IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

EDWARD G. HUMPHREYS, JR.,

Plaintiff-Appellee,

Shelby Chancery No. 102511-2
C.A. No. 02A01-9506-CH-00138

Vs.

JAMES ROBERT HUMPHREYS and DIANE HUMPHREYS-BARLOW,

Defendants-Appellants.

FILED

July 10, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

FROM THE SHELBY COUNTY CHANCERY COURT

THE HONORABLE FLOYD PEETE, JR., CHANCELLOR

Glen G. Reid, Jr., and Robert A. McLean of
McDonnell Dyer, Memphis, For Appellee

Stephen P. Hale and Richard R. Roberts of Memphis
For Appellants

AFFIRMED AND REMANDED

Opinion filed:

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

DAVID R. FARMER, JUDGE

HOLLY KIRBY LILLARD, JUDGE

This is a suit for contribution. On February 22, 1993, Edward G. Humphreys, Jr., (hereinafter, "Plaintiff") filed a complaint in the Shelby County Chancery Court against his

brother, James Robert Humphreys, and his sister, Diane Humphreys-Barlow (hereinafter, "Defendants"), to recover their pro-rata share of the cost and expenses incurred in cleaning up fuel contamination on real property that Plaintiff and Defendants had owned as tenants-in-common and had sold. Following a bench trial, the trial court found that Defendants were liable to Plaintiff for their pro-rata share of the total expense of $68,481.00, including ten percent interest, that Plaintiff had incurred to remediate the contamination on the property in question. Subsequently, the Chancellor entered an amended order deleting the interest included in the total expense, thereby reducing the total expense to $60,294.00. Plaintiff was awarded judgment for defendants pro rata share in the amount of $40,196.00. Plaintiff was denied pre-trial interest. Defendants have appealed and present the following issues for review:

ISSUES

> 1. Whether the Chancellor erred in determining liability of the defendants based upon the reasonableness of the Plaintiff's action.
>
> 2. Whether the Chancellor erred in determining that the Plaintiff and Defendants would have been subject to liability to Plantation Properties.
>
> 3. Whether the Chancellor erred in determining that the Plaintiff and Defendants would have been subject to liability to the State of Tennessee.

Plaintiff presents the following issue:

> Whether the Chancellor abused his discretion in refusing to award pre-judgment interest as an element of damages.

FACTS

In May, 1986, Plaintiff and Defendants inherited approximately 57 acres of property at the intersection of Macon Road and Germantown Parkway in Shelby County, Tennessee. At the time the parties became the owners of the property, there were four underground petroleum storage tanks on the property that had been used to refuel the equipment and trucks used in the family's farming and nursery operations. In February, 1989, the parties entered into a real estate sales contract to sell the property to Glenbrook Equities, Inc. The contract stated in relevant part:

14. Representations, Warranties, Covenants and Agreements of Seller.

> A. Representation and Warranties of Seller. For the purpose of inducing Purchaser to enter into this Contract and to consummate

> the sale and purchase of subject property in accordance herewith, Seller represents and warrants to Purchaser the following as of the date of this Contract and as of the Closing Date...:
>
> ***
>
> (2) That there is no condition existing with respect to the subject property, or any part thereof, which violates any regulation, decree, code, ordinance, rule or law of any city, county, state or federal government or governmental agency....
>
> (3) that Seller has not received notice of and has no knowledge or information of...any natural or artificial condition upon or affecting the subject property or any part thereof, any of which would result in any material change in the condition of the subject property, or any part thereof, or in any way limit or impede construction of the improvements to be constructed on the subject property.

In March, 1989, the parties decided to remove the four underground fuel tanks, as two of the tanks had been leaking. The parties wished to avoid complications that might arise from the tanks having been on the property, especially since two producing water wells were in close proximity to the leaking tanks. Plaintiff and Defendants employed E.F. Williams, an environmental engineer, to supervise the removal. Plaintiff, himself, removed the tanks from the property on March 20, 1989. Thereafter, Williams tested the soil and found fuel contamination. The parties attempted to remedy the contamination by removing soil and allowing it to aerate before replacing it. Afterwards, Williams prepared a report which stated that the contamination no longer represented a potential source for underground soil contamination; however, unknown to the parties at the time, some contamination did, in fact, remain.

In June, 1989, Glenbrook Equities assigned the real estate sales contract to Plantation Properties. Later that month, Plaintiff and Defendants conveyed the property to Plantation Properties (hereinafter, "Plantation") for consideration of $4.6 Million. Plantation paid Plaintiff and Defendants a down payment of $1 Million with the remaining $3.6 Million to be paid pursuant to a promissory note secured by a deed of trust. In January, 1992, Plantation entered into a contract to sell 1.2 acres of the property to Apple South, Inc., for approximately $460,000. Apple South intended to construct and operate an Applebee's Restaurant at that location. Apple South hired Professional Service Industries, Inc., (hereinafter "PSI") to perform an environmental investigation of the site. PSI found both gasoline and diesel fuel contamination

in the area where one of the underground fuel tanks had been located. PSI notified the Tennessee Department of Environment and Conservation regarding the contamination, and by letter dated May 7, 1992, the State made written demand upon Plantation, Plaintiff and Defendants to eliminate the contamination. Plantation urged Plaintiff and Defendants to remedy the condition because the contamination threatened the viability of Plantation's contract with Apple South, and adverse publicity could be detrimental to Plantation's efforts to develop the remaining 55 acres of the property. PSI performed additional tests on the property, some of which were observed by Plaintiff. The tests indicated contamination at the bottom of one of the former tank pits to a depth of 33 feet below the surface. Subsequent testing by E.F. Williams indicated that contamination extended to as far as 45 feet below the surface.

Plaintiff was convinced that the contamination had occurred during the time he and Defendants had owned the property, and he was concerned about the legal exposure he and Defendants might face if the contamination were not remedied. Thereafter, Plaintiff funded and personally undertook to clean up the property by removing and replacing the contaminated soil. Plaintiff's cleanup efforts were successful and met with the State's approval. After the contamination had been eliminated from the property, Plantation and Apple South closed the sale of the property.

Defendants refused to pay Plaintiff for their share of expenses incurred in eliminating the contamination. Plaintiff filed the instant Complaint on February 22, 1993, seeking contribution from Defendants for their pro-rata share of the cost of the cleanup as well as pre-judgment interest. In their Answer, Defendants averred that they were not liable for contribution because neither they nor Plaintiff had any legal responsibility or liability to clean up or to eliminate any contamination on the property.

This action for contribution was tried without intervention of a jury, and the trial court made written findings of fact and conclusions of law. Rule 13(d) T.R.A.P. requires this Court to review the findings of fact by the trial court de novo upon the record, accompanied by a presumption of the correctness of the findings. Unless the preponderance of the evidence is otherwise, we must affirm the trial court absent error of law.

ISSUES 1 AND 2:

Whether the Chancellor erred in determining liability of the defendants based upon the reasonableness of the Plaintiff's action.

Whether the Chancellor erred in determining that the Plaintiff and Defendants would have been subject to liability to Plantation Properties.

The right of contribution carries with it the requirement of a liability. The right to recover contribution is the right to proceed against persons jointly liable. Contribution is founded upon principles of equity which require that persons under a common liability bear it in equal proportions and that one not bear more than his share. TRW-Title Ins. Co. v. Stewart Title Guar. Co., 832 S.W.2d 344 (Tenn. App. 1991) appeal. den. (Tenn. 1992); Fontenot v. Roach, 120 F. Supp. 788 (E.D. Tenn. 1954); Huggins v. Graves, 337 F.2d. 486 (6th Cir. 1964).

The right to contribution arises the moment that one co-obligor pays more than his share of a common liability. Moody v. Kirkpatrick, 234 F.Supp. 537, 541 (M.D. Tenn. 1964). Therefore, a party who discharges a common obligation for his own protection and which action enures to the benefit of a co-obligor is entitled to contribution. To entitle one to contribution, the payment must be compulsory in the sense that the party was under an obligation to pay. TRW-Title Ins. Co.,832 S.W.2d at 346. However, it is not necessary that a suit be instituted or that a judgment be rendered against the person seeking contribution. Huggins v. Graves, 337 F. 2d 486, 487 (6th Cir. 1964); See also, McLochlin v. Miller, 217 N.E.2d 50 (Ind. Ct.App. 1966); Consolidated Coach Corp. v. Burge, 54 S.W.2d 16 (Ky. Ct. App. 1932). Therefore, a party need not wait until he and a co-obligor are sued in order to seek contribution for remedial action taken.

In the instant case, neither the State of Tennessee nor Plantation sued Plaintiff or Defendants or obtained a judgment against them. The existence of liability must be proved by other means. In Terminal Transport Co., Inc. v. Cliffside Leasing Corp., 577 S.W.2d 455, 458 (Tenn. 1979), the Supreme Court said:

> [T]he question of the existence of liability must be answered by probabilities as they existed at the time of settlement, not by consideration alone of the legal effect of facts. citing, Tankrederiet Gefion A/S v. Hyman-Michaels Company,

406 F.2d 1039 (6th Cir. 1969).

In Terminal Transport, our Supreme Court relied upon Wisconsin Barge Line, Inc., v. Barge Chem 300, 546 F.2d 1125 (5th Cir. 1977). In that case, a barge owner was sued for injuries sustained by an employee in a barge collision. After the barge owner settled the lawsuit, it sought indemnity from another party. The Court of Appeals, reversing the District Court, held that the barge owner need not go to trial and lose in order to establish that it was compelled to pay the employee for his injuries. Specifically, the Court of Appeals stated:

> It is enough if the proof shows the existence of a reasonable and good faith belief in liability... and that the settlement was made in good faith and for a reasonable amount under the circumstances. Wisconsin Barge Line, Inc., v. Barge Chem 300, 546 F.2d 1125, 1128 (5th Cir. 1977), citing West Coast Terminals Co., of Cal. v. Luckenbach Steamship Co., 349 F.2d 568, 570 (9th Cir. 1965).

In the case before us, the Chancellor found that it was reasonable for Plaintiff to perceive and conclude that he and Defendants were liable both to Plantation and to the State of Tennessee for the contamination that had occurred during the time he and Defendants owned the property. We find no error in this determination. Plaintiff asserts and we agree that a common liability on the part of defendants could be premised on several theories. For example, the real esate contract for the sale of the property contained representations and warranties regarding the condition of the property stating in relevant part:

> 14. Representations, Warranties, Covenants and Agreements of Seller.
>
> A. Representation and Warranties of Seller.
> For the purpose of inducing Purchaser to enter into this Contract and to consummate the sale and purchase of subject property in accordance herewith, Seller represents and warrants to Purchaser the following as of the date of this Contract and as of the Closing Date...:
>
> ***
>
> (2) That there is no condition existing with respect to the
> subject property, or any part thereof, which violates any regulation, decree, code, ordinance, rule or law of any city, county, state or federal government or governmental agency....
>
> (3) that Seller has not received notice of and has no knowledge or information of...any natural or artificial condition upon or affecting the subject property or any part thereof, any of which would result in any material change in the condition of the subject property, or any part thereof, or in any way limit or impede construction of the improvements to be constructed on the subject

property.

In June, 1989, Glenbrook assigned the contract to Plantation Properties, and the Plaintiff and Defendants conveyed the property to Plantation on June 13, 1989. The trial court found that the warranties and representations made by the parties were binding upon them and relied upon by Plantation. Paragraph 14(C) of the contract explicitly provides for the continuation of the warranties and representations:

> C. Survival of Representations and Warranties. The representations and warranties of Seller set forth herein shall be continuing and shall survive the Closing and shall not be merged into the Closing documents.

The contract appears clear and unambiguous. Contrary to Defendants' assertions, we do not find there to be a conflict between paragraphs 6 and 14 of the real estate sales contract. Paragraph 14 is a warranty from the sellers that no condition existed on the property in violation of any law. Paragraph 6 gives the purchaser the right to conduct tests upon the property and to delay closure, if necessary. The two clauses are not mutually exclusive nor does one control over the other. Rather, they are unambiguous and work in concert. Courts should interpret a contract in such a way as to give effect to all terms and conditions. Rainey v. Stansell, 836 S.W.2d 117 (Tenn. App. 1992)(All provisions of a contract should be construed as in harmony with each other, if such construction can be reasonably made). See also, Park Place Center Enterprises, Inc. v. Park Place Mall Assocs. L.P., 836 S.W.2d 113 (Tenn. App. 1992).

Plaintiff and Defendant warranted and represented to Plantation that there existed no condition on the property that violated any law. The warranties and representations survived the sale of the property. Because there is no dispute that the property was contaminated when it was sold, the Chancellor was correct in finding that Plaintiff and Defendants faced liability for breach of warranty.

The Chancellor held that Plaintiff and Defendants would have been subject to an enforcement action by the State of Tennessee for environmental contamination for an unlawful discharge of pollutants under the Tennessee Water Quality Control Act. Based on the testimony of witnesses for both Plaintiff and Defendants, the trial court found that the contamination that existed on the property at the time of closing was likely to move into the groundwater thereby

providing the State with the right to undertake an enforcement action.

Defendants insist that the State had no power to require that they and Plaintiff clean up the contaminated property because neither the Tennessee Petroleum Underground Storage Act (hereinafter, "TPUSA"), T.C.A.§ 68-215-101 (1988) et seq., nor the Tennessee Water Quality Control Act (hereinafter, "TWQCA"), T.C.A.§ 69-3-101 (1977), et seq., apply either to the tanks in question or to the resulting condition on the property.

The TPUSA provides that "...all releases of petroleum or petroleum products from petroleum underground storage tanks shall be solely and exclusively regulated..." under the TPUSA. T.C.A.§ 68-215-127 (1988). The TPUSA, by its own terms, exempts from exclusive regulation "[F]arm or residential tanks of one thousand one hundred (1,100) gallons or less used for storing motor fuel for noncommercial purposes..." T.C.A.§ 68-215-124(2) (1988). While the four tanks that were located on the property are specifically exempted from exclusive regulation by the TPUSA because each had a capacity less than 1,100 gallons, this does not mean that they are not subject to regulation. Leakage and concomitant contamination therefrom cannot be permitted to occur unchecked.

The Tennessee Department of Environment and Conservation informed the parties that they were in violation of the TWQCA. After reviewing the data and observing additional tests, Plaintiff, too, concluded that he and Defendants were in violation of the TWQCA. That Act states in relevant part:

> (b) It is unlawful for any person...to carry out any of the following activities...:
>
> (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;
>
> (7) The discharge of sewage, industrial wastes, or other wastes into a well or a location that is likely that the discharged substance will move into a well, or the underground placement of fluids and other substances which do or may affect the waters of the state...
> T.C.A.§ 69-3-108(b)(6) and (7) (1993)(emphasis added).

The term "other wastes" has been defined by the Act to include oil and petroleum byproducts such as diesel and gasoline which had been stored within the tanks in question. T.C.A.§ 69-3-

103(18)(1992). Unrebutted testimony established that the contamination was “likely” to move into the groundwater and neighboring wells. Glen Birdwell of the Tennessee Department of Environment and Conservation who was one of Plaintiff’s witnesses testified:

> **DIRECT EXAMINATION:**
> Q. Now, one last question. Why was the State of Tennessee concerned with the site under the Tennessee Water Quality Control Act?
>
> A. Because of the amount, well, the contamination that was present in the ground. Particularly the I think it is almost 3,000 parts per million TPH at, what, 33 feet below the surface of the soil, the potential for the contamination of the groundwaters of the State was there and that was the thrust.
>
> Q. And you said potential. Will you explain to the court what you mean by potential?
>
> A. The potential or the likelihood of threat of water to the State....
>
> * * *
>
> **CROSS EXAMINATION:**
> Q. Now, when you said potential, essentially to you when you used that term that means might get to the waters, is that what you are saying?
>
> A. Yes, might, likely, potential.
>
> * * *
>
> Q. And it is your testimony that it is more probable than not that it will reach the groundwater.
>
> A. It is likely and probable that it could reach the groundwater.

Similarly, Ben Brantley, Plaintiff’s witness, testified on cross-examination:

> Q. Is that more probable or less probable than not? You can’t say, can you?
>
> A. Well, in all likelihood if that contamination remained in place, groundwater would eventually be adversely affected. I can say that.

Ed Williams, Defendants’ own expert, testified that it was likely that the groundwater would be contaminated within one year. (TE. 218-19). Defendants introduced no proof to rebut Plaintiff’s position that the groundwater eventually would be contaminated by the fuel that had leaked from the tanks. Consequently, we find no error in the Chancellor’s finding that it was likely that groundwater contamination would occur.

Defendants assert that the contamination is not addressed by the TWQCA because the TWQCA specifically exempts "...any agricultural or forestry activity or the activities necessary to the conduct and operations thereof or to any lands devoted to the production of any agricultural or forestry products unless there is a point source discharge from a discernable, confined, and discrete water conveyance." See, T.C.A.§ 69-3-120(g) (1992). The T.W.Q.C.A. does not define "point source discharge" or "a discernable, confined, and discrete water conveyance." However, the TWQCA is the state equivalent of the Federal Water Pollution Control Act (hereinafter, "FWPCA"), 33 U.S.C. § 1361 (1987), et seq. The purpose of the TWQCA is "...to enable the state to qualify for full participation in the natural pollutant discharge elimination system established under...the Federal Water Pollution Control Act. . . ." T.C.A.§ 69-3-102(c) (1992). The FWPCA defines a "point source" as:

> ... any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container... from which pollutants are or may be discharged. . . . 33 U.S.C. § 1362(14) (1988).

As one federal court noted in O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642, 655 (E.D. Pa. 1981):

> The essence of a point source discharge is that it be from a 'discernable, confined, and discrete conveyance'... Contrary to defendants' assertions, this has nothing to do with the intent of the operators or the reasonableness of the existing collection system. See generally, Sierra Club v. Abston Construction Co., 620 F.2d 41, 45-46 (5th Cir. 1980). Notwithstanding that it may result from such natural phenomena as rainfall and gravity, the surface run-off of contaminated waters, once channeled or collected, constitutes discharge by a point source. Sierra Club, 620 F.2d at 47.

In this case, there is no dispute that the underground tanks were leaking into the soil. Further, the unrebutted testimony established that the fuel contaminate was migrating downward toward the groundwater. We find that the leaking tanks were point sources for the soil contamination. Accordingly, we do not find that the Chancellor erred in concluding that the State of Tennessee had the authority to compel Plaintiff and Defendant to clean up the contamination under the TWQCA. For all of the above reasons the trial court correctly held that plaintiff is entitled to contribution from defendants.

PLAINTIFF'S ISSUE - PRE-JUDGMENT INTEREST

By Amended Order entered April 26, 1995, the Chancellor denied Plaintiff's prayer for pre-judgment interest. T.C.A.§ 47-14-123(1979) provides in relevant part, "[P]re-judgment interest, i.e. interest as an element of, or in the nature of, damages ...may be awarded by courts or juries in accordance with the principles of equity at any rate not in excess of ...ten percent (10%) per annum...." The award of prejudgment interest is within the trial court's sole discretion. Kirksey v. Overton Pub. Inc., 804 S.W.2d 68 (Tenn. App. 1990). In this instance, the trial court elected not to award Plaintiff pre-judgment interest. The trial court's decision regarding pre-judgment interest should not be disturbed upon appellate review unless the record reveals a "manifest and palpable abuse of discretion." Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 446 (Tenn. 1992). Upon examination of the record, we do not find such an abuse of discretion.

Accordingly, the judgment of the trial court is affirmed, and the case is remanded for such further proceedings as necessary. Costs of appeal are assessed against the appellants.

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W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

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DAVID R. FARMER, JUDGE

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HOLLY KIRBY LILLARD, JUDGE