

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

F.P. WOLL & COMPANY : CIVIL ACTION  
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: :  
v. : :  
: :  
: :  
FIFTH AND MITCHELL STREET :  
CORPORATION, et al. : NO. 96-5973

WALDMAN, J.

February 3, 1999

M E M O R A N D U M

I. Background

Plaintiff has asserted claims against defendants Fifth and Mitchell Company and Fifth and Mitchell Corporation under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq., the Pennsylvania Hazardous Sites Cleanup Act (HSCA), 35 P.S. § 6020.101 et seq. and the Pennsylvania Storage Tank and Spill Prevention Act (STSPA), 35 P.S. § 6021.101 et seq., as well as common-law claims for nuisance, negligence and strict liability in engaging in abnormally dangerous activity. All of these claims arise from the contamination of a property in Montgomery County, Pennsylvania purchased by plaintiff from Fifth and Mitchell Company in 1981. The court has subject matter jurisdiction over the federal claims under 28 U.S.C. § 1331 and supplemental jurisdiction over the state claims pursuant to 28 U.S.C. § 1367(a).

Plaintiff and defendants Fifth and Mitchell Street Company and Fifth and Mitchell Street Corporation (collectively Fifth and Mitchell) have filed cross-motions for summary judgment.

## II. Legal Standard

In considering a motion for summary judgment, a court determines whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record must be drawn in favor of the non-movant. Id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991).

Because they "often involve multiple defendants and difficult remedial questions," Amoco Oil Co. v. Borden, 889 F.2d 664, 667 (5th Cir. 1989), use of the summary judgment procedure on the issue of liability only is frequently appropriate in CERCLA cases. See United States v. Alcan Aluminum Corp., 990 F.2d 711, 720 (2d Cir. 1993); Amoco Oil Co., 889 F.2d at 667-68; American Nat. Bank & Trust Co. of Chicago as Trustee for Illinois Land Trust No. 120658-01 v. Harcros Chemicals, Inc., 1997 WL 281295, \*6 (N.D. Ill. May 20, 1997); State ex rel. Howes v. W.R. Peele, Sr. Trust, 876 F. Supp. 733 (E.D.N.C. 1995); Chesapeake and Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1269, 1274 (E.D. Va. 1992).

To obtain summary judgment in a CERCLA case, the plaintiff must show that there is no triable issue of fact as to the existence of each of the elements of his prima facie case for CERCLA liability under 42 U.S.C. § 9607 and as to the nonexistence of each of the narrow defenses to CERCLA liability set forth in 42 U.S.C. § 9607(b). To secure summary judgment, the defendant must show that there is no triable issue of fact as to the nonexistence of at least one of the elements of the plaintiff's prima facie case or as to the existence of one of the § 9607(b) defenses. See Artesian Water Co. v. Government of New Castle County, 659 F. Supp. 1269, 1279 (D. Del. 1987), aff'd, 851 F.2d 653 (3d Cir. 1988).

### III. Facts

While the parties clearly differ on the conclusions to be drawn, the pertinent facts for purposes of these motions are essentially uncontroverted. They are as follow.

Plaintiff owns a parcel of real property located at Fifth Street and Cannon Avenue in Lansdale Borough, Montgomery County, Pennsylvania. Plaintiff bought this property as an investment from Fifth and Mitchell Street Company on September 1, 1981. Fifth and Mitchell Street Company had purchased the property on November 1, 1980 from Fifth and Mitchell Street Corporation which had owned it since 1956.<sup>1</sup> Before buying the property, plaintiff conducted a due diligence investigation. Plaintiff did not then learn of environmental contamination at the property.

Under a building on this property is a 10,000 gallon underground fuel oil storage tank which plaintiff sealed in September 1992. By letter of May 6, 1993, the Pennsylvania Department of Environmental Resources (DER) advised plaintiff that the soil immediately below the storage tank was contaminated

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<sup>1</sup> While not altogether clear from the record presented, it appears that Fifth and Mitchell Company was a limited partnership in which Fifth and Mitchell Corporation was a principal or managing partner. In any event, these defendants are jointly represented, have filed joint pleadings and submissions, and appear to have an identity of interests.

with petroleum and directed plaintiff to correct and mitigate the contamination.

From 1968 to 1975, Fifth and Mitchell leased a portion of the property to Met-Pro Corporation. Met-Pro engaged in manufacturing operations on the property including metal processing, painting and welding. Persons still working at the site in 1989 reported that Met-Pro used substantial quantities of TCE (trichloroethene) which was stored in large tanks on the premises.

For almost fifteen years, Fifth and Mitchell leased a portion of the property to Eaton Laboratories and its predecessor, Eaton Chemical Co. Eaton remained as a tenant of plaintiff and continued to operate on the property until late 1983. Eaton produced chlorinated solvents and dry-cleaning chemicals on the property. This process involves the substantial use of PCE. In a report for the EPA, Black and Veatch documented the delivery to Eaton of PCE in bulk which was stored at its building in 55-gallon drums beneath which two floor drains were located.

In July 1993, the United States Environmental Protection Agency (EPA) notified plaintiff that the property was located within Area 6 of the North Penn Superfund Site and that the operations of prior tenants were suspected of contributing to the Site's contamination. Shortly thereafter, the EPA conducted

tests on the property which showed concentrations of tetrachloroethene (PCE) as well as base neutral aromatic hydrocarbons.<sup>2</sup> Plaintiff then engaged Environ Corporation to conduct testing for it on the property. In the summer of 1993, plaintiff alerted its insurers, asking that they defend and indemnify it.

Fifth and Mitchell has not produced any expert report or other evidence refuting plaintiff's expert's conclusion that hazardous substances were placed and discharged at the site during Fifth and Mitchell's ownership of the property. Plaintiff contends it is thus entitled to summary judgment.

Fifth and Mitchell contends that plaintiff's expert based his opinions on mere speculation and failed to employ any scientific methodology. Fifth and Mitchell argues that because plaintiff has otherwise not presented evidence to link Fifth and Mitchell with the discharge of hazardous wastes, it is entitled to summary judgment.

#### **IV. Discussion**

##### **A. CERCLA**

To sustain a direct claim under 42 U.S.C. § 9607(a) or a claim for contribution under 42 U.S.C. § 9613(f), the plaintiff must show that:

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<sup>2</sup> Tetrachloroethene is a regulatory synonym for perchloroethylene. See 40 C.R.F. § 302.4 (table).

(1) a hazardous substance was disposed of at a "facility";

(2) there has been a "release or a "threatened release" of a hazardous substance from the facility into the environment;

(3) the release or threatened release has required or will require the expenditure of "response costs"; and,

(4) the defendant falls within one of four categories of responsible persons.

See United States v. CDMG Realty Co., 96 F.3d 706, 712 (3d Cir. 1996); Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 12 F. Supp.2d 391, 399 (M.D. Pa. 1998). If these elements are satisfied, the "responsible persons" will be held liable for appropriate response costs regardless of their intent. See CDMG Realty Co., 96 F.3d at 712.

A responsible person can escape liability under § 9607 only if he establishes that the release or threatened release was caused solely by one or more of the following circumstances:

(1) an act of God;

(2) an act of war; or,

(3) the act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant.

See 42 U.S.C. § 9607(b); FMC Corp. v. United States Dept. of Commerce, 29 F.3d 833, 841 (3d Cir. 1994); Caldwell Trucking PRP Group v. Spaulding Composites Co., 1996 WL 608490, \*1 (D.N.J. Apr. 22, 1996) United States v. Atlas Minerals and Chemicals, Inc., 797 F. Supp. 411, 416 (E.D. Pa. 1992).<sup>3</sup>

The term "responsible persons" includes "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." See 42 U.S.C. § 9607(a)(2). A disposal of a hazardous substance occurs when it is discharged, deposited, injected, dumped, spilled, leaked or placed on any land or water so that it "may" enter the environment. See 42 U.S.C. § 6903(3); CDMG Realty, 96 F.3d at 713. It is the ownership or operation of a facility "at the time of 'disposal,' not at the time of 'release'" which is pertinent for purposes of CERCLA liability. Id. at 715.

A CERCLA plaintiff is not required to link a particular defendant with a specific release or response cost as the Act effectively places on a defendant the burden of disproving

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<sup>3</sup> In § 9613 contribution actions, certain equitable defenses and limitations on liability are recognized which are not available in direct CERCLA actions under § 9607. See Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 89 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989); Caldwell Trucking PRP Group v. Spaulding Composites Co., Inc., 1996 WL 608490, \*1 (D.N.J. Apr. 22, 1996). None of those defenses are implicated in the instant motions.

causation. United States v. Alcan Aluminum corp., 964 F.2d 252, 265 (3d Cir. 1992) ("virtually every court that has considered this question has held that a CERCLA plaintiff need not establish a direct causal connection between the defendant's hazardous substances and the release or the plaintiff's incurrence of response costs"); Premium Plastics v. LaSalle National Bank, 904 F. Supp. 809, 814-15 (N.D. Ill. 1995) (citing additional cases). A CERCLA plaintiff "must simply prove that the defendant's hazardous substances were deposited at the site from which there was a release and that the release caused the incurrence of response costs." Alcan Aluminum, 964 F.2d at 266 (emphasis in original).

A defendant then has the burden to prove by a preponderance of the evidence that the release was caused solely by an unrelated third party. United States v. A & N Cleaners and Launderers, Inc., 854 F. Supp. 229, 239 (S.D.N.Y. 1994). This effectively results in "imposing liability upon some individual defendants who caused no harm but are unable to prove it by a preponderance of the evidence." Id. at 241.<sup>4</sup>

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<sup>4</sup> CERCLA liability has been characterized as "a black hole that indiscriminately devours all who come near it." Long Beach Unified School Dist. v. Dorothy B. Godwin California Living Trust, 32 F.3d 1364, 1366 (9th Cir. 1994) (quoting Jerry L. Anderson, The Hazardous Waste Land, 13 Va. Env'tl. L.J. 1, 6-7 (1993)).

Even a lessor of property who had no control over the offending activities of his tenant may be held liable under CERCLA. See United States v. Monsanto Co., 858 F.2d 160, 168 (4th Cir. 1988) (under plain language of § 9607(a)(2) "any person who owned a facility at a time when hazardous substances were deposited there may be held liable for all costs of removal or remedial action"), cert. denied, 490 U.S. 1106(1989); Clear Lake Properties v. Rockwell Intern. Corp., 959 F. Supp. 763, 769 (S.D. Tex. 1997) ("contractual relationship" under CERCLA includes any "instrument transferring title or possession" including lease); Elf Atochem North America, Inc. v. United States, 868 F. Supp. 707, 709 (E.D. Pa. 1994) ("Under CERCLA even an owner that does not have any control over the disposal activity is still liable for waste disposed at its facilities"); Atlantic Richfield Co. v. Blosenski, 847 F. Supp. 1261, 1277 (E.D. Pa. 1994) ("Mere ownership is enough" for CERCLA liability); United States v. A & N Cleaners and Launderers, Inc., 788 F. Supp. 1317, 1326, 1332-33 (S.D.N.Y. 1992) ("It is well-established that a lease constitutes a 'contractual relationship'" under § 9607(b)(3)); United States v. Argent Corp., 1984 WL 2567, \*2 (D.N.M. May 4, 1984) (owner-lessor of property where hazardous substances were disposed is subject to CERCLA liability even if owner-lessor had no connection to activities which caused release or threatened release of hazardous substances); Developments in the Law --

Toxic Waste Litigation, 99 Harv. L. Rev. 1511, 1515 (1986)  
("courts have held that a landowner may be liable [under § 9607]  
for a release of hazardous wastes on his land even though the  
disposal facility is operated by a lessee").

PCE is a "hazardous substance" under CERCLA. See ABB Industrial Systems, Inc., v. Prime Technology, Inc., 120 F.3d 351, 354 (2d Cir. 1997); Lincoln Properties, Ltd. v. Higgins, 1993 WL 217429, \*18 (E.D. Cal. Jan. 21, 1993). It is not disputed that the disposition of such a hazardous substance in a manner which causes property to become contaminated is a "release" under CERCLA. See § 9607(22). Fifth and Mitchell does not suggest that any release of this hazardous substance on the subject property was solely the result of an act of God or an act of war, and does not argue that plaintiff is equitably barred from seeking contribution. If a Fifth and Mitchell tenant disposed of a hazardous substance during its ownership of the subject property which was subsequently released, Fifth and Mitchell may thus be liable under CERCLA.

Plaintiff submitted a report of ERM an environmental consulting firm. The report concludes that it is probable that PCE was discharged into the environment on the subject property both before and after 1978. The report states that historical documents reviewed by ERM show that operations on the subject property used chlorinated solvents, including PCE and TCE, since

before 1968, that Eaton Chemical and Eaton Laboratories used "significant quantities of PCE and possibly some TCE at the site," and that the presence of these substances in the soil and groundwater, as revealed by tests at the site, "confirm that releases occurred on the property."<sup>5</sup>

ERM reviewed and considered records of the North Penn Water Authority (NPWA) indicating the presence of PCE and TCE on the property as early as 1979. ERM reviewed and considered an analysis of soil samples in 1988 by TDS Environmental showing the presence of PCE and TCE. ERM reviewed and considered its own report of 1990 showing the presence of PCE in the soil and PCE and TCE in the ground water. ERM reviewed and considered the Black and Veatch report of 1994 for the EPA documenting Eaton's use of PCE and showing PCE on the property.

The ERM report states that in "ERM's experiences, industrial operations using significant quantities of such chlorinated solvents frequently released them to the environment, particularly in the time period preceding the 1980's." The report states that given the nature of the tenants' operations, it is "highly likely" that organic chemicals including PCE and TCE" were released to the environment before 1981, "probable"

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<sup>5</sup> TCE is trichloroethene, also a hazardous substance. See 40 C.F.R. § 302.4 (table).

that PCE was discharged by Eaton before and after 1978 and "probable" that TCE was released during Met-Pro's operation.

Fifth and Mitchell argues that the ERM report is "devoid of scientific methodology" and "predicated upon conjecture as to the date of an alleged release." Fifth and Mitchell contends it is thus entitled to summary judgment in the absence of other evidence to show a release of hazardous substances occurred on the property when Fifth and Mitchell owned it. Fifth and Mitchell appears to misperceive who is required to prove what in a CERCLA case. As noted, a CERCLA plaintiff must simply prove that a defendant owned or operated a site when a hazardous substance was deposited there and not at the time of a release of such substance. Alcan Aluminum, 964 F.2d at 266.<sup>6</sup>

Fifth and Mitchell relies on various state court decisions to discount the report of plaintiff's expert. Even as to claims arising under state law, however, the admissibility of expert opinion and other evidence in the federal courts is determined by the Federal Rules of Evidence. See Salas by Salas v. Wang, 846 F.2d 897, 906 (3d Cir. 1988); 1836 Callowhill Street v. Johnson Controls, Inc., 819 F. Supp. 460, 462 n.5 (E.D. Pa. 1993); D'Orio v. West Jersey Health Systems, 797 F. Supp. 371, 376 (D.N.J. 1992).

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<sup>6</sup> An HSCA plaintiff similarly need not prove a release at the time a defendant owned a contaminated site. See 35 P.S. § 6020.701(a).

Federal Rule of Evidence 702 provides that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702 requires that the expert scientific opinion be based on "methods and procedures of science" rather than on "subjective belief or unsupported speculation" and requires that the expert have "good grounds" for his or her belief. See In re Paoli Railroad Yard PCB Litigation, 35 F.3d 717, 742 (3d Cir. 1994), cert. denied, 513 U.S. 1190 (1995); Robert Billet Promotions, Inc. v. IMI Cornelius, Inc., 1998 WL 721081, \*10 (E.D. Pa. Oct. 14, 1998). See also Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592-95 (1993).

Environmental science "is ill-suited to lead a factfinder toward definitive answers, dealing as it does in statistical probabilities." B.F. Goodrich v. Betkoski, 99 F.3d 505, 525 (2d Cir. 1996) (citation omitted), cert. denied sub nom Zollo Drum Co., Inc. v. B.F. Goodrich Co., 118 S. Ct. 2318 (1998). A CERCLA plaintiff "is not required to prove its case with scientific certainty." Id. at 526. To require a CERCLA plaintiff's expert to rely on direct evidence that a defendant was responsible for the disposal of a hazardous substance would

allow many potentially responsible parties to evade liability and defeat CERCLA's broad remedial goals. Id.

In B.F. Goodrich, the Court held it was not impermissibly speculative for a plaintiff's expert to rely on the type of hazardous substances found in normal tire products although he could not be certain that the tire products disposed of by a particular appellee were similar to normal tire products. Id. at 524. In State v. Almy Bros., Inc., 1998 WL 57666 (N.D.N.Y. Feb. 4, 1998), the Court held that it was not impermissibly speculative for plaintiff's expert to opine that because a defendant's operations at a site were of the type that typically explain the presence of the kind of hazardous waste in question, the defendant was more likely than not responsible for similar environmental contamination in the absence of another explanation. Id. at \*10-11.

In the instant case, plaintiff's expert concludes that because Fifth and Mitchell's tenants conducted precisely the sort of operations that produce the kind of contamination found on the subject property, and because disposal of hazardous substances in a manner causing that kind of contamination was commonplace in the tenants' industry at the time, the tenants more likely than

not contributed to the release of hazardous substances during the time Fifth and Mitchell owned the property.<sup>7</sup>

Absent another logical explanation, it is not unreasonable to infer disposal of a substance by a party from its use of significant quantities of the substance while operating a leased facility on a property and evidence of a subsequent release of that substance at the property. Fifth and Mitchell has presented no evidence to show that its tenants did not contribute to the release of hazardous substances at the site.

Fifth and Mitchell's reliance on Smith v. Union Pacific R. Co., 168 F.R.D. 626 (N.D. Ill. 1996) is misplaced. In Smith, the defendant delivered to plaintiff on the last permissible date for disclosure of expert reports a report which consisted merely of conclusions favorable to the defendant with no supporting explanation. Indeed, the court characterized the report as "a bad joke." Id. at 628-29.

The report in the instant case was delivered to Fifth and Mitchell three weeks before it was due, and defendant never sought an extension of discovery to depose plaintiff's expert. It sets forth the expert's opinions, data he considered and the

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<sup>7</sup> Courts have recognized that PCE has been widely used as a dry-cleaning solvent. See State of New York v. Laskins Arcade Co., 91 F.3d 353, 355 (2d Cir. 1996); Westfarm Assoc. L.P. v. Washington Suburban Sanitary Comm'n., 66 F.3d 669, 674 (4th Cir. 1995); Lincoln Properties, Ltd. v. Higgins, 1993 WL 217429, \*2 (E.D. Cal. Jan.21, 1993).

reasons for his opinions in compliance with Fed. R. Civ. P. 26(a)(2)(B). There has been no showing that the expert relied on data of a type not ordinarily relied on by experts in the field in formulating opinions or that his methodology was unscientific. The expert set forth good grounds for his opinions. His conclusions are ones which could rationally be reached on the basis of the underlying studies and data considered. See General Electric Co. v. Joiner, 118 S. Ct. 512, 519 (1997); In re Paoli Railroad Yard PCB Litigation, 35 F.3d at 742.

The court cannot conscientiously conclude on the record presented that no rational factfinder could find by a preponderance of the evidence that a Fifth and Mitchell tenant disposed of hazardous substances which were released into the environment on the subject property.

Plaintiff's motion for summary judgment will also be denied. Although plaintiff has presented sufficient evidence to allow a rational factfinder to conclude that a Fifth and Mitchell tenant disposed of hazardous substances which were released, the evidence does not compel such a conclusion. One could conceivably infer from plaintiff's failure to detect contamination after undertaking a diligent investigation before its purchase of the property that the contaminants subsequently found were deposited and discharged after the sale in 1981. Also, the weight ultimately to be accorded the expert's opinions

is best left for trial where he will be subject for the first time to cross-examination, where the force of the underlying data can be better assessed and where the degree of professional certainty with which he expresses his opinions will be more apparent.

B. HSCA

The HSCA is similar to but even broader in its reach than CERCLA and like CERCLA, it provides for a private cause of action. See Andritz Sprout-Bauer, 12 F. Supp.2d at 407; Bethlehem Iron Works, Inc. v. Lewis Industries, Inc., 891 F. Supp. 221, 225-26 (E.D. Pa. 1995). To sustain a claim for response costs under the HSCA, a plaintiff must show:

- (1) A release or threatened release,
- (2) of a hazardous substance,
- (3) from a site, and
- (4) that defendant is a responsible person as defined in subsection 701(a) of the HSCA; i.e., a person who "owns or operates" a site as defined in HSCA subsection 701(a)(1).

See 35 Pa. C.S.A. § 1620.701(a); Andritz Sprout-Bauer, 12 F. Supp.2d at 407; Com., Dept. of Environmental Resources v. Bryner, 613 A.2d 43, 45 (Pa. Commw. 1992).

Under the HSCA, the class of "responsible persons" includes anyone who owns or operates a site at the time a hazardous substance is placed or located there. See 35 P.S.

§ 6020.701(a); Darbouze v. Chevron Corp., 1998 WL 512941, \*10 (E.D. Pa. Aug. 19, 1998). To escape liability, the burden is on such an owner or operator to prove by a preponderance of the evidence that any subsequent release or threatened release of the substance was caused solely by an act of God, an act of war or the conduct of an unrelated third party. See 35 P.S. § 6020.703(a) & (f). Fifth and Mitchell has presented no such evidence. Under the HSCA, "any person in the chain of title is subject to liability even in the absence of evidence that it contributed to the current environmental problem." Andritz Sprout-Bauer, 12 F. Supp.2d at 408.

The court cannot conclude from the summary judgment record that a rational factfinder either must or could not find that hazardous substances released on the subject property were placed or located there when it was owned by Fifth and Mitchell. Accordingly, the parties' motions for summary judgment as to plaintiff's HSCA claim will also be denied.

### C. STSPA

The Storage Tank Act is a public health statute designed to control the storage of "regulated substances" in new and existing storage tanks. Darbouze, 1998 WL 512941 at \*11; Centolanza v. Lehigh Valley Dairies, Inc., 658 A.2d 336, 338 (Pa. 1995). Regulated substances include petroleum and fuel oil. See 35 P.S. § 6021.103. When the DER does not enforce the Act, a

private party may bring an action to recover costs for cleanup and for any diminution in property value. Darbouze, 1998 WL 512942 at \*11; Centolanza, 658 A.2d at 338.

A private plaintiff receives the benefit of a rebuttable presumption that "a person who owns or operates an above ground or underground storage tank shall be liable, without proof of fault, negligence or causation, for all damages, contamination or pollution within 2,500 feet of the perimeter of the site of a storage tank containing or which contained a regulated substance of the type which caused the damage, contamination or pollution." See 35 P.S. § 6021.1311(a). The presumption may be overcome with clear and convincing evidence that the defendant did not contribute to the damage, contamination or pollution. Id.

To sustain its claim, plaintiff must prove, inter alia, that Fifth and Mitchell is an "owner" or "operator" of the tank below which contamination was found in 1993. There is no showing or even an allegation that Fifth and Mitchell was an "operator," i.e., that it managed, controlled or retained responsibility for the operation of the fuel tank. See 35 P.S. § 6021.103. Rather, plaintiff appears to premise its claim on Fifth and Mitchell's ownership of the tank as an appurtenance to the property.

For a party to be liable as an "owner" of an underground storage tank, however, the party must have owned a

tank holding a regulated substance on or after November 8, 1984 or at a time when all regulated substances were removed if removal occurred prior to that date. Id. Fifth and Mitchell did not own the property on November 8, 1984. Plaintiff did. There is no evidence to show that all regulated substances had been removed from the tank prior to plaintiff's purchase of the property in 1981. The tank was sealed by plaintiff in 1992. it thus appears that Fifth and Mitchell is entitled to summary judgment on the record presented on plaintiff's STSPA claim.

D. Common-Law Claims

Fifth and Mitchell contends that plaintiff's common law claims are barred by the statute of limitations.

Plaintiff's common law claims are subject to a two-year statute of limitations. See 42 Pa. C.S.A. § 5524; Dombrowski v. Gould Electronics, Inc., 954 F. Supp. 1006, 1013 (M.D. Pa. 1996); Gurfein v. Sovereign Group, 826 F. Supp. 890, 917 (E.D. Pa. 1993); Tri-County Business Campus Joint Venture v. Clow Corp., 792 F. Supp. 984, 995 & n.10 (E.D. Pa. 1992).

It is uncontroverted that the EPA notified plaintiff in July 1993 that the agency suspected the operations of former tenants contributed to contamination at the site and that plaintiff then alerted its insurers, asking them to defend and indemnify it. EPA contractors conducted testing of the soil and groundwater on the subject property in the summer of 1993.

Plaintiff filed its first complaint in this action well over two years later.

Plaintiff argues that under the discovery rule, the limitations period did not begin until it ascertained the amount of the environmental damage and knew what a willing buyer aware of the environmental problems would pay for the property. Without citing any authority, plaintiff states that the "mere awareness of contamination and resulting property damage is not enough to start the running of the limitations period." Under plaintiff's theory, the statute of limitations did not begin to run until September 1997 when an agreement of sale for the subject property was signed. Plaintiff misconstrues the discovery rule.

The time to commence a tort action begins to run when an injury is sustained. Bohus v. Beloff, 950 F.2d 919, 924 (3d Cir. 1991). The statute of limitations begins to run "as soon as the right to institute and maintain a suit arises." Pocono Int'l Raceway, Inc. v. Pocono Produce, 468 A.2d 468, 471 (Pa. 1983). Lack of knowledge, mistake or misunderstanding do not toll the running of the limitations period, even though a party may not discover his injury until it is too late to afford a remedy. Id. For a claim to accrue, the plaintiff need not know the exact cause of an injury or that he has a legal cause of action. Bohus, 950 F.2d at 924-25. A party must "use all reasonable

diligence to be properly informed of the facts and circumstances upon which a potential right of recovery is based and to institute suit within the prescribed statutory period." Id. See also A. McD. v. Rosen, 621 A.2d 128, 130 (Pa. Super. 1993); Petri v. Smith, 453 A.2d 342, 346 (Pa. Super. 1982).

The so-called "discovery rule" tolls the running of a statute of limitations until the plaintiff knows or reasonably should know that he has sustained an injury caused by another party's conduct. The statute is tolled only if a person in plaintiff's position exercising reasonable diligence would not have been aware of the salient facts. Baily v. Lewis, 763 F. Supp. 802, 806 (E.D. Pa.), aff'd, 950 F.2d 721 (3d Cir. 1991). "There are very few facts which cannot be discovered through the exercise of reasonable diligence." Vernau v. Vic's Market, Inc., 896 F.2d 43, 46 (3d Cir. 1990). See also Urland by and through Urland v. Merrell-Dow Pharms, Inc., 822 F.2d 1268, 1273 (3d Cir. 1987).

Once plaintiff is aware of the salient facts, his failure to investigate or to exercise reasonable diligence in the investigation will not prevent the statute of limitations from running. O'Brien v. Eli Lilly & Co., 668 F.2d 704, 710 (3d Cir. 1981). When the only reasonable conclusion from the competent evidence of record construed most favorably to the plaintiff is that the time it took for the plaintiff to file suit was

unreasonable, summary judgment should be granted. See Carns v. Yingling, 594 A.2d 337, 340 (Pa. Super. 1991); MacCain v. Montgomery Hosp., 578 A.2d 970, 974 (Pa. Super. 1990), appeal denied, 592 A.2d 45 (Pa. 1991).

Plaintiff clearly knew well over two years before filing its complaint that former tenants were suspected by a responsible government agency of contaminating the subject property. Plaintiff's duty to investigate was triggered and a diligent investigation clearly would have revealed the information about the tenants' operations and the condition of the property noted in earlier environmental reports as well as the report completed for the EPA shortly thereafter. Moreover, plaintiff clearly understood it may have been damaged as a result of the tenants' conduct by the summer of 1993 when it asked its insurers to defend and indemnify it.

That plaintiff had not yet signed an agreement for the sale of its property does not obviate the fact it knew the property was contaminated and that the value had thus been diminished in a manner which could be professionally assessed. A claim accrues when the plaintiff is damaged, not when the amount or extent of damages is determined. Liberty Bank v. Ruder, 587 A.2d 761, 765 (Pa. Super. 1991); Pashak v. Barish, 450 A.2d 67, 69 (Pa. Super. 1982). That a plaintiff does not know the precise extent of his injury will not stop the running of the limitations

period. Sterling v. St. Michael's School, 600 A.2d 64, 65 (Pa. Super.), appeal denied, 670 A.2d 142 (Pa. 1995); Bradley v. Ragheb, 633 A.2d 192, 196 (Pa. Super. 1993), appeal denied, 658 A.2d 791 (Pa. 1994). "Once any damages are known, the statute begins to run." Manzi v. H.K. Porter Co., 587 A.2d 778, 779-80 (Pa. Super. 1991), appeal denied, 607 A.2d 254 (Pa. 1992). "[A]ny ascertainable injury triggers the statute." Id. at 781.

To accept that the statute of limitations did not begin to run until plaintiff signed an agreement of sale could effectively enable similarly situated parties to forestall the running of the statute of limitations indefinitely.

Insofar as plaintiff has suggested that the release of the hazardous substances was a "continuing trespass," the court rejects that argument for the reasons cogently set forth in Dombrowski v. Gould Electronics, 954 F. Supp. 1006 (M.D. Pa. 1996). Contamination effects a permanent change in the condition of the affected property and thus constitutes a permanent, not continuing, trespass. Id. at 1013. The statute of limitations runs from the time contamination first occurs or reasonably should have been discovered. Id. See also Tri-County Business Campus Joint Venture, 792 F. Supp. at 996 (depositing of hazardous substances at property prior to conveyance to plaintiff does not constitute continuing trespass).

Plaintiff's reliance on 42 U.S.C. § 9658 is also unavailing. Section 9658 provides a "federally required commencement date" for state law actions for damages from exposure to hazardous substances which applies if the otherwise applicable state statute of limitations provides an earlier commencement date. See Tucker v. Southern Wood Piedmont Co., 28 F.3d 1089, 1091 (11th Cir. 1994). The federal commencement date is "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in [§ 9658(a)(1)] were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." See 42 U.S.C. § 9658(b)(4)(A). Since this standard produces the same result as the Pennsylvania discovery rule, "the limitations period for plaintiff's common law tort claims is identical, regardless of whether Pennsylvania or CERCLA limitations law is applied." Tri-County Business Campus Joint Venture, 792 F. Supp. at 995 n.11. See also Merry v. Westinghouse Electric Corp., 684 F. Supp. 852, 855 (M.D. Pa. 1988).

#### **V. Conclusion**

For the foregoing reasons, the parties' cross-motions for summary judgment as to plaintiff's CERCLA and HSCA claims will be denied and Fifth and Mitchell's motion for summary judgment on plaintiff's STSPA and common-law claims will be granted. An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

F.P. WOLL & COMPANY : CIVIL ACTION  
 :  
 v. :  
 :  
 :  
 FIFTH AND MITCHELL STREET :  
 CORPORATION, et al. : NO. 96-5973

O R D E R

AND NOW, this                    day of February, 1999, upon  
consideration of plaintiff's Motion for Summary Judgment (Doc.  
#83) and defendant Fifth and Mitchell's Motion for Summary  
Judgment (Doc. #86), consistent with the accompanying memorandum,  
**IT IS HEREBY ORDERED** that plaintiff's Motion is **DENIED** and  
defendant's Motion is **GRANTED** as to plaintiff's Storage Tank Act  
and common law nuisance, negligence, strict liability and  
fraudulent misrepresentation claims and is otherwise **DENIED**.

BY THE COURT:

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JAY C. WALDMAN, J.