448-449. Furthermore, as in the present case, the policy expressly provided that no action shall lie against the defendant if the plaintiff failed to satisfy all of the conditions set forth in the policy. *Id.* at 449. This Court explained that it was clear from the language of the policy that, as a condition precedent to the defendant's performance under the contract, the plaintiff was required to take the measures necessary to protect the defendant's subrogation rights. *Id.* at 449. This Court concluded that, by releasing a potential tortfeasor from liability, the plaintiff destroyed the defendant's subrogation rights and, thus, the plaintiff was barred from pursuing a cause of action on the insurance policy. *Id.* at 450.

We find no basis on which to distinguish *Stolaruk* from the case before us. Here, as in *Stolaruk,* plaintiffs breached a condition precedent by releasing a potential tortfeasor, the *Haviland* defendants, from liability and destroying Home Indemnity's subrogation rights. In *Stolaruk*, no payment was made under the policy, but this Court ruled that the defendant's subrogation rights had been destroyed. *Id.* at 450. Accordingly, based on *Stolaruk*, we do not believe we erred in interpreting the subrogation clause and we reject plaintiffs' argument that payment must be made under the policy before the subrogation clause may be applied.

Plaintiffs next argue that this Court erred in assuming that, but for plaintiffs' release of the *Haviland* defendants, Home Indemnity could have recovered the defense costs incurred in the *Kysor* litigation from the *Haviland* defendants. Plaintiffs assert that, based on the *Kysor* court's finding that the groundwater contamination at the Cadillac site was not caused by the 1984 spills, the *Haviland* defendants' wrongdoing did not cause the *Kysor* litigation. In response, defendants argue that the fact that the *Kysor* trial court determined that the groundwater contamination at the Cadillac site was not caused by the 1984 spills "does not change the fact that appellants were impleaded into the *Kysor* litigation because of the actions of the Haviland defendants."

An exception to the general rule that attorney fees are not recoverable in litigation unless expressly allowed by court rule or statute provides that a plaintiff may recover as damages from a third party the attorney fees the plaintiff incurred in a prior lawsuit the plaintiff was required to defend or prosecute because of the wrongful acts of the third party. *Bonner v Chicago Title Ins Co,* 194 Mich App 462, 468; 487 NW2d 807 (1992). An exception to a general rule must be narrowly construed. *Rinaldi v Rinaldi,* 122 Mich App 391, 402; 333 NW2d 61 (1983). Attorney fees may not be recovered under the exception where there is no evidence that a third party's wrongdoing caused the prior litigation. *Bonner, supra,* 194 Mich App 469. Furthermore, in our prior opinion, we failed to recognize that the exception is intended to be applied only where the third party is guilty of malicious, fraudulent or similar wrongful conduct, rather than simple negligence. *In re Thomas Estate,* 211 Mich App 594, 602; 536 NW2d 579 (1995); *Scott v Hurd-Corrigan Moving & Storage Co, Inc,* 103 Mich App 322, 347-348; 302 NW2d 867 (1981)(exception not applied where there was no evidence of fraud or malice); *G & D Co v Durand Milling Co,* 67 Mich App 253, 260; 240 NW2d 765 (1976)("the attorney's fee rule is intended to be applied where the party at fault is guilty of malicious, fraudulent or similar wrongful conduct, not of simple negligence as alleged here."); *State Farm Mutual Automobile Ins Co v Allen,* 50 Mich App 71, 79-80; 212 NW2d 821 (1973)(exception applied

where third parties were guilty of fraud and forgery). But see *Warren v McLouth Steel Corp,* 111 Mich App 496, 508; 314 NW2d 666 (1981).[2]

In our original opinion, we held that, but for plaintiffs' release of the *Haviland* defendants, plaintiffs would have had a claim against the *Haviland* defendants for attorney fees incurred in the *Kysor* litigation because plaintiffs were forced to defend the *Kysor* litigation due to the *Haviland* defendants' wrongful acts that resulted in the rupture of the TCE tank in August, 1984. The *Kysor* court found that the 1984 TCE tank collapse did not contribute to the contamination at the site. Despite that finding, plaintiffs' counsel stated at the hearing on the motion for summary disposition in the instant case that "[i]t is undisputed that the basis of [the third-party claim against plaintiffs in the *Kysor* litigation] and the conduct for which the third parties sought indemnity arose out of that 1984 explosion." In any event, there is no evidence that the *Haviland* defendants' conduct with respect to the August, 1984 storage tank rupture was malicious or fraudulent, or amounted to anything other than simple negligence. In fact, plaintiffs' complaint against the *Haviland* defendants alleged negligence, breach of warranty, and breach of contract, but did not allege any malicious or fraudulent conduct. We therefore conclude that the exception does not apply to the facts of this case and that plaintiffs had no basis on which to recover from the *Haviland* defendants the attorney fees plaintiffs incurred in the *Kysor* litigation. Accordingly, because plaintiffs had no right to recover the attorney fees from the *Haviland* defendants, Home Indemnity had no subrogation rights with respect to the attorney fees. *Poynter v Aetna Casualty & Surety Co,* 13 Mich App 125, 128; 163 NW2d 716 (1988). Thus, we now conclude that the trial court erred in granting Home Indemnity's motion for summary disposition on the ground that plaintiffs' action on the insurance policy was barred by their destruction of Home Indemnity's subrogation rights.

II.

In our previous opinion, we concluded that the trial court was correct in applying the manifestation approach to determine the trigger for insurance coverage. Our conclusion was based on caselaw applying the manifestation trigger in the context of environmental contamination on the basis that it would be difficult, if not impossible, to determine the precise timing of the property damage in those cases. However, the Supreme Court's opinion in *Gelman Sciences, Inc v Fidelity & Casualty Co,* 456 Mich 305, 316; 572 NW2d 617 (1998), leads us to a different conclusion.

In *Gelman,* the Court emphasized that it is the policy language as applied to the specific facts of a case that determines coverage. *Gelman, supra,* 456 Mich 317. The Court held that the standard general comprehensive liability policy language in the case before it, which provided coverage for property damage occurring during the policy period, did not support the application of a manifestation trigger. *Id.* at 320. Rather, the Court held that the policy language unambiguously dictated application of an injury-in-fact trigger of coverage. *Id.* at 319-320. Under the injury-in-fact approach, coverage is triggered when actual property damage occurs. *Id.* at 314. Thus, when applying the injury-in-fact approach in an environmental contamination case, the finder of fact must determine when the exposure to pollutants resulted in actual property damage. *Id.*

Gelman emphasizes that the determination of when an occurrence takes place for the purpose of determining if coverage exists under a particular policy depends on the policy language, rather than the type of injury alleged. Therefore, in the instant case, the language of each policy must be examined to determine coverage. If, as in *Gelman*, a policy contains standard comprehensive general liability policy language that defines an occurrence as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured," then coverage will be triggered when property damage first occurred and under subsequent policy periods during which the property damage continued to occur. *Id.* at 328. Because several of the policies were not submitted to this Court, we remand to the trial court for a determination of whether the policy language requires the application of the injury-in-fact approach. Assuming the policies contain the standard language, we remand to the trial court for a determination of the numerous questions of fact involved in the application of the injury-in-fact approach, such as when the property damage first occurred and continued to occur, and which policies were in existence during those times. On remand, the trial court should also consider the issues raised in the parties' motions for summary disposition that it did not consider due to its finding that defendants were entitled to summary disposition based on the application of the manifestation trigger.

Reversed and remanded. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Martin M. Doctoroff
/s/ Stephen J. Markman

[1] Defendants Home Indemnity Company and Home Insurance Company filed an application for leave to appeal as cross-appellants. However, the Court denied the application on the ground that the question presented was not ruled upon by the lower courts.

[2] In *Warren, supra,* a simple negligence case, this Court held that the exception allowing the recovery of attorney fees from a third party whose wrongful conduct forced the plaintiff to defend a prior lawsuit "is broad enough to encompass the factual situation where a passive tortfeasor has been forced to defend against the claims of a plaintiff because of the injuries caused by the active tortfeasor." *Warren, supra,* 111 Mich App 508. However, we were unable to locate any other case applying the exception to cases of simple negligence. In light of the weight of authority holding that the exception should only be applied in cases of malicious, fraudulent, or similar conduct, we decline to follow *Warren*.