2016 IL App (1st) 152495-U

FIRST DIVISION
November 21, 2016

No. 15-2495

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE TRAVELERS INDEMNITY COMPANY Plaintiff-Appellee, v. AMSTED INDUSTRIES, INC. and BURGESS-NORTON MANUFACTURING COMPANY, INC., Defendants-Appellants.	))))))))))	Appeal from the Circuit Court of Cook County. No. 11 CH 3885 Honorable Sophia Hall, Judge Presiding

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JUSTICE SIMON delivered the judgment of the court.
Justice Harris concurred in the judgment.
Justice Mikva concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The trial court did not err when it granted insurer's motion for summary judgment. The insured failed to give timely notice of pollution for two of its sites and its excuse for the delay was unjustified.

¶ 2 Defendants Amsted Industries Inc. and Burgess-Norton Manufacturing Company, Inc. (collectively "Amsted") appeal from an order of the circuit court granting summary judgment for plaintiff The Travelers Indemnity Company ("Travelers") in a declaratory judgment action

concerning insurance coverage. The trial court held that Travelers had no duty to defend Amsted on the ground that Amsted failed to provide timely notice of a pollution occurrence on two of its sites. We affirm.

¶ 3 BACKGROUND

¶ 4 Amsted Industries Inc. ("Amsted") is a diversified manufacturing company of industrial components. In May 1968, Amsted acquired the assets and liabilities of Burgess-Norton Manufacturing Company, Inc. ("Burgess"). In 1969, Amsted acquired the assets and liabilities of Standard Automotive Parts Company which included a five-acre parcel of commercial property located at 660 Nims Street, Muskegon, Michigan ("Nims"). Amsted conducted foundry operations and manufactured automobile parts at Nims until 2003. Another parcel, the Getty parcel ("Getty"), is a two and one-half acre parcel located immediately to the east of Nims, at 1485 South Getty Street. Amsted leased Getty from the City of Muskegon beginning in the mid-1990s, and later purchased it in 1998. Amsted constructed a facility at Getty, where it manufactured hydraulic components and other automobile parts from 1990 until 2003 when it sold Getty. The Nims site and the Getty parcel constitute the Muskegon site.

¶ 5 Two lagoons, both unlined natural indentations in the ground, are located on the Nims parcel. Before 1977, wastewater from operations at Nims was discharged into the lagoons for evaporation into the water or absorption into the ground. In 1986, an environmental consulting group sampled and conducted a baseline monitoring report of wastewater at Nims. The report indicated that the discharges at Nims violated or exceeded federal pretreatment standards for metal finishers. In 1987, Amsted retained an environmental consultant, Dames and Moore, to conduct an audit of Nims. The audit detected the presence of trichloroethylene/trichloroethene ("TCE") in the soil where the Nims lagoons were located. The report stated that TCE was

identified in the clay layer in the top few feet of ground, but did not indicate the presence of TCE in the groundwater.

¶ 6 In 2001 and early 2003, Amsted retained another environmental consultant, Clayton Group Services, Inc. ("Clayton"), to conduct another audit at Nims. The audit identified "potential issues of environmental concern." In connection with its sale of the Getty parcel in 2003, Amsted retained Clayton to conduct another investigation as part of a process of preparing a baseline environmental assessment. The assessment included two evaluations: phase I, an initial environmental assessment, and phase II, a follow-up or more complex assessment. On March 6, 2003, Clayton issued a phase I environmental site assessment report for Getty. That report identified several "recognized environmental conditions," and recommended "further investigation and/or assessment" of those conditions. The Nims lagoon area was among the "recognized environmental conditions" identified in the report.

¶ 7 After receiving the phase I report for Getty, Amsted requested information regarding its pollution cleanup obligations under Michigan law, which Clayton provided on March 12, 2003. Amsted also hired Clayton to complete a phase I report at Nims. That report discussed, among other things, the presence of the two lagoons onsite, the former presence of heat treating operations onsite, the former presence of underground storage tank onsite, and the potential impact of migrating contaminants from other sites. Clayton recommended follow-up testing to evaluate the extent and the materiality of various "recognized environmental conditions" at Nims.

¶ 8 Clayton undertook a phase II investigation for the Getty parcel only. The investigators determined that there was chlorinated solvent groundwater contamination at Getty. Although geared towards Getty, the report specified that excessive levels of TCE were detected in the

groundwater samples collected from a monitoring well installed at one of the Nims lagoons. The report stated that "[c]hrominium in soil and [TCE] in groundwater (former seepage lagoon). Additional investigation will be required in this portion of the property to further evaluate the nature and the extent of chromium and [TCE]."

¶ 9 In September 2003, Amsted began remediation work at Getty, excavating soil and recovering groundwater contaminants. On September 22, 2003, Clayton sent Amsted another proposal for additional investigation at Nims to "further evaluate the presence, magnitude, and extent of [the] contamination previously detected in soil and groundwater." The proposal reiterated the findings of prior samplings confirming that excessive levels of TCE were detected in groundwater at the location of the Nims lagoons. No further action was taken at Nims at that time.

¶ 10 In order to close the Getty sale, Amsted entered into an escrow agreement, providing that, in order to receive payment of several thousand dollars, Amsted was required to: 1) notify the Michigan Department of Environmental Quality ("MDEQ") about contamination at Getty, 2) remediate the contamination under the MDEQ's supervision, and 3) secure MDEQ's confirmation that site closure had been achieved under Michigan law.

¶ 11 In November 2004, Clayton submitted another proposal to Amsted for further testing at Nims to "define the extent of TCE detected in groundwater at the site." Later the same month, Clayton advised Amsted that investigative activities at Nims also detected "the presence of manganese at elevated concentrations in the groundwater, and that contamination may migrate offsite at a concentration exceeding the water quality standard."

¶ 12 To address the environmental issues at Getty, in October 2005, Amsted, through Clayton, submitted a proposed remedial action plan to MDEQ. Among other things, the proposed

remedial action noted that "TCE has been detected in groundwater samples collected for locations along" the property boundary with the Nims parcel. Several Amsted officials testified that they believed that TCE migrated up-gradient to Getty from another site, the West Shore Pavilion.

¶ 13 In April 2006, the MDEQ rejected the remedial action plan for the Getty parcel because, among other reasons, it did not provide remedial actions to address the Nims contamination. In the summer of 2006, Amsted retained an outside environmental attorney, James Enright, to assist with its response to the MDEQ's April 2006 letter rejecting the remedial action plan for Getty. Several meetings between Amsted and MDEQ representatives took place in 2006 and 2007 to discuss the contamination.

¶ 14 On January 17, 2007, Clayton issued a phase II report for Nims which identified several groundwater contaminants. Amsted ordered additional testing at Nims. Clayton submitted its follow-up report on August 24, 2007, which indicated that the operations at Nims "had releases that have impacted soils and groundwater." It also referenced the previous reports and findings. Subsequently, Clayton undertook a focused investigation at Nims that concluded in November 2007. The final report determined that operations at Nims contributed to the groundwater contamination onsite and to the organic compound contamination discovered at Getty.

¶ 15 Several Amsted representatives testified that they were mindful of Amsted's insurance reporting requirements. In September 2006, Enright drafted a memorandum to senior management at Amsted discussing possible contamination issues at Nims. Enright stated that, given Nims' history, there existed the possibility of significant onsite contamination, including heavy metals and chlorinated solvents. Enright noted that MDQE would most likely require Amsted to investigate and remediate the contamination at Nims.

¶ 16 In November 2006, Amsted gave Enright copies of Travelers policies. By January 2007, Enright was investigating the possibility of a claim. Enright testified that, at that point in time, no groundwater contamination had been definitely identified. He also stated that, even if the groundwater contamination were identified at Nims, Amsted did not anticipate it would have a claim under the policies because it believed the source of contamination was an up-gradient, off-site source. On January 29, 2007, Enright advised Amsted that "in reviewing the [Travelers Policies], I see that if we are to make a claim, it has to relate to damage occurring during policy periods." He added that "the most likely kind of 'damage' that can support a claim is groundwater pollution" because "the groundwater underlying a property belonged to the state such that . . . it amounted to damage to someone else's property."

¶ 17 In April 2007, Dan Litwin, Amsted's risk manager, asked Enright and Edward Brosius, Amsted's assistant general counsel, whether Amsted "should consider employing an insurance archaeologist" to try to locate historical coverage for the contamination. Brosius agreed that "it would be worthwhile to employ the insurance archaeologist "given the potential exposure." The same day, Enright emailed Amsted's officials about "evaluating insurance coverage, and potential compliance with notification requirements relating to contaminated groundwater emanating from the property." In November 2007, Brosius instructed Enright to notify Travelers about the Muskegon site. Amsted, through Enright, first notified Travelers about the Nims site on February 22, 2008.

¶ 18 Travelers issued commercial general liability policies to Amsted from 1967 until 1977. The policies provided coverage for "bodily injury or property damage which occurs during the policy period" and it is caused by an "occurrence." Occurrence is defined as "as accident, including injurious exposure to conditions, which results, during policy period, in bodily injury

or property damage neither expected not intended from the standpoint of the insured." The policies contain the following conditions to coverage:

> "Insured's Duties in the Event of Occurrence, Claim or Suit
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> (a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the insured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable. The named insured shall promptly take at his expense all reasonable steps to prevent other bodily injury or property damage from arising out of the same or similar conditions, but such expense shall not be recoverable under this policy.
>
> (b) If a claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative."

¶ 19 In January 2013, Amsted began receiving several "Notices of Intent to File Citizens Suits" from neighbors of the Muskegon site. The notices stated that the neighbors intended to file lawsuits against Amsted due to alleged injuries and to seek damages from the contamination emanating from the Muskegon site. Amsted received at least 25 notices. In November 2013, Patricia Houseman, one of the neighbors who sent a pollution notice, sued Amsted with respect to the pollution emanating from the Muskegon site.

¶ 20 In September 2004, Amsted reached a settlement agreement with several insurers carriers related to umbrella policies from 1965-1975, as those carriers were prepared to liquidate under bankruptcy. Amsted received $19 million under the agreement including amounts for

"anticipated [] environmental claims which might trigger excess coverage." Nims was among the claims resolved in the agreement as Amsted disclosed the Nims potential contamination to the excess insurers and projected remediation costs of $9.7 million.

¶ 21 Travelers is the only insurer from which Amsted seeks coverage for its environmental liabilities at the Muskegon site. Travelers denied coverage for all of Amsted's environmental liabilities at the Muskegon site.

¶ 22 In April 1959, Amsted acquired South Bend Lathe Works in South Bend, Indiana. In 1965, Amsted acquired a five-to-six parcel of land located at 400 West Sample Street in South Bend ("South Bend site"). The operations at the South Bend site included the manufacture of punch presses and related machining. In June 1975, Amsted sold the South Bend division's assets and the site to a third party.

¶ 23 In February 2007, the United States Environmental Protection Agency ("EPA") sent Amsted a letter stating that EPA documented "the release or threat of releases of hazardous substances, pollutants and contaminants from the environment" at the South Bend site and that Amsted was a "potential responsible party." The letter encouraged Amsted to reimburse EPA for clean-up costs at the site.

¶ 24 In March 2007, Amsted advised the EPA that it retained an outside environmental attorney and requested an in-person meeting to discuss the site. Later in March, the EPA sent Amsted an information request requiring disclosure of a variety of information, including insurance coverage from 1965 to 1975, and any insurance claims that Amsted might have submitted with respect to the contamination. In April 2007, Amsted advised EPA about the Travelers policies and stated that it was in the process of notifying Travelers about the South Bend site.

¶ 25 During discovery, Edward Brosius stated that Amsted first notified Travelers about its potential liability at the South Bend site on June 30, 2008. The notice did not mention any prior notification to Travelers regarding the contamination at the South Bend site. During briefing on the parties cross-motions for summary judgment, Amsted asserted, for the first time, that it attempted to notify Travelers about the South Bend site in April 2007. The notice letter was addressed to an "Excess Liability" claims center and sought to provide notice under a series of excess insurance policies. The letter did not identify Travelers, and Travelers had no record of receiving the letter.

¶ 26 In October 2011, Amsted was sued with respect to the pollution at the South Bend site. Amsted settled the pollution suit for $75,000. Fireman's Fund Insurance Company participated in the Amsted's defense and funded a portion of the settlement. Travelers denied it owed indemnity obligations for all of Amsted environmental liabilities at the South Bend site.

¶ 27 On January 31, 2011, Travelers filed its complaint for declaratory judgment seeking a finding that it had no duty to defend or indemnify Amsted for environmental issues at Nims, Getty, and at the South Bend site. Amsted counterclaimed seeking a declaratory judgment that it is entitled to coverage and damages for breach of contract. Both parties moved for summary judgment. Amsted withdrew its coverage claim for Getty shortly after Travelers moved for summary judgment.

¶ 28 The circuit court granted Travelers' motion for summary judgment and denied Amsted's cross-motion for summary judgment. The court held that Amsted's notices of coverage for both the Nims and the South Bend sites were untimely and that Travelers owed no duty to defend or indemnify Amsted for its claims. This appeal follows.

¶ 29 ANALYSIS

¶ 30 We review the grant of summary judgment *de novo*. *Cook v. AAA Life Insurance Co.*, 2014 IL App (1st) 123700, ¶ 24. Summary judgment should only be granted if a strict construction against the movant of all the pleadings, depositions, admissions, and affidavits on file establishes no genuine issue of material fact and the entitlement of the moving party to judgment as a matter of law. *Bd. of Educ. of Twp. High Sch. Dist. No. 211, Cook Cty. v. TIG Ins. Co.*, 378 Ill. App. 3d 191, 193 (2007). When, as occurred here, the parties file cross-motions for summary judgment, they agree that no genuine issues of material fact exist and that the dispute involves only questions of law, which the court may decide based on the record. *Progressive Insurance Co. v. Universal Casualty Co.*, 347 Ill. App. 3d 10, 17 (2004).

¶ 31 On appeal, Amsted argues that the trial court erred in granting Travelers summary judgment because Amsted did not breach its notice obligations of a potential claim of pollution at the Nims and the South Bend sites. As for the Nims site, Amsted contends that it gave Travelers reasonable notice within 90 days of the November 2007 determination that Nims was a contamination source of the pollution identified at the site.

¶ 32 When construing the language of an insurance policy, a court is to ascertain and give effect to the intentions of the parties as expressed by the words of the policy. *Country Mut. Ins. Co. v. Livorsi Marine, Inc.*, 222 Ill. 2d 303, 311 (2006). The insurance policy notice provisions impose valid prerequisites to insurance coverage. *Id.* A policy condition requiring notice "[a]s soon as practicable" is interpreted to mean "within a reasonable time." *Id*. Reasonableness is an objective standard, determinable as a matter of law when the facts are not in dispute. *Zurich Ins. Co. v. Walsh Const. Co. of Illinois*, 352 Ill. App. 3d 504, 509 (2004). Breaching a policy's notice clause by failing to give reasonable notice will defeat the right of the insured party to recover

under the policy. *Country Mut. Ins. Co. v. Livorsi Marine, Inc.*, 222 Ill. 2d at 312. A delay of even a few months in giving notice breaches the policy as a matter of law, defeats coverage, and justifies the entry of summary judgment for the insurance company. *Montgomery Ward & Co. v. Home Ins. Co.*, 324 Ill. App. 3d 441, 449 (2001).

¶ 33 Here, the Travelers policies required Amsted to provide Travelers written notice of an occurrence "as soon as practicable." The record indicates that Amsted did not fulfill its notice requirement. Amsted's notice to Travelers about a potential claim for the Nims site was given in February 2008. However, it is undisputed that, as early as March 2003, Clayton, Amsted's environmental consultant, identified Nims and, specifically, the Nims lagoons as "recognized environmental conditions." Later the same year, Clayton confirmed the presence of TCE in groundwater at the exact location of the Nims lagoons and advised Amsted that further testing at Nims was necessary to "define the extent of TCE detected in groundwater at the site." Based on the evidence, Amsted was aware that some contamination with TCE existed at Nims site since 2003.

¶ 34 Moreover, in September 2004, Amsted received $19 million in a settlement agreement with a number of insurers whose excess policies covered the exact time period as, and provided coverage directly in excess of, the Travelers policies. Nims was among the "anticipated [] environmental claims which might trigger excess coverage," and Amsted received $9.7 million for potential remediation costs of the Nims contamination.

¶ 35 Amsted received further information regarding its potential liability at Nims in November 2004, when Clayton advised Amsted that investigative activities at Nims also detected "the presence at manganese at elevated concentrations in the groundwater" and that the contamination "may migrate offsite at a concentration exceeding the water quality standard." Later in October

2005, Amsted, through Clayton, submitted a proposed remedial action plan for the Getty parcel, while noting that "TCE has been detected in groundwater samples collected for locations along" the property boundary with Nims. Furthermore, in April 2006, the Michigan Department of Environmental Quality rejected the plan because it did not include remedial actions at Nims. Even more compelling, Amsted began contemplating insurance coverage for the contamination in November 2006, when Enright requested and received the Travelers policies to assess the possibility of coverage. In November 2007, Amsted advised Enright to notify Travelers about the Nims contamination. The notice was finally sent in February 2008.

¶ 36 Based on the undisputed record, Amsted's notice to Travelers was not timely considering that Amsted was aware of some contamination at the site since 2003, was subsequently informed several times that groundwater contamination existed at Nims, and it still waited over a year before giving the notice after assessing and evaluating the existence of insurance coverage under Travelers policies. See *Montgomery Ward & Co. v. Home Ins. Co.*, 324 Ill. App. 3d 441, 449 (2001) (holding that a delay of even a few months in giving notice has been held to be unreasonable and to constitute a breach of the notice condition as a matter of law); see also *Equity General Insurance Company v. Patis*, 119 Ill. App. 3d 232, 238 (1983) (a nearly five-month delay in giving notice could not reasonably be construed as “as soon as practicable”); *Illinois Valley Minerals Corp. v. Royal Globe Ins. Co.*, 70 Ill. App. 3d 296 (1979) (holding that notice given six months after an accident was not given within reasonable time).

¶ 37 Amsted maintains that its reasonable belief in nonliability excused any delay in reporting. Amsted attempts to justify the timing of its notice based on the fact that it did not "learn that it could be the source of the contamination at Nims, as opposed to merely that there existed contamination at Nims" until November 2007. Amsted claims that, prior to November

2007, it reasonably believed that the source of contamination on the Nims parcel was an adjacent up-gradient site, the West Shore Pavilion.

¶ 38 Contrary to Amsted's argument, an insured's reasons for doubting their liability cannot excuse the failure to notify. *Tribune Co. v. Allstate Ins. Co.*, 306 Ill. App. 3d 779, 788 (1999). A court may consider an insured's reasons for failing to provide timely notice, but if the court concludes that the insured's excuse is insufficient, the late notice will absolve the insurer of any coverage obligations. *MHM Servs., Inc. v. Assurance Co. of Am.*, 2012 IL App (1st) 112171, ¶ 51. The key element of the duty to notify is not the appearance that the insured, in fact, may be liable. *National Bank v. Winstead Excavating of Bloomington*, 94 Ill. App. 3d 839 (1981). Instead, the test is whether any reasonably prudent person "could foresee a lawsuit" and would either contact his attorney or his liability carrier. *Twin City Fire Ins. Co. v. Old World Trading Co.*, 266 Ill. App. 3d 1, 7 (1993). The duty to notify arises on the day the insured receives information regarding an alleged incident which potentially might be covered under the insurance policy. *Id*.

¶ 39 Here, although Amsted repeatedly asserts that, until November 2007, it believed that it was not the source of TCE contamination, the undisputed facts in the record disclose that at least since November 2006, Enright and the Amsted executives, who had internal responsibility for notice to insurers, began assessing the possibility of coverage under the Travelers policies. Another fifteen months passed before notice was given, even though Enright advised Amsted that the presence of contamination discovered at Nims since 2003 would constitute the kind of damage that, under certain conditions, can support a claim. See *Am. Mut. Liab. Ins. Co. v. Beatrice Companies, Inc.*, 924 F. Supp. 861, 875 (N.D. Ill. 1996) (noting that discussions between the insured and its attorney regarding the possibility of coverage one year before notice

was given is evidence that the insured had no legitimate excuse for the delay). At least since 2006, when Enright evaluated the policies in the light of the numerous reports about contamination at Nims, Amsted knew that the Nims groundwater contamination potentially might have been covered under the Travelers insurance policies. Accordingly, Amsted's delay in providing notice of an occurrence was not justified. Therefore, the trial court did err in concluding that Amsted did not give timely notice of occurrence or have a valid excuse for the delay in providing notice of the contamination for the Nims site.

¶ 40 Amsted argues next that the circuit court erred when it ruled that Amsted breached its notice obligations regarding the South Bend site. Amsted contends that it gave timely notice to Travelers in a 2007 letter it found and produced in December 2014, after the discovery cutoff in the instant case. In turn, Travelers argues that Amsted's assistant general counsel, Edward Brosius stated, in sworn testimony, that Amsted did not give notice to Travelers until June 30, 2008. In addition, Travelers maintains that the alleged notice letter on its face did not constitute sufficient notice to Travelers because it does not identify Travelers applicable primary coverage insurance policy or the relevant period of coverage.

¶ 41 Initially, we note that June 30, 2008, is the notice that controls. Before any mentioning of the notice letter long after discovery closed, Amsted's assistant general counsel admitted that notice regarding the applicable Travelers coverage was given on June 30, 2008. See *Chmielewski v. Kahlfeldt*, 237 Ill. App. 3d 129, 133 (1992) ("once a party has given sworn testimony he should not be allowed to change his testimony to avoid the consequences of his prior testimony"). Moreover, the court properly held that even if the court would consider the 2007 letter as notice, it does not constitute sufficient notice seeking coverage. The letter does not identify Travelers applicable primary coverage insurance policies issued to Amsted, nor the

proper time period of coverage, from 1965 to 1975. Instead, the letter is addressed to an "Excess Liability" claims center and seeks to provide notice under a series of excess insurance policies that "The Aetna and Surety Company" issued to two different policyholders, Varlen Corporation and Dyson-Kissner Corporation.

¶ 42 Next, the trial court did not err in holding that Amsted breached its obligation regarding the South Bend site because the notice given on June 30, 2008 was untimely. The record reflects in February 2007, Amsted received a letter from EPA which stated that the site was contaminated. The letter advised Amsted that it was a "responsible party," encouraged Amsted to participate in the cleanup, and to reimburse the EPA for costs incurred in responding to the contamination. Amsted promptly retained an environmental counsel and, in April 2007, advised the EPA about the Travelers policies and that was in the process of placing Travelers on notice. The chronology of these events demonstrates that by April 2007, Amsted knew of the potential coverage under the Travelers policies and of the necessity to give notice. Amsted still waited another thirteen months, until June 30, 2008, before giving notice. Accordingly, Amsted's notice of pollution as to the South Bend site was not timely. See *Montgomery Ward & Co. v. Home Ins. Co.*, 324 Ill. App. 3d at 449 (the insured's eight-month or year long delay in giving notice to the insurer after receiving letters regarding contamination constituted late notice).

¶ 43 Finally, Amsted argues that, at minimum, a fact finder should determine whether, based on the extensive and complicated facts of this case, Amsted acted reasonably. Although generally, a fact finder decides whether a party acted reasonably, here, Amsted invited the trial court to decide the issue as a question of law when it filed its cross-motion for summary judgment. See *Mills v. McDuffa*, 393 Ill. App. 3d 940, 949 (2009). Since both parties filed cross-motions for summary judgment, they conceded that no material questions of fact exist and

that only a question of law is involved that the court may decide based on the record. *Bank of Am., N.A. v. Judevine*, 2015 IL App (1st) 140532, ¶ 19. We find that the trial court did not err in holding that Amsted failed to satisfy the condition precedent of notice to Travelers as required by the insurance policies for both the Nims and the South Bend sites.

¶ 44 CONCLUSION

¶ 45 Based on the foregoing we affirm the judgment of the circuit court.

¶ 46 Affirmed.

¶ 47 Mikva, J., concurring in part and dissenting in part.

¶ 48 I respectfully dissent from that portion of the court's order concluding that summary judgment was appropriately granted to Travelers in reference to the Nims site, on the basis that Amsted failed to give timely notice.

¶ 49 Amsted notified Travelers in February of 2008 that its investigation in the late summer and early fall of 2007 indicated that it might be a source of groundwater contamination that had occurred during the time that the Travelers policy was in place. No law suit had been filed against Amsted at that point. However, Amsted agrees that a prerequisite to liability coverage under the Travelers policy is notice to Travelers, within a reasonable time after it knew or should have known that there was a potential claim against Amsted for causing this contamination.

¶ 50 In deposition transcripts submitted in connection with the parties' cross-motions for summary judgment, Amsted's representatives consistently testified that, while there was some evidence of groundwater contamination at the Nims site prior to January 2007, it was not until then that the contamination was confirmed. They further testified that, even if contaminates were discovered at Nims, if they were not in the water they could not migrate from Nims and thus would not give rise to liability. Amsted's representatives also consistently testified that it was not

until they received the results of a follow-up investigation from Clayton, their environmental consultant, in November of 2007 that they determined that Amsted likely contributed to the groundwater contamination. They insisted that, until this time, they believed that the contamination was caused by one or more known, up-gradient polluters. As the majority opinion recognizes, it was this November 2007 report that conclusively "determined that operations at Nims contributed to the groundwater contamination onsite and to the organic compound contamination discovered at Getty." In light of this testimony, a determination of whether Amsted had actual knowledge of a potential claim against it prior to November of 2007 would involve credibility determinations not appropriate for resolution on a motion for summary judgment. Travelers does not suggest that the delay between November of 2007 and February of 2008 was unreasonable.

¶ 51 Instead Travelers' argument and the majority opinion's conclusion that notice was untimely both rest on what Amsted *should* have known, based on the facts available to it. "In contrast to 'actual knowledge,' one is deemed to have constructive knowledge of such facts as one would have known by the exercise of reasonable care." *In re Application of the County Treasurer*, 302 Ill. App. 3d 639, 646 (1998). A party "who has notice of facts which would cause a reasonable person to inquire further may be charged with having notice of other facts that might have been discovered after a reasonable inquiry." *Smolek v. K.W. Landscaping*, 266 Ill. App. 3d 226, 229 (1994). Generally whether a party is deemed to have constructive notice is a question of fact. *Smolek*, 266 Ill. App. 3d at 229.

¶ 52 The record in this case contains extensive reports and testimony concerning environmental information shared with Amsted officials from 1986 through 2007, information that a finder of fact could conclude would have caused a reasonable insured to investigate sooner

than Amsted did. The language of the various reports summarizing environmental studies conducted on the Getty and Nims properties is not disputed. "A triable issue precluding summary judgment exists," however, not just where the material facts are disputed, but where "reasonable persons might draw different inferences from the undisputed facts." *Tagliere v. Western Springs Park District*, 408 Ill. App. 3d 235, 241 (2011). In my view, reasonable minds could differ regarding whether the evidence in this case gives rise to the inference that Amsted should have known of potential claims against it sooner than it says it did. Nor does it matter that the parties here filed cross-motions for summary judgment. Our supreme court has made it clear that "the mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate a court to render summary judgment." *Pielet v. Pielet,* 2012 IL 112064 ¶ 28. Here, at what point Amsted should have known that a claim could be asserted against it is, in my view, a classic issue of fact.

¶ 53 Finally, Travelers' reliance, which the majority opinion adopts (*supra* ¶ 34), on the fact that Amsted settled with its excess insurers in September of 2004 with reference to Nims is a classic red herring. As Amsted fully explains, with citations to the record, these excess carriers were preparing to liquidate and Amsted's only choice was to negotiate a settlement for potential claims at its various sites. For all of its foundries, including Nims, Amsted simply projected potential remediation costs based on worst case predictions of environmental exposure. Amsted personnel testified, without contradiction, that this settlement had nothing to do with any claims actually expected at Nims or any knowledge that the company had regarding groundwater contamination.

¶ 54 Because I disagree with the court's determination that the timeliness of Amsted's notice relating to the Nims property was properly decided on summary judgment. I respectfully dissent from that portion of the court's order.

¶ 55 I join the remainder of the court's order holding that Amsted breached its notice obligations regarding the South Bend site, except for that portion of paragraph 41, *supra*, which finds that Amsted's assistant general counsel's statement in his deposition was an "admission" that the company gave no notice of potential claims involving the South Bend site until June 30, 2008. Amsted's in-house counsel stated in his deposition simply that he "didn't think" there was any notice before June 2008. The witness's ignorance of or failure to remember an earlier notice given by the company's outside counsel is not an "admission" that no such notice was given. However, I certainly agree with this court and with the trial court that the notice that Amsted now claims it gave in 2007 was insufficient as a matter of law and that a delay of sixteen months after Amsted was notified by the EPA that it was a "responsible party" was not reasonable.