

Supreme Court of Indiana.
Richard U. PFLANZ and Delores J. Pflanz,
Appellants (Plaintiffs Below),

v.

Merrill FOSTER, Individually, Merrill Foster, d/b/a
Friendly Foster's Service, and Sunoco, Inc. (R & M),
Appellees (Defendants Below).
No. 36S01-0710-CV-425.

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On Petition to Transfer from the Indiana Court of
Appeals, No. 36A01-0612-CV-548.

SHEPARD, Chief Justice.

The question here is whether a property owner's
claim for contribution toward environmental cleanup
costs is barred by the statute of limitation if the
owner should have known about the contamination
more than ten years before the complaint was filed.
We hold that the statute of limitation does not begin
to run until the owner is ordered to cleanup the
property, regardless of whether an owner earlier
knew or should have known about the need for
cleanup.

Facts and Procedural History

Taking all the allegations in the complaint to be true,
the facts are as follows. In 1976, Merrill Foster
purchased a service station from Sunoco, Inc. and
began operating it as Friendly Foster's Service. In
1978, he closed the petroleum dispensing activities
and stopped using the underground storage tanks. In
April 1984, Richard and Delores Pflanz bought the

property from Foster. Prior to the sale, Foster advised
the Pflanzes about the presence of the underground
tanks, but told them that the tanks were not in use and
had been closed. In reality, the tanks remained open
and contained some petroleum. The Pflanzes
operated a tire store on the property for two years, at
which time they sold their business and began leasing
the property to a third party.

In 2001, the Pflanzes learned for the first time that
there were environmental issues with the property.
The Indiana Department of Environmental
Management (IDEM) inspected the property and
discovered that the underground tanks were leaking.
Thereafter, the Pflanzes incurred over \$100,000 in
cleanup costs, including costs for closing or
removing the underground tanks and removing
contaminated soil and water.

On December 30, 2004, the Pflanzes filed a
complaint against Foster and Sunoco seeking a
determination of liability relating to the
environmental contamination, damages under
theories of waste, negligence, and stigma,
contribution for cleanup costs pursuant to the
Underground Storage Tanks Act (USTA), and
declaratory relief for future anticipated cleanup costs.
See Ind.Code Ann. ch. 13-23-13 (West 2007). Foster
moved to dismiss for failure to state a claim upon
which relief could be granted, arguing that the
complaint was barred by the statute of limitation. The
trial court agreed and dismissed.

On March 2, 2006, the Pflanzes filed a second
complaint under the same cause number, containing
allegations substantially similar to those in the first
complaint. On Foster's motion, the court dismissed
the second complaint.

The Pflanzes appealed. The Court of Appeals
affirmed, reasoning that when Indiana enacted the
USTA's contribution statute in 1987 and amended it
in 1991, the Pflanzes, in the exercise of reasonable
diligence, should have tested the property for
contamination such that the statute of limitation
began to run no later than 1991. *Pflanz v. Foster*, 871
N.E.2d 971 (Ind.Ct.App.2007), *vacated*. We granted
transfer.

I. Statute of Limitation for Contribution and Declaratory Relief

The parties agree that the general ten-year statute of limitation applies to the Pflanzes' contribution claim. See Ind.Code Ann. § 34-11-1-2(a) (West 2007). Cf., *Comm'r, Ind. Dep't of Envtl. Mgmt. v. Bourbon Mini-Mart, Inc.*, 741 N.E.2d 361 (Ind.Ct.App.2000) (applying the ten-year statute of limitation for actions that are not limited by any other statute, rather than the six-year statute for property damage, because the case involved recovery of environmental cleanup costs), *summarily aff'd* by 783 N.E.2d 253 (Ind.2003). The resolution of this case turns on when the ten-year limitation began to run.

In the American legal system, demonstrated harm is an indispensable element of virtually every type of civil claim. In cases ranging from contract to tort to medical malpractice, a claimant cannot recover a monetary judgment unless he has suffered actual damage. The law does not usually permit monetary recovery for claims solely involving future damages; rather, some damage must have already begun to occur. This notion that the statute of limitation begins to run when all the elements of a cause of action can be shown (including whether some damages have been felt) is part of how we determine when a cause "accrues." See *Doe v. United Methodist Church*, 673 N.E.2d 839, 842 (Ind.Ct.App.1996) ("For a cause of action to accrue [for limitation purposes], it is not necessary that the full extent of the damage be known or even ascertainable but only that some ascertainable damage has occurred.")

Under Indiana's discovery rule, a cause of action accrues, and the statute of limitation begins to run, when a claimant knows or in exercise of ordinary diligence should have known of the injury. *Wehling v. Citizens Nat'l Bank*, 586 N.E.2d 840, 843 (Ind.1992).

Foster contends that the statute of limitation began running when the Pflanzes knew or should have known about the contamination. The Pflanzes' contribution claim, however, is not a claim for damage to the property itself. Rather, they seek to recover for the cleanup costs IDEM required, which resulted from Foster's use of the land.

In contribution or indemnification cases, the damage that occurs is the incurrence of a monetary obligation that is attributable to the actions of another party. That is why, generally, parties bringing contribution and indemnification claims must wait until after the obligation to pay is incurred, for otherwise the claim

would lack the essential damage element. See *Bourbon Mini-Mart*, 741 N.E.2d at 372 n. 9 ("an obligation to indemnify or for contribution does not arise until the party seeking such remedy suffers loss of damages, i.e., at the time of payment of the underlying claim"); *TLB Plastics Corp., Inc. v. Procter & Gamble Paper Products Co.*, 542 N.E.2d 1373, 1376 (Ind.Ct.App.1989) (obligation to indemnify arises only after one seeking indemnity suffers loss or damages even if indemnity and injured party's claim are litigated contemporaneously); *Estate of Leinbach v. Leinbach*, 486 N.E.2d 2, 5 (Ind.Ct.App.1985) ("to be entitled to contribution, the [claimant] must have first paid the debt"); *McLochlin v. Miller*, 139 Ind.App. 443, 448, 217 N.E.2d 50, 53 (Ind.Ct.App.1966) ("payment must be made under compulsion to entitle payor to contribution").

Because the damage at issue in the Pflanzes' contribution claim is the cleanup obligation assessed by IDEM that resulted from Foster's use of the land, the statute of limitation did not begin to accrue until after the Pflanzes were ordered to clean up the property.

Accordingly, because IDEM ordered the Pflanzes to pay for the environmental cleanup costs in 2001, the Pflanzes filed their contribution claim well within the ten-year statute of limitation.

II. Statute of Limitation for Stigma Damages

Indiana law permits recovery of "stigma damages" for losses in the fair market value of property after remediation of environmental contamination. *Terra-Products, Inc. v. Kraft Gen. Foods, Inc.*, 653 N.E.2d 89 (Ind.Ct.App.1995). Stigma damages are warranted where the claimant can demonstrate that an imperfect market rendered her property less valuable despite complete restoration. *Id.* at 93. A claim for such damages cannot ripen until remediation has been substantially completed because only then can the impact of the former environmental contamination on property value be determined. *Id.* See *Allgood v. Gen. Motors Corp.*, No. 102CV1077DFHTAB (S.D.Ind. Sept.18, 2006).^{FN1} Claims for stigma damages are governed by a six-year statute of limitation. Ind.Code Ann. § 34-11-2-7 (West 2007).

The statute of limitation for stigma damage claims cannot begin to toll until after the claimant has incurred real damage. As with contribution claims,

the “damage” in stigma damage claims is not the environmental contamination itself. Rather, the damage is a diminution in property value despite acceptable remediation of the environmental contamination. This diminished property value results from buyers' perceived risk that the property will require future environmental cleanup costs.

Stigma damages cannot be determined prior to substantial completion of the remediation. Before substantial completion of the remediation, the property's value will necessarily be lower because of the known presence of environmental contamination. Thus, whether or not the claimant's property value will continue to be diminished post-cleanup cannot be ascertained until remediation has been substantially completed.

The Pflanzes' claim for stigma damages cannot possibly have been outside the statute of limitation period. The Pflanzes first incurred cleanup costs in 2001 and filed their claim in 2006.

III. Statute of Limitation for Waste and Negligence Claims

Claims for waste and negligence related to real property are governed by a six-year statute of limitation. Ind.Code Ann. § 34-11-2-7 (West 2007).

Unlike the Pflanzes' contribution claim, their claims for waste and negligence are based on alleged injury that arose around the time the property was sold to them, rather than damages that arose at the time of the IDEM inspection. The Pflanzes' claims presumably stem from their contention that, prior to the property's sale, Foster incorrectly told them the underground storage tanks were not in use and had been closed. (Appellants' Br. at 11.) The Pflanzes argue that because of what they describe as Foster's “fraudulent misrepresentation,” they were prevented from discovering the injury (i.e., that the tanks may cause or may have caused environmental contamination) until the IDEM inspection in 2001. (*Id.*)

Foster, on the other hand, argues that the Pflanzes should have discovered the potential injury no later than 1991 because by that time Indiana had adopted legislation, including the USTA, providing a right to contribution for costs associated with underground storage tank environmental remediation. *See* Ind.Code

Ann. ch. 13-23-13. According to Foster, the Pflanzes should have taken steps to investigate and monitor the underground storage tanks after the adoption of that legislation.

Neither party asserts that the Pflanzes had actual knowledge that the underground storage tanks could result in environmental contamination prior to the IDEM inspection in 2001. Thus, for ascertaining when the statute of limitation began to run on the negligence and waste claims, the question is when the Pflanzes, in the exercise of ordinary diligence, should have known of the injury.

The resolution of this question rests on factual determinations not yet in the record. We cannot accept the trial court's holding that, as a matter of law, the passage of the USTA automatically put landowners on notice that they should inspect and monitor any underground storage tanks on their property even if, taking the Pflanzes' allegations as true, the former property owners had assured them the tanks were closed and not in use. Perhaps the exercise of ordinary diligence required periodic soil testing or inspection of the tanks in light of Indiana's enactment of the USTA, but that determination cannot be made on the basis of the facts now deployed.

Accordingly, we reverse the trial court's dismissal of this claim and remand for such further examination of it as the parties may place before the court.

Conclusion

For the above reasons, we reverse the trial court's order of dismissal and remand the case for further proceedings on the merits.

DICKSON, SULLIVAN, BOEHM, RUCKER, JJ.,
concur.

FN1. In *Allgood*, the court stated that

a [stigma] damage award would need to be based on something more than guesswork.... While the court does not mean to indicate that a post-remediation stigma claim can be sought only after the last grain of soil has been removed, the present circumstances of this case make clear that any estimate of post-remediation

value of the plaintiffs' land would be speculative and premature.