

## ***Michigan Court of Appeals Refuses to Vacate Judgment Against South Macomb Disposal Authority Based on “Discovered Evidence”***

The Michigan Court of Appeals has refused to reopen a judgment against a landfill operator in an insurance case based on evidence discovered after the judgment, when the landfill operator could have obtained the evidence earlier.

South Macomb Disposal Authority (SMDA) operates several municipal landfills in Macomb County, Michigan. In 1990, the Michigan Department of Natural Resources (MDNR) informed SMDA that tests had revealed that two of SMDA’s landfills had leaked leachate into the surrounding groundwater. SMDA’s insurers, American Insurance Company and National Surety Corporation and Citizens Insurance Company of America (the insurance companies), denied coverage for any claims, arguing that the claims fell within the pollution exclusion clauses in the insurance policies. The pollution exclusions excluded coverage for pollution based claims unless the discharge or release was “sudden and accidental.”

SMDA sued the insurance companies, seeking to compel them to pay the costs of remediating the contamination, and to defend it against any government enforcement actions.

The insurance companies moved for judgment before trial, arguing that the discharges from SMDA’s two landfills were not sudden and accidental, and, therefore, not covered because of the pollution exclusions in the policies. SMDA claimed that, in the 1950’s and 1960’s, an adjoining parcel of land (the Walker site) had been operated as a landfill, and argued that the groundwater contamination came from the Walker site. SMDA argued that because there was an off-site source of the contamination, the pollution exclusions do not apply. The trial court denied the insurance companies’ motion.

The court of appeals reversed, stating that SMDA failed to present persuasive evidence that hazardous substances from the Walker site had caused the contamination problem, and that SMDA had failed “to set forth specific facts showing that there is a genuine issue for trial.” The court of appeals also found that SMDA had failed to present evidence to demonstrate that the leakage from the two SMDA landfills was “sudden.” The court of appeals, therefore, held that the trial court had erred in denying the insurance companies’ motion for judgment before trial, and sent the case back to the trial court for further action, and the trial court entered judgment for the insurance companies.

SMDA directed its expert, Dr. Michael Sklash (Sklash), to conduct an investigation to uncover some new scientific evidence to determine whether or not the contaminated groundwater came from SMDA's two landfill sites or another possible source. Sklash, relying on data gathered in a 1998 hydrogeological investigation of the landfill sites, concluded that the groundwater contamination had not come from the two SMDA landfills, but most likely had come from the "old Walker site." He reported that the chemical composition of groundwater samples was dramatically different from the leachate from SMDA's landfills, and concluded that the groundwater contamination had not come from the SMDA landfills.

Armed with Dr. Sklash's report, SMDA asked the trial court to reverse its earlier judgment, claiming that the evidence upon which Sklash based his opinions constituted "[n]ewly discovered evidence which by due diligence could not have been discovered" in time for the trial court to consider it when it addressed the insurance companies' motion for judgment before trial. The insurance companies objected to this motion, arguing that the information upon which Sklash based his testimony was not "newly discovered evidence."

The circuit court found that Dr. Sklash's affidavit showed that the Walker site was leaking, and was, therefore, a contributor to the contamination at the two SMDA landfills. Accordingly, the court found that SMDA was partially entitled to relief from the earlier judgment with respect to its claim regarding the Walker site.

The insurance companies appealed the circuit court's decision granting relief to SMDA, arguing that the circuit court had improperly reversed the original decision by the court of appeals. When an appellate court remands a matter to a trial court, the trial court is authorized to take any action that is not inconsistent with the appellate court's decision. Therefore, the appeals court held that it was proper for the trial court to consider SMDA's motion, which was based on newly discovered evidence.

The insurance companies next argued that the circuit court's consideration of SMDA's motion was precluded by the doctrine of "law of the case." The appeals court found that that doctrine did not apply because the facts did not remain materially the same. SMDA provided new evidence to show that there exists a question of material fact whether off-site sources may have contributed to the contamination. Therefore, the appeals court found that the circuit court did not fail to apply the "law of the case" doctrine.

The insurance companies next argued that the trial court abused its discretion in granting SMDA's motion for relief. The Michigan court rules allow a court to grant a party relief from judgment if the party presents newly discovered evidence that it could not have discovered in time for the first trial. There are four requirements that must be met for newly discovered evidence to support a motion for post-judgment relief: 1) the evidence must be newly discovered; 2) the evidence must not be merely cumulative; 3) the newly discovered evidence must be likely to change the result; and 4) the party moving for relief from judgment must not have been able to produce the evidence with reasonable diligence.

Upon review, the court of appeals concluded that SMDA failed to demonstrate that, with due diligence, it would not have been able to produce the newly discovered evidence at an earlier time. The Court noted that SMDA had been notified by MDNR as early as 1990 that SMDA was the suspected source of contamination, and SMDA began an investigation in 1994 or 1995 to look for other potential sources. The court of appeals found that SMDA had failed to demonstrate that it could not have found the financial means to complete to complete the investigation begun in 1994 or 1995. Moreover, Sklash's testimony did not show that the passage of time was necessary for the data to be collected. On the contrary, Sklash's testimony indicated that contaminants had been migrating from the Walker Site since before 1979. Therefore, SMDA failed to establish that it would not have been able to discover the evidence earlier through due diligence. Thus, the appeals court held that the circuit court abused its discretion in granting SMDA's motion for relief, and reversed the decision.

Christopher J. Dunsky