THIRD DIVISION
January 21, 2015

No. 1-13-2760

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PREMARK INTERNATIONAL, LLC, Plaintiff-Appellant, v. CONTINENTAL CASUALTY COMPANY, PACIFIC INDEMNITY COMPANY, and ONEBEACON INSURANCE COMPANY, Defendants-Appellees.	))))))))))))	Appeal from the Circuit Court of Cook County 04 CH 9118 Honorable David B. Atkins, Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justices Lavin and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Environmental investigation costs are not considered damages under Florida law, which applies for purposes of determining coverage under the insurance policies at issue here; therefore, plaintiff was not entitled to indemnification for investigation costs related to boron contamination. Moreover, plaintiff produced no evidence that lead contamination occurred while the policies were in effect and, in fact, argued in an earlier phase of the litigation that the contamination was the result of an unexpected and fortuitous event in 1974. Thus, the trial court did not err in granting summary judgment for defendants.

¶ 2 Plaintiff-appellant Premark International, LLC appeals the trial court's orders granting summary judgment in favor of defendants-appellees Continental Casualty Co., Pacific Indemnity Co, and OneBeacon Insurance Co. (collectively, Insurers) in an insurance declaratory action concerning environmental contamination at a location in Florida. Premark contends the trial court erred in granting summary judgment because (1) the environmental investigation and monitoring costs incurred by Premark relating to boron contamination constituted "damages" under the relevant insurance policies under both Florida and Illinois law and (2) Premark produced sufficient evidence of lead contamination during the relevant policy periods to raise a genuine issue of material fact as to whether the Insurers' policies were triggered. Premark also claims the trial court erred in denying its motion to reconsider because it presented significant evidence of lead contamination prior to 1974 and had never argued that a 1974 storm, which caused contaminated water on the property to overflow into an adjacent body of water, was the sole cause of contamination. We are not persuaded by Premark's arguments and affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 Florida Tile Industries, Inc., a Florida corporation that owned a ceramic tile manufacturing plant in Lakeland, Florida, began operations in 1954. In 1972, it changed its name to Sikes Corporation. Premark, a Delaware limited liability company with its principal place of business in Glenview, Illinois, purchased Sikes Corporation in 1990 and changed its name back to Florida Tile. In 2003, Premark sold Florida Tile but retained certain environmental liabilities. Florida Tile assigned its claims for insurance coverage related to those environmental liabilities to Premark. The two separate liabilities at issue in this appeal concern lead contamination and boron contamination detected at the Lakeland, Florida plant and nearby property.

¶ 5 Florida Tile's Lakeland manufacturing facility was adjacent to a 25-acre lake known as Lake Wire. Lead was originally used in some of Florida Tile's ceramic glazes. From 1954 to 1965, wastewater containing glaze from Florida Tile's manufacturing and plant cleaning processes was treated using a filter press that separated the glaze waste from the water and discharged the effluent into Lake Wire through the storm sewer system. The filtered effluent was never tested to determine whether it contained any lead.

¶ 6 Beginning in 1965, Florida Tile stopped using the filter press and constructed settling ponds ("Impoundments") for the treatment of wastewater. The wastewater was initially pumped from the factory into one pond where gravity settled the solids and any water that did not dissipate either by evaporation or seeping into the ground was then decanted into the second pond. After the glaze settled in the second pond and the water again dissipated, the solid waste was removed and disposed of off-site. In 1968 Florida Tile added a third settling pond. The water levels in the Impoundments were managed to prevent overflow but in May 1974, heavy rains caused an overflow of turbid, contaminated water from the Impoundments directly into Lake Wire.

¶ 7 Lake Wire was first tested for lead in 1980, and a fan-shaped formation on the floor of the lake, referred to as the delta, was tested in 1982. The delta formed and expanded at the outfall, the area where Florida Tile's storm sewer system emptied into the lake. The Florida Department of Environmental Protection (FDEP) conducted an investigation into the contamination of Lake Wire that lasted for the better part of two decades and ultimately determined that the sediment and soil at the outfall and the lake's surface water all contained lead in excess of applicable standards. In 2003, Florida Tile entered into an agreement with the FDEP to remove the contaminated soil and sediments from Lake Wire.

¶ 8 In the meantime, Florida Tile entered into an agreement with the United States Environmental Protection Agency (EPA) to close the Impoundments. As a result of the ongoing supervision of the closure under an environmental statute involving permit requirements for hazardous waste management facilities, the FDEP notified Florida Tile in 2000 that boron was detected in the groundwater near the Impoundments. Florida Tile agreed to monitor the groundwater and its monitoring confirmed that boron in and around the Impoundments exceeded the new standard for boron promulgated in 1994. The FDEP also required Florida Tile to submit a contamination assessment plan and perform additional monitoring in 2006 and 2007. In 2008, the FDEP determined that the boron had been "satisfactorily delineated" through natural dissipation and required Florida Tile to submit a remedial action plan for ongoing monitoring. As of December 31, 2009, Premark had incurred $757,137.37 in monitoring costs related to the boron contamination.

¶ 9 After being notified of environmental contamination at both Lake Wire and the Impoundments, Premark notified Florida Tile's insurance carriers and demanded indemnity under various comprehensive general liability insurance policies. When Florida Tile's insurers contested coverage, Premark filed this declaratory judgment action against nine insurance carriers. Six of the insurance companies were eventually dismissed through settlement or for other reasons and the remaining three, the Insurers in this appeal, filed motions for summary judgment to separately address the contamination at Lake Wire and the Impoundments.

¶ 10 Pacific Indemnity Company issued Florida Tile two comprehensive general liability policies, effective March 1, 1967 through May 1, 1969. The policies covered sums the insured would become legally obligated to pay as damages due to property damage. The

policies further provide that "damages" include "damages for loss of use of property resulting from property damage."

¶ 11 Continental Casualty Company issued Florida Tile two umbrella policies covering the period from March 1, 1964, to March 1, 1970. Continental promised to pay all sums the insured was obligated to pay as a result of liability (imposed by law or assumed by the insured under contract or agreement) for damages and expenses, as defined by the term "ultimate net loss," on account of property damage "caused by or arising out of each occurrence." The policy defines "occurrence" as an event or continuous or repeated exposure to conditions which unexpectedly caused property damage during the policy period. "Ultimate net loss" is defined as the total sum the insured becomes obligated to pay by reason of property damage claims, either through adjudication or compromise, and all sums paid for expenses "in respect to litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any [covered] occurrence []."

¶ 12 OneBeacon Insurance Company also issued umbrella policies to Florida Tile, covering the period from March 1, 1968, to March 1, 1973. The policies covered all sums the insured would be obligated to pay through liability (imposed by law or assumed by the insured under contract or agreement) for damages and expenses, as defined by the term "ultimate net loss," on account of property damage. OneBeacon's policy defines "ultimate net loss" similarly to the Continental policies, but with the words "as damages" inserted, namely, the total sum that the insured becomes legally obligated to pay *as damages* because of property damage claims. The term "occurrence" is defined to similarly restrict coverage to events during the policy period.

¶ 13 Unlike other policies of insurance issued to Florida Tile, none of the Insurers' policies contained pollution exclusions. Thus, assuming the other requirements for coverage under

the policies were met, the policies provided coverage for gradual and repeated releases of contaminated water resulting in damage to property owned by third parties.

¶ 14 The Insurers and Premark filed cross-motions for partial summary judgment on the issue of coverage for investigation costs related to boron contamination in the Impoundments. The Insurers argued that the policies only covered damages Premark became legally obligated to pay to third parties, and did not cover investigation costs incurred directly by Premark as a result of environmental regulatory and permitting requirements. The Insurers also took the position that Florida law was controlling on this issue because it conflicted with Illinois law, and Florida law interprets "damages" for purposes of insurance coverage as money paid to compensate another for a loss.

¶ 15 Premark argued that Illinois law applied and Illinois law permits the recovery of environmental investigation costs as "damages." Premark contended that because no Florida court had squarely addressed this issue in terms of environmental contamination, there was no conflict between Illinois and Florida law and Illinois law therefore applied. Premark further claimed that Florida courts have never held that such costs *are not* damages, and federal courts applying Florida law have held that environmental investigation costs *are* damages. Finally, Premark argued that two of the policies at issue included coverage for expenses in addition to damages so that even if environmental investigation costs were not damages, they were nonetheless covered expenses.

¶ 16 In a written order entered July 30, 2012, the circuit court granted the Insurers' motion for partial summary judgment on the boron contamination issue and denied Premark's cross-motion for summary judgment. The circuit court rejected Premark's argument that the costs incurred were covered expenses because the boron investigation was not related to a "claim" but instead was Florida Tile's response to an FDEP agreement. The circuit court also rejected

Premark's argument that the Florida cases relied on by the Insurers were distinguishable because they dealt with mandatory injunctions rather than environmental response costs, finding it to be a distinction without a difference. Finally, the circuit court determined that Florida law (i) conflicted with Illinois law, (ii) applied to the issue of interpretation of the policies and (iii) limits damages to include only damages to compensate a third-party for property damage or personal injury claims. Thus, the court concluded that the monitoring costs incurred by Premark in connection with the boron contamination were not covered under the policies.

¶ 17 The Insurers also filed a motion for partial summary judgment on the issue of lead contamination in Lake Wire. The Insurers argued that they were entitled to summary judgment because Premark could not prove the existence of property damage to Lake Wire during any of the relevant policy periods (collectively, 1964 - 1973). Instead, earlier in the litigation, Premark had taken the position that property damage at Lake Wire resulted from a heavy rainfall on May 15, 1974, which caused a "sudden and accidental" discharge of contaminated water into the lake. Deposition testimony established that when the filter press was used to separate the glaze waste from the water, the discharged effluent was clear water and there was no evidence that the filter press was not effective in removing the contaminants. Deposition testimony further established that the settling ponds worked as expected and there was no discharge of water into the lake from the Impoundments, clear or otherwise, prior to the May 1974 event.

¶ 18 In its response, Premark contended that at the summary judgment stage it was only required to present "some evidence" that the contamination occurred during the relevant policy periods. Premark pointed to a number of indications in deposition testimony that the filter press had not successfully prevented all of the glaze waste from entering Lake Wire.

The cited evidence included aerial photos of the delta at the outfall prior to 1974, testimony that glaze waste had been observed in the mud at the outfall and the surface water appeared cloudy at times around the outfall, results from testing done on the concrete trench and pipes used to convey the filtered water to Lake Wire showing high concentrations of lead, and core samples collected in the delta that showed glaze waste with high concentrations of lead at different levels of the sediment, indicating that the waste was deposited at different times. Premark claimed that it had previously argued that the May 1974 event was a significant contributor to the property damage but was not the sole cause. Finally, Premark contended that the clear effluent that was discharged after wastewater passed through the filter press still contained microscopic glaze particles and dissolved lead.

¶ 19 On September 13, 2010, the circuit court granted the Insurers' motion for partial summary judgment on the lead contamination issue. In its order, the court explained that earlier in the litigation, another insurance company, Employers Insurance Company of Wausau, argued in a motion for summary judgment that because of a pollution exclusion provision in its policies, the policies did not cover any type of pollution unless it was the result of a sudden and accidental discharge. In order to defeat that argument, Premark contended that the lead contamination discovered by the FDEP was the result of the May 15, 1974 rain event, and argued further that the 1974 rainstorm caused the sole discharge of contaminated water by Florida Tile into Lake Wire. Based on this argument, Wausau's motion for summary judgment was denied.

¶ 20 The court concluded that because Premark had taken the position for the first five years of litigation that it routinely discharged water that met the state standard for water quality and therefore any turbid overflow would be fairly considered abrupt and unexpected, it could not now take the contrary factual position that water discharged routinely into Lake Wire over 20

years contained pollutants. Therefore, the court granted the Insurers' motion for partial summary judgment on the lead contamination issue.

¶ 21 Following the ruling, the trial judge presiding over the litigation retired. After the appointment of his successor, Premark filed a motion for reconsideration, contending that the court erred in refusing to consider evidence demonstrating property damage prior to 1974. Premark insisted it had never maintained that the 1974 discharge was the sole discharge of contaminated water into Lake Wire.

¶ 22 Denying Premark's motion for reconsideration, the circuit court noted that Premark previously contended there was no evidence of contamination prior to 1974 and after it prevailed in defeating Wausau's motion for summary judgment, it then changed its position in an attempt to defeat the Insurers here. The court explained that it had considered the evidence Premark submitted in support of its new position but concluded that "the existence of multiple inferences regarding contamination occurring prior to the 1974 rain event does not create a triable issue of fact in this case, especially where such inferences depend almost entirely on mere speculation."

¶ 23 On July 15, 2013, the Insurers filed a motion for entry of judgment and award of costs. The Insurers noted that all issues had been resolved but the litigation had been ongoing for almost 10 years, five separate orders had been entered resolving certain claims against other insurers, and no order had been entered dismissing all counts with prejudice. Specifically, the Insurers noted that over the course of the litigation, counts that referred to the "Lakeland Site" evolved into the two separate issues of Lake Wire and the Impoundments. Therefore, the Insurers requested the entry of a final judgment in their favor.

¶ 24 On July 24, 2013, the circuit court entered an order granting the Insurers' motion for entry of judgment and awarding costs. The order stated that all claims and counts asserted against the Insurers had been resolved in the Insurers' favor and were therefore dismissed with prejudice. Premark filed this appeal on August 22, 2013.

¶ 25 ANALYSIS

¶ 26 As an initial matter, the Insurers renew their motion to dismiss this appeal, contending that the trial court's order of June 26, 2013, denying Premark's motion for reconsideration, finally disposed of all issues in the case and, therefore, Premark's notice of appeal filed on August 22, 2013, was untimely. Although the Insurers moved for the entry of final judgment, a motion that was granted on July 24, 2013, they claim on appeal that this was merely a "housekeeping" request and that all substantive issues were resolved by the trial court's June 26, 2013, order.

¶ 27 We decline the Insurers' invitation to revisit our previous denial of the motion to dismiss. The original complaint involved multiple claims, various counterclaims and multiple defendants, some of whom settled while others were dismissed as a result of successful summary judgment motions. A final order is one that "[r]esolves every right, liability or matter raised." *Marsh v. Evangelical Covenant Church of Hillside*, 138 Ill. 2d 458, 465 (1990). Generally, "a notice of appeal may not be filed until after the trial court has finally disposed of all claims." *John G. Phillips & Associates v. Brown*, 197 Ill. 2d 337, 342 (2001). The Insurers correctly determined that a final judgment order was necessary in the absence of any single order resolving all claims and counterclaims. This had the effect, intentional or otherwise, of leading Premark to believe – at a time when it could have filed a timely notice of appeal from the June 26, 2013 order – that a final judgment had not yet been entered in the case. Moreover, having taken that position in the trial court, the Insurers cannot now claim

that an earlier order disposed of the entire case. See *Schumacher v. Continental Air Transport Co., Inc.*, 204 Ill. App. 3d 432, 434-35 (1990) ("A party whose conduct contributes to or causes another to commit an irregularity in a judicial procedure cannot later use the irregularity to his advantage[,]" even where one party does not intend to mislead the other.) We will therefore consider the appeal as timely filed.

¶ 28 All of Premark's challenges on appeal concern the trial court's rulings on summary judgment motions. Summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012); *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). When the parties file cross-motions for summary judgment, the court is invited to decide the issues presented as a question of law. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. We review an order granting summary judgment *de novo*. *Id.* ¶ 30.

¶ 29 A. Impoundments – Boron Contamination

¶ 30 Premark first contends that the trial court erred in granting partial summary judgment on the boron contamination issue because environmental investigation costs are "damages" under both Illinois and Florida law. Premark claims that there is no controlling Florida law on this issue and this court may therefore rely on federal district court decisions that have applied Florida law. Alternatively, Premark argues the investigation costs were covered under the policies as they fall within the definition of expenses.

¶ 31 As both the insured and the risk are based in Florida, the parties do not dispute the trial court's determination that Florida substantive law applies to the interpretation of the

insurance policies to the extent that it conflicts with Illinois law. The dispute is over whether Florida law does, in fact, conflict with Illinois law.

¶ 32 The parties agree that in Illinois, the term "damages" in insurance policies includes both legal and equitable relief. See *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 114-15 (1992); *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 175-76 (2004). But the parties disagree as to whether the Florida appellate decision in *Garden Sanctuary, Inc. v. Insurance Co. of North America*, 292 So. 2d 75, 77 (Fla. Dist. Ct. App. 1974) applies to environmental investigation costs and limits "damages" to compensatory legal damages under Florida law. Premark argues that *Garden Sanctuary* is not controlling law on this issue because it does not specifically address environmental investigation or response costs. Premark claims that such costs are damages under Florida law because the only Florida courts to consider the issue – federal district courts sitting in Florida – have reached that conclusion. In the event this court finds Florida law to be unsettled on this issue due to the lack of any controlling decisions from Florida state courts of review, Premark invites us to follow these federal court opinions as persuasive authority in interpreting Florida law.

¶ 33 In support of its claim that the only federal courts to apply Florida law on this issue have held that environmental investigation costs are covered as damages under insurance policies, Premark cites three federal district court decisions: *U.S. v. Pepper's Steel and Alloys, Inc.*, 823 F. Supp. 1574, 1583-84 (S.D. Fla. 1993), *Hudson Insurance Co. v. Double D Management Co., Inc.*, 768 F. Supp. 1542, 1546 (M.D. Fla. 1991), and *CSX Transportation, Inc. v. Admiral Insurance Co.*, No. 93-132-CIV-J-10 (M.D. Fla. 1996). In response, the Insurers cite three other Florida federal district court decisions that reach the opposite conclusion. See *In re Celotex Corp. v. AIU Insurance Co.*, 152 B.R. 652 (M.D. Fla. 1993);

Hayes v. Maryland Casualty Co., 688 F. Supp. 1513 (N.D. Fla. 1988); *Harris Corp. v. Travelers Indemnity Co.*, No. 96-166-CIV-ORL-19A (M.D. Fla. 1998).

¶ 34 We reject Premark's arguments for two reasons. First, we do not agree that environmental investigation costs are considered damages under Florida law. Second, although we do not believe Florida law is unsettled on this issue, we find the federal district court decisions cited by the Insurers to be the more persuasive authority as those decisions actually apply Florida law to the interpretation of "damages."

¶ 35 With respect to the first point, *Garden Sanctuary* is the only reported decision from a Florida court of review addressing the issue whether the costs incurred by an insured to comply with injunctive relief fall within the definition of "damages" under a liability insurance policy. In *Garden Sanctuary*, a cemetery operator was sued after an area of the cemetery was damaged by a bulldozer. *Garden Sanctuary*, 292 So. 2d at 76. Among other things, the complaint sought a mandatory injunction requiring the reconstruction and restoration of the area to its natural state. *Id*. The cemetery operator argued that its legal obligation to restore the cemetery was equivalent to being liable for damages and should therefore be covered under its insurance policy. *Id*. Rejecting this argument, *Garden Sanctuary* adopted the reasoning of the 5th Circuit Court of Appeals in *Aetna Casualty and Surety Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955), which restricted the term "damages" to payments to third parties who have a legal claim for damages against the insured on account of injury to or destruction of property. *Id*. at 76-77.

¶ 36 The parties note that no Florida case has specifically addressed the issue of whether environmental response costs are considered damages under Florida law. But the Florida Supreme Court held more recently that the undefined term "damages" in Florida's offer of judgment statute was clear and unambiguous and that damages are compensation for loss or

injury. *Nichols v. State Farm Mutual Automobile Insurance Co.*, 932 So. 2d 1067, 1073 (Fla. 2006). The *Nichols* court relied on the definition that damages are "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." (Internal quotation marks omitted.) *Id*. (quoting *Black's Law Dictionary* 416 (8th ed. 2004)).

¶ 37 Premark attempts to distinguish *Garden Sanctuary* on the grounds that it involved a mandatory injunction rather than environmental investigative costs. We agree with the trial court that this is a distinction without a difference. We see no difference between an injunction requiring a cemetery operator to repair and restore a damaged site and a requirement under an environmental permitting and regulatory statute to investigate and monitor contamination at a site. In either context, funds expended by the insured do not constitute payments to third parties to compensate that party for property damage.

¶ 38 In support of its argument, Premark relies on *Pepper's Steel*, a federal district court case in which the court adopted the reasoning of the California Supreme Court in *AIU Insurance Co. v. Superior Court*, 799 P.2d 1253 (Cal. 1990) and determined that *Hanna* did not apply to injunctive relief sought under environmental statutes. *Pepper's Steel*, 823 F. Supp. at 1583. In particular, Premark relies on the court's observation that in cases like *Garden Sanctuary*, where mandatory injunctions are imposed for tortious conduct, "it is entirely speculative whether the plaintiff suffered compensable harm, [which] differs from the relationship between the various remedies authorized by [environmental statutes], under which injunctive relief may be available even though legal or restitutive remedies are adequate." See *id*. (quoting *AIU*, 799 P.2d at 1277).

¶ 39 This reliance is misplaced. Premark has not cited nor have we found any Florida case that draws such a distinction among equitable remedies. The fact that the California Supreme Court has determined that such a distinction exists under California law is not relevant to

how Florida defines damages. Further, a California court's attempt to distinguish *Hanna* on these grounds is likewise irrelevant where no Florida court has distinguished *Hanna* since its reasoning was adopted in *Garden Sanctuary*. Thus, under Florida law, equitable remedies are not considered damages for purposes of insurance coverage.

¶ 40 Our own supreme court has recognized that the distinction drawn by the majority of courts that have considered this issue has typically been whether the relief sought is compensatory damages or equitable relief, which includes both mandatory injunctions and environmental investigation and response costs. See *Outboard Marine*, 154 Ill. 2d at 114-15 (discussing conflicting positions taken by various courts on this issue). The *Outboard Marine* court noted that *Hanna*, the decision adopted in *Garden Sanctuary*, is among those decisions finding the term "damages" is unambiguous and that it "excludes the cost of compliance with mandatory injunctions and/or response costs sought pursuant to [an environmental statute]." *Id*. at 114.

¶ 41 The federal district court in *Celotex* specifically compared the differences between Illinois and Florida law on the issue of whether insurance coverage was available for purely equitable relief such as restitution or injunctions. *Celotex*, 152 B.R. at 659-61. The court observed that while Illinois has rejected the distinction between legal and equitable remedies in its interpretation of the term "damages," Florida continues to interpret "damages" for insurance coverage purposes as strictly limited to legal rather than equitable claims. *Id*. at 660-61.

¶ 42 Because Florida has not made a distinction between environmental response costs and other forms of equitable relief and because *Hanna* through *Garden Sanctuary* remains the law in Florida and limits damages to legal rather than equitable claims, it is clear that under Florida law environmental investigation costs are not considered damages for purposes of

insurance coverage. Therefore, we decline Premark's invitation to follow federal district court opinions based on the claimed absence of controlling authority from the state's supreme court or intermediate appellate court.

¶ 43 The second reason we reject Premark's arguments is based on a careful review of the federal district court opinions cited by Premark and those cited by the Insurers. This review lends additional support to our conclusion regarding Florida law. While certain of the district court decisions cited by Premark have followed the law of other states and expanded damages to include equitable remedies, those federal district courts that have followed Florida law have continued to limit damages to compensatory legal damages.

¶ 44 In *Pepper's Steel*, the court distinguished *Hanna* based on reasoning from the California Supreme Court in *AIU* and only mentioned *Garden Sanctuary*, a Florida appellate decision, in passing as a case that followed *Hanna*. *Pepper's Steel*, 823 F. Supp. at 1582-83. The court in *Hudson* considered *Garden Sanctuary* but rejected it as precedent because it did not address the issue of whether environmental injunctions should be treated differently than injunctions in suits asserting common law claims. *Hudson*, 768 F. Supp. at 1546. *Hudson* then followed "the great majority of state court decisions" in holding that environmental response costs were damages. *Id*.

¶ 45 In contrast, the *Hayes* court held that environmental investigation and cleanup costs are not damages, relying specifically on *Hanna* and *Garden Sanctuary*. *Hayes*, 688 F. Supp. at 1515. Similarly, the *Celotex* court held that under Florida law, no insurance coverage was available for the costs of complying with court-ordered restitutions or injunctions. *Celotex*, 152 B.R. at 661. The court further noted that it was clear that *Hanna*, in which the court strictly limited "damages" to legal rather than equitable claims, continues to be the law in

Florida, despite the fact that some federal district courts have carved out exceptions for environmental injunctions. *Id*. at 660-61.

¶ 46 Based on our examination of reported decisions, we find the trial court correctly found a conflict between Illinois and Florida law on the issue of whether environmental response costs are "damages" and, given that Florida law applies, also properly ruled that costs incurred by Premark to investigate and monitor boron contamination do not constitute damages under Florida law.

¶ 47 Although we have concluded that under Florida law environmental investigation and cleanup costs are not considered damages for purposes of insurance coverage, it is not clear that even if Illinois law applied, the costs for investigating the boron contamination would be considered damages. Our supreme court has noted that environmental investigation costs are only considered damages if they are in response to a claim. *Central Illinois Light*, 213 Ill. 2d at 173. Unless the policy language specifies otherwise, a claim "need not take the form of a lawsuit or administrative proceeding." *Id*. But at the very least, the concept of a claim requires that an insured seeking indemnification for costs incurred as a result of a legal obligation imposed by a strict liability statute must have acted in response to an assertion by a potential plaintiff that it must "act or face the consequences." *Id*.

¶ 48 There is nothing in the record to indicate that Florida Tile was acting in response to a threat of legal action by the FDEP. The letters relied on by Premark merely reflect the agency's supervision of the boron monitoring as part of the permit process for a hazardous waste management facility. The deposition testimony of an FDEP employee also does not support Premark's contention that it was required to "clean up" the site. Although the employee initially answered "yes" in response to the question regarding whether Florida Tile was required to do any actual cleanup, he later explained that Florida Tile was, in fact, only

required to do an assessment and then develop a plan to address the contamination. He then testified that the most efficient corrective action was determined to be natural attenuation monitoring, *i.e.*, over time, the boron "would likely clean up itself" and the primary plan was to continue monitoring until the boron dissipated to the target level. Nothing in this testimony indicates an assertion by the FDEP that Florida Tile "must act or face the consequences." Thus, even under Illinois law, it is unlikely that the boron investigation costs would be considered damages.

¶ 49 Finally, we find no merit in Premark's argument that if the boron investigation costs are not damages, they qualify as expenses for purposes of coverage. The language in the policies qualifies investigation costs as expenses only to the extent that they are related to suits or claims. Premark incurred investigation and monitoring costs related to the boron contamination as a result of an agreement with the FDEP arising out of permit requirements for the closure of the Impoundments, and not as a result of a suit or claim. Therefore, these costs are not covered expenses under the policies.

¶ 50 B. Lake Wire – Lead Contamination

¶ 51 Premark next contends that the trial court erred in granting summary judgment on the lead contamination issue and in denying its motion to reconsider. First, Premark argues that the Insurers did not meet their burden of production because they did not affirmatively prove there was no discharge prior to 1974 or otherwise establish that Premark had no evidence to prove there was a discharge prior to 1974. Second, Premark argues that summary judgment was premature because expert discovery had not begun. In the alternative, if the Insurers did meet their burden of production, Premark claims that the evidence establishes or at least raises a reasonable inference that property damage occurred prior to 1974. Finally, Premark

disputes the trial court's finding that it previously took the position that the 1974 rain event was the sole discharge of contaminated water into Lake Wire.

¶ 52 In a motion for summary judgment, the movant bears the initial burden of production and may satisfy that burden by either (1) presenting evidence that would entitle it to judgment as a matter of law or (2) demonstrating that there is an absence of evidence to support the nonmoving party's case. *Pecora v. County of Cook*, 323 Ill. App. 3d 917, 933-34 (2004). If the movant satisfies this burden, the burden then shifts to the nonmoving party to present some factual basis that would entitle it to judgment in its favor. *Id*. at 933.

¶ 53 Facts necessary to defeat summary judgment may be established by circumstantial evidence, but only where the inference drawn from such evidence is the more probable conclusion rather than merely a possible one. *Wrobel v. City of Chicago*, 318 Ill. App. 3d 390, 398 (2000). If the nonexistence of the fact to be inferred is just as probable as its existence, "then the conclusion that it exists is a matter of speculation, surmise and conjecture, and the trier of fact cannot be allowed to draw it." (Internal quotation marks omitted.) *Mann v. Producer's Chemical Co.*, 356 Ill. App. 3d 967, 974 (2005) (quoting *Wiegman v. Hitch—Inn Post of Libertyville, Inc.*, 308 Ill. App. 3d 789, 795-96 (1999)).

¶ 54 Premark's arguments that the evidence established contamination prior to 1974 and that it never contended the 1974 rain event was the sole discharge of contaminated water are belied by the record. We also find no merit to Premark's contention that the Insurers did not satisfy their burden of production. Finally, we reject Premark's claim that the trial court ignored the evidence and granted summary judgment solely on the basis of the inconsistent positions taken by Premark.

¶ 55 As an initial matter, it is important to distinguish between discharges of wastewater during the years the filter press was in use (1954-66) and those during the years the Impoundments were used (1966-1974). Two of the Insurers – OneBeacon (1968-73) and Pacific Indemnity (1967-69) wrote policies that did not incept until after the Impoundments were in use, but which expired prior to the 1974 rainstorm. This is also the case with respect to the Continental policy that covered the period from March 1, 1967, through March 1, 1970. Thus, as to these policies, any evidence of claimed discharges during the period when the filter press was in use is irrelevant. In this context, Premark was required to demonstrate that there were discharges of lead-contaminated wastewater into Lake Wire after it began using the Impoundments (which it represents was in February 1966) and prior to the policies' respective expiration dates. And, accepting Premark's contention that the 1974 rainstorm was the only "sudden and accidental" overflow of turbid water, it was necessary for Premark to identify evidence tending to show that despite its efforts to filter and clarify the glaze waste through use of the Impoundments, there were nevertheless gradual and ongoing releases of lead-contaminated water into Lake Wire.

¶ 56 But contrary to Premark's efforts to compartmentalize the arguments it successfully advanced in opposition to Wausau's motion for summary judgment, it is impossible to reconcile Premark's current position, *i.e.*, that apart from the 1974 event, there were numerous and repeated releases of lead-contaminated water prior to that date, with the position it took earlier in this litigation. Specifically, in defending Wausau's motion for summary judgment, Premark argued: "Treated water discharged from [the Impoundments] was *not a pollutant or contaminant*" and that the only release of "turbid" (*i.e.*, contaminated) water occurred as a result of the 1974 rainstorm.

¶ 57 Wausau's policies contained pollution exclusions barring coverage for losses related to pollution unless those losses were the result of a sudden and accidental release of contaminants. Thus, in order to preserve coverage under those policies, Premark took the position that contamination of Lake Wire was not gradual and ongoing, but was caused by the sudden and accidental overflow of contaminated water from the Impoundments in 1974.

¶ 58 If, as Premark previously argued, the treated water released into Lake Wire from the Impoundments was not a pollutant or contaminant, it cannot now contend precisely the opposite. Therefore, the trial court properly refused to allow Premark to contradict itself in attempting to defeat the Insurers' motion for summary judgment. Because OneBeacon's and Pacific Indemnity's policies covered periods when only the Impoundments were in use, this conclusion mandates that summary judgment in their favor be affirmed. The same is true with respect to the Continental policy covering the period from March 1, 1967, through March 1, 1970.

¶ 59 Moreover, even if, as Premark now argues, its prior position was that the 1974 rainstorm was not the only cause of lead contamination in Lake Wire, it nevertheless produced no evidence that glaze waste containing lead migrated from the floor of the Impoundments into Lake Wire during the effective dates of the Insurers' policies. Premark points only to the testimony of its corporate designee that in addition to the 1974 rain event, she believed lead-contaminated waste found its way into Lake Wire prior to 1974 during the years the filter press was used. Because, as noted, all of the Insurers' policies – save one – incepted after Florida Tile stopped using the filter press, this testimony does not preclude summary judgment in the Insurers' favor.

¶ 60 This leaves only the Continental policy in effect from March 1, 1964, through March 1, 1967. For a portion of the period this policy was in effect, Florida Tile was still using the

filter press to treat wastewater discharged into Lake Wire. The Insurers argue that Premark's previous litigation position also precludes it from claiming that wastewater treated through the filter press contained contaminants that were routinely discharged into Lake Wire.

¶ 61 But, as we note above, although Premark's witness designated pursuant to Illinois Supreme Court Rule 206 (a)(1) (eff. Dec. 1, 1999) initially testified that Premark did not possess any factual information that either the delta or the surface water of Lake Wire was contaminated prior to 1974, later in the same deposition she testified that Premark "believed" that another significant contributor to lead contamination in Lake Wire was the discharge of water treated through the filter press.

¶ 62 Giving Premark the benefit of the doubt and given that Wausau's policies were in effect from 1971 through 1977, we will assume for the sake of argument that when Premark previously argued that the "only" release of contaminated water into Lake Wire was as a result of the 1974 rain event, it was not referring to claimed contamination prior to the effective date of Wausau's coverage. Thus, we will examine the evidence identified by the parties regarding the claimed discharge of lead-contaminated water during the years the filter press was in use and while the Continental policy was in effect to determine whether there is any genuine issue of material fact that would preclude judgment in Continental's favor as a matter of law.

¶ 63 Premark's own evidence and witnesses established that during the years the filter press was used, the effluent was never tested for lead, there was no evidence the filter press was not working properly, and no testing was done for lead in Lake Wire prior to 1980. Thus, the Insurers satisfied their burden of production by demonstrating an absence of evidence to support Premark's claim of contamination prior to 1974 and the burden then shifted to Premark to establish a factual basis for that claim.

¶ 64 Although Premark has cited to numerous documents and deposition testimony excerpts that purportedly establish that contamination occurred prior to 1974, a careful review of the record discloses that none of the evidence identified is sufficient to raise a genuine issue of material fact regarding the existence of pre-1974 contamination. The testimony of its corporate designee that Premark "believed" lead-contaminated wastewater was discharged through the filter press is, without more, insufficient to raise a triable issue.

¶ 65 Premark cites to a 1965 letter from the City of Lakeland which states that the construction of the Impoundments "should eliminate any problem resulting from the discharge of this waste into Lake Wire." But other than its vague reference to "any problem," and without any testimony or other evidence to place the letter in context, the letter contains no reference to lead contamination or any other type of contamination and therefore does not support any conclusion about lead contamination prior to 1974. Again, Premark's Rule 206 (a)(1) witness admitted as much.

¶ 66 The testimony of a former Florida Tile employee, Waylon Wigley, who claimed to have seen glaze in the mud of the delta in 1968 or 1969 while he was fishing is not evidence of lead contamination. As the Insurers point out, Lake Wire is not contaminated with glaze; it is contaminated with lead. The Insurers further cite evidence that most glazes used by Florida Tile did not contain lead. Thus, it would be purely speculative to infer from Wigley's testimony that Lake Wire was contaminated with lead prior to 1974.

¶ 67 Similarly, the aerial photographs of the delta prior to 1974 cannot possibly establish that lead contamination had already occurred many years earlier. The delta was formed primarily through dirt and other debris carried in the storm water runoff. Thus, the delta would have formed whether there was clear or contaminated water discharged into Lake Wire and so its

mere existence cannot establish that it contained lead. No testing was done on the delta until 1982 and the aerial photographs therefore establish nothing more than its existence.

¶ 68 Data from core samples taken in 1999 also does not establish the existence of lead contamination during the filter press years. No expert testimony was offered on the core sample data, a subject that clearly requires expert interpretation. The samples at depths of 0-1 feet, 1-2 feet and 2-3 feet show "visibly discernible material" while samples at depths of 3-4 feet and 4-5 feet show nothing. This alone is insufficient to establish that the "visibly discernible material" is lead or the dates on which it was deposited. Only expert testimony could support such an inference. Although Premark in its brief expresses "confidence" that expert analysis of the core samples would support its contention that there were multiple discharges of lead-contaminated water into Lake Wire, that prediction is no substitute for evidence sufficient to raise a genuine issue of material fact on that issue.

¶ 69 Finally, a 1991 workplan prepared as a result of a RCRA Facility Investigation that reports the presence of glaze waste in a concrete trench cannot establish evidence of lead contamination in Lake Wire during the filter press years because the authors of the report merely express their "beliefs" about when the trench was used and where it was located in relation to the filter press, information that would indicate whether the trench carried influent or effluent. Because the nonexistence of lead contamination in Lake Wire prior to 1974 based on this evidence is just as probable as its existence, such evidence is nothing more than speculation, surmise and conjecture and the trial court properly granted summary judgment in favor of the Insurers.

¶ 70 Premark also argues that summary judgment was premature because expert discovery had not begun, an argument raised for the first time in its motion to reconsider. Generally, on a motion for reconsideration, a party may not raise issues for the first time in the absence of a

reasonable explanation why those issues were not raised earlier. See *Kopley Group V., L.P. v. Sheridan Edgewater Properties, Ltd.*, 376 Ill. App. 3d 1006, 1022 (2007); *Delgatto v. Brandon Associates, Ltd.*, 131 Ill. 2d 183, 195 (1989). "The submission of new matter on [a motion for reconsideration] after summary judgment has been granted *** should not be allowed in the absence of a reasonable explanation why it was not available at the time of the original hearing." *Delgatto*, 131 Ill. 2d at 195. Premark did not offer any explanation for its failure to raise the issue of expert discovery in its response to the summary judgment motion and therefore the trial court was not obligated to address this issue or to grant the motion for reconsideration on these grounds. Further, the notion that summary judgment could fairly be characterized as "premature" in a case that had been pending for more than five years is specious.

¶ 71 In any event, Premark failed to file a Rule 191(b) affidavit (Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013)) to explain why it needed additional discovery or affidavits in order to respond to the motion. "Parties who fail to file Rule 191(b) affidavits cannot complain that the discovery process was insufficient or limited." (Internal quotation marks omitted.) *U.S. Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 39. Thus, having waited until after summary judgment was granted to raise the claimed necessity of expert testimony, Premark's claim that summary judgment was premature is unavailing.

¶ 72 CONCLUSION

¶ 73 The trial court did not err in granting summary judgment on the issue of boron contamination where environmental investigation costs are not considered damages under Florida law for the purpose of insurance coverage; therefore, Premark was not entitled to indemnification for the boron contamination. The trial court also did not err in granting summary judgment on the issue of lead contamination where Premark produced no evidence

the lead contamination occurred while the policies at issue here were in effect and, in fact, argued in an earlier phase of the litigation that the contamination was the result of an event in 1974. We therefore affirm the orders of the circuit court of Cook County granting summary judgment to the Insurers.

¶ 74 Affirmed.