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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5527-03T1

W.R. GRACE & CO. and ECARG INC.,

Plaintiffs-Appellants,

v.

WEJA, INC. d/b/a CLEAN MACHINE CAR WASH; SUNOCO, INC. (R&M); SHELL OIL COMPANY; WALLACE TEICH; G.E. 440, INC.; SUNRICH ENTERPRISES, INC.; DANIEL V. RICHARDS; ATLANTIC EMPLOYERS INSURANCE CO; and CONTINENTAL INSURANCE COMPANY OF NEW JERSEY,

Defendants-Respondents,

and

MO-PARK INDUSTRIES, INC. and JERRY FELDMAN,

Defendants.

WEJA, INC.,

Third-Party Plaintiff/Respondent,

v.

SHELL OIL COMPANY; CONTINENTAL INSURANCE COMPANY; and ATLANTIC EMPLOYERS INSURANCE COMPANY,

Third-Party Defendants/Respondents.

SUNOCO, INC. (R&M),

Third-Party Plaintiff/Respondent,

v.

CONTINENTAL INSURANCE COMPANY and
ATLANTIC EMPLOYERS INSURANCE COMPANY,

Third-Party Defendants/Respondents.

Submitted: February 28, 2006 - Decided: November 30, 2006

Before Judges Kestin, Lefelt and R. B. Coleman.

On appeal from the Superior Court of New Jersey, Law Division, Civil Part, Hudson County, L-7908-95.

Pitney Hardin, attorneys for appellants (Robert G. Rose and William S. Hatfield, on the brief).

Soriano, Henkel, Biehl & Matthews, attorneys for respondents Weja, Inc. and Wallace Teich (Frederick C. Biehl, III, on the brief).

Hartlaub, Dotten & Terry, attorneys for respondent Sunoco, Inc. (R&M) (Michael D. Mezzacca, of counsel and on the brief).

Norris, McLaughlin & Marcus, attorneys for respondents G.E. 440, Inc., Sunrich Enterprises, Inc., and Daniel V. Richards (Charles W. Miller, III, of counsel and, with Jennifer C. Howell, on the brief).

Thelen Reid & Priest, attorneys for respondent Shell Oil Co. (Kathleen M. Balderston, of the New York bar, admitted pro hac vice, on the brief).

No brief was filed by any other party.

PER CURIAM

Plaintiffs, W.R. Grace & Co. (Grace) and its wholly-owned subsidiary Ecarg, Inc. (Ecarg), seek recovery for cleanup and

removal costs of underground storage tanks (USTs) associated with petroleum contamination at a site on Route 440 in Jersey City, formerly used as a gas station and car wash. Plaintiffs sued various defendants in numerous counts. They named as defendants two oil companies, Sunoco, Inc. (R&M) (Sunoco) and Shell Oil Co. (Shell), which had supplied gasoline to the location. Plaintiffs also sued former tenants that had operated the gas station, including defendants Weja, Inc. (Weja) and its sole shareholder, Wallace Teich; and G.E. 440 Inc., (G.E. 440), Sunrich Enterprises, Inc. (Sunrich), and Daniel V. Richards. Plaintiffs claimed violation of the Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11 to -23.24; negligence; abnormally dangerous activities; nuisance; and breach of contract. The damages sought from the various defendants included indemnification, leasehold damages and unpaid rent. The claims for nuisance and breach of contract were against Weja and Teich only.

Various defendants filed cross-claims and third party complaints. Plaintiffs amended the complaint to allege direct insurance coverage claims, as well. Those claims were eventually dismissed on summary judgment, and plaintiffs have abandoned them on appeal.

Plaintiffs appeal from the summary judgment dismissal before trial of their claims against both oil companies and three of the gas station's former operators. Plaintiffs also appeal from the denial of a jury trial on their common law breach of contract and negligence claims. The trial court ruled those claims were ancillary and incidental to the claims brought under the Spill Act and the Underground Storage of Hazardous Substances Act, N.J.S.A. 58:10A-21 to -35. No jury trials are available for claims brought under either act. See In re Environmental Ins. Declaratory Judgment Actions, 149 N.J. 278, 291-98 (1997), aff'g, 287 N.J. Super. 385, 391-96 (App. Div. 1996); Lyn-Anna Properties, Ltd. v. Harborview Dev. Corp., 145 N.J. 313 (1996).

Accordingly, the case against Weja and Teich was tried without a jury. Based on findings and conclusions articulated on the record, the trial court determined that plaintiffs owned the UST system and were responsible for registration and removal of the tanks and associated costs; that plaintiffs were responsible for sixty percent of the cleanup costs and Weja was responsible for forty percent; that Teich was responsible personally for back rent; and that Weja was responsible for $39,000 of plaintiffs' pre-trial attorneys' fees and forty

percent of the reasonable attorneys' fees and costs incurred during trial and post-trial.

On appeal, plaintiffs assert the judge erred in granting summary judgment dismissing the claims against Shell, Sunoco, and two former tenants, Richards and Sunrich; in denying a jury trial on plaintiffs' common law breach of contract and negligence claims; in allocating responsibility for remediation costs at the site; in allocating responsibility for cleanup of gasoline contamination; in failing to award all damages against Teich personally that the judge awarded against Weja; and in the limitations imposed on plaintiffs' recovery of pre-trial, trial, and post-trial attorneys' fees and costs. We reverse and remand.

For the reasons given, we hold that the trial court erred in dismissing, on summary judgment, plaintiffs' claims against Shell, Sunoco, Richards, and Sunrich; in denying plaintiffs a jury trial on the breach of contract and negligence claims; and in allocating responsibility for remediation costs at the site. A new trial with Shell, Sunoco, Richards, and Sunrich as defendants may result in a new allocation of responsibility for cleanup of gasoline contamination.

We also hold the trial court erred in ruling that Teich was not personally liable for all damages awarded against Weja. The

trial court's calculations as to attorneys' fees, costs, and interest may well change after a new trial. In making new calculations, the trial court, differently from its prior consideration of these elements, should, based on the language of the applicable lease, award interest on attorneys' fees and costs.

I

A.

Amy Joy Realty took title to the property in the 1950s. In 1970, G.E. 440 leased the site, constructing a gas station and car wash. The gas station on the property sold Shell gasoline until April 1981, and Sunoco gasoline until 1986.

Amy Joy Realty sold the property in 1981 to Louis Feil, who then sold it to Daylin, Inc. (Daylin), a subsidiary of Grace. Shortly before the Amy Joy/Feil/Daylin transactions, Richards and his company, Sunrich, purchased the stock of the lessee, G.E. 440, along with the gas station and car wash business. The site had two piping systems for the gas station: steel lines and fiberglass lines. By June 1981, the gas station's steel lines were already out of use because Richards had replaced them with fiberglass lines through a UST system upgrade financed by Sunoco.

On September 10, 1982, G.E. 440 and Richards, trading as Sunrich, entered into a contract with Weja to sell the gas station and car wash business, contingent on Weja obtaining a new lease with Grace. Sometime before October 1982, Daylin's name was changed to Grace Retail Corporation. On October 1, 1982, Grace Retail Corporation entered into a lease with Weja as tenant for the period from October 1, 1982, to September 31, 1997. On October 7, 1982, Richards signed a bill of sale on behalf of G.E. 440, himself and Sunrich, transferring ownership of the gas station and car wash to Weja. In 1986, title to the property was transferred to Ecarg, which took the property subject to the Weja lease.

B.

Before becoming the sole shareholder and owner of Weja, Teich had been a co-owner and officer of the corporation. His co-owner, Arlan Eisler, testified he was not aware that Weja had made any improvements to the USTs or lines from 1982 until operation of the gas station ceased in 1986. Eisler believed that, as part of the negotiation with Sunoco for the franchise agreement, Weja took on the debt that Richards owed Sunoco for putting in new tanks or a new UST system. Eisler thought Grace owned everything underground even though the contract between

Weja and Richards stated that Weja had purchased the tanks from Richards.

Teich testified that Weja made no alterations to the UST system or to underground lines. Richards had installed new tanks about one year before Weja took over the gas station. Teich believed that, when Weja signed its lease, the tanks belonged to Grace. When shown the bill of sale from G.E. 440 and Richards to Weja for the sale of the gas station and car wash, which included three USTs in the list of equipment purchased, Teich stated that Weja had not purchased them because the lease with plaintiffs stated that Grace owned the property, building, and tanks. Thus, he concluded, Weja never could have sold the USTs.

Bill E. Miller, a salesperson and project manager for a subsidiary of Grace, testified that he had responsibility for the Weja site, however, he had not seen the October 1982 lease until pre-trial discovery in November 1997. He explained that, because tank ownership information had been withheld from Grace by Weja, two certifications he had signed and sent to the Department of Environmental Protection (DEP) stating that Grace was the owner of the tanks were erroneous.

Eisler testified that Teich operated the site every other day and had direct responsibility for the gas station business

and compliance with laws and regulations. Teich testified that it was Eisler who had the main responsibility for the gas station while Teich had the main responsibility for the car wash. Teich also testified that Eisler handled all negotiations with Sunoco to purchase gasoline, and when Sunoco employees came to the property, they met with Eisler.

In September 1992, Teich signed a management agreement with Hugh Kevin Park to manage the car wash. Park paid rent to Weja. Teich stated that he used the money he received from Park as his own salary.

C.

On June 29, 1994, the Hudson Regional Health Commission (HRHC) ordered Weja to register and remove the USTs. In a letter dated July 22, 1994, Teich forwarded the HRHC letter to plaintiffs, claiming that plaintiffs were responsible for registration and removal. Plaintiffs responded in a letter dated August 17, 1994, addressed to Weja and Teich, contending that Weja was responsible.

Nevertheless, plaintiffs began removal of the USTs. After sampling, about thirty percent of the soil was placed back in holes at the property and the rest was shipped to a facility in Ohio. DEP twice ordered installation of ground wells to

delineate contamination, with a plan to continue monitoring the site.

Plaintiffs hired Dames and Moore, a licensed and certified UST contractor, to remove the UST system at the property. After three periods of excavation uncovering contamination, on June 5, 1995, Dames and Moore submitted a closure report to DEP.

Miller testified that when the tanks were removed from the ground he could smell petroleum. He did not see any breaks in the fiberglass lines but recalled talk about loose joints. He remembered that liquid in the pit where the tanks had been removed had a gasoline sheen. He also remembered, at the time the fiberglass lines were being removed, a vacuum truck attempting to remove residual product from the lines.

Louis Echevarria, a Dames and Moore employee, testified that gasoline product was found in the fiberglass lines but he saw no leaking; that there was some staining under the fiberglass pipes that looked like gasoline or oil; that he saw some loose joints in the fiberglass lines; that he smelled a petroleum odor when the lines were removed, but there was no spill at that time; and that the tanks had no holes in them, but when they were removed there was contamination.

Andrew V. Goddard, a former Dames and Moore employee and project manager, testified that the tanks had a small amount of

product in them before they were removed, but no holes; that the area above the tanks had green soil; that the fiberglass lines were full of gasoline; that gasoline was removed using a vacuum truck; that the fiberglass lines were cut and removed with proper precautions, but one area near the pipe smelled strongly of gasoline and other spots along the pipe had weaker gasoline odors; and that the unused steel lines were dry with no gasoline odor. His notes indicated that the two most likely sources for contamination were overfills and leaking pipes. The steel pipes were a potential source of contamination, but it was difficult to conclude that was so because those pipes had been out of service for a long time.

Neil F. Petersen, plaintiffs' petroleum fingerprint and geochemistry expert, testified about analyzing petroleum compounds and determining different brands, ages, and types of refined petroleum products. He reviewed soil and water samples from the property and made distinctions between Shell and Sunoco gasoline using the hydrocarbon characteristics of each product. Petersen opined that a large number of samples had signature characteristics of different types of Sunoco gasoline sold both before and after 1984. He analyzed some soil as contaminated with Shell gasoline and identified weathered samples with characteristics that restricted them to the late 1970's when

Shell gasoline was delivered to the site. He also identified a high proportion of groundwater samples containing MTBE, which Sunoco first added to its gasoline in 1984. Petersen opined, based on site sampling, that approximately eighty to eighty-five percent of the contamination exceeding DEP cleanup standards was related to Sunoco gasoline and the remaining fifteen to twenty percent was attributable to Shell gasoline.

Marc Selover, an environmental engineer, who testified as Weja's expert in environmental site assessment and remediation, addressed the responsibility for pollution on the site. He opined that the most significant source of contamination was the Shell gasoline from the steel piping where, he believed, free-phase gasoline product was found. Selover's initial allocation was that seventy percent of the contamination came from leaking steel lines and thirty percent came from Weja's operation.

John J. Trela, plaintiffs' expert in soil and groundwater contamination and remediation, testified about the source of the contamination. Of the thirty-three actionable samples, he attributed twenty-nine to Sunoco gasoline. Trela allocated cleanup costs mathematically based on the actual number of samples with Shell and Sunoco contamination, and attributed 79.60% to 85.61% to Sunoco gasoline. According to Trela, of the contaminated soil piles that had to be removed and disposed of

offsite, 140 yards were attributable to Shell gasoline and 440 yards to Sunoco. In his initial expert reports prepared before numerous defendants were dismissed from the case, Trela had not disagreed with Selover's allocation of seventy percent of the contamination having come from leaking steel lines and thirty percent from Weja's operation.

Constantine Tsentas, a geologist and principal of Dames and Moore, testified about the property and its remediation. He stated that only one out of twenty-eight manifests accompanying shipments of contaminated soil from the site contained a reference to petroleum contamination. This was because, in addition to the petroleum problems at this site, the property contained chromium pollution unrelated to operation of the gas station and car wash.

D.

The trial judge concluded that plaintiffs owned the tanks. He found as valid Selover's initial allocation of seventy percent of the contamination from leaking steel lines and thirty percent from Weja's operation. The judge noted that Trela did not disagree with this allocation in his initial report. Nevertheless, the judge stated that this initial allocation did not include consideration of groundwater contamination, and he

decided that there should be a sixty-forty split instead of seventy-thirty.

II

A.

Plaintiffs assert the trial court erred in granting summary judgment dismissing the claims against Shell, Sunoco, Richards, and Sunrich. We agree.

On appeal, we apply the same standard as governs the trial court in determining whether to grant or deny a summary judgment motion. Kopin v. Orange Prods., Inc., 297 N.J. Super. 353, 366 (App. Div.), certif. denied, 149 N.J. 409 (1997); Antheunisse v. Tiffany & Co., 229 N.J. Super. 399, 402 (App. Div. 1988), certif. denied, 115 N.J. 59 (1989). Summary judgment is to be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995).

B.

The summary judgment issue regarding plaintiffs' claims against Shell and Sunoco was: did a genuine issue of material fact exist as to whether spills and overfills during gasoline

deliveries caused site contamination. Shell and Sunoco assert that plaintiffs never presented any proof of overfills or spills by the oil companies and that, therefore, the trial court properly granted summary judgment dismissing plaintiffs' claims against them. Our analysis of the record discloses the existence of genuine issues of material fact precluding a grant of summary judgment to Shell and Sunoco.

It is undisputed that Shell delivered gasoline to the property from 1975 to 1981 and that Sunoco delivered gasoline from 1981 to April 1986. Plaintiffs contend that Shell and Sunoco delivered more than 2,153,564 gallons of gasoline to the gas station. Although Sunoco and Shell dispute the total number of gallons delivered, there is no disagreement that the deliveries were placed in fill ports that did not have any spill or overfill containment system.

Plaintiffs emphasize that, when the intact tanks were removed in 1995, there was gasoline contamination near the fill ports, and gasoline was detected in samples taken directly adjacent to the fill ports at the west end of the tanks and the down gradient to the east of the tanks. Plaintiffs point to opinions of their experts and Weja's expert that gasoline delivery spills and overfills were a source of contamination. Although, at the summary judgment stage, no direct evidence was

proffered to establish overfills at this site as causing the contamination, sufficient evidence existed to create an inference. "On a motion for summary judgment the court must grant all the favorable inferences to the non-movant." Brill, supra, 142 N.J. at 536.

Also, Dames and Moore's field notes at the time of the UST removal in 1995 provide documentation that the fill ports were a source of contamination. The notes reflect that significant contamination was observed in the stained soil around a number of the fill ports on the western end of the tanks and that there was a strong gasoline odor at those locations. And, the deposition testimony of two technicians employed by Dames and Moore provided additional support for the theory propounded by plaintiffs.

Plaintiffs contended that all this matter, taken together, supported the inference that Sunoco and Shell had caused contamination at the site. Plaintiffs argued the inference was sufficient to defeat the oil companies' motions for summary judgment.

Sunoco and Shell claimed that, in the absence of contemporary eyewitness accounts of overfills made at the time of the gasoline deliveries, there was no proof that overfills were the cause of at least some of the contamination. The oil

companies also argued on their summary judgment motions that Trela lacked sufficient basis to opine that soil samples showing elevated levels of contamination from locations to the east of the tanks could have been attributable to overfills at the western ends of the tanks.

The judge, in deciding the motions, characterized Trela's opinion regarding gasoline spills as "close to a net opinion[.]" He criticized Trela for failing to "delineate how other causes should be ruled out or why it's more likely than not that this contamination was caused by overfills. And he relies upon the . . . general soil testing system, to show that . . . there were overspills by Shell and Sunoco."

We disagree with the trial court's assessment, in part because some of Trela's opinions, including that there was evidence of overfills, was based on the deposition testimony of Goddard and an assistant, as well as their field notes. For example, plaintiffs are correct in their contention that the judge incorrectly ignored Trela's opinion that the contamination in the three sampling points at the east end of the tanks resulted from the gasoline's down gradient migration as "carried by lateral ground water flow" from the fill port source area at the site, and tended to show that the hydrogeology of the site was consistent with the spread of the contamination from the

fill ports located at the western end of the tanks across the property. Viewing the proffered showings in the light most favorable to the non-moving party, see Brill, supra, 142 N.J. at 540, Trela's report, among other features, created an issue of material fact that should have been reserved for decision by the trier of fact. The mere possibility of an overfill was not sufficient to raise a genuine issue of material fact, but the notes and first-hand observations of the field technicians coupled with the expert's interpretation was adequate to defeat summary judgment.

Proof of leakage need not be direct and can be established through circumstantial evidence. See United States v. Strandquist, 993 F.2d 395, 400 (4th Cir. 1993).

Accordingly, we conclude that the trial court erred in granting summary judgment in favor of Sunoco and Shell.

C.

We also discern the existence of material issues for trial related to the integrity of the UST system from April 1981 to September 1982 that precluded the grant of summary judgment in favor of Richards and Sunrich. We reject the contentions of Richards and Sunrich, the successors to G.E. 440's interests, that plaintiffs failed to make a prima facie showing sufficient to survive summary judgment of discharges of gasoline from April

29, 1981 until September 10, 1982, the period during which Richards and Sunrich operated the gas station.

There was ample support in the record for plaintiffs' claim, relying on Trela's expert report of July 23, 1999, that due to the hydraulic effect of the high water table at the site, the joints in the UST system's fiberglass piping failed, contributing to subsurface gasoline leakage at the site in 1981 and 1982. Richards's assertions and opinions to a contrary effect did not eliminate the issue as encompassing a factual dispute to be resolved by the ultimate finder of fact. The dispute, rather, emphasized the inappropriateness of summary judgment resolution. The judge's view that the discrepancies did not show there was leakage of gasoline and that there was no opinion to support leakage, but rather merely evidence of the unreliability of the methods of testing, amounted to a finding that should not have been made on summary judgment. The required grant of all favorable inferences to plaintiffs should have resulted in a denial of summary judgment on the claims of leakage based on tank readings.

In granting summary judgment, the motion judge emphasized that Trela's report did not pinpoint any date when the fiberglass piping failed, other than to say it was between 1981 and 1986. In this connection also he made a factual

determination impermissible on summary judgment. On the motion, it was not necessary for the expert to pinpoint dates of leakage.

Plaintiffs contended that, under the Spill Act, Richards and Sunrich are persons "in any way responsible" for the discharge of gasoline at the site in 1981 and 1982, claiming that there were material issues of fact concerning the integrity of the fiberglass piping in 1981 and 1982. Although plaintiffs had no direct proof of contamination during the period that Richards and Sunrich controlled the property, there was evidence of leakage from Sunoco gasoline distributed prior to 1984 and from Shell gasoline sold prior to 1981. Inventory discrepancies existed while Richards and Sunrich controlled the property that plaintiffs claimed showed leakage. Thus, based on the standard that governs grants or denials of summary judgment, it is clear that plaintiffs had raised a material issue of fact concerning leakage from April 1981 to September 1982, requiring their claims against Richards and Sunrich to go to trial.

It is possible there was water in the tanks, as alleged by Richards and Sunrich. There was no direct evidence of any leakage from the tanks, and discrepancies in the readings reported from day to day during that period could have been due to many factors. Viewing all the evidence in the light most

favorable to plaintiffs, however, they had established sufficient inferences under the summary judgment standard to be entitled to a trial on the issue of possible contamination in 1981 and 1982.

For the foregoing reasons, we hold the trial court erred in granting summary judgment in favor of Richards and Sunrich.

III

Plaintiffs contend, also, that the trial court erred in denying a jury trial on their common law breach of contract and negligence claims. See Insurance Co. of N. Am. v. Anthony Amadei Sand & Gravel, Inc., 162 N.J. 168, 175 (1999); (a right to a trial by jury, "must arise under a statute or our State Constitution"); Shaner v. Horizon Bancorp., 116 N.J. 433, 435-46 (1989).

Plaintiffs had moved in limine for a ruling that they were entitled to a jury trial on their common law breach of contract and negligence claims, asserting those were classic common law claims with different causes of action, different elements, and different damages from claims under the Spill Act. The judge relied on GEI Int'l Corp. v. St. Paul Fire & Marine Ins. Co., 287 N.J. Super. 385, 391-96 (App. Div. 1996), and its affirmance in In re Envtl. Ins. Declaratory Judgment Actions, 149 N.J. 278 (1997), as well as Lyn-Anna Props., Ltd. v. Harborview Dev.

Corp., 145 N.J. 313 (1996), to conclude that plaintiffs had no right to a jury trial because the breach of contract and negligence claims were "incidental and ancillary to the Spill Act claim." Plaintiffs do not challenge the trial court's view that there is no right to a jury trial under the Spill Act, or in respect of any claims that are ancillary and incidental to a principal Spill Act claim. They argue, however, that the court misapplied the cases relied upon and misconstrued plaintiff's common law claims as deriving solely from their Spill Act claims. Plaintiffs assert that the judge gave no explanation of how the negligence claim might be considered derivative, given that different proofs were implicated. They argue that the trial court erred when it reasoned that the sole basis for the breach of contract claims was that "the tenants contaminated the property in violation of the Spill Act[.]"

The trial court's ruling in this regard was on a question of law and must be reviewed de novo. See Balsamides v. Protameen Chems., Inc., 160 N.J. 352, 373 (1999); and Casey v. Brennan, 344 N.J. Super. 83, 110 (App. Div. 2001), aff'd o.b., 173 N.J. 177 (2002).

Weja and Teich assert that the negligence claim is identical to the breach of contract claim, in that plaintiffs seek to recover damages for cleanup of the property both prior

to and following Weja's tenancy. They add that the claims Weja and Teich are liable for contamination prior to Weja's tenancy are based solely on the October 1982 lease, and they contend that paragraph 21 of the lease, which addresses defaults, contains language specifically barring a trial by jury: "Tenant waives trial by jury in any action or proceeding by the Landlord to enforce Landlord's rights hereunder." Yet, on its face, this provision does not encompass jury trial waivers by the landlord, plaintiffs.

GEI, supra, 287 N.J. Super. 385, relied upon by the trial court as a basis for its ruling in this regard, does not support denying a jury trial for common law claims that are separate and distinct from a party's Spill Act claims. There, the plaintiff had brought a declaratory judgment action principally under the Spill Act, seeking to establish the relative responsibility of prior owners and operators of a contaminated site for the costs of remediation. See id. at 389-90. The plaintiff also made claims for common law contribution and indemnification, and for strict liability in tort; and sought, as well, a declaratory judgment as to rights and obligations under insurance contracts. See id. at 388, 390. We held that, because the plaintiff's contribution and indemnification claims sought solely to apportion responsibility for Spill Act liability, such claims

were ancillary and incidental to the plaintiff's Spill Act claims, and that there was no right to a jury trial. See id. at 394. We also held that the claims against insurance carriers were in the nature of equitable claims seeking specific performance, and thus were triable without a jury. See id. at 395.

We agree with plaintiffs that the trial judge's reliance on GEI to deny a jury trial here was misplaced. The facts and legal theories in that case were very different from those at hand. GEI involved no claims for breach of a lease agreement or other contract between the parties, or for negligence with specific allegations of conduct that proximately caused compensable damage.

In In re Envtl. Ins. Declaratory Judgment Actions, supra, 149 N.J. at 298, the Supreme Court held there is no right to a jury trial in a declaratory judgment action for insurance coverage on future environmental costs. Plaintiffs, in asserting their common law breach of lease claim, do not seek a declaratory judgment or specific performance, but instead seek money damages.

Neither the Supreme Court's ruling in In re Envtl. Inc. Declaratory Judgment Actions nor ours in GEI stands as precedent that would justify denial of plaintiffs' right to a jury trial

on their common law claims in this matter. Plaintiffs' contract claims arise from their assertions of Weja's breach of the October 1982 lease, as well as alleged acts of negligence by Weja and the other defendants. Those claims do not derive from the Spill Act claim; nor is there any other basis in the form of action or relief sought for denying the jury trial right. Plaintiffs' common law claims rest on independent causes of action, with different proofs as to liability and the right to recovery of damages beyond the costs of cleanup permitted by the Spill Act.

The error in the trial court's early view that plaintiffs' non-Spill-Act claims were ancillary and derivative is borne out as a matter of hindsight both by the fact that relatively few of the awards made were for Spill Act violations and that only a small portion of the counsel fee awards made reflected Spill Act responsibility. In GEI, the plaintiff sought to apportion responsibility for a Spill Act violation. Here, the breach of contract claims and the negligence claims were wholly separate from the Spill Act claims and could be presented to a jury understandably. They were, on their own, independently viable. On retrial, those claims should be presented to a jury, with the trial court itself deciding the Spill Act claims.

IV

Our reversal of the summary judgment dismissal of the claims against Shell, Sunoco, Richards, and Sunrich, as well as our holding that plaintiffs' breach of contract and negligence claims must be tried before a jury, require a remand for a new trial. A retrial may well produce a different allocation of remediation-cost responsibility than resulted from the first trial, even in the context of a determination that plaintiffs as owners of the property bear some responsibility, under prevailing standards, for the costs of remediation.

Other issues of fact and law that need to be addressed in these connections should be considered anew. Without impeding the trial court in its reconsideration of the matter, we are constrained to reflect on other rulings we consider to have been erroneously made in the first trial based upon the proofs adduced.

A.

The first such matter is the trial court's ruling that plaintiffs were the owners of the tanks. The trial court's determination in this regard flowed from its understanding of the terms of the October 1982 lease between Grace Retail Corporation and Weja. A question concerning "[i]nterpretation and construction of a contract is a matter of law for the court

subject to *de novo* review." Fastenberg v. Prudential Ins. Co., 309 N.J. Super. 415, 420 (App. Div. 1998). Here, the trial judge determined that the "facts support the interpretation given to . . . clause [8C of the contract] by Weja. At best, the language is ambiguous and that ambiguity must be resolved against the drafter of the lease, the landlord[,]" plaintiffs. He concluded, therefore, that ownership of the tanks vested in plaintiffs at the time of the lease because they had already been installed.

Section 8C of the October 1982 lease between Grace Retail and Weja provided:

> The title to all alterations, additions, improvements, repairs, fixtures (other than Tenant's Property), underground tanks, and all machinery and equipment permanently attached to the Demised Premises (other than any car wash equipment), if any, and all appurtenances thereto attached to the Demised Premises shall vest in Landlord upon the installation thereof, and the same shall remain upon and be surrendered with the Demised Premises as a part thereof, without disturbance and without charge, provided, however, that Tenant may remove any compressors installed by Tenant or purchased from the previous lessee of the Demised Premises, provided further that Tenant shall repair any damage to the Demised Premises caused by Tenant in so removing such compressors.

The trial judge characterized plaintiffs' argument as being that section 8C only referred to underground tanks that might be

installed after the lease was signed, while he described Weja's claim as being that the paragraph vested title of these tanks with the landlord at the time of signing of the lease since they were installed on the premises. The judge explained that the clause vested title in the landlord to alterations, additions, improvements, and repairs to underground tanks, to machinery or equipment permanently attached to the premises, and the appurtenances thereto. He determined that the question was whether the intent was to vest ownership of the tanks in the landlord so long as they were "installed regardless of when," or whether ownership of that equipment vested only when "installed in the future." He found support for the former interpretation because the lease addressed the removal of compressors installed by a tenant or purchased from a previous lessee. He explained:

> A compressor purchased from the previous owner is obviously already installed on the premises. Apparently, the parties believe that it was the type of machinery or equipment permanently attached to the premises, that would vest in the landlord under the proceeding [sic] language of the clause, so that they felt compelled to spell out their intention, to allow the tenant to remove the compressor.
>
> Mr. Teich, who was involved in the lease negotiations for . . . Weja, testified that he believed when he signed the lease, that the tanks . . . [would] belong to Grace.

> Mr. Miller, Grace's representative, upon reading the lease, believed that Grace owned the tanks, and so certified to the DEP.
>
> [He t]estified, however, that at that time, he had not read the bill of sale, and was not aware of the bill of sale for the ownership to Weja.

When interpreting a disputed provision in a contract, the court is to determine, first, whether the language of the agreement is clear or ambiguous. See Schor v. FMS Fin. Corp., 357 N.J. Super. 185, 191 (App. Div. 2002).

> "An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations[.] To determine the meaning of the terms of an agreement by the objective manifestations of the parties' intent, the terms of the contract must be given their 'plain and ordinary meaning.'"
>
> [Ibid. (quoting Kaufman v. Provident Life & Cas. Ins. Co., 828 F. Supp. 275, 283 (D.N.J. 1992), aff'd mem., 993 F.2d 877 (3d Cir. 1993).]

In determining whether a term is ambiguous, the court must examine the document as a whole. See Schor, supra, 357 N.J. Super. at 191. Further, it should make every effort to avoid rendering any portion of the contract meaningless. See J. Josephson, Inc. v. Crum & Forster Ins. Co., 293 N.J. Super. 170, 214-16 (App. Div. 1996).

When the terms of a contract create ambiguity, a court may admit parol evidence in order to provide an understanding of the parties' intentions. See Seidenberg v. Summit Bank, 348 N.J. Super. 243, 256 (App. Div. 2002). "In the quest for the common intention of the parties to a contract, the court must consider the relations of the parties, the attendant circumstances, and the objects they were trying to attain." Anthony L. Petters Diner, Inc. v. Stellakis, 202 N.J. Super. 11, 28 (App. Div. 1985). When ambiguous language requires consideration of parol evidence, the meaning of a doubtful provision becomes a mixed question of law and fact. See id. at 27-28. A trial judge's findings on such questions should not be disturbed if supported by adequate, substantial and credible evidence in the record. See Twp. of W. Windsor v. Nierenberg, 150 N.J. 111, 132 (1997) (citing Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84 (1974)).

Here the judge, having concluded that the language under consideration was "[a]t best . . . ambiguous[,]" considered testimony as to the intent of the parties. He resolved the ambiguity with a finding that plaintiffs owned the tanks because, when the lease was signed, the tanks had already been installed; and because it was logical that plaintiffs would want

control of the tanks if they were to re-rent the gas station to another tenant.

Plaintiffs contend the trial court erred in the ownership conclusion it reached and the ruling on that basis regarding the cost of registering and removing the UST. Plaintiffs argue, in sum, that the finding and conclusion were contrary to the overwhelming weight of the evidence concerning the history of ownership of the tanks at the site and was based on a misreading of the October 1982 lease.

Plaintiffs assert that the judge correctly determined the tanks to have been originally owned by G.E. 440 under the 1970 lease, as well as by Sunrich, G.E. 440's successor as tenant at the site. Plaintiffs also contend the judge correctly found that, in its contract of sale for the gas station and car wash business, Sunrich had transferred ownership of the UST system to Weja. Plaintiffs argue that the trial court erred in determining that, because the tanks had been installed prior to formation of the October 1982 lease, plaintiffs owned the tanks notwithstanding that ownership of the tanks, historically, "had been vested in the tenant from the very inception of operation of the gas station at the site[.]"

According to plaintiffs, the judge's error stemmed from his misinterpretation of section 8C. They explain that the section

contains an *in futuro* clause requiring a triggering event ("upon installation thereof") in order for title to vest in Grace as landlord. They assert that, by its express terms, section 8C is prospective in nature and applies to certain defined future improvements——specifically including "underground tanks"——to be made by the tenant after signing the lease.

Plaintiffs claim it was undisputed that Weja made no "alterations, additions, improvements, repairs," or changes to the UST system after acquiring it that would trigger such vesting. Weja did not improve or alter the tanks because it mistakenly believed that both the tanks and piping were a state-of-the-art fiberglass system installed by Richards, the prior tenant.

Plaintiffs' view is correct. Not only did Weja purchase the tanks from Sunrich initially, but also the lease between Grace Retail and Weja did not change that ownership. There was never a triggering event to change ownership.

It appears the judge was incorrect to view section 8C as ambiguous, thus, as a matter of law, applying the rule that any ambiguity should be construed against the drafter. Section 8C of the lease, read fairly and reasonably from a historic perspective, cannot be seen to be ambiguous.

Plaintiffs claim that the only reason Weja negotiated the provision in section 8C is because it clearly understood that new compressors would vest in the landlord "upon installation" and it wanted to assure its ability to remove them. It appears that Weja did not consider the installation of new tanks because of the belief that Richards had already installed a new UST system. Plaintiffs stress that Weja had purchased the tanks from Richards and had a continuing obligation to repay Sunoco for the 1981 upgrade of the UST system.

Plaintiffs contend that the only logical interpretation of section 8C was that the tanks remained the personal property of Weja, as tenant, unless replaced sometime in the future. Given the history of the site, we agree. Weja's lease was not in effect when the tanks were installed. Others were the lessees. A lease cannot bind individuals who were not parties to it. The tanks belonged to G.E. 440 and Sunrich when they were installed, prior to the signing of Weja's lease. The tanks were sold to Weja as part of the property of the business. After Weja entered into its lease, the tanks continued to belong to Weja.

B.

Our review of the record discloses, as well, that, apart from the tank ownership question, the trial court erred in

adjudicating plaintiffs solely responsible for the UST removal for several other reasons.

1.

The October 1982 triple net lease assigned responsibility to the tenant, Weja, for registration, removal and clean up. Moreover, Weja bore that responsibility as the owner of the tanks. Section 6 of the lease imposes the obligation on Weja to operate in compliance with law. Section 7 of the lease requires Weja to conduct maintenance and repairs at the site. Section 9 imposes an indemnification obligation on Weja in favor of Grace for all of Weja's operations. Apart from the tank ownership issue, the lease controlled the respective responsibilities of the landlord and tenant regarding the leased premises, including the UST system. Since the UST system was part of Weja's operations, it follows that, as between the parties, Weja is responsible for leaks in the system.

2.

We also agree with plaintiffs that the trial judge erred as a matter of law in considering "ownership" as the primary criterion for assigning the costs of UST registration and removal without giving due weight to Weja's statutory responsibilities as an "operator" pursuant to N.J.S.A. 58:10-23.11g.c(1), a provision of the Spill Act, and N.J.S.A. 58:10A-

22(i), a provision of the Underground Storage of Hazardous Substances Act, as well as N.J.S.A. 58:10A-25(a)(6)-(7) and N.J.A.C. 7:14B-8.1 to -8.8, which place responsibility for compliance on both the owner and operator of USTs.

N.J.S.A. 58:10-23.11g.c(1) provides: "[A]ny person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred." N.J.S.A. 58:10A-22(i) states: "'Operator' means any person in control of, or having responsibility for, the daily operation of a facility." N.J.S.A. 58:10A-25a(6) and (7) authorize the adoption of regulations to govern the responsibility of "the owner or operator" of a UST, and N.J.A.C. 7:14B-8.1 to -8.8 provide remediation standards governing owners and operators.

Weja took the UST system out of service in 1986 and abandoned it, leaving gasoline product in the tanks and in the fiberglass lines. In 1994, when HRHC ordered Weja to register and remove the tanks, Weja refused to comply with N.J.A.C. 7:14B-9.1 of the UST regulations. Weja forwarded the letter from HRHC to plaintiffs, and plaintiffs registered the tanks and erroneously admitted their ownership.

Plaintiffs, relying on Analytical Measurements, Inc. v. Keuffel & Esser Co., 843 F. Supp. 920, 929-30 (D.N.J. 1993), and Bahrle v. Exxon Corp., 279 N.J. Super. 5, 36 (App. Div. 1995), state that a Spill Act claim requires allocation among "liable parties," including owners and operators. Plaintiffs contend that the trial judge failed to conduct the equitable analysis required by the Spill Act to allocate responsibility for removal of the USTs between landlord and tenant, which allocation should have been based on their respective obligations under the 1982 lease. We agree.

The judge examined the 1982 lease and determined that plaintiffs were the owners of the tanks. The statutory framework for cleanup does use the term "owner or operator," and all responsible parties are strictly liable. Even assuming ownership by plaintiffs, it is not equitable to release from all responsibility the party that had possession and control of the tanks.

3.

The trial judge also erred in determining that Teich was not personally liable as an operator. He held Teich responsible for breach of contract for the failure to pay rent and, piercing the corporate veil, found Teich liable for $53,116.52. Addressing liability under the Spill Act in piercing-the-

corporate-veil terms, the judge found that Teich and Eisler were the shareholders of Weja and shared the responsibilities for the gas stations and car wash operations. He found, however,

> no direct involvement of Mr. Teich in the spill or the loose pipes.
>
> He took the property as it was when it was leased to him by Grace. And had no direct involvement with the activities that caused the spill, originally, with the pipes.
>
> The fact that he was a director of the corporation operating [the] gas station on occasions and the car wash on occasions, I don't believe would be . . . sufficient so that he exercised that degree of control over the condition that caused the contamination.

Plaintiffs assert that, under the Spill Act, Teich is a responsible party as an operator of the gas station from September 1982 to April 1986, during which he was personally responsible for operations on a day-to-day basis. Department of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 502 (1983), stands for the proposition that control or ability to control a property at the time of a discharge will suffice to hold a person responsible for the discharge of hazardous substances under the Spill Act. "The subsequent acquisition of land on which hazardous substances have been dumped may be insufficient to hold the owner responsible. Ownership or control over the property at the time of the discharge, however, will suffice."

Ibid. The Court also stated that the Legislature intended the Spill Act to be liberally construed to effect the purpose of remediating environmental contamination. Ibid.

In re Kimber Petroleum Corp., 110 N.J. 69, 85 (1988), appeal dismissed sub nom. Kimber Petroleum Corp. v. Daggett, 488 U.S. 935, 109 S. Ct. 358, 102 L. Ed. 2d 349 (1988), establishes that even a person "remotely responsible for causing contamination will be deemed a responsible party" under the Spill Act. The trial court's determination that Teich did not have sufficient personal control over the condition that caused the contamination to impose individual liability on him is contrary to the intent of the Spill Act.

N.J.S.A. 58:10-23.11g.c(1) states that, with certain exceptions provided in N.J.S.A. 58:10-23.11g12, strict liability is imposed on "[a]ny person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, . . . for all cleanup and removal costs no matter by whom incurred." In Ventron, supra, 94 N.J. at 502, the Court interpreted the Spill Act and stated that "[t]he phrase 'in any way responsible' is not defined in the statute," but that the Legislature intended the Spill Act to be "liberally construed to effect its purposes. (Citation omitted). The subsequent acquisition of land on which hazardous substances have been

dumped may be insufficient to hold the owner responsible. Ownership or control over the property at the time of the discharge, however, will suffice." Ibid.

The resolution of this issue depends primarily on a determination of when spills occurred. There was ample evidence of some leakage while Teich controlled the property. Teich had a duty to investigate the discrepancies in gasoline measured in the tanks, which included checking for possible leaks. He also had a duty to report discrepancies to the oil company. He was sufficiently involved in the operation and control of the property to be held personally liable under prevailing standards.

V

The need for a retrial of the matter will require, as well, a redetermination of attorneys' fees and costs entitlements. In this regard we note only, by way of guidance to the trial court, that sections 9 and 21E of the lease between plaintiffs and Weja, read together, seem clearly to contemplate that "legal interest" will be payable in respect of "any expense" incurred by the landlord in "prosecuting . . . any action or proceeding by reason of any default of Tenant under this Lease." The trial court will need to determine whether and to what extent sections

9 and 21E justify an interest calculation of any award that may be made for attorneys' fees and costs.

VI

Reversed and remanded.