No. 08-1616

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
CASE NOS. 23585, 23586

GOODRICH CORPORATION fka
THE B.F. GOODRICH COMPANY
Plaintiff-Appellee,

v.

COMMERCIAL UNION INSURANCE COMPANY,
Defendant-Appellant,

and

CERTAIN LONDON MARKET INSURERS, et al.
Defendants.

APPELLANT COMMERCIAL UNION INSURANCE COMPANY'S MEMORANDUM IN SUPPORT OF JURISDICTION

Paul A. Rose (0018185)
Sallie Conley Lux (0022477)
BROUSE MCDOWELL
388 South Main Street, Suite 500
Akron, OH 44311
Telephone: (330) 535-5711
Telefax: (330) 253-8601
E-mail: prose@brouse.com
slux@brouse.com

Attorneys for Appellee Goodrich Corporation

IRENE C. KEYSE-WALKER (0013143)
(COUNSEL OF RECORD)
SUSAN M. AUDEY (0062818)
TUCKER ELLIS & WEST LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1414
Telephone: (216) 592-5000
Telefax: (216) 592-5009
E-mail: ikeyse-walker@tuckerellis.com
susan.audey@tuckerellis.com

Attorneys for Appellant Commercial Union Insurance Company

Andrew M. Reidy
Catherine J. Serafin
HOWREY, SIMON, ARNOLD & WHITE
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2402
Telephone: (202) 383-7485
Telefax: (202) 383-0800
E-mail: reidya@howrey.com
serafinc@howrey.com

Additional Counsel for Appellee Goodrich Corporation

Dennis J. Bartek
Natalie M. Niese
Law Offices of Dennis J. Bartek
2300 East Market Street, Suite E
Akron, OH 44312
Telephone: (330) 784-8580
Telefax: (330) 784-8434
E-mail: djbartek@aol.com
nniese@barteklawoffice.com

Attorneys for Certain London Market Insurers

ROBERT V.P. WATERMAN, JR.
THOMAS D. WATERMAN
LANE & WATERMAN LLP
220 North Main Street, Suite 600
Davenport, IA 52801-1987
Telephone: (563) 324-3246
Telefax: (563) 324-1616
E-mail: bwaterman@l-wlaw.com
twaterman@l-wlaw.com

Attorneys for Appellant Commercial Union Insurance Company

Michael J. Baughman
COHN BAUGHMAN & MARTIN
333 W. Wacker Dr., Suite 900
Chicago, IL 60606
Telephone: (312) 753-6600
Telefax: (312) 753-6601
E-mail: michael.baughman@mclolaw.com

Daniel Carter
Jeffrey Ruple
BUCKLEY KING
1400 Bank One Center
600 Superior Ave.
Cleveland, OH 44114-2652
Telephone: (216) 363-1400
Telefax: (216) 579-1020
E-mail: carter@bucklaw.com
ruple@bucklaw.com

Attorneys Century Indemnity Company, as successor to CIGNA Specialty Insurance Company, formerly known as California Union Insurance Company, and as successor to CCI Insurance Company, as successor to Insurance Company of North America

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I. WHY THIS CASE PRESENTS ISSUES OF GREAT AND GENERAL PUBLIC INTEREST.

In 2002, this Court issued its seminal environmental insurance allocation decision, concluding that instead of a "pro rata" share, each policy covering an insured's liability for some portion of damages caused by an insured's pollution is responsible for "all sums" before, during, and after its policy period, and that the insured is entitled to "select" which policy is responsible for insuring the entire loss. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.* (2002), 95 Ohio St.3d 512. But until the Ninth District's decision in this case, no Ohio state appellate court had addressed how *Goodyear* affects the rights of insureds that settle with the issuers of multiple triggered policies before "selecting" any policy for coverage. *No* court had addressed how *Goodyear* affects an insured's right to collect a jury award of its full damages from a non-settling insurer when it has already recovered millions of dollars more than its adjudicated damages in "pre-selection" settlements. In short, "[t]here is little Ohio law on the issue of settlement credits and none that addresses many of the issues raised by the parties here." See App. Op. at 13 (¶37), Appx. A-13.

The Ninth District's decision raises important, recurring[1] questions of first impression for this Court, including:

1. What constitutes the insured's "selection" of coverage under "all sums" and when must it occur?

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[1] Currently pending before the same lower court is another complex environmental coverage action brought by the same plaintiff insured: *Goodrich Corp. v. Affiliated FM Ins. Co.*, Summit C.P. No. CV-2002-11-6854.

2. Can an insured collect more that it owes in damages by invoking "all sums" but never making an "all sums" selection ?

3. When are insurance proceeds "due and payable" from a non-settling insurer that has never been selected under "all sums"?

The nature and timing of an insured's "selection" of a responsible policy presents an important issue for this Court. No case has examined the inherent confluence of an "all sums" selection and the determination of when amounts become "due and payable" for purposes of prejudgment interest under Ohio law. The Ninth District held that an insured is entitled to collect over a decade of prejudgment interest from an excess insurer whose policy has *never* been selected for "all sums" responsibility. The Court of Appeals could "find[] nothing in the *Goodyear* decision" that requires an insured to "select" a triggered policy for coverages at anytime, up to and including the date the Trial Court enters judgment on the jury verdict in the insured's coverage litigation. App. Op. at 44 (¶132) Appx. A-44. But the appellate court also incongruously concluded that the insured's refusal to select did not prevent sums determined by the jury from being "due and payable" more than ten years prior to trial.

The effect of "pre-selection" settlements on a jury's damage determination presents an important issue because this Court has not analyzed whether an insured can actually profit from its own polluting conduct by perpetually delaying its *Goodyear* selection. The Ninth District held that an insured can keep the amount a jury has determined represents its full loss, without any set-off of prior settlements unless the non-settling insurer (a stranger to the settlements) proved that *all* – not merely some, but all – of the monies paid in settlement were for the exact same damages awarded by the jury.

See App. Op. at 15-16 (¶43-46) Appx. A-15 – A-16. That conclusion conflicts with the two fundamental quid pro quos endorsed by this Court in *Goodyear* that justify making a single policy responsible for costs to remediate pollution occurring before and after that policy period: 1) the insured does not interfere with the "selected" insurer's ability to obtain contribution from other insurers; and 2) the insured "cannot collect more than it owes in damages."[2]

It also conflicts with federal authorities,[3] including the *only* court to consider the issue under Ohio law – *GenCorp, Inc. v. AIU Ins. Co.* (N.D.Ohio 2003), 297 F.Supp.2d 995, 1005, aff'd (C.A.6, 2005), 138 Fed.Appx. 732. The Ninth District decision inexplicably ignores *GenCorp* and its well-reasoned analysis of the consequences of an insured's choice to "allocate broadly" by settling multiple triggered policies, instead of making a *Goodyear* selection of a single policy to provide coverage. It is irrelevant that a non-settling insurer cannot show dollar for dollar which portion of prior settlements was for the damages awarded by the jury, so long as some portion of those settlements was for the same damages. Id. That lack of relevance becomes acutely evident when, as here,

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[2] *Keene Corp. v. Ins. Co. of N. Am.* (C.A.D.C. 1981), 667 F.2d 1034, 1050 (*Goodyear* expressly adopts the reasoning of *Keene* – see 95 Ohio St.3d at 516, ¶10-11).

[3] *U.S. Industries, Inc. v. Touche Ross Co.* (C.A.10, 1988), 854 F.2d 1223, 1263 (once defendant shows "that plaintiff settled claim with other parties on which the non-settling defendants were found liable at trial * * * the burden then shifts to the plaintiff to prove * * * the settlement did not represent common damages with a jury award"); *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.* (C.A.3, 1999), 177 F.3d 210, 226-29 (requiring "full" settlement credit because it is "much simpler," "eliminates the need for any court to pass on the fairness of *Chemical Leaman*'s subjective allocation along the various contamination sites," and "eliminates any chance of double recovery by an insured.").

a trial court agrees with the insured that the non-settling insurers are not even allowed to review the "confidential" settlement agreements themselves. Insurers cannot "prove" where settlement dollars went if they are denied access to the settlement agreements paying out those settlement dollars in exchange for a full release from the coverage litigation. This Court should adopt the well-reasoned, contract-based approach of the *GenCorp* court.

The Ninth District decision addresses yet another important issue of first impression in Ohio: i.e., does an insured have the burden to prove what part of pollution damage from routine operations is the result of "sudden and accidental" events that constitute exceptions to a pollution exclusion? Once again, the Ninth District acknowledges that "[t]he parties do not cite, nor could this court find, any authority that directly addresses this issue" (Appx. A-39, ¶119), and sided with the insured without seeking to announce or apply Ohio law. And, once again, by rewriting the contracts the Ninth District ignored the fundamental tenets of this Court's insurance jurisprudence.

In *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, this Court established that gradual pollution falls within a pollution exclusion in a general liability policy, and only sudden and abrupt releases are subject to the exclusion's exception. *Hybud*, however, did not expressly address who bears the burden of proving that the damages were attributable to the "sudden and accidental" events. That question is squarely presented in this case, where the jury returned an interrogatory expressly finding "indivisible" damage. This Court should address this question in the context of the unresolved issue presented as a result of *Hybud.*

Finally, the Ninth District concluded that insureds are entitled to attorney fees incurred in the prosecution of a breach of contract/bad faith action, *even though the jury found no malice and awarded no punitive damages.* This Court has held that attorney fees cannot be awarded for breach of contract, or for a tort (including the tort of bad faith), unless the jury has awarded punitive damages. But it has yet to squarely address the question of whether attorney fees can be awarded for the breach of an insurance contract, or the tort of bad faith, when the jury verdict expressly finds no malice, awards no punitive damages, and concludes that "attorney fees" incurred in the coverage action are the *only* damages incurred other than breach of contract damages. This case presents that opportunity.

The net result of all of the above is that an insured that proved $42 million in clean-up and defense costs stands to recover over $110 million – $55.8 million in settlements with primary and excess insurers and an additional judgment exceeding $55 million against Defendants-Appellants Commercial Union Insurance Company ("CU") and Certain London Market Insurers ("London"). This anomalous result is the direct result of gaps in this Court's insurance jurisprudence as detailed above. For the benefit of all Ohio litigants and businesses concerned with that jurisprudence, this case presents a timely and broad opportunity to address those gaps.

II. STATEMENT OF THE CASE AND FACTS

Beginning in 1953 and continuing through 1975, Defendant-Appellee Goodrich Corporation purchased primary insurance from American Motorist Insurance Company ("AMICO"). In all, AMICO sold $55 million in coverage to Goodrich. At the same time,

Goodrich purchased excess insurance coverage from a number of different companies with different limits and at different inception points. In 1975, Goodrich stopped buying primary insurance, but continued to buy excess insurance. CU sold four excess policies to Goodrich.

In 1989, Goodrich first notified most of its excess insurers about potential environmental liability at its former facility in Calvert City, Kentucky. Six years later, it entered into a "coverage-in-place" agreement with its sole primary carrier (AMICO), under which AMICO would reimburse Goodrich's submitted remediation costs up to a limit of $20 million.

In 1999, Goodrich sued 30 of its excess insurers for coverage for damages at the Calvert City site. Following extensive discovery, the excess insurer defendants obtained summary judgment on their "late notice" defense to Goodrich's claims. The Ninth District reversed in 2002 because disputed issues of fact precluded judgment as a matter of law. See, generally, *B.F. Goodrich Co. v. Commercial Union Ins. Co.*, 9th Dist. No. 20936, 2002-Ohio-5033 (Appx. A-79 – A-99).

The case went to trial in December of 2005, by which time Goodrich claimed it had spent nearly $75 million in clean-up costs at the Calvert City site. All but six of the 30 insurers settled shortly before or during trial, for a total of $35.8 million (in addition to the $20 million paid by AMICO).

In answers to interrogatories, the jury determined, in relevant part, that: 1) CU's and London's excess policies provided coverage; 2) damages from Goodrich's gradual pollution and sudden releases of chemicals were "indivisible"; 3) Goodrich incurred $40

million in clean-up costs and $2 million in defense costs (roughly half of the amount Goodrich claimed); 4) CU had breached its "duty of good faith" to Goodrich, but had not acted with actual malice; 5) the only "damages" flowing from the tort of "bad faith" were the attorney fees Goodrich incurred in the prosecution of this action; and 6) Goodrich was awarded no punitive damages.

Based on these findings, the Trial Court ruled on numerous post-trial motions (Appx. 51) and entered final judgment against CU for over $57.7 million, comprised of: **1)** a money judgment of $20 million for Calvert City past remediation costs (after subtracting the $20 million that AMICO paid from the $40 million jury award) plus $2 million in defense costs for the underlying Calvert City actions (this judgment is also entered against London jointly and severally); **2)** prejudgment interest on the $22 million in the amount of $20,464,832.62, and per diem interest thereafter of $3,616; **3)** $12 million for Goodrich's attorneys fees and expenses incurred in prosecuting this action (plus prejudgment interest thereon of $3.2 million and interest thereafter at $1,978.34 per diem); and **4)** a declaration that CU and London are required to pay to Goodrich future remediation and defense costs relating to the Calvert City, Kentucky site, plus statutory interest on such costs. Appx. A-51 – A-55. The Court of Appeals affirmed. App. Op., Appx. A-1 – A-50.

III. ARGUMENT

Proposition of Law No. 1:

> **Under Ohio's "all sums" approach to insurance allocation adopted in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.* (2002), 95 Ohio St.3d 512, an insured who settles with multiple insurers for a single loss is limited to a single recovery and can collect from a non-settling excess liability insurer only to the extent the awarded damages exceed both: 1) the policy limits of all settled primary and lower level excess policies; and 2) the dollar amounts obtained from higher level settling excess insurers.**

The courts below erred by denying the non-settling excess insurers *any* credit or setoff for over $35 million Goodrich recovered in settlements. Those decisions violate: 1) basic contract principles governing the triggering of excess policies (*Fulmer v. Insura Prop. & Cas. Co.* (2002), 94 Ohio St.3d 85); and 2) the bedrock principle that an insured is only entitled to a single recovery. (*Roberts v. State Farm Mut. Auto Ins. Co.* (2003), 155 Ohio App.3d 535).

A non-settling excess insurer is liable only for insured losses that exceed the combined limits of all settled primary and lower level excess policies. *GenCorp,* 297 F.Supp.2d at 1007-08. The Sixth Circuit adopted the *GenCorp* district court's decision, recognizing that the insured "by settling with its primary and umbrella insurers * * * had made the choice to allocate its liability as broadly as possible, which meant that it had to demonstrate that its liabilities would exceed the cumulative limits of the [settled] primary and umbrella policies before it could trigger the excess policies." 138 Fed.Appx. at 734; accord *Fulmer,* 94 Ohio St.3d at 96 (excess insurer required to pay only damages above underlying policy limits when insured settles with primary insured for less than limits).

This rule correctly places the risk of settling too low on the insured that controls the negotiations and chooses to settle.

Ohio law also requires a dollar-for-dollar setoff for the settlements Goodrich recovered from higher level excess insurers. *Roberts*, 155 Ohio App.3d at ¶71. ("To fail to reduce Roberts' verdict against National Union by the amount of the settlement with State Farm would result in Roberts receiving compensation in an amount double the value the jury placed upon her loss – i.e., a windfall."). The Ninth District erroneously relied on *Fidelholz v. Peller* (1998), 81 Ohio St.3d 197 to award Goodrich a windfall. App. Op. at 15, (¶43), Appx. A-15. *Fidelholz* was legislatively overruled in 1999 by R.C. 2307.22, .23, .25 and .28 which, inter alia, codify Ohio legislative policies providing for deduction of settlements to avoid a double recovery.

Numerous courts have recognized that the burden is correctly placed on the insured to prove why no credits should be allowed for a particular settled policy. See, e.g., *GenCorp*, 297 F.Supp.2d at 1005-06 and cases cited supra, p.3, n. 3. Those decisions accord with *Goodyear*'s recognition that the insured's right to pick and choose a particular policy for an "all sums" recovery operates in tandem with the targeted insurer's right to contribution from other insurers. *Goodyear*, 95 Ohio St.3d at 516. Settlement credits and setoffs appropriately limit insureds to a single recovery while avoiding a second round of contribution litigation between insurers that would chill settlements by challenging their finality. This Court should adopt *GenCorp's* comprehensive and well-reasoned analysis of the proof issue as it relates to an insured's "pre-selection" settlements.

Proposition of Law No. 2:

> **Under *Goodyear*, insurance proceeds from an excess policy cannot be "due and payable" for the purpose of obtaining prejudgment interest under R.C. 1343.03(A) before the insured has complied with all conditions precedent to coverage, including selecting that policy for reimbursement.**

Under R.C. 1343.03(A), prejudgment interest (PJI) does not begin to accrue before sums are "due and payable." In insurance coverage actions, sums may become due and payable from the date coverage was demanded, from the date coverage was denied, from the date of the accident, or "some other time," based upon the circumstances and nature of the insured interest. *Landis v. Grange* (1998), 82 Ohio St.3d 339, 342.

Complex environmental coverage litigation implicating multiple levels of "all sums" policies issued over four decades falls into the "other times" category of *Landis*. The acute need for this Court's guidance on PJI accrual under such circumstances is well illustrated in this case. The Ninth District determined that CU's coverage was "due and payable" when Goodrich settled its claims with its primary insurer (AMICO), and affirmed an award of over $20 million in PJI even though "Goodrich had not selected [CU's] policy at the time the trial court made its prejudgment interest determination." App. Op. at. 19-21 (¶62), Appx. A-19 – A-21. The Court further granted Goodrich's cross-appeal and held that the London insurers will owe PJI *if and when* they are "selected" by Goodrich. Id. at 17 (¶52), Appx. A-17; 43-44 (¶131), Appx. A-43 – A-44 ("Goodrich has the right to select the policy or policies under which it wishes to pursue coverage * * *. [I]n the event Goodrich chooses different coverage (coverage under the

other insurer's policy or policies), a given insurer is obligated to pay up to the applicable limits of a selected policy, with interest to be calculated thereon").

Inasmuch as Goodrich has failed to make *any* policy selection under the all sums allocation method set forth in *Goodyear*, *none* of the still unselected carriers could possibly be held to have knowingly failed to have fulfilled any duty to defend or indemnify Goodrich. To hold otherwise results in insurers being liable for massive amounts of accrued PJI even though the insurer's obligation had not been established and it had no ability to avoid the imposition of such interest because under *Goodyear*, the insured – and *only* the insured – could determine which policy would respond to the loss.

Proposition of Law No. 3:

> **Under the American Rule, an insured cannot recover attorneys fees for breach of contract, and cannot recover attorneys fees for the tort of "bad faith" without an award of punitive damages.**

Absent a contrary statute or contract provision, attorney fees cannot be awarded for breach of contract (*Ketcham v. Miller* (1922), 104 Ohio St. 372, paragraph two of the syllabus) and cannot be awarded in tort actions (including "bad faith" actions) unless *punitive damages* are awarded (*Zappitelli v. Miller* (2007), 114 Ohio St.3d 102, 103; *Shimola v. Nationwide Ins. Co.* (1986), 25 Ohio St.3d 84, 87). The jury in this case expressly found that CU did not act maliciously, awarded no punitive damages for the tort of bad faith, and found "0.00" compensatory damages on Goodrich's bad faith claim. The logical conclusion of well-established principles is that following the return of these express and specific jury interrogatories, the Trial Court had no basis for its award of $12

million in attorney fees as "compensatory" damages for breach of contract or "bad faith." The appellate court's "waiver" conclusion (Appx. A-22 – A-24) is also misplaced – CU's right to judgment as a matter of law on Goodrich's attorney fee claim arose when the jury denied Goodrich's punitive damage claim, and was preserved for review in CU's motion for JNOV. Indeed, the finding of "bad faith" itself is fatally flawed where, as here, a Court of Appeals has confirmed that a jury must decide whether the insured provided unreasonably late notice of its claims (Appx. at A-79) and the jury awarded the insured barely half of the "loss" claimed.

Proposition of Law No. 4:

> **A general liability insurer owes no obligation to reimburse cleanup costs paid by a third party pursuant to a contractual assignment that transferred financial liability from the insured.**

The Ninth District acknowledged that a third party ("Geon/PolyOne") assumed Goodrich's contractual liability for cleanup costs at the site and has paid those costs since 1993.[4] App. Op. at 31 (¶97), Appx. A-31; accord *Westlake Vinyls, Inc. v. Goodrich Corp.* (W.D.Ky. 2007), 518 F.Supp.2d 918, 946, 953, 964. Neither Goodrich nor the courts below cited any authority from any jurisdiction permitting an insured that has been fully

[4] Ohio does not recognize automatic transfers of insurance coverages to successor corporations by operation of law. See *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St.3d 482, at ¶61 ("[W]hen a covered occurrence under an insurance policy occurs before liability is transferred to a successor corporation, coverage does not arise by operation of law when the liability was assumed by contract.")

indemnified by a third party to recover twice for the same loss. A liability insurer "does not have any further obligation" to an insured that has already been indemnified by a third party. *Pan Pacific Retail Properties, Inc. v. Gulf Ins. Co.* (C.A.9, 2006), 471 F.3d 961, 972-974. The courts below erred by failing to adhere to this fundamental principle of insurance law.

Proposition of Law No. 5:

> **The insured cannot recover under the "sudden and accidental" exception to the pollution exclusion for pollution damage that was caused by the insured's routine operations, and recovery is limited to the amount the insured proves is directly attributable to sudden and accidental events. (*Hybud Equip. Corp. v. Sphere Drake Ins. Co.* (1992), 64 Ohio St.3d 657, applied.)**

In *Hybud Equip. Corp. v. Sphere Drake Ins. Co.* (1992), 64 Ohio St.3d 657, this Court held that the pollution exclusion is unambiguous and bars coverage for gradual pollution, and that the sudden and accidental "exception to the pollution exclusion covers only those damages caused by an abrupt release." Id. at 666. The burden is on the policyholder to establish that the exception to the pollution exclusion is applicable. *U.S. Industries, Inc. v. INA* (1996), 110 Ohio App.3d 361, 366. The courts below nevertheless effectively rewrote the pollution exclusion out of the policies and permitted Goodrich to recover for gradual pollution damage because an indivisible part thereof resulted from sudden spills. App. Op. at 41 (¶124), Appx. A-41. This precedent conflicts with *Hybud*

as well as other Ohio appellate case law[5] and decisions from other jurisdictions.[6] Significantly, the *Hybud* court noted that public policy supports enforcement of the pollution exclusion to "encourage diligence by placing the financial burden for gradual or long-term pollution upon the entity best able to foresee and stop it." *Hybud*, 64 Ohio St.3d at 667. This sound public policy would be undermined if an insured could force its insurers to pay all its damages for its gradual pollution merely because sudden and accidental spills contributed to the property damage.

IV. CONCLUSION

Ohio is and will continue to be home to numerous suits involving coverage for longtail injuries. Each of these suits involves a policyholder that must consider, based on the relative strength or weakness of its coverage claims, whether to "select" a single policy for coverages or settle with numerous carriers for a relatively modest amount, as well as the effect of that decision on coverages. Insurance carriers also need this Court's guidance on their coverage obligations under the "all sums" method adopted in *Goodyear*. And these litigants, as well as all Ohio companies, need to know their

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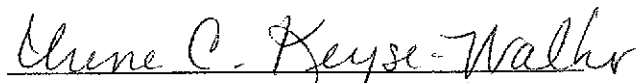
[5] See, e.g., *Employers Ins. of Wausau v. Amcast Indus. Corp.* (1998), 126 Ohio App.3d 124, 130-31 (pollution exclusion precludes coverage for property damage caused during "routine and normal operations;" affirming summary judgment for insurer where contamination resulted from "multiple releases occurring over a period of years, which collectively, could not be considered sudden and accidental.")

[6] See, e.g., *Golden Eagle Refinery Co., Inc. v. Associated Int'l Ins. Co.* (2001), 85 Cal. App.4th 1300, 1314-15 ("[W]here both covered and noncovered events cause damage[,] a failure to differentiate and allocate is fatal to a claim for indemnity."); *Nautilus Ins. Co. v. Country Oaks Apartment, Ltd.* (W.D.Tex. June 2, 2008), 2008 WL 2284992, *2-*3 (applying pollution exclusion to bar any recovery for property damage caused by both covered and uncovered discharges).

contracts will apply as written. Because clarification of these issues will prevent unnecessary, protracted litigation in the future, and bring stability to insurance markets, discretionary review is warranted.

Respectfully submitted,



Irene C. Keyse-Walker (0013143)
(COUNSEL OF RECORD)
Susan M. Audey (0062818)
TUCKER ELLIS & WEST LLP
925 Euclid Avenue, Suite 1100
Cleveland, Ohio 44115-1414
Tel: (216) 592-5000
Fax: (216) 592-5009
E-mail: ikeyse-walker@tuckerellis.com
susan.audey@tuckerellis.com

Robert V.P. Waterman, Jr.
Thomas D. Waterman
LANE & WATERMAN LLP
220 North Main Street, Suite 600
Davenport, IA 52801-1987
Telephone: (563) 324-3246
Telefax: (563) 324-1616
E-mail: bwaterman@l-wlaw.com
twaterman@l-wlaw.com

Attorneys for Appellant Commercial Union Insurance Company

CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 13th day of August, 2008, by U.S. Mail, postage prepaid, upon the following:

Paul A. Rose
Sallie Conley Lux
BROUSE MCDOWELL
388 South Main Street, Suite 500
Akron, OH 44311

Attorneys for Appellee Goodrich Corporation

Catherine J. Serafin
Andrew M. Reidy
HOWREY, SIMON, ARNOLD & WHITE
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2402

Attorneys for Appellee Goodrich Corporation

Dennis J. Bartek
Natalie M. Niese
LAW OFFICES OF DENNIS J. BARTEK
2300 East Market Street, Suite E
Akron, OH 44312

Attorneys for Certain London Market Insurers

Michael J. Baughman
COHN BAUGHMAN & MARTIN
333 W. Wacker Dr., Suite 900
Chicago, IL 60606

Daniel Carter
Jeffrey Ruple
BUCKLEY KING
1400 Bank One Center
600 Superior Ave.
Cleveland, OH 44114-2652

Attorneys for Century Indemnity Company, as successor to CIGNA Specialty Insurance Company, formerly known as California Union Insurance Company, and as successor to CCI Insurance Company, as successor to Insurance Company of North America

Elaine C. Reyes-Walker
One of the Attorneys for Appellant Commercial Union Insurance Company

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APPENDIX

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

GOODRICH CORPORATION

C.A. Nos. 23585 & 23586

Appellee/Cross-Appellant

v.

COMMERCIAL UNION INSURANCE COMPANY, et al.

Appellants/Cross-Appellees

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 1999-02-0410

DECISION AND JOURNAL ENTRY

Dated: June 30, 2008

CARR, Presiding Judge.

{¶1} Commercial Union Insurance Company ("Commercial Union") and a group of London Market Insurers: Accident & Casualty Company; Commercial Union Assurance Company; Edinburgh Assurance Company; United Scottish Insurance Company, Ltd.; Victoria Insurance Company, Ltd.; Road Transport, GP AV; Winterthur Swiss Insurance Company; World Auxiliary Insurance Corporation Limited; and Yasuda Fire & Marine Insurance Company (U.K.) Limited (collectively referred to as "the London Market Insurers")[1], separately appeal from a judgment of the Summit County Court of Common Pleas entered against them in favor of Goodrich Corporation ("Goodrich"). Goodrich cross-appeals from the judgment. This Court affirms in part and reverses in part.

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[1] Although these insurers are individual entities, for ease of discussion and for consistency with the parties' practice throughout the trial, they will be referred to as a collective group throughout most of this opinion.

I.

{¶2} This action commenced in 1999, when Goodrich filed a complaint against several insurance carriers with whom it had held excess general commercial liability insurance policies from 1955 through 1986. Goodrich had already settled its coverage dispute with its primary insurance carrier and had exhausted its $20 million in primary insurance coverage. Goodrich's excess insurance policies attached at coverage levels of $20 million and higher.

{¶3} Goodrich's principal claims were for breach of contract and bad faith. The litigation focused on whether the insurers were contractually obligated to indemnify Goodrich against claims filed by the government under the Comprehensive Environmental Response, Compensation, and Liability Act and the Resource Conservation and Recovery Act. Goodrich's environmental cleanup costs stemmed from soil and groundwater contamination caused by Goodrich's manufacturing and waste water disposal practices from approximately 1963 to 1983 at its plant in Calvert City, Kentucky. The sole contaminant at issue in this litigation was ethylene dichloride ("EDC"), a chemical used in Goodrich's production of vinyl chloride monomer.

{¶4} Experts had opined that there were four main sources of the EDC groundwater contamination at Calvert City: (1) the burn pits (Goodrich disposed of oily EDC waste water by burning it in open pits during the early 1960s until 1967); (2) the landfill (during the mid-1960s until 1973, Goodrich also disposed of EDC in a landfill at Calvert City); (3) the process areas (periodic pipe ruptures and equipment malfunctions caused EDC to accidentally spill into the environment); and (4) the settling ponds (during much of this period, EDC waste was placed in large ponds and allowed to settle, evaporate, and dissipate in a process akin to a septic system).

{¶5} Although this case proceeded to trial against numerous defendant insurers, by the time the trial ended, Goodrich had settled with most of its excess insurers. The jury ultimately decided Goodrich's claims against four insurers or insurer groups: Commercial Union on claims of bad faith and breach of contract, and the London Market Insurers, California Union Insurance Company, and Insurance Company of North America on claims of breach of contract. The jury's general verdicts were for Goodrich against Commercial Union and the London Market Insurers on all claims, and for California Union Insurance Company and Insurance Company of North America against Goodrich. On the breach of contract claims, the jury found that Goodrich had sustained $42 million in damages, including two million dollars in litigation expenses on the underlying actions by the government. The jury also found that Goodrich was entitled to recover its attorney fees in this case on both the breach of contract claims and the bad faith claim. As instructed by the trial court, the jury did not calculate a dollar award for attorney fees but left that determination for the trial court.

{¶6} Commercial Union, the London Market Insurers, and Goodrich all filed motions for judgment notwithstanding the verdict on various grounds, and the trial court later denied all of those motions. The trial court decided many issues through post-trial proceedings. These issues included Goodrich's attorney fees, prejudgment interest, whether the damage judgment against the defendants would be reduced due to Goodrich's prior settlements with other insurers, and whether Goodrich would incur future cleanup costs.

{¶7} The trial court ordered the appellants to pay Goodrich over $22 million in attorney fees and other litigation costs, with Commercial Union being held liable for a greater portion of those costs due to Goodrich's bad faith judgment and separate attorney fee award against it. The trial court awarded Goodrich over $20 million in prejudgment interest against

Commercial Union only. The trial court also determined that the damage judgment against Commercial Union and the London Market Insurers would be reduced by $20 million received from the primary insurer because liability under the excess policies did not attach until Goodrich's damages had reached $20 million. Despite their requests and arguments to the contrary, the trial court did not allow Commercial Union and the London Market Insurers any further reduction of the damage award due to settlement money received by Goodrich. The trial court also declared that Commercial Union and the London Market Insurers are contractually obligated to Goodrich for remediation and defense costs at the Calvert City site incurred after September 30, 2005, the damage cutoff date for trial.

{¶8} Commercial Union and the London Market Insurers filed separate appeals, which this Court later consolidated. Goodrich cross-appealed against each of the appellants as well as against the remaining defendants. Goodrich filed two briefs in its cross-appeal, assigning slightly different cross-assignments of error against Commercial Union and the London Market Insurers. For ease of discussion, the assignments and cross-assignments of error will be rearranged and, to the extent the assigned errors are identical or related to other assignments of error or cross-assignments of error, they will be consolidated.

II.

Bad Faith

COMMERCIAL UNION'S ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED WHEN IT DENIED CU'S MOTIONS FOR DIRECTED VERDICT AND [JUDGMENT NOTWITHSTANDING THE VERDICT] ON [GOODRICH'S] 'BAD FAITH' [CLAIMS]."

CROSS-ASSIGNMENT OF ERROR I AGAINST LONDON

"THE TRIAL COURT ERRED IN GRANTING A DIRECTED VERDICT TO LONDON MARKET RELATING TO GOODRICH'S BAD FAITH CLAIM."

{¶9} Goodrich had alleged bad faith claims against both Commercial Union and the London Market Insurers and presented evidence at trial on each of these claims. Each insurer filed a motion for directed verdict on the bad faith claim against it at trial. The trial court granted a directed verdict to the London Market Insurers on Goodrich's bad faith claim, but denied the directed verdict motion of Commercial Union. The jury ultimately found for Goodrich on its bad faith claim against Commercial Union. Commercial Union moved for a judgment notwithstanding the verdict on the bad faith claim, which the trial court denied.

{¶10} Through its first assignment of error, Commercial Union contends that the trial court erred when it overruled its motions for directed verdict and judgment notwithstanding the verdict on Goodrich's bad faith claim. Through its first cross-assignment of error against the London Market Insurers, Goodrich contends that the trial court erred in granting the London Market Insurers a directed verdict on the bad faith claim. This Court will address each bad faith claim in turn.

{¶11} This Court begins by emphasizing that a motion for judgment notwithstanding the verdict under Civ.R. 50(B) is reviewed under the same standard as a motion for a directed verdict under Civ.R. 50(A). *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 679. On appeal, this Court reviews de novo and applies the same standard as the trial court. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, at ¶4. Pursuant to Civ.R. 50(A)(4), a motion for directed verdict is granted if, after construing the evidence most strongly in favor of the nonmoving party, "reasonable minds could

come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party."

{¶12} The standard to determine whether an insurer acted in bad faith was set forth in *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, paragraph one of the syllabus:

> "An insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor."

{¶13} As the Court emphasized in *Zoppo*, an insurer has an "affirmative duty to conduct an adequate investigation." Id. at 558. Consequently, the circumstances that would provide a "reasonable justification" for an insurer's denial of coverage would necessarily include a full investigation of the insured's alleged claim.

Commercial Union

{¶14} The evidence at trial established that Goodrich first provided notice to Commercial Union about potential environmental cleanup claims at its Calvert City site in June 1989. The notice included cleanup cost estimates at that time of over $17 million. Commercial Union responded by informing Goodrich that it believed the notice was premature, but it requested more information. Goodrich responded by sending more information and periodic updates over the next several years. Commercial Union did no follow-up investigation into the potential merit or extent of the Calvert City environmental claim at that time. Goodrich eventually gathered 20 file drawers of documents at its Calvert City site, which it made available to its insurers, but Commercial Union did not ask to inspect any of those documents until many years later. Goodrich received no further communications from Commercial Union until 1995.

{¶15} In March, 1995, Goodrich informed Commercial Union that it was nearing a settlement with its primary insurance carrier and that coverage under the primary policy would

be exhausted. Through a letter dated September 14, 1995, following other correspondence between the parties, Commercial Union indicated to Goodrich that it would investigate the claim under a full reservation of rights. Through a letter dated October 6, 1995, Goodrich indicated that, among other things, its underlying policy coverage had been exhausted and that the majority of the claim documentation was at the Calvert City site. Goodrich and Commercial Union spent many months corresponding back and forth to work out the details for Commercial Union to review the documentation.

{¶16} During March of 1997, Goodrich sent a coverage demand letter to Commercial Union for over $70 million for Calvert City cleanup costs. Commercial Union responded with a denial of coverage because Goodrich had failed to establish that it had exhausted its underlying insurance coverage. Additional correspondence went back and forth between Goodrich and Commercial Union over the next several months, including a letter from Commercial Union that it had a new claims handler who would need to become familiar with the case.

{¶17} During September, 1997, the parties met at Goodrich's corporate headquarters in Richfield, Ohio and, later that month, Commercial Union came to Calvert City to inspect the relevant documents. Goodrich provided Commercial Union with copies of many documents and arranged for a meeting in December 1997 to discuss Goodrich's settlement demand, which it had sent to Commercial Union several months earlier. Goodrich indicated to Commercial Union that it expected a response to its settlement demand at the December meeting. Commercial Union never asked to postpone the December meeting, nor did it ever indicate that it would not be prepared by that time to respond to the settlement demand. At the December meeting, however, Commercial Union again indicated that it was not prepared to respond and did not know when it would be because it needed more information.

{¶18} Goodrich first gave notice to Commercial Union in 1989, and continued to send periodic information to Commercial Union over the next several years. After receiving notice from Goodrich, Commercial Union did no fact investigation, nor did it review any of Goodrich's primary insurance policies in connection with the Calvert City notice. It was not until six years later that Commercial Union started corresponding with Goodrich about the claim, and it continued to deny liability without inspecting the Calvert City documentation.

{¶19} Construing this evidence in favor of Commercial Union, the circumstances under which it denied coverage to Goodrich did not include any investigation of the Calvert City claims. Although Commercial Union purported to have defenses to Goodrich's claims, it had not reviewed any of the relevant facts to determine what Goodrich's claims were. From the evidence presented at trial, reasonable minds could have concluded that Commercial Union refused to indemnify Goodrich for its Calvert City cleanup costs under circumstances that did not provide reasonable justification.

{¶20} Commercial Union also raises a legal argument that the bad faith claim must fail because the jury found that Goodrich had incurred no damages. It is true that, on the general verdict form, the jury found for Goodrich and against Commercial Union on the bad faith claim but awarded $0.00 in compensatory damages. The parties had also submitted a series of interrogatories to the jury on this claim, however, and the jury's answer to those interrogatories demonstrate that the jury did award Goodrich compensatory damages on the bad faith claim. Although the jury failed to quantify a dollar amount of compensatory damages on this claim, a further reading of the jury instructions and jury interrogatories indicates that the jury awarded attorney fees as a component of compensatory damages but, as it had been instructed, left the amount of attorney fees to be determined later by the trial judge.

{¶21} Without any objection on the record from Commercial Union, the trial court instructed the jury that it could award attorney fees as a component of compensatory damages on the bad faith claim:

> "If you find bad faith, you will consider what damages will compensate the insured. You may award attorney fees as compensatory damages or any other damages you find are caused by the bad faith of the insurer.
>
> "If you decide that Commercial Union is liable for attorney fees, the court will determine the amount."

{¶22} The jury also answered specific jury interrogatories about damages on the bad faith claim against Commercial Union. Jury Interrogatory Question Number 3 asked the jury whether Goodrich had proved compensatory damages arising out of bad faith, to which the jury answered, "Yes." Question Number 4 further asked the jury:

> "Are attorneys' fees to be included in compensatory damages? If the answer is 'yes,' you shall not determine an amount for such fees or include any such amount in any other determination of damages."

The jury answered "Yes" to Question Number 4. Question Number 5 asked the jury:

> "What is the amount of compensatory damages? If your answer to Question 4 was 'yes,' do not include attorney fees in your determination of these damages."

The jury responded to Question 5 with an answer of "$0.00."

{¶23} A full reading of these interrogatory answers indicates that the jury did find compensatory damages on the bad faith claim, but did not quantify the damages because it had been instructed not to do so. It is apparent from the jury's answers to its interrogatories that it found that attorney fees would be awarded as compensatory damages for the bad faith claim but that no additional compensatory damages were warranted. The jury's answers were clear and unambiguous and can be interpreted no other way. As the trial court commented during a discussion with the parties about the jury's verdicts and answers to the interrogatories, "the proof of [bad faith] compensatory damages is the attorney fees."

{¶24} Because Commercial Union has failed to demonstrate that the trial court erred in failing to grant a directed verdict or judgment notwithstanding the verdict on Goodrich's claim against it for bad faith, Commercial Union's first assignment of error is overruled.

London Market Insurers

{¶25} The trial court granted the London Market Insurers a directed verdict on Goodrich's bad faith claim. Goodrich challenges that determination through its first cross-assignment of error against the London Market Insurers.

{¶26} Unlike Goodrich's evidence against Commercial Union, its evidence pertaining to its negotiations with the London Market Insurers failed to demonstrate an unjustified refusal to pay Goodrich's claim. Although Goodrich presented extensive evidence pertaining to its bad faith claim against Commercial Union, it presented much less evidence about its claims negotiations with the London Market Insurers. Moreover, the facts pertaining to Goodrich's bad faith claim against the London Market Insurers were markedly different from those pertaining to Commercial Union.

{¶27} Goodrich's insurance claim against Commercial Union was relatively straightforward: it involved only one insurance company, a total of three insurance policies, and was limited to the Calvert City site. Goodrich's claims negotiations with the London Market Insurers, on the other hand, were much more complicated because the insurer was actually a group of several insurance companies; numerous insurance policies covering a more extended period of time were at issue; and the negotiations involved several Goodrich cleanup sites in addition to Calvert City.

{¶28} During 1989, Goodrich sent notice about its environmental liability at Calvert City to some of the London Market Insurers through their brokers. At that time, Goodrich

believed that the relevant disposal period had begun in 1963, so it notified only those insurers with whom it held policies during 1965 and later. Goodrich later came to believe that the relevant EDC disposal period began before 1963 and, after locating pre-1963 London Market policies, notified additional London Market Insurers in 1991.

{¶29} Unlike Commercial Union, the London Market Insurers conducted an ongoing investigation of Goodrich's claim shortly after receiving notice. Those London Market Insurers who received notice from Goodrich in 1989 promptly responded with a reservation of rights letter. The insurers who were notified in 1991 likewise promptly responded with another reservation of rights letter. Through these letters, the London Market Insurers asked to review the documentation at the Calvert City site, which they did. Goodrich and the London Market Insurers had ongoing negotiations over the next decade.

{¶30} In addition to the numerous insurers and policies involved, Goodrich's coverage negotiations with the London Market Insurers were further complicated by the fact that negotiations were not confined to Goodrich's liability at the Calvert City site. Goodrich's initial notice to the London Market Insurers involved Goodrich's potential environmental liability at over 30 cleanup sites. Coverage negotiations over the next decade continued to involve multiple environmental sites.

{¶31} In March 1996, Goodrich indicated that it thought it could make a settlement demand, but by June 1996, Goodrich was still evaluating its position in regard to the London Market Insurers and was still contemplating settling its multiple liability claims. As Goodrich's claims representative testified, "it was different for London. It was a broader demand. It was Calvert City and a host of these long-tail liability claims."

{¶32} During March, 1997, Goodrich made a settlement demand to the London Market Insurers, but that demand involved the Calvert City site as well as several other Goodrich environmental cleanup sites. There was no evidence that Goodrich ever made a specific demand for coverage at only the Calvert City site, and, more significantly, the London Market Insurers never issued Goodrich a denial of coverage.

{¶33} From the evidence presented at trial, construed in favor of Goodrich, reasonable minds could not conclude that London Market Insurers unjustifiably refused to pay Goodrich's claim. Therefore, the trial court did not err in granting the London Market Insurers a directed verdict on Goodrich's bad faith claim.

{¶34} Commercial Union's first assignment of error and Goodrich's first cross-assignment of error against the London Market Insurers are overruled.

Settlement Setoffs

COMMERCIAL UNION'S ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED WHEN IT DENIED CU'S MOTION FOR APPLICATION OF CREDITS AND SETTLEMENT SETOFFS."

LONDON MARKET'S ASSIGNMENT OF ERROR IV

"THE TRIAL COURT ERRED WHEN IT DENIED CERTAIN LONDON MARKET [INSURERS'] MOTION FOR APPLICATION OF CREDITS AND SETTLEMENT SET-OFFS."

LONDON MARKET'S ASSIGNMENT OF ERROR V

"THE TRIAL COURT ERRED BY DENYING CERTAIN LONDON MARKET [INSURERS] SET-OFFS FOR AMOUNTS PAID BY OTHER LONDON MARKET SUBSCRIBERS."

{¶35} Through Commercial Union's second assignment of error and the London Market Insurers' fourth and fifth assignments of error, the appellants contend that the trial court erred in failing to offset the damages awarded against them by the amounts paid by the insurers who had

already entered into monetary settlements with Goodrich. After the trial concluded, both appellants moved for a damage setoff due to the $55.8 million in settlement money that Goodrich had received from its other insurers. The trial court did allow a $20 million setoff against the $42 million damage judgment because the excess policies did not attach until the primary insurance coverage of $20 million had been exhausted. Aside from the $20 million setoff, however, the trial court denied Commercial Union and the London Market Insurers any further credit for Goodrich's recovery through settlements with its other insurers.

{¶36} Because Goodrich had already received $55.8 million from the settling insurers for its claims at the Calvert City site, the appellants contend that Goodrich's settlement recovery should completely offset the $42 million judgment against Commercial Union and the London Market Insurers, or Goodrich will be overcompensated for its actual damages.

{¶37} There is little Ohio law on the issue of settlement credits and none that addresses many of the issues raised by the parties here, such as whether a non-settling insurer should be entitled to settlement credit, and if so, how should equitable principles and public policy factor into that determination. Relying on case law from other jurisdictions, the parties dispute many facets of the law pertaining to allocation of settlement credits. This Court need not delve into undefined areas of Ohio law, however, as this issue can be resolved by applying undisputed principles of law.

{¶38} "Setoff of settlement funds has been recognized as a means to protect against the danger of a double recovery" in cases where a plaintiff has received monetary settlements from other defendants or potential defendants. *Celmer v. Rodgers*, 11th Dist. No. 2004-T-0083, 2005-Ohio-7055, at ¶27. The parties do not dispute that the basis for granting a defendant credit for the settlement money that the plaintiff has received from other defendants is the notion that a

plaintiff should not receive more than one recovery for the same damages. As the trial court stated in its ruling, "[a]pplication of a settlement credit assumes that the compensation paid by each defendant is for the same damages." Where no potential for double recovery by the plaintiff has been demonstrated, however, setoff should not be permitted. *Howard v. Seidler* (1996), 116 Ohio App.3d 800, 816.

{¶39} It has been held in other jurisdictions that, "because [settlement] credit is in the nature of an affirmative defense on the issue of damages, the defendant who seeks to take advantage of this credit bears the burden of proving the amount of credit to which he is entitled." *Riehle v. Moore* (Ind.App.1992), 601 N.E.2d 365, 371; see, also, *Weyerhaeuser Co. v. Commercial Union Ins. Co.* (2001), 15 P.3d 115. Ohio courts agree that the "burden of proving mitigation of damages is upon the party claiming the mitigation." See, e.g., *Capital Equip. Ents., Inc. v. Wilson Concepts, Inc.* (1984), 19 Ohio App.3d 233, 234.

{¶40} Commercial Union and the London Market Insurers failed to demonstrate that Goodrich would receive a double recovery for the same damages; therefore, the trial court properly denied any credit against the judgment for settlements Goodrich received beyond $20 million received from the primary insurer.

{¶41} Because all of the settlements at issue involved insurance coverage disputes over Goodrich's environmental liability at its Calvert City site, Commercial Union and the London Market Insurers seemed to presume that the damages were the "same" and sought a dollar for dollar setoff against the damages awarded by the jury. Aside from a jury interrogatory that specified that $2 million of the judgment was for underlying litigation expenses, the jury did not indicate what specific damages were included in its $40 million figure. As the litigation had focused solely on Goodrich's past EDC remediation costs at Calvert City, the damages awarded

obviously were for EDC cleanup costs, although it is uncertain which of the claimed costs the jury awarded.

{¶42} The record fails to even suggest that any of Goodrich's negotiated settlements with its other insurers was intended to merely compensate Goodrich for its past cleanup costs at Calvert City. In fact, although there is nothing that breaks down or quantifies the components of each insurer's monetary settlement with Goodrich, the insurers paid for a release from liability to Goodrich for a much wider array of claims than simply EDC groundwater remediation at Calvert City. Goodrich released the settling insurers from liability for the cleanup of other contaminants and from liability for claims for personal injury and other property damage. Commercial Union and the London Market Insurers oversimplify this issue to suggest that the trial court could just deduct the total settlement dollars ($58.5 million) from the jury's damage award ($42 million) to completely offset the damages awarded in this case.

{¶43} Moreover, the dollar amounts of insurers' settlements were not likely confined to compensating Goodrich for its property damage or other potential liability claims. In *Fidelholtz v. Peller* (1998), 81 Ohio St.3d 197, 201, the Ohio Supreme Court stressed that defendants settle for many reasons in addition to compensating the plaintiff for its injury "such as the avoidance of bad publicity and litigation costs, the possibility of an adverse verdict, and the maintenance of favorable commercial relationships."

{¶44} The record does not quantify the total costs of this litigation, but litigation costs in this case undoubtedly have been phenomenal. The settling insurers were able put an end to litigation costs of their own, as well as potential liability for Goodrich's attorney fees and costs. Goodrich has spent nearly 20 years seeking coverage from its insurers for its environmental cleanup costs at its Calvert City site. The parties have been involved in this litigation for nearly

a decade, and this case does not necessarily end with this appeal, as one or more of the parties may pursue an appeal to the Ohio Supreme Court.

{¶45} Moreover, in addition to the damages found by the jury, the trial court awarded Goodrich over $22 million in attorney fees and litigation costs, which does not account for any of the fees and costs associated with this appeal, nor does it account for the insurers' defense costs. Goodrich was also awarded over $20 million in prejudgment interest. The trial court also made a declaration that Goodrich will likely incur future liability for cleanup costs at Calvert City and that it has a right to be indemnified by Commercial Union and the London Market Insurers. The settling insurers purchased a release from all of this potential liability.

{¶46} Because Commercial Union and the London Market Insurers failed to demonstrate that Goodrich's settlement with other insurers was for the "same damages" that Goodrich recovered in this action, the trial court did not err in failing to further offset the damage award. The second assignment of error of Commercial Union and the fourth and fifth assignments of error of the London Market Insurers are overruled.

Prejudgment Interest

COMMERCIAL UNION'S ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN AWARDING PREJUDGMENT INTEREST AGAINST CU ON SUMS NOT 'DUE AND PAYABLE'."

CROSS-ASSIGNMENT OF ERROR III AGAINST C.U.

"THE TRIAL COURT ERRED IN ITS PREJUDGMENT INTEREST CALCULATION BY FAILING TO GIVE EFFECT TO UNAMBIGUOUS LANGUAGE IN CU POLICY E22-8502-313 THAT LOSS IS PAYABLE ONCE GOODRICH PAYS THE AMOUNT OF UNDERLYING LIMITS."

CROSS-ASSIGNMENT OF ERROR III AGAINST LONDON

"THE TRIAL COURT ERRED IN FAILING TO AWARD PREJUDGMENT INTEREST AGAINST LONDON."

{¶47} After Goodrich prevailed at trial, the parties briefed and the trial court later held a hearing on the issue of prejudgment interest. Goodrich moved for prejudgment interest pursuant to R.C. 1343.03(A), which provides that Goodrich was entitled to interest from the date that the contractual obligation became "due and payable" under the contract.

{¶48} The trial court ultimately awarded Goodrich prejudgment interest against Commercial Union, payable from June 30, 1995, the date that Goodrich settled its claims with its primary insurer. The trial court awarded Goodrich no prejudgment interest against the London Market Insurers.

{¶49} Commercial Union challenges the prejudgment interest award through its third assignment of error. Through two cross-assignments of error, Goodrich contends that the trial court erred in its calculation of prejudgment interest against Commercial Union and that it erred in failing to award it any prejudgment interest on its damage judgment against the London Market Insurers.

{¶50} To facilitate discussion, this Court first will address Goodrich's challenge regarding the London Market Insurers.

London Market Insurers

{¶51} Although Goodrich also sought prejudgment interest on the damage award against the London Market Insurers, the trial court awarded no prejudgment interest against them.

{¶52} Goodrich makes a purely legal argument here. It maintains that, given that the jury had found a breach of contract by the London Market Insurers, the court had no discretion not to award prejudgment interest, as it was required by R.C. 1343.03(A) to do so. This Court agrees.

{¶53} After the parties filed their briefs in this case, this Court adopted the legal position that had been followed by many other appellate districts that the trial court has no discretion not to award prejudgment interest on a breach of contract:

> "[A]lthough not expressly stated by this Court, numerous appellate districts have found, and we agree, that 'once a plaintiff receives judgment on a contract claim, the trial court has no discretion but to award prejudgment interest under R.C. 1343.03(A).' *Zunshine v. Cott*, 10th Dist. No. 06AP-868, 2007-Ohio-1475, at ¶25, citing *First Bank of Marietta v. L.C. Ltd.* (Dec. 28, 1999), 10th Dist. No. 99AP-304. See, also, *Stoner v. Allstate Ins. Co.*, 5th Dist. No. 05 CA 16, 2006-Ohio-3998, at ¶18 (holding that R.C. 1343.03(A) is mandatory requiring a trial court to award prejudgment interest); *Water Works Supplies, Inc. v. Grooms Constr. Co., Inc.*, 4th Dist. No. 04CA12, 2005-Ohio-1292, at ¶32 (holding that '[t]he mandatory language of R.C. 1343.03(A) means that the trial court must award prejudgment interest when appropriate.'); *Indiana Ins. Co. v. Farmers Ins. of Columbus*, 5th Dist. No. 2002 AP 11 0090, 2003-Ohio-4851, at ¶60 (noting that the statutory language of R.C. 1343.03(A) that creditor is entitled to interest is mandatory)." *Zeck v. Sokol,* 9th Dist. No. 07CA0030-M, 2008-Ohio-727, at ¶44.

{¶54} Because the jury found a breach of contract by the London Market Insurers, the trial court had no discretion to deny Goodrich's request for prejudgment interest against that party. Its only decision was to determine when the interest would begin to run, or when the obligation became "due and payable." The trial court erred in failing to grant Goodrich prejudgment interest on its damage claim against the London Market Insurers.

{¶55} As will be noted below, in its award of prejudgment interest against Commercial Union, the trial court looked to the specific language of the Commercial Union policies and the facts surrounding Goodrich's claims negotiations with it to determine when prejudgment interest became due and payable. Goodrich held different policies with the London Market Insurers, however, and the facts surrounding its claims negotiations and coverage demands with the London Market Insurers were also different from the situation with Commercial Union. Therefore, the trial court will need to determine when prejudgment interest begins to run against

the London Market Insurers because the court may determine that Goodrich's contractual obligation became "due and payable" from the London Market Insurers on a different date from the date that its claim became "due and payable" from Commercial Union. Consequently, it is necessary for this Court to remand to the trial court for a hearing on this matter.

{¶56} Moreover, as the London Market Insurers were held jointly and severally liable with Commercial Union for the full $22 million damage judgment, and Goodrich has already been awarded prejudgment interest against Commercial Union on the full damage award, the trial court must determine the extent to which liability for the prejudgment interest award will be allocated between the London Market Insurers and Commercial Union. Goodrich's third cross-assignment of error against the London Market Insurers is sustained.

Commercial Union

{¶57} Goodrich and Commercial Union also challenge the trial court's calculation of the prejudgment interest award against Commercial Union. Goodrich and Commercial Union agree that prejudgment interest should accrue from the date the contractual obligation became "due and payable" under the insurance contract. See R.C. 1343.03(A). Their dispute focuses on when Commercial Union's contractual obligation to Goodrich became "due and payable." The trial court found the "due and payable" date to be June 30, 1995, when Goodrich settled its claims with its primary insurer.

{¶58} This Court reviews the trial court's determination of when prejudgment interest became "due and payable" under an abuse of discretion standard. *Zunshine v. Cott*, 10th Dist. No. 06AP-868, 2007-Ohio-1475, at ¶26. An "abuse of discretion" means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion is more than an error of judgment, but instead

demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶59} Although Commercial Union contends that the trial court abused its discretion by awarding prejudgment interest from June 30, 1995, it fails to propose an alternate "due and payable" date. Instead, it essentially maintains that the trial court abused its discretion by awarding any prejudgment interest because the damages were disputed until the jury resolved the dispute.[2]

{¶60} As explained above, however, after Goodrich was awarded a damage judgment on its breach of contract claim against Commercial Union, the trial court was obligated to award prejudgment interest pursuant to R.C. 1343.03(A). See *Zeck,* at ¶44.

{¶61} Although Goodrich contends that the trial court should have used an earlier "due and payable" date, it has failed to demonstrate any abuse of discretion by the trial court. Goodrich maintains that, based on the loss payable language in one of its three insurance policies with Commercial Union, the trial court should have awarded prejudgment interest from the date that Goodrich had actually paid $20 million in cleanup costs, an earlier date than when it settled with its primary insurer. It further maintains that "[i]f Goodrich chooses CU's second policy to pay this loss, the effect of the trial court's ruling would be to leave Goodrich less than whole[.]"

{¶62} Even if construction of the loss payable language in the second Commercial Union policy supported Goodrich's argument for an earlier "due and payable" date, Goodrich had not selected that policy at the time the trial court made its prejudgment interest

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[2] Although Commercial Union also reiterates arguments that it raised through its second and fourth assignments of error, to avoid redundancy, this Court will confine its review of those arguments to the appropriate assignments of error.

determination. Goodrich cannot demonstrate any actual prejudice by the court's prejudgment interest calculation but merely speculates as to what prejudice it may suffer "if" it chooses the second policy.

{¶63} Moreover, as this Court reviews this decision under an abuse of discretion standard, it was not unreasonable or arbitrary for the trial court to select a "due and payable" date that would be applicable to all three Commercial Union policies, regardless of which policy Goodrich will ultimately choose. The trial court explained that when Goodrich settled its claims with its primary insurer in 1995, coverage under the terms of the Commercial Union policies was triggered and, because Goodrich had given notice to Commercial Union long before that time, Commercial Union had adequate time to investigate the claim and ensure that its liability had been triggered. This Court finds no abuse of discretion in the trial court's determination of when Commercial Union's obligation became "due and payable" to Goodrich under the contracts of insurance.

{¶64} Goodrich's third cross-assignment of error against the London Market Insurers is sustained. Commercial Union's third assignment of error and Goodrich's third cross-assignment of error against Commercial Union are overruled.

Attorney Fee Award

COMMERCIAL UNION'S ASSIGNMENT OF ERROR IV

"THE TRIAL COURT ERRED WHEN IT DENIED CU'S MOTION FOR JNOV AND AWARDED GOODRICH ATTORNEY FEES AND COSTS INCURRED IN THIS ACTION."

LONDON MARKET'S ASSIGNMENT OF ERROR VI

"THE TRIAL COURT ERRED WHEN IT DENIED CERTAIN LONDON MARKET [INSURERS'] MOTION FOR JNOV AND AWARDED ATTORNEYS FEES IN THIS BREACH OF CONTRACT ACTION."

{¶65} Both appellants contend that the trial court erred in denying their motions for judgment notwithstanding the verdict based on the award of attorney fees to Goodrich on its breach of contract claims. Commercial Union further contends that the trial court erred in awarding attorney fees on Goodrich's bad faith claim. The appellants contend that the attorney fee award should be vacated because the jury failed to find malice or bad faith on the part of either defendant.

{¶66} The appellants challenge the legal soundness of an attorney fee award in this case, apparently ignoring the fact that such an award was completely within the parameters of the legal instructions that the trial court gave to the jury. The jury was not instructed that it must first find bad faith and/or award punitive damages before awarding attorney fees. Instead, the trial court instructed the jury that it could award attorney fees as a component of compensatory damages on the bad faith claim against Commercial Union as well as the claims for breach of contract against both appellants.

{¶67} Without any objection on the record by Commercial Union or the London Market Insurers, after six weeks of trial and much discussion by the parties and the trial judge about how the court would instruct the jury, the trial court instructed the jury that Goodrich was claiming attorney fees as a component of its breach of contract damages. The court further instructed the jury:

> "If you find for Goodrich, you should determine whether its attorney fees in this case are damages for which it should be compensated. You do not need to determine the amount of attorney fees incurred in this case. If you decide that

> Goodrich is entitled to recover its attorney fees in this case, the court will determine the amount."

{¶68} Jury Interrogatory Question Number 60 asked the following:

> "Not including the claim of bad faith, do you find that any damages include the attorney fees Goodrich incurred in this case? If the answer to this question is 'yes,' you shall not determine an amount for such damages or include an amount in any calculation of damages."

{¶69} The jury answered "yes" to Interrogatory Question Number 60 and, as it had been instructed by the trial court, did not determine an amount of attorney fees or include an amount in its calculation of damages.

{¶70} Likewise, as quoted above in this Court's discussion of Commercial Union's first assignment of error pertaining to the bad faith claim judgment, the jury was instructed that it could award attorney fees as a component of damages on the bad faith claim, it was given interrogatories to that effect, and it made a finding that Goodrich was entitled to attorney fees on its bad faith claim. Commercial Union raised no objection on the record to those instructions or special interrogatories.

{¶71} The jury followed its instructions and, as it was instructed that it could award attorney fees as a component of compensatory damages, it did. The appellants later attempted to vacate this award, contending that there was no legal basis to award attorney fees in this case.

{¶72} Although the parties dispute whether the appellants raised this issue in their post-trial motions, it is clear from the record that they acquiesced in allowing the issue of attorney fees to go to the jury. The parties cannot wait until after trial to challenge the legal soundness of the jury instructions through a motion for judgment notwithstanding the verdict when they raised no objection to those instructions before they were given to the jury. See *Hinkle v. Cornwell Quality Tool Co.* (1987), 40 Ohio App.3d 162, 164-165 (implicitly holding that jury instructions

cannot be challenged through a motion for judgment notwithstanding the verdict where there was no objection at trial).

{¶73} Commercial Union and the London Market Insurers essentially challenge the trial court's legal instruction to the jury on attorney fees, which they did not challenge at trial. Civ. R. 51(A) provides that "a party may not assign as error the giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." The Ohio Supreme Court has also repeatedly stressed that, to preserve an issue for review, a party must "timely advise a trial court of possible error, by objection or otherwise[.]" *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121.

{¶74} The parties and the jury sat through a lengthy trial that lasted nearly seven weeks. The trial court gave the parties every opportunity to have input into the jury instructions and interrogatories. There is nothing in the record to indicate any attempt by the appellants to correct this alleged error at the appropriate time. The trial court did not err in failing to correct an alleged error that the appellants acquiesced in and waited to raise until after they received an unfavorable decision by the jury. The fourth assignment of error of Commercial Union and the sixth assignment of error of the London Market Insurers are overruled.

Allocation of Attorney Fees

CROSS-ASSIGNMENT OF ERROR IV AGAINST LONDON

"THE TRIAL COURT ERRED IN REDUCING LONDON'S RESPONSIBILITY FOR GOODRICH'S ATTORNEYS' FEES."

{¶75} After hearing disputed evidence as to the reasonableness and necessity of Goodrich's attorney fees in this litigation, the trial court determined that Goodrich was entitled to receive compensation from the appellants for over $22 million in attorney fees and litigation

costs. To allocate the appellants' responsibility for this attorney fee award, the trial court further ordered that Commercial Union would be held responsible for a greater portion of the attorney fees because Goodrich also had been awarded attorney fees on its bad faith claim against Commercial Union.

{¶76} Through its fourth cross-assignment of error against the London Market Insurers, Goodrich argues that the trial court erred in its allocation of the appellants' responsibility to pay Goodrich's attorney fees. Specifically, Goodrich contends that the trial court erred in reducing the responsibility of the London Market Insurers for the attorney fee award.

{¶77} Goodrich recognizes that the trial court's determination of the amount of attorney fees to award was discretionary and that this Court will affirm that decision absent an abuse of discretion. See, e.g., *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 146. Goodrich contends that its attorney fees were reasonable and argues against a reduction of its attorney fee award, implying that this aspect of the trial court's order somehow reduced the attorney fees that Goodrich was awarded. The trial court did not reduce the dollar amount of attorney fees awarded to Goodrich, however; it simply required Commercial Union to pay a greater share of the award than the London Market Insurers.

{¶78} Goodrich has failed to demonstrate any abuse of discretion by the trial court in holding Commercial Union responsible for a greater portion of the attorney fee award. The trial court explained that the bad faith verdict was solely against Commercial Union, that Goodrich was awarded attorney fees as damages on the bad faith claim in addition to its breach of contract claims, and that the London Market Insurers should not be responsible for that share of the attorney fees because they prevailed on the bad faith claim against them.

{¶79} Bearing in mind that it was "impossible to determine with mathematical precision the time and costs attributable solely to the bad faith claim[,]" the trial court allocated the attorney fees between the breach of contract claims and the bad faith claim based on the percentage of jury interrogatories attributable to the bad faith claim. The trial court explained that it considered that percentage, 12 percent, to be a reasonable estimate of the costs and time that Goodrich devoted solely to the bad faith claim. Therefore, the trial court held Commercial Union solely responsible for 12 percent of the attorney fees and Commercial Union and the London Market Insurers jointly and severally liable for the remaining 88 percent of the attorney fee award.

{¶80} Goodrich has failed to demonstrate anything arbitrary or unreasonable about the trial court's allocation of responsibility for the attorney fee award between Commercial Union and the London Market Insurers. Goodrich's fourth cross-assignment of error against the London Market Insurers is overruled.

Litigation Expenses

CROSS-ASSIGNMENT OF ERROR IV AGAINST C.U.

CROSS-ASSIGNMENT OF ERROR V AGAINST LONDON

"THE TRIAL COURT ERRED IN EXCLUDING CERTAIN OF GOODRICH'S LITIGATION EXPENSES."

{¶81} The parties agree that the assessment of litigation costs also lies within the sound discretion of the trial court. See *Howard v. Wills* (1991), 77 Ohio App.3d 133, 137. Goodrich contends that the trial court abused its discretion by refusing to award it certain litigation expenses. Specifically, the trial court refused to order Commercial Union and the London Market Insurers to reimburse Goodrich for the fees it had incurred due to traveling for the purpose of taking depositions or for out-of-town counsel to travel to Akron for trial.

{¶82} In the same order denying Goodrich recovery of these costs, however, the trial court indicated that it would award Goodrich its attorney fees for both local and national counsel, fees which were later determined to be over $20 million. Commercial Union and the London Market Insurers had argued that Goodrich should not receive attorney fees for both its local counsel and national counsel because their work was duplicative and the national counsel, who were more experienced in environmental litigation, charged significantly higher hourly rates than Goodrich's local counsel. Nonetheless, the trial court awarded Goodrich attorney fees that had been charged by both its local and national counsel.

{¶83} In the very next paragraph of its order, however, the trial court explained that it would not allow Goodrich to recover counsel's travel and meal expenses. The court explained that "[e]xpenses such as these are not capable of evaluation as to their reasonableness. The court notes that the hourly rate of compensation for counsel is sufficient for living and travel expenses."

{¶84} The trial court's explanation for denying Goodrich recovery of its travel expenses as part of its attorney and litigation fees was not unreasonable or arbitrary. Moreover, Goodrich fails to cite any legal authority that it has a right to recover travel expenses as part of its litigation fee award. In fact, Commercial Union and the London Market Insurers cite authority that travel expenses are not recoverable as litigation costs. See, e.g., *Taylor v. McCullough-Hyde Mem. Hosp.* (1996), 116 Ohio App.3d 595, 601.

{¶85} Goodrich has failed to demonstrate an abuse of discretion by the trial court and its fourth cross-assignment of error against Commercial Union and its fifth cross-assignment of error against the London Market Insurers are overruled.

Ongoing Fees

CROSS-ASSIGNMENT OF ERROR V AGAINST C.U.

CROSS-ASSIGNMENT OF ERROR VI AGAINST LONDON

"THE TRIAL COURT ERRED BY NOT AWARDING GOODRICH ONGOING FEES AND EXPENSES."

{¶86} Through its fifth cross-assignment of error against Commercial Union and its sixth cross-assignment of error against the London Market Insurers, Goodrich asserts that, when the trial court determined the attorney fee award, it erred in denying its request for ongoing fees and costs, including its attorney fees and costs of this appeal. In a very brief argument, Goodrich maintains that the trial court was required to award it attorney fees for this appeal.

{¶87} Goodrich relies on two cases that were not breach of contract cases, but were instead declaratory judgment actions brought by insureds under the former R.C. 2721.09, and attorney fees were allowed under that statutory authority. See *Willoughby Hills v. Cincinnati Ins. Co.* (1986), 26 Ohio App.3d 146; *Koch & Koasis Land Co., Inc. v. Motorits Mut. Ins. Co.* (June 13, 1990), 7th Dist. No. 89 C.A. 36.

{¶88} Under former R.C. 2721.09, attorney fees could be granted by the trial court in declaratory judgment actions whenever "necessary and proper," yet those requirements were often interpreted loosely. In *Motorists Mut. Ins. Co. v. Brandenburg* (1995), 72 Ohio St.3d 157, 158, the Ohio Supreme Court explained that absent some statutory authority to the contrary, the general "American Rule" is that parties to a legal dispute pay their own attorney fees. The court further held that former R.C. 2721.09 provided a trial court with statutory authority "to assess attorney fees based on a declaratory judgment issued by the court" and that the trial court had full discretion to award such fees. Id. at 160.

{¶89} Effective September 24, 1999, in explicit response to the *Brandenburg* decision, the Ohio General Assembly amended R.C. 2721.09 and enacted R.C. 2721.16 to place a limitation on attorney fees that can be recovered in declaratory judgment actions. See Staff Notes to R.C. 2721.16. The parties discussed on the record that the court's authority to award attorney fees in declaratory judgment actions was now limited by statute and the trial judge explicitly noted that she would not be awarding attorney fees in the declaratory judgment action.

{¶90} Because the cases cited by Goodrich have no application here, Goodrich has demonstrated no error by the trial court in failing to award ongoing attorney fees and litigation expenses. Its fifth cross-assignment of error against Commercial Union and its sixth cross-assignment of error against the London Market Insurers are overruled.

Damages

CROSS-ASSIGNMENT OF ERROR II AGAINST C.U.

CROSS-ASSIGNMENT OF ERROR II AGAINST LONDON

"THE TRIAL COURT ERRED IN DENYING GOODRICH'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT REGARDING DAMAGES FOR PAST REMEDIATION COSTS."

{¶91} Goodrich contends that the trial court erred in failing to grant its motion for judgment notwithstanding the verdict on the issue of damages. Specifically, it maintains that it presented evidence to establish that its past remediation costs were over $74 million and the jury's finding that it had proven only $42 million in damages was irrational and not supported by the evidence.

{¶92} To reiterate, a motion for judgment notwithstanding the verdict should be granted if, after construing the evidence most strongly in favor of the nonmoving party, "reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is

adverse to such party." Civ.R. 50(A). In other words, to prevail on its motion for judgment notwithstanding the verdict, Goodrich was required to prove that reasonable minds could only conclude that it had proven over $74 million in past remediation costs that were covered losses under its excess insurance policies.

{¶93} Goodrich relies on a case in which the Third District Court of Appeals reversed the trial court's denial of a judgment notwithstanding the verdict because there was only one rational way to view the damage evidence and reasonable minds could not have viewed it otherwise. See *Bellman v. Ford Motor Co.*, 3d Dist. No. 12-04-11, 2005-Ohio-2777, at ¶28-29. Goodrich essentially contends that the *Bellman* reasoning is fully applicable here because its damage evidence was clear and undisputed. Unlike the *Bellman* case, however, the damage evidence in this case was disputed by the insurers and could have been interpreted in a variety of ways by the jury. Reasonable minds could have come to many different conclusions in determining Goodrich's breach of contract damages.

{¶94} Although Goodrich presented evidence that its past remediation costs were in excess of $74 million, the defendant insurers vigorously disputed whether many of those costs were reasonable and/or necessary to the remediation efforts at the Calvert City site. The insurers focused on many facts that could have led the jurors to reduce Goodrich's damages.

{¶95} For example, Goodrich presented evidence that it chose to do the groundwater remediation itself, rather than having the government run the remediation, as a means of controlling the costs. There was evidence before the jury to dispute whether the methods chosen by Goodrich to clean the groundwater were the most cost effective, however. Moreover, the insurers disputed whether some of Goodrich's claimed remediation costs were actually costs

incurred due to the production process, due to unrelated groundwater monitoring requirements, or were otherwise not solely related to this cleanup effort.

{¶96} There were no cost invoices for most of the work done by Goodrich and the insurers maintained throughout the trial that many of Goodrich's self-estimated costs were grossly inflated. Even an expert who purported to have verified Goodrich's remediation costs conceded that his role was to determine whether Goodrich had incurred the costs it listed, not whether the costs were reasonable and necessary. There was also testimony from another Goodrich witness that, after Goodrich sold most of its Calvert City plant to Westlake Vinyls, it was necessary to purchase steam from Westlake to run the groundwater strippers and Westlake had been charging Goodrich inflated rates for the steam. That same witness further testified that 45 percent of the waste currently being treated at the main groundwater stripper was attributable to Westlake's production process.

{¶97} In 1993, Goodrich spun off its GEON vinyl division into a separate company, GEON. GEON later merged with another company to form PolyOne. Since the 1993 spin-off, through a contract with Goodrich, GEON/PolyOne agreed to pay the Calvert City ongoing remediation costs. Although Goodrich maintained during trial that it was the only party legally responsible to the government for the cleanup costs, the evidence was not disputed that GEON/PolyOne had assumed contractual liability to Goodrich to pay those costs since 1993 and that it had been doing so. The costs paid by GEON/PolyOne accounted for $29.3 million of the total damages sought by Goodrich. The insurers contended that they should have no obligation to indemnify Goodrich against any cleanup costs incurred since 1993 because these costs are being paid by PolyOne ("the PolyOne defense").

{¶98} There was also evidence that some of the groundwater contamination came from the settling ponds and that Goodrich did not close the ponds until it was required to do so because it was too expensive. The insurers argued that, had Goodrich closed the ponds earlier, the EDC contamination may have been lessened.

{¶99} The insurers gave the jury many reasons to reduce the damages sought by Goodrich in this case. There were no jury interrogatories that required the jury to break down the damage award in a manner that would explain why the jury found damages of $40 million, plus $2 million in underlying litigation costs, rather than $74 million. Absent such explicit findings by the jury, this Court will not begin to speculate about which of the insurers' challenges persuaded the jury to award less than the total damages sought by Goodrich.

{¶100} It is clear from the record, however, that much of Goodrich's evidence on whether its remediation costs were necessary and reasonable was disputed and there were many reasons upon which the jury could have based a decision to reduce Goodrich's damage figure. Because reasonable minds could have come to many conclusions on the calculation of Goodrich's damages, the trial court did not err in denying Goodrich's motion for judgment notwithstanding the verdict. Goodrich's second cross-assignment of error against Commercial Union and its second cross-assignment of error against the London Market Insurers are overruled.

Declaratory Judgment

COMMERCIAL UNION'S ASSIGNMENT OF ERROR V

"THE TRIAL COURT ERRED WHEN IT ENTERED DECLARATORY JUDGMENT RELIEF IN FAVOR OF GOODRICH."

LONDON MARKET'S ASSIGNMENT OF ERROR X

"IF IT IS DETERMINED THAT THE TRIAL COURT ENTERED DECLARATORY JUDGMENT RELIEF AGAINST ANY OF THE CERTAIN LONDON MARKET INSURERS, WHICH EACH CERTAIN LONDON

MARKET INSURER DENIES, IT WAS ERROR TO ENTER SUCH DECLARATORY RELIEF."

{¶101} The jury determined that Commercial Union and the London Market Insurers had breached their insurance contracts with Goodrich by failing to provide coverage for $40 million that Goodrich expended for past cleanup costs at Calvert City as well as $2 million in underlying litigation expenses. Goodrich had also sought a declaration that the insurers were contractually obligated to provide coverage for future cleanup costs at the site. The issue of liability for future costs was decided through a post-trial proceeding and the trial court determined that Goodrich had established that damages at its Calvert City site are "covered damages" under its contracts of insurance, that its damages continue to accrue, and that the insurers are required to pay Goodrich for the remediation and defense costs it has incurred or will incur after September 30, 2005 at the Calvert City site.

{¶102} The London Market Insurers assign error to the trial court's entry of a declaratory judgment "if it is determined that the trial court entered declaratory judgment relief against any of the [C]ertain London Market Insurers[.]" Although the trial court's initial entry on this matter made no explicit reference to the London Market Insurers, its later judgment entry that summarized the final judgment did. The second, more comprehensive entry clearly entered a declaratory judgment against the London Market Insurers.

{¶103} Through its comprehensive order that summarized the rights and obligations of Commercial Union, the London Market Insurers, and Goodrich, the trial court declared that Commercial Union and the London Market Insurers are required to pay the defense and remediation costs that Goodrich incurs after September 30, 2005, plus interest from the date those costs are incurred, if Goodrich selects coverage under one of their insurance policies.

{¶104} Commercial Union and the London Market Insurers contend that the trial court erred in determining that Goodrich has a right to insurance coverage for future cleanup costs because PolyOne is contractually obligated to pay those costs. As this Court noted in its discussion of Goodrich's cross-assignments of error on damages, the insurers raised this "PolyOne defense" at trial. They had already brought this defense before the jury when it determined their liability on the breach of contract claims. This post-trial proceeding was not an opportunity to relitigate liability issues.

{¶105} The trial court determined prior to the beginning of trial that certain issues would not be decided by the jury, but would be determined by the trial court after trial, if the jury found bad faith and/or breach of contract. Those issues included prejudgment interest, attorney fees, and whether Goodrich will incur future cleanup costs.

{¶106} As the trial court explained to the parties prior to the commencement of trial:

> [I]t's my understanding that if coverage is found here, that the jury will be asked to assess the damages in respect to claims which should have been allowed to date, but if a declaration of coverage is made, then any future costs are going to have to be submitted as you would any other claim for coverage, and the court is not going to permit any evidence to be presented during this trial regarding what those future costs may be."

The trial court further held in a written order that:

> "Insurer Defendants' Motion in Limine to Bar Goodrich from Introducing Testimony or Other Evidence Regarding Goodrich's Alleged Future Costs is GRANTED. The Court will hear evidence on the issue that there will in fact be future costs, but this evidence will not be presented to the jury."

It was determined prior to trial that the issue of future costs, as well as prejudgment interest, attorney fees, and settlement credits would not be determined by the jury but, in the event the jury found liability on the part of the insurers, the issues would be determined by the trial court through post-trial proceedings. As quoted above, the trial court clearly emphasized prior to trial

that the only issue for later determination on the issue of future costs was whether "there will in fact be future costs."

{¶107} Although Commercial Union and the London Market Insurers attempted to relitigate their PolyOne defense through this post-trial proceeding, this was not an opportunity for them to do so. Just as they could not relitigate liability issues during the post-trial proceedings on attorney fees, prejudgment interest, or settlement credits, they could not do so in this limited proceeding on future costs.

{¶108} The PolyOne defense to the insurers' obligation to cover Goodrich's remediation costs incurred after 1993 was put before the jury to determine as the trier of fact. Because the parties did not test the issue with a jury interrogatory, however, there is no way of knowing the jury's finding on this defense. Nonetheless, the insurers put this coverage defense before the jury at trial and implicitly asked the jury to make a finding on this defense. Because the jury was not asked to make a finding, we do not know whether the jury accepted or rejected this defense.

{¶109} The absence of an explicit finding by the jury on the PolyOne defense, however, did not give the parties an opportunity to relitigate the issue through a post-trial proceeding before the trial judge. The Rules of Civil Procedure provide limited avenues for the trial court to delve into or overturn a jury's findings, none of which was followed here. Because the PolyOne defense was not properly before the trial court in this post-trial proceeding, the trial court did not err in refusing to revisit that defense.

{¶110} In a brief, additional argument, Commercial Union asserts that declaratory relief was also inappropriate because it is unknown whether Goodrich will incur further liability and declaratory relief cannot be based on speculative future events. Although the trial court noted in its initial judgment entry that Goodrich "may" incur future costs, the evidence before the court

was not disputed that there will be additional environmental cleanup costs incurred at the Calvert City site and, aside from the PolyOne defense, the defendants did not dispute that Goodrich will incur liability for those costs.

{¶111} The trial court found, based on the presentation of evidence that Goodrich will incur future cleanup costs, that Commercial Union and the London Market Insurers are "required to pay to Goodrich Corporation the remediation and defense costs [Goodrich] has incurred or will incur subsequent to September 30, 2005" for cleaning up the Calvert City site and for defending underlying actions in accordance with any of their contracts of insurance selected under *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842.

{¶112} Because Commercial Union and the London Market Insurers have failed to demonstrate any error in the trial court's declaratory judgment, Commercial Union's fifth assignment of error and the London Market Insurers' tenth assignment of error are overruled.

Pollution Exclusion

COMMERCIAL UNION'S ASSIGNMENT OF ERROR VI

"THE TRIAL COURT ERRED BY DENYING CU'S MOTIONS FOR DIRECTED VERDICT AND [JUDGMENT NOTWITHSTANDING THE VERDICT] BASED ON ITS POLLUTION EXCLUSION."

LONDON MARKET'S ASSIGNMENT OF ERROR VII

"THE TRIAL COURT ERRED BY DENYING CERTAIN LONDON MARKET INSURER'S MOTION FOR A DIRECTED VERDICT OR JNOV BASED ON THEIR POLLUTION EXCLUSIONS."

{¶113} Through Commercial Union's sixth assignment of error and the London Market Insurers' seventh assignment of error, both appellants contend that the trial court erred in failing

to grant either a directed verdict or a judgment notwithstanding the verdict based on the pollution exclusions in some of the relevant insurance policies.[3]

{¶114} Again restating the standard, a trial court should grant a motion for directed verdict or a motion for judgment notwithstanding the verdict only if, after construing the evidence most strongly in favor of the nonmoving party, "reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party." Civ.R. 50(A). Consequently, the trial court would have erred in denying these motions only if the jurors could only have found that the pollution exclusions in some of the insurance policies issued by Commercial Union and the London Market Insurers precluded coverage for the Calvert City cleanup costs.

{¶115} There was evidence that one of the Commercial Union policies and some of the London Market Insurers' policies issued beginning in the early 1970s included pollution exclusions with "sudden and accidental" exceptions. Basically, these pollution exclusions provided that there would be no insurance coverage for property damage caused by the discharge or release of pollutants into the environment unless the release or discharge was sudden and accidental. Thus, Goodrich was required to establish that its property damages (EDC groundwater contamination) had been caused by releases of EDC into the environment that were both abrupt and accidental. See *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 665. Ohio courts have held that the burden is upon the policyholder to establish that the exception to the pollution exclusion is applicable. *Plasticolors, Inc. v. Cincinnati Ins.*

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[3] There is no dispute that some of the insurance policies of each of these insurers included no pollution exclusion. Consequently, this exclusion pertains to only some of the relevant policies and is not fully dispositive of the coverage issue as to either appellant.

Co. (1992), 85 Ohio App.3d 547, 550.

{¶116} Thus, the parties' litigation on this issue necessarily focused on the possible causes of EDC groundwater contamination at Calvert City: gradual EDC discharges from the plant versus sudden and accidental spills of EDC. Goodrich presented evidence that there had been several sudden and accidental releases of EDC at the Calvert City plant during the relevant time frame and that these sudden and accidental spills were among the main sources of EDC contamination at the site.

{¶117} The relevant spills included a rupture in a pipeline through which EDC was pumped into the plant from barges on the Tennessee River. It was estimated that approximately 60,000 gallons of EDC had spilled by the time the leak was discovered and the transfer was shut down. Another spill of approximately 2,000-6,000 gallons of EDC-containing water occurred due to a reactor problem. Goodrich also presented evidence that there had been additional significant spills of EDC that had been sudden and accidental: 7,000-10,000 gallons of vinyl chloride, 4,000-6,000 gallons of EDC-containing wastes, and 750,000 pounds of vinyl chloride.

{¶118} The insurers concede that Goodrich presented evidence of many sudden and accidental releases of EDC at the Calvert City site. Goodrich also presented evidence that the sudden releases of EDC contributed to the property damage at the site, but that it was virtually impossible to measure how much EDC contamination came from a given source. Goodrich established facts that there had been sudden and accidental releases of EDC that caused property damage, but it was unable to quantify the extent of property damage that was solely attributable to the sudden releases of EDC.

{¶119} The dispute between the parties is whether Goodrich's coverage under the sudden and accidental exception to the pollution exclusions was limited to the property damage that it

could directly attribute to the sudden spills. The parties do not cite, nor could this court find, any Ohio authority that directly addresses this issue.

{¶120} It is the position of Commercial Union and the London Market Insurers that, because Goodrich could not demonstrate how much of the EDC contamination was directly attributable to the sudden and accidental releases, it had failed to prove that any of its damages qualified for coverage under the sudden and accidental exception to the pollution exclusions. The insurers cite a single California appellate decision to support their position. See *Golden Eagle Refinery Co., Inc. v. Associated Internatl. Ins. Co.* (2001), 85 Cal.App.4th 1300, 1314-15. The *Golden Eagle* decision was called into question by another California appellate district, however, because its reasoning purportedly ignored California Supreme Court case law on the issue of insurance coverage when there are concurrent causes of the property damage. See *State v. Underwriters at Lloyd's London* (2006), 54 Cal.Rptr.3d 343, 357-61, certiorari granted, (2007), 57 Cal.Rptr.3d 542.

{¶121} Goodrich, on the other hand, maintains that because its property damage resulted from both an insured cause (sudden and accidental spills) and an excluded cause (gradual EDC releases) that are indivisible, the insurance policy covers the loss. Goodrich maintains, with supporting authority, that Ohio courts follow a "concurrent cause" theory of insurance recovery. Where property damage results from more than one contributing cause, and the insurance policy "expressly insures against direct loss and damage by one element but excludes loss or damage by another element, the coverage extends to the loss even though the excluded element is a contributory cause." *Andray v. Elling*, 6th Dist. No. L-04-1150, 2005-Ohio-1026, at ¶34, quoting *Gen. Am. Transp. Corp. v. Sun Ins. Office, Ltd.* (C.A.6, 1966), 369 F.2d 906, 908.

{¶122} Courts in other jurisdictions, including the Supreme Courts of Minnesota and Rhode Island, have applied the concurrent causation doctrine to situations such as this, where damages are caused by both insured and uninsured causes that are indivisible, and have concluded that there is insurance coverage in such situations. See, e.g., *Sav-o-Mat, Inc. v. Nat'l Farmers Union Property and Cas. Co.* (Aug. 25, 2005), Colo.Dist.Ct. No. 00 CV 8556; *Textron, Inc. v. Aetna Cas. and Sur. Co.* (2000), 754 A.2d 742; *SCSC Corp. v. Allied Mut. Ins. Co.* (1995), 536 N.W.2d 305.

{¶123} The decisions cited above followed the premise that once the insurer establishes that an exclusion is applicable, the burden shifts back to the insured to establish the applicability of an exception to the exclusion. Once the insured has established facts to trigger the sudden and accidental exception, however, the burden shifts back to the insurer to prove that the excluded, gradual releases of pollution were the overriding cause of the insured's damages. The insured does not have the additional burden of proving that the sudden and accidental occurrences were the sole or overriding cause of the damage, for it is ultimately the burden of the insurer to prove that damages fall within an exclusion from coverage. See, e.g., *SCSC Corp.*, 536 N.W.2d at 314. It is also the law in Ohio that "[a] defense based on an exception or exclusion in an insurance policy is an affirmative one, and the burden is cast on the insurer to establish it." *Continental Ins. Co. v. Louis Marx & Co., Inc.* (1980), 64 Ohio St.2d 399, 401, quoting *Arcos Corp. v. Am. Mut. Liability Ins. Co.* (D.C.E.D.Pa.1972), 350 F.Supp. 380, 384.

{¶124} The position taken by *SCSC Corp.* seems to be more consistent with Ohio law on concurrent causation than the California position cited by Commercial Union and the London Market Insurers. Therefore, Goodrich established to the jury that it had sustained damages due to sudden and accidental releases of EDC into the groundwater and that those sudden and

accidental releases had caused property damage that was indivisible from the damage caused by gradual releases of EDC. Absent evidence by the insurers to the contrary, Goodrich's failure to prove that the sudden and accidental releases were the sole or overriding cause of its remediation liability did not defeat its claims under the sudden and accidental exception to the pollution exclusions.

{¶125} For the reasons stated above, the trial court did not err in denying the motions for directed verdict and judgment notwithstanding the verdict filed by Commercial Union and the London Market Insurers based on the pollution exclusions in some of their policies. Commercial Unions' sixth and the London Market Insurers' seventh assignments of error are overruled.

Specificity of Trial Court Judgment

LONDON MARKET'S ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED BY ENTERING A COLLECTIVE JUDGMENT AGAINST CERTAIN LONDON MARKET INSURERS, AN ENTITY THAT DOES NOT EXIST."

LONDON MARKET'S ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED BY AWARDING AN AMOUNT AGAINST THE CERTAIN LONDON MARKET INSURERS IN EXCESS OF THEIR REMAINING SEVERAL SUBSCRIBED PORTIONS OF THE POLICY LIMITS."

LONDON MARKET'S ASSIGNMENT OF ERROR VIII

"THE TRIAL COURT ERRED BY AWARDING GOODRICH DOUBLE DAMAGES."

LONDON MARKET'S ASSIGNMENT OF ERROR IX

"THE TRIAL COURT ERRED BY FAILING TO REQUIRE GOODRICH TO SELECT A TRIGGERED POLICY AGAINST WHICH TO MAKE A CLAIM PRIOR TO ENTRY OF JUDGMENT."

LONDON MARKET'S ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED BY AWARDING POST-JUDGMENT INTEREST, AS POST-JUDGMENT INTEREST IS NOT DUE UNLESS AND UNTIL AN OBLIGATION TO PAY EXISTS."

{¶126} The London Market Insurers raise several assignments of error that have been grouped together because they all pertain to the London Market Insurers' apparent confusion about particular language in the trial court's judgment entry.

{¶127} The London Market Insurers first contend that the trial court erred in entering judgment against "Certain London Market Insurers," rather than the individual insurance companies, because no such entity exists. To avoid confusion to the court and jury, the London Market Insurers had represented themselves as a collective entity throughout these proceedings. Although the trial court's judgment again makes repeated references to the London Market Insurers as a collective entity, the trial court was also careful to list the specific London Market insurance companies against whom it was entering judgment: "Accident and Casualty Company; Commercial Union Assurance Company; Edinburgh Assurance Company; United Scottish Insurance Company; Victoria Ins. Co. Ltd.; Road Transport, GP AV; Winterthur Swiss Insurance Company; World Auxiliary Insurance Corporation Limited; and Yasuda Fire and Marine Insurance Company." The trial court's judgment entry is clear that judgment was entered against these individual insurance companies, jointly and severally with Commercial Union, and not some collective entity that does not exist. The London Market Insurers' first assignment of error is overruled.

{¶128} Through their second and eighth assignments of error, the London Market Insurers contend that the trial court erred in awarding Goodrich double damages and in entering judgment against them for $22 million because that judgment exceeds the aggregate liability

limits of its remaining policies. The London Market Insurers apparently believe that the trial court's judgment entry awards Goodrich $22 million against Commercial Union and another $22 million against the London Market Insurers. Again, the London Market Insurers seem to misunderstand the trial court's judgment.

{¶129} The trial court explicitly stated that it awarded Goodrich a single award of $22 million in compensatory damages against Commercial Union and the London Market Insurers "jointly and severally." The trial court clearly did not award Goodrich a damage judgment of $44 million, but instead awarded $22 million, for which Commercial Union and the London Market Insurers are jointly and severally responsible. The London Market Insurers' eighth assignment of error is overruled.

{¶130} Moreover, in addition to ordering that there would be joint and several liability on the damage award, the trial court repeatedly stated throughout its judgment entry that its judgment against each defendant insurer presumed selection under *Goodyear Tire & Rubber Co. v. Aetna Cas. & Surety Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, at ¶12. In *Goodyear*, the Ohio Supreme Court reversed this Court's decision that had applied a pro rata allocation of liability among insurers for a continuous injury, deciding instead to apply an "all sums" approach. The *Goodyear* court held that an insured "is entitled to secure coverage from a single policy of its choice that covers 'all sums' incurred as damages 'during the policy period,' *subject to that policy's limit of coverage*." (Emphasis added.) *Goodyear*, at ¶11.

{¶131} In other words, under *Goodyear*, Goodrich has the right to select the policy or policies under which it wishes to pursue coverage, but its right to such coverage is necessarily limited by the liability limits of the selected policies, pursuant to the explicit language of *Goodyear*. The trial court's journal entry also states repeatedly that, in the event Goodrich

chooses different coverage (coverage under the other insurer's policy or policies), a given insurer is obligated to pay up to the applicable limits of a selected policy, with interest to be calculated thereon. Therefore, the trial court did not order the London Market Insurers to pay Goodrich a damage award in excess of the aggregate limits of its remaining policies. The London Market Insurers' second assignment of error is overruled.

{¶132} Through their ninth assignment of error, the London Market Insurers contend that the trial court erred in failing to require Goodrich to select a policy for coverage before it entered judgment. The London Market Insurers merely assert that the trial court could have avoided confusion if it had required Goodrich to select a policy for coverage as "recommended" by the Ohio Supreme Court in *Goodyear*. This Court finds nothing in the *Goodyear* decision that mandates the trial court to require Goodrich to make a policy selection before it enters judgment. The London Market Insurers have failed to demonstrate any error by the trial court and their ninth assignment of error is overruled.

{¶133} Through their third assignment of error, the London Market Insurers contend that the trial court erred in awarding Goodrich post-judgment interest against it. Aside from reiterating arguments that it raised through other assignments of error, which will not be discussed again here, the London Market Insurers maintain that the trial court erred in awarding post-judgment interest against them, because they will owe no such interest unless Goodrich selects coverage under one of their policies. As explained above, the trial court stated throughout its judgment entry, and specifically pertaining to its award of post-judgment interest against the London Market Insurers, that its award presumed selection under *Goodyear*, supra, of one of policies of the London Market Insurers. The trial court further explained that "[i]f Goodrich should select different coverage, London will be required to pay up to the limits of the

coverage obligations of the selected London policy or policies with interest calculated thereon." The London Market Insurers have failed to demonstrate any error in the trial court's award of post-judgment interest and their third assignment of error is overruled.

{¶134} The London Market Insurers' first, second, third, eighth and ninth assignments of error are overruled.

Discovery of Claims Handling Materials

CROSS-ASSIGNMENT OF ERROR I AGAINST C.U.

"THE TRIAL COURT ERRED BY HOLDING BOONE DID NOT APPLY TO THE PRE-DENIAL CLAIM MATERIALS REQUESTED BY GOODRICH AND BY FAILING TO COMPEL THEIR PRODUCTION."

{¶135} Through its first cross-assignment of error against Commercial Union, Goodrich contends that the trial court erred in denying its motion to compel Commercial Union to produce certain pre-denial claims handling materials that allegedly would have supported its claim for punitive damages on the bad faith claim against Commercial Union. Goodrich argues that it was entitled to discovery of these materials pursuant to the Ohio Supreme Court's holding in *Boone v. Vanliner Insurance Co.* (2001), 91 Ohio St.3d 209.

{¶136} Citing *Boone*, 91 Ohio St.3d 213-14, the trial court did grant Goodrich's motion to compel discovery of pre-denial claims materials from Commercial Union to the following extent:

"The insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage. At that stage of claims handling, the claims files will not contain work product[.]"

{¶137} Goodrich maintains that the trial court misconstrued *Boone* and interpreted it too narrowly. Specifically, Goodrich maintains that in a bad faith claim, *Boone* requires discovery

of pre-denial materials, including materials outside the claims file and attorney work product. This Court disagrees.

{¶138} Other jurisdictions may have interpreted *Boone* to support Goodrich's position, but this Court has not. See, e.g., *Garg v. State Automobile Mut. Ins. Co.*, 155 Ohio App.3d 258, 264-265, 2003-Ohio-5960 (Second District Court of Appeals construing *Boone* more broadly). In its discovery orders, the trial court quoted directly from the *Boone* opinion and applied the syllabus law verbatim. This Court finds no error in the trial court's application of *Boone*.

{¶139} Although Goodrich quotes selected language from the *Boone* opinion that suggests that work product may also be discoverable, the *Boone* majority clearly explains its holding as it pertains to work product:

> "[W]e hold that in an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage. At that stage of the claims handling, the claims file materials will not contain work product, *i.e.*, things prepared in anticipation of litigation, because at that point it has not yet been determined whether coverage exists." *Boone*, 91 Ohio St.3d at 213-214.

{¶140} Nothing in the *Boone* holding supports Goodrich's assertion that it was entitled to discover Commercial Union's work product or materials outside the claims file. Goodrich has failed to demonstrate that the trial court construed *Boone* too narrowly or that it otherwise misapplied *Boone*. Goodrich's first cross-assignment of error against Commercial Union is overruled.

Verdicts for Other Defendants

CROSS-ASSIGNMENT OF ERROR VI AGAINST C.U.

CROSS-ASSIGNMENT OF ERROR VII AGAINST LONDON

"THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR INA ON GOODRICH'S BREACH-OF-CONTRACT CLAIM."

CROSS-ASSIGNMENT OF ERROR VII AGAINST C.U.

CROSS-ASSIGNMENT OF ERROR VIII AGAINST LONDON

"THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR CAL UNION ON GOODRICH'S BREACH-OF-CONTRACT CLAIM."

{¶141} Goodrich contends that the trial court erred in entering judgment for the Insurance Company of North America ("INA") and California Union Insurance Company ("Cal Union") on its breach of contract claims against them.

{¶142} As noted above, most of the defendant insurers settled with Goodrich before or during the trial. By the time the case went to the jury, Goodrich had breach of contract claims against four distinct defendants or defendant groups (Commercial Union, the London Market Insurers, INA, and Cal Union). The jury was given general verdict forms on the breach of contract claim against each of the four defendants and, at the same time, was given four sets of written interrogatories to answer on each separate breach of contract claim. The jury returned general verdicts for Goodrich against Commercial Union and the London Market Insurers and for INA and Cal Union against Goodrich.

{¶143} Goodrich contends that the jury's answers to the written interrogatories pertaining to INA were inconsistent with its answer to interrogatories pertaining to Cal Union and/or Commercial Union. Goodrich contends that, pursuant to Civ.R. 49(B), the trial court was required to address these inconsistencies.

{¶144} Civ.R. 49(B) provides, in relevant part:

> "When the general verdict and the answers [to written interrogatories] are consistent, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When one or more of the answers is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial."

{¶145} Goodrich has failed to demonstrate that Civ.R. 49(B) had any application here because there were no inconsistencies between any of the four general verdicts (pertaining to Commercial Union, the London Market Insurers, INA, or Cal Union) and the answers to written interrogatories that corresponded to each particular general verdict. The jury's answers to the set of interrogatories pertaining to each of the four defendants was entirely consistent with its general verdicts for INA and Cal Union, and its general verdicts for Goodrich and against Commercial Union and the London Market Insurers.

{¶146} Goodrich merely raised inconsistencies between the jury's findings on the distinct facts pertaining to the different defendants, not any inconsistency between the answers to interrogatories and the general verdict on any one defendant. Therefore, Civ.R. 49(B) was inapplicable and the trial court did not err by failing to reconcile any inconsistency in the jury's answer to written interrogatories between different defendants. The sixth and seventh cross-assignments of error against Commercial Union and the seventh and eighth cross-assignments of error against the London Market Insurers are overruled.

III.

{¶147} Goodrich's third cross-assignment of error against the London Market Insurers is sustained. The remaining assignments of error and cross-assignments of error are overruled. The judgment of the Summit County Court of Common Please is affirmed in part and reversed only insofar as it failed to award prejudgment interest against the London Market Insurers. The cause is remanded solely to address the issue of prejudgment interest against the London Market Insurers.

Judgment affirmed in part,
reversed in part,
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to all parties equally.

DONNA J. CARR
FOR THE COURT

SLABY, J.
MOORE, J.
CONCUR

APPEARANCES:

IRENE C. KEYSE-WALKER, SUSAN M. AUDEY, and KAREN ROSS, Attorneys at Law, for Appellant/Cross-Appellee.

DENNIS J. BARTEK and NATALIE M. NIESE, Attorneys at Law, for Appellee/Cross-Appellant.

BRIAN D. SULLIVAN, ROBERT V. P. WATERMAN, and THOMAS D. WATERMAN, Attorneys at Law, for Appellant/Cross-Appellee.

PAUL A. ROSE, SALLIE CONLEY LUX, and AMANDA M. LEFFLER, Attorneys at Law, for Appellee/Cross-Appellant.

LISA DEL GROSSO, Attorney at Law, for Appellee/Cross-Appellant.

STEVEN G. JANIK, Attorney at Law, for Appellee/Cross-Appellant.

ANDREW REIDY and CATHERINE SERAFIN, Attorneys at Law, for Appellee/Cross-Appellant.

DANIEL CARTER and JEFFREY RUPLE, Attorneys at Law, for Appellee/Cross-Appellant.

MICHAEL J. BAUGHMAN, Attorney at Law, for Appellee/Cross-Appellant.

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IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

2007 JAN -4 AM 9:59

SUMMIT COUNTY
CLERK OF COURTS

GOODRICH CORPORATION, Plaintiff, -vs- COMMERCIAL UNION INSURANCE COMPANY, et al., Defendants.	)	CASE NO. CV 1999-02-0410 JUDGE BOND **FINAL JUDGMENT ENTRY AS TO COMMERCIAL UNION INSURANCE COMPANY AND CERTAIN LONDON MARKET INSURANCE COMPANIES**

This matter came on to trial to a jury and to the Court on December 6, 2005. The jury returned its verdicts and interrogatory answers on January 18, 2006. This Court conducted a hearing on May 25 and May 26, 2006, upon various issues reserved for the Court, and it has considered various briefs and arguments presented by the parties since the discharge of the jury.

In accordance with the verdicts and interrogatory answers of the jury and this Court's various decisions filed on July 21, 2006, and November 7, 2006, the Court hereby enters final judgment in favor of Goodrich Corporation and against Commercial Union Insurance Company, nka One Beacon America Insurance Company ("Commercial Union"), and Certain London Market Insurance Companies ("London"). The London Market Insurance Company Defendants which remain in this case, and against which this final judgment is entered, are Accident and Casualty Company; Commercial Union Assurance Company; Edinburgh Assurance Co.; United Scottish Insurance Company Limited; Victoria Ins. Co. Ltd.; Road Transport, GP AV; Winterthur Swiss Insurance

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Company; World Auxiliary Insurance Corporation Limited; and Yasuda Fire and Marine Insurance Company. Final judgment is entered as follows:

1. The Court enters judgment as compensatory damages against Commercial Union and London, jointly and severally, in the amount of $22,000,000, which includes: (a) remediation costs through September 30, 2005, for the Calvert City, Kentucky, environmental site in the amount of $20 Million; and (b) defense costs through September 30, 2005, for the underlying actions concerning the Calvert City, Kentucky, environmental site in the amount of $2 million.
2. The Court further enters judgment against Commercial Union for (a) interest upon the amount of $22,000,000 through May 25, 2006 in the amount of $19,661,893.41; and (b) interest upon the amount of $2 million through May 25, 2006, in the amount of $802,939.21. This calculation presumes selection under *Goodyear Tire & Rubber Co. v. Aetna Cas. & Surety Co.*, 95 Ohio St. 3d 512, 517 (2002), by Goodrich of Commercial Union coverage that attaches at $20 million and provides indemnity limits of at least $20 million. If Goodrich should select different coverage, Commercial Union will be required to pay up to the limits of the coverage obligations of the selected Commercial Union policy or policies with interest to be calculated thereon.
3. The Court further enters judgment against Commercial Union for interest upon the damages referenced in paragraph 1, above, in the amount of $3,616.43 *per diem* from May 26, 2006, until such time as the judgment for damages referenced in paragraph 1 is satisfied. If the rate of statutory interest currently provided by Ohio R.C. 1343.03 and R.C. 5703.47 is modified after the entry of judgment, this *per diem* rate will be

adjusted to reflect any such modification. This calculation presumes selection under *Goodyear Tire & Rubber Co. v. Aetna Cas. & Surety Co.*, 95 Ohio St. 3d 512, 517 (2002), by Goodrich of Commercial Union coverage that attaches at $20 million and provides indemnity limits of at least $20 million. If Goodrich should select different coverage, Commercial Union will be required to pay up to the limits of the coverage obligations of the selected Commercial Union policy or policies with interest to be calculated thereon.

4. The Court further enters judgment against London for post-judgment interest in the amount of $3,616.43 *per diem* from the date that this judgment is entered until such time as the judgment for damages referenced in paragraph 1, above, is satisfied. If the rate of statutory interest currently provided by Ohio R.C. 1343.03 and R.C. 5703.47 is modified after the entry of judgment, this *per diem* rate will be adjusted to reflect any such modification. This calculation presumes selection under *Goodyear Tire & Rubber Co. v. Aetna Cas. & Surety Co.*, 95 Ohio St. 3d 512, 517 (2002), by Goodrich of London coverage that attaches at $20 million and provides indemnity limits of at least $20 million. If Goodrich should select different coverage, London will be required to pay up to the limits of the coverage obligations of the selected London policy or policies with interest to be calculated thereon.
5. The Court awards Goodrich damages against Commercial Union in the amount of $12,035,102.95 as attorney fees and expenses. The Court further holds that London is jointly and severally liable with Commercial Union to Goodrich for 88% of such fees and expenses, and it correspondingly awards Goodrich damages against London for the amount of $10,590,889.83. The Court further awards interest to Goodrich

and against Commercial Union upon such attorneys' fees and expenses through May 25, 2006, in the amount of $3,251,972.58, and interest for the period after May 25, 2006, in the amount of $1,978.34 *per diem*, and it awards interest to Goodrich and against London upon such attorneys' fees and expenses in the amount of $1,740.96 *per diem* from the date that this judgment is entered until such time as the judgment against London for damages referenced in this paragraph is satisfied. If the statutory interest currently provided by Ohio R.C. 1343.03 and R.C. 5703.47 is modified after the entry of judgment, the *per diem* rates reflected in this paragraph will be adjusted to reflect any such modification. Goodrich may recover the damages reflected in this paragraph against Commercial Union or London, or both, as Goodrich chooses, until such time as it has obtained a full recovery of all such damages.

6. The Court further declares and adjudges that Commercial Union and London are required to pay to Goodrich Corporation the remediation and defense costs it has incurred or will incur subsequent to September 30, 2005, for cleaning up the Calvert City, Kentucky, site and for defending the underlying actions concerning the Calvert City, Kentucky, site in accordance with any of their contracts of insurance selected by Goodrich Corporation under *Goodyear Tire & Rubber Co. v. Aetna Cas. & Surety Co.*, 95 Ohio St. 3d 512, 517 (2002). Further, Commercial Union is required to pay statutory interest upon such costs from the date they are incurred by Goodrich, and London is required to pay statutory interest upon such costs from either the date they are incurred by Goodrich or the date of this entry, whichever is later.
7. The Court retains jurisdiction of this matter for purposes of the determination and enforcement of this judgment.

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This Final Judgment Entry resolves all remaining claims as to all remaining parties and is final and appealable.

IT IS SO ORDERED.

JUDGE JANE BOND

Pursuant to Civ.R. 58(B), the Clerk of Courts shall serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.

JUDGE JANE BOND

cc: Attorney Robert V.P. Waterman, Jr.
Attorney Brian D. Sullivan
Attorney Paul A. Rose
Attorney Dennis J. Bartek

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

GOODRICH CORPORATION fka THE B. F. GOODRICH COMPANY Plaintiff -vs- COMMERCIAL UNION COMPANY, et al. Defendants	CASE NO. CV 99 02 0410 JUDGE BOND **RULING ON MOTION FOR SETTLEMENT CREDITS**

This matter is before the court on motion of Defendant Commercial Union Insurance Co. for settlement credits to be allocated by the court. Settlements were reached with primary and excess insurers for claims arising from environmental pollution at the Calvert City site and which occurred over a number of years and under differing factual circumstances. Plaintiff B.F. Goodrich Co. anticipates incurring future costs to remedy the ongoing pollution clean-up and has asserted such claims in this action.

Trial proceeded with verdicts and interrogatories returned regarding the non-settling insurers, Commercial Union Insurance Co. and certain London Market Insurers. Interrogatories established compensatory damages payable in the amount of $40 million as past property damage and $2 million for attorney fees expended in defense of legal proceedings, other than this suit, related to the pollution. Commercial Union Insurance Co. was found to have acted in bad

faith and attorney fees were awarded as compensatory damages for the bad faith. The bad faith claim against certain London Market insurers was dismissed.

The settlement agreements reached by B.F. Goodrich and multiple insurers, both primary and excess, have been filed under seal with the court. A number of those agreements were provided to Commercial Union Insurance Co. when the settling insurer agreed to disclosure.

I.

This court does not consider for any purpose the fact that Commercial Union Insurance Co. did not settle and chose to exercise its right to trial. The decision to proceed to trial is not "intransigence" or in some way reprehensible conduct deserving of sanction. Whether a settlement is reached between any two parties represents a calculated risk that the benefits of a settlement will outweigh the possible detriments of a trial and its resulting verdict. No party should be judicially punished for proceeding to trial.

However, well-established law does favor settlement. The benefits of settlement to the parties, the legal system and the public have been exhaustively set forth in the case law and the court will not regurgitate them here. To this end, the legal principles adopted by the courts should promote settlement and not create disincentives. Principles of law create expectations for the parties. They then rationally consider these in calculating the risks of the various courses of action available to them.

The parties acknowledge that there is no controlling law on allocating settlement credits in the State of Ohio. Cases have been cited which address various collateral issues but

these are distinguished on their facts and provide little guidance in this developing area of the law.

Settlement credits have been found to be applicable in assuring equitable results when more than one insurer is involved with an insured's claims for damages. The basis for settlement credits is the foundational principle that an injured party should only receive compensation for the damages incurred and anything received in addition to that is a "double recovery." Therefore, if a plaintiff receives funds for its damages from one defendant, another defendant, though equally responsible, should not be compelled to pay the same damages again. The respective obligations of such defendants are balanced with rights of set-off and contribution.

Application of a settlement credit assumes that the compensation paid by each defendant is for the same damages. Obviously the need to preclude double recovery does not arise if the two defendants are separately liable for different types of damages.

In the matter before the court, B.F. Goodrich argues that the issue of settlement credits is never reached because the funds to be paid in settlement are for damages and risks other than those set forth in the jury verdict rendered against Commercial Union Insurance Co. and certain London Market Insurers. Therefore, B.F. Goodrich argues there is no double recovery to be prevented.

Commercial Union Insurance Co. responds to this argument by stating that since the settlement agreements have not all been presented to it, it cannot be established that the settlements are not for the same damages within the jury verdict. Defendant further argues that the terms of those settlement agreements which it has received fail to specifically allocate settlement proceeds to claims other than the damages awarded herein and such failure entitles

defendant to credit or setoffs for the settlements in their entirety. If allocations have been made, Commercial Union argues in the alternative that such allocations should be disregarded by the court and that as a nonparty to the agreements, Commercial Union is not bound by them.

Commercial Union also argues that if the settlements include future damages, such damages may be paid by another entity and not B.F. Goodrich and speculative future claims do not justify denying settlement credits or setoffs now.

Commercial Union also claims that failing to allow the settlement credits allows B.F. Goodrich to recover damages in excess of the jury verdict. In essence what is argued is that the jury verdict on past damages should be applied as a limitation to benefit Commercial Union -- against which the verdict was rendered -- to the detriment of B.F. Goodrich in whose favor the verdict was rendered.

The fact that the plaintiff sought more damages than were awarded by the jury does not preclude it receiving funds in excess of the verdict from settling insurers. This is precisely the risk that the parties evaluated in determining the settlement terms. Commercial Union chose not to settle on any terms, but now faced with a verdict against it, seeks to avail itself of the benefit of the settlements of other insurers. Once the laundry comes out of the wash, Commercial Union uses the dollars of the settling insurers to pay the verdict entered against it.

Considered in isolation, each of the individual propositions of Commercial Union appears to have merit and to be supported by case law. It is only when the full outcome is realized that the true act of prestidigitation is revealed. Commercial Union, after a long and complex trial costing hundreds of thousands of dollars which resulted in a $42 million verdict against it, would pay nothing for these damages, and the settling insurers who amicably resolved

their claims would pay the entire damage claim -- to the detriment of the plaintiff who prevailed at trial.

Such a result, if adopted as the law in the State of Ohio, would instruct future insurers to avoid settlement, go to trial and expect to reap the benefit of the settlements entered into by any of their less sophisticated or hapless brethren. The insured plaintiffs would be foolish to enter settlement agreements which may then be used to diminish their recovery.

It is instructive that other states have rejected this shell game. See generally, E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., S.D.N.Y. No. 82 CIV 7327, unreported, 1997 WL 251548 (May 13, 1997), Weyerhaeuser Company v. Commercial Union Ins. Co., 15 P.3d 115 (Wash. 2001), Insurance Company of North America v. Kayser-Roth Corp., 770 A.2d 403 (R.I. 2001).

The better approach is to give the plaintiff the benefit of its bargained-for settlements, let the non-settling defendants proceed to trial and take the risk of the outcome. If an insurer thinks it is entitled to contribution from other insurers, let it proceed against them. The law should provide an incentive for multiple insurers to join together to fashion a reasonable settlement which does not accord a double recovery and which recognizes a shared interest in the resolution of claims without the onus of litigation.

In respect to the settlement agreements before the court, it is the conclusion of the court that they include and discharge liabilities other than solely past costs incurred by B.F. Goodrich. They are resolving claims for future costs, terminating rights and defenses of both parties, concluding the litigation and risks associated with it, including future appeals, and importantly, providing finality and fiscal certainty. The settling parties have jointly negotiated the value of these rights and risks. The court will not consider the amounts of these settlements

as excessive in respect to the damages awarded by the jury which was based upon a much narrower scope of evidence and issues.

The court does not find that the jury determination of damages is based upon the same issues or facts as encompassed by the settlements. Therefore, there is no double recovery to be avoided and settlement credits are not applicable on that basis.

The court further finds that settlement credits should not be applicable where a plaintiff has entered into good faith agreements with primary and excess insurers and the application of credits would have the effect of completely abrogating the obligation of a non-settling insurer for payment of a damage award by a jury when the insurer has proceeded to trial.

II.

The court must also consider the effect, if any, of the finding of bad faith on the issue of settlement credits. Commercial Union argues that the fact that it has been found to have acted in bad faith has no relevance to its entitlement to settlement credits.

The legal framework for the principle of settlement credits has been addressed above. It is not grounded in any statutory prescription but in the common law and the equitable powers of a court to fashion relief which is fair, just and proportionate. Courts have established general principles to achieve these ends and upon occasion the principles may be inapposite. When this occurs, there must be a balancing of the aims sought and consideration of the impact of future application of the decision as the law evolves.

Bad faith is a judicial sanction created in response to the unique relationship between an insured and insurer. The relationship, while not rising to the level of a true fiduciary status, is recognized to be of a higher order than an arms-length traditional contract. The unequal relative

positions of the parties in an insured relationship must also be considered. Protection of the insured is one of the primary purposes of the doctrine of bad faith.

When an insurer has been found to have acted in bad faith, the law permits damages to be awarded and intends by this sanction to warn others against such conduct. If an insurer has acted in bad faith, should the equitable purposes of avoiding a double recovery be used to enable avoidance of the payment of damages to the injured insured?

Such a result would not further the purposes of the law or promote fair and open dealings between insurer and insured.

The court finds that an insurer who is found to have acted in bad faith may not be awarded settlement credits to abrogate payment by the insurer of the damages awarded at trial.

Commercial Union Insurance Co. is obligated only in accordance with the terms of its policy for payment of covered costs in excess of the $20 million primary coverage of the American Motorists Insurance Co. policy up to the policy limit of $20 million. Considering the policy terms and the verdict of the jury, Commercial Union is only obligated to pay what it contracted to pay and what the law requires.

Judgment shall be rendered accordingly.

It is so ordered.

JUDGE JANE BOND

cc: Attorney Robert V. P. Waterman
Attorney Paul A. Rose
Attorney Dennis J. Bartek

JB/ctm
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CLERK OF COURTS

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

GOODRICH CORPORATION fka THE B. F. GOODRICH COMPANY	)	CASE NO. CV 99 02 0410
Plaintiff	)	JUDGE BOND
-vs-	)	
COMMERCIAL UNION COMPANY, et al.	)	**RULING ON MOTION FOR PREJUDGMENT INTEREST**
Defendants	)	

This matter is before the court on motion of Plaintiff B.F. Goodrich for prejudgment interest. The law related to this issue is complex, convoluted and contradictory. The threshold question is: shall prejudgment interest be granted? If so, when does the interest calculation begin to run and on what amount of damages?

The initial decision to award prejudgment interest is within the discretion of the court. The Ninth District Court of Appeals stated: "A trial court's determination of whether to grant prejudgment interest will be upheld absent an abuse of discretion." Vilagi v. Allstate Indem. Co., 2004 Ohio 4728 (9th Dist. 2004). The court went on to state: "A trial court only abuses its discretion if it makes more than simply an error in judgment; the court must act in an unreasonable, arbitrary, or unconscionable manner." Id.

The applicable statutory provision is R.C. 1343.03(A) which states:

> In cases other than those provided for in sections 1343.01 and 1343.02 of the Revised Code, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract. Notification of the interest rate per annum shall be provided pursuant to sections 319.19, 1901.313 [1901.31.3], 1907.202 [1907.20.2], 2303.25, and 5703.47 of the Revised Code.

This section appears to set up two classifications for entitlement to interest. The first includes money due and payable upon any: bond, bill, note or other instrument of writing, any book account, any settlement between parties, and all verbal contracts. The second includes judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction. Each of these classifications produces a sum certain for the calculation of the interest. One classification is pre-adjudication and the other is post-adjudication. The terms of the statute then go on to specify how to determine the rate of calculation of the interest. Nowhere does the statute expressly state when the interest is to begin running.

The Ohio Supreme Court in Landis v. Grange Mutual Ins. Co. (1998), 82 Ohio St.3d 339, 341, concluded that underinsured motorists coverage claims are contract claims arising from tortious conduct. The Court then concluded prejudgment interest may be awarded under R.C.

1343.03(A) for an underinsured motorist claim, since benefits were due and payable based on an instrument of writing, the insurance contract.

The question then becomes when did the money become due and payable. In other words, on what date should the prejudgment interest accrue. The Supreme Court deferred discretion to the trial court of when to begin calculation of prejudgment interest. The court stated at p. 342:

> Whether the prejudgment interest in this case should be calculated from the date coverage was demanded or denied, from the date of the accident, from the date at which arbitration of damages would have ended if Grange had not denied benefits or some other time based on when Grange should have paid Landis is for the trial court to determine.

In exercising discretion, the Ohio Supreme Court provided some guidance in Royal Elec. Constr. Corp. v. Ohio State Univ., 73 Ohio St. 3d 110 (1995). In its opinion the court sought to simplify the determination of when prejudgment interest should be awarded. The court abrogated the historic distinction of whether the claim could be classified as "liquidated," "unliquidated" or "capable of ascertainment."

The court stated: "Rather, in determining whether to award prejudgment interest pursuant to R.C. 2743.18(A) and 1343.03(A), a court need only ask one question: Has the aggrieved party been fully compensated?" Id. at p. 116.

The court gives its reasoning as follows:

> An award of prejudgment interest encourages prompt settlement and discourages defendants from opposing and prolonging, between injury and judgment, legitimate claims. Further, prejudgment interest does not punish the party responsible for the underlying damages as suggested by appellees, but rather, it acts as compensation and serves ultimately to make the aggrieved party whole...Indeed, to make the aggrieved party whole, the party should be compensated for the lapse of time between accrual of the claim and judgment.

...

> Accordingly, we hold that in a case involving breach of contract where liability is determined and damages are awarded against the state, the aggrieved party is entitled to prejudgment interest on the amount of damages found due by the Court of Claims. The award of prejudgment interest is compensation to the plaintiff for the period of time between accrual of the claim and judgment, regardless of whether the judgment is based on a claim which was liquidated or unliquidated and even if the sum due was not capable of ascertainment until determined by the court.

The case arose as a result of contract claims by the plaintiff contractor against Ohio State University for the construction of two buildings on the campus. The case was litigated in the Court of Claims and the plaintiff prevailed. The trial judge who awarded prejudgment interest found the damages sustained by the plaintiff accrued (became due and payable) at the time the contractor had substantially completed each of the buildings. Two separate dates were found to be the starting point for the interest calculations. The court found this to be a reasonable basis and affirmed the judgment.

Applying these principles to the case before the court, there is no date certain when a total sum of money became due and payable. A contract of insurance such as this is not analogous to a bill on account or a contract for the payment of goods or services upon delivery. Once the clean-up costs paid by B.F. Goodrich exhausted the coverage of the underlying insurer, AMICO, the obligation of Commercial Union was triggered under the terms of its contract of insurance. It was then obligated to reimburse B.F. Goodrich or directly pay its contractors as on-going covered clean-up costs were incurred.

Plaintiff has constructed an elaborate timeline to attempt to relate certain costs to various events in the history of the claim. The plaintiff seeks a rolling calculation of daily interest based on invoices paid over the period of time when plaintiff was incurring costs for the

clean-up of the site. Plaintiff also seeks interest for attorney fees and costs as they were incurred. It seeks interest for "clean up costs proven at trial" in excess of $42 million. See Plaintiff's Post-Trial Exhibit 89. Based on the jury interrogatories, not all these costs were allowed.

Plaintiff acknowledges that the first $20 million in costs is not the obligation of Commercial Union and makes no claim for prejudgment interest for costs incurred prior to January 1, 1992. The case is analogous to the underinsured motorist who seeks payment from his excess insurer when his primary insurance is exhausted. Here the settlement with AMICO was effectively the exhaustion of the underinsurance.

The date of settlement with AMICO was June 30, 1995. The settlement unambiguously pulled the trigger for coverage under the terms of Commercial Union's policy which "followed form." Demand for coverage by B.F. Goodrich and notice to Commercial Union under the policy terms had been given long before June 30, 1995. Commercial Union had ample opportunity to investigate the facts, calculate its risks and determine its course of action. The court notes that B.F. Goodrich had been paying substantial amounts of money for clean-up costs and attorney fees before June 30, 1995. The loss of these funds for payment of its operating expenses and for general business purposes is itself a separate classification of damage.

However, the court also considers that Commercial Union Insurance Co. had a right to assure that the underlying insurance was exhausted before its own liability was triggered. The court finds the date of June 30, 1995 to be a reasonable date to begin compensating B.F. Goodrich for its losses. This serves the purposes set forth by the Ohio Supreme Court in Royal Elec., Supra. See also Horstman v. Cincinnati Insurance Company, Second App. Dist. unreported No. 18430 (Nov. 17, 2000).

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The court awards prejudgment interest against Commercial Union Insurance Co. on the compensable damages proven of $20 Million and the attorney fees as awarded by the court. Interest is to be calculated from June 30, 1995 to the date of payment of the judgment in accordance with R.C. 1343.

Judgment will be granted accordingly.

It is so ordered.

JUDGE JANE BOND

cc: Attorney Robert V. P. Waterman
Attorney Paul A. Rose
Attorney Dennis J. Bartek

JB/ctm
99-0410-a

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

GOODRICH CORPORATION fka THE B. F. GOODRICH COMPANY Plaintiff -vs- COMMERCIAL UNION INSURANCE CO., et al. Defendants	CASE NO. CV 1999 02 0410 JUDGE BOND **ORDER FOR ATTORNEY FEES**

This matter came on for hearing on May 25, 2006 and was concluded on May 26, 2006. Post-hearing briefs were submitted. A jury award of attorney fees to Plaintiff B.F. Goodrich Company was made by jury interrogatories. The award of attorney fees was made as compensatory damages in accordance with Interrogatory No. 60. The compensatory damages were awarded against Defendants Commercial Union Insurance Company and Certain London Market insurers.

A separate finding of bad faith was made against Commercial Union Insurance Company in accordance with Interrogatory No. 1. A finding that compensatory damages had been proven arising from bad faith was made in accordance with Interrogatory No. 4. In determining the amount of compensatory damages, the jury was instructed not to include any amount for attorney fees in the determination of damages. Interrogatory No. 5 specified the

amount of compensatory damages as zero. With this finding, the jury awarded only the attorney fees as compensatory damages for the bad faith claim.

The court finds the answers to the interrogatories are not inconsistent. Since the jury was instructed it could not determine the amount of attorney fees awarded, if it decided that only the attorney fees should be awarded, the sole answer it could make in response to Interrogatory No. 5 would be zero.

The jury awarded the attorney fees as compensatory damages for bad faith and not as punitive damages. It awarded no amount as punitive damages in accordance with Interrogatory No. 6.

Upon the evidence, stipulations and briefs, the court makes the following findings of fact and conclusions of law.

In determining attorney fees, the court must apply the standard set forth in Bittner v. Tri-County Toyota (1991), 58 Ohio St.3d 143. Since the plaintiff proceeded on multiple distinct causes of action with thirty-eight defendants, the court must determine, if possible, which claims were successfully established against Defendant Commercial Union Insurance Company and certain of the London Market Insurers. See Hensley v. Eckerhart (1983), 461 U.S. 424.

The court must determine the number of hours reasonably expended in pursuing the successful claims. The evidence must establish with reasonable specificity how the hours claimed were spent. After a calculation of reasonable hours expended, the court must establish a reasonable hourly fee. It is necessary that the appropriate level of legal expertise be used for different services rendered. The use of paralegal, associated and other support personnel must be specified to assure service in a cost efficient manner.

The award of fees may include reasonable expenses for trial exhibits and payment of expert fees as necessary. Filing fees and deposition costs, including transcripts for use at trial, are reasonable and necessary costs.

The court must consider the novelty of issues and skill necessary to perform the services properly, the extent and length of the professional relationship with the clients and whether counsel was precluded from accepting other work as a result of pursuing these claims, fees customarily charged in this locality for similar legal services, the experience, reputation, and ability of the lawyers, the amount involved, the results obtained and whether any fee agreement was fixed or contingent. See Freeman v. Crown City Mining (4th Dist. 1993), 90 Ohio App.3d 546.

Some of the plaintiff's attorneys did not have a lengthy relationship with the client but that is inherent in the nature of such claims. There was no evidence that other work was precluded although expending this number of hours on one case since December of 1997 necessarily places pressure on counsel and affects the workload.

The court must consider the result achieved for the client. Although thirty-five insurance companies were defendants in the suit, settlements were reached with all but Commercial Union Insurance Company and certain London Market insurers. Many of the settlements were reached only after the trial had commenced. Two resulted after the trial concluded but before judgment was rendered. Time spent on preparing specific claims when the plaintiff does not prevail on those issues is not recoverable.

Here, however, there is extensive overlap with the evidence related to all the claims, and the testimony presented at trial was necessary and relevant to all the multiple defendants and the multiple causes of action. The facts are inextricably intertwined between the claims against the numerous defendants. It is impossible to accurately segregate the hours of service related to

only one particular claim against one particular defendant. In addition, the proceedings against underlying insurers were certainly instrumental in achieving the settlements with insurers whose liability attached after the exhaustion of those underlying policies.

The court further finds that while B.F. Goodrich Company did not uniformly prevail, it recovered by judgment or settlement against all but a small number of the defendant insurers. It is overwhelmingly the prevailing party against Commercial Union Insurance Company and prevails to a lesser degree against certain London Market insurers.

The court finds that legal work of this nature is a specialty that requires skills beyond the normal practice skills of the average attorney. The court further finds that the plaintiff's attorneys have specialized in claims of this nature and have worked in this area of the law extensively.

Originally two cases were filed in the federal district courts, one in the northern district of Ohio and the other in the western district of Kentucky. The cases were subsequently consolidated, and upon consolidation and realignment of the parties, a judgment of dismissal without prejudice was ordered for lack of complete diversity. Local counsel was retained by plaintiff for representation in the suit in the western district of Kentucky.

During the federal litigation, a complaint was filed in state court in Ohio. This action was dismissed as the federal actions proceeded. Once the consolidated federal case was dismissed, a second state suit was commenced. Pretrial work included motions for summary judgment and extensive discovery issues. Sixty-nine fact witnesses and thirteen expert witnesses were deposed in many locations throughout the United States and London. Appeal of the summary judgment rulings resulted in plaintiff's prevailing in the Ninth District Court of Appeals and the case was remanded for trial. The Ohio Supreme Court declined jurisdiction.

The trial preparation required an extraordinary number of exhibits and complex organization of the exhibits with detailed chronology and cross-referencing for the separate defendants. The evidence stretched over fifty years of operation of the Calvert City site where the pollution occurred. Multiple pretrial and *in limine* motions were presented by all parties necessitating replies and hearings. Multiple attempts at mediation were conducted in different venues. Some settlements were achieved with certain defendants. The most significant was with the primary insurer, AMICO.

The trial itself continued over a period of seven weeks with multiple fact and expert witnesses. The issues were vigorously defended by counsel for the eighteen insurance companies that proceeded to trial. Defense counsel for the various insurance companies coordinated their defense and allocated certain issues and witnesses among the defense attorneys to implement their strategy and to increase their efficiency in the use of their time. They also generated a joint defense group common defense fund in the amount of $606,487.00 for their expenses.

Counsel for the defendant insurers were from law firms located throughout the United States with additional local counsel appearing from time to time. The specialized nature of this area of the law promotes the use of counsel to provide representation in the various venues wherever claims such as these arise. Using both local and specialized "national" counsel is a common practice in this area of the law.

Defendants do not dispute the reasonableness or necessity of the hours expended by plaintiff's counsel. The primary issue raised by the defense is the use of "national" counsel to prosecute the case together with experienced, specialized local counsel. Defendants argue that the use and hourly rates of "national" counsel are both unreasonable and unnecessary and that a fair award would be at an hourly rate prevalent in this local area.

The normal standard for determining a reasonable hourly rate is the compensation prevailing in the locality for lawyers of equivalent skill and experience. This, however, is not a normal case.

It is unreasonable to expect plaintiff to bring a suit such as this with only local counsel when specialized defense counsel will promptly be dispatched from top law firms all over the nation. Without disparaging in any respect the skills and experience of local counsel, plaintiff needs to assemble a team of lawyers who can litigate on the same skill level as the opponents.

The court further finds that it is not reasonable to pay local hourly rates to lawyers who practice in other localities with significantly higher expenses and compensation levels. Where, as here, the nature of the case and the prevailing practice require specialized representation, counsel should be compensated at the reasonable rates they would receive litigating the case in their own locality.

In evaluating the hours expended, the court has considered whether the hours claimed have been documented with sufficient specificity as to the work performed to assure a reasonable and accurate calculation. It is also necessary that the efficient use of time has been achieved by assigning work to individuals who have the appropriate skills for the task. Appropriate use of associate lawyers and paralegals has been made.

The court finds that the hourly rates of plaintiff's counsel were reasonable, the hours expended were necessary for the litigation and that certain costs were necessary. The court will not allow costs for expert witnesses who were not called at trial nor will the court allow costs for a jury consultant or for couriers. These costs are not necessary.

The court will not allow travel or meal expenses for purposes of taking depositions. The court will not allow living or meal expenses incurred during trial or for travel expenses for

the purpose of attending trial. Expenses such as these are not capable of evaluation as to their reasonableness. The court notes that the hourly rate of compensation for counsel is sufficient for living and travel expenses.

The court will not allow miscellaneous expenses for unspecified staff overtime, offsite storage, "trial support expenses" or copier rental. The court will not allow expenses denominated only for "mediation". The court will not allow expenses incurred for fact witnesses. The court will not allow transcribing and deposition costs for any witness whose deposition was not used in evidence.

The plaintiff is seeking allowance of certain costs that would normally be considered as "overhead" in the provision of attorney services. These costs are typically included in the hourly fee rates charged. Such costs include telephone, fax, postage, and library fees. The court finds that these fees are not separate expenses which should be allowed in an award of attorney fees and costs.

The court finds that certain trial expenses and expenses incurred in the management of the extraordinary number of exhibits are proper. Reasonable expenses for copying and transporting the exhibits, binding them and numbering them are also allowable. The court finds that number of exhibits and the time period covered by the evidence are overriding considerations justifying allowance of these costs which would not be permitted otherwise. Hagemeyer v. Sadowski,(1993), 86 Ohio App.3d 563.

While the parties entered into certain stipulations in regard to the evidence (See Stipulations of May 25, 2006), the court is not bound by such stipulations but must make its own independent evaluation of whether the claimed fees and expenses meet the required legal standard.

It is the conclusion of the court that both Commercial Union Insurance Company and certain London Market insurers are liable for attorney fees and costs. However, the court notes the bad faith finding was solely against Commercial Union Insurance Company. Therefore, the time and expense plaintiff expended in furtherance of the bad faith claim should not result in fees and costs to the London Market insurers who prevailed on that claim.

It is impossible to determine with mathematical precision the time and costs attributable solely to the bad faith claim. However, the court notes that seven interrogatories out of a total of sixty interrogatories were solely related to the bad faith claim. Considering the evidence and the issues of law, the court finds that to be a reasonable and proportionate allocation of the attorney fees and costs related to the bad faith claim. The court concludes that approximately twelve percent of the attorney fees and costs are attributable to the bad faith claim and shall not be awarded against certain London Market insurers.

Plaintiff B.F. Goodrich shall submit to the court a summary of hours, rates and costs consistent with this order.

It is so ordered.

JUDGE JANE BOND

cc: Attorney Robert V.P. Waterman, Jr.
Attorney Paul Rose
Attorney Dennis Bartek
dle 99-0410

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IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

GOODRICH CORPORATION fka THE B. F. GOODRICH COMPANY	)	CASE NO. CV 1999 02 0410
Plaintiff	)	JUDGE BOND
-vs-	)	
COMMERCIAL UNION INSURANCE CO., et al.	)	**JUDGMENT ENTRY**
Defendants	)	

- - -

This matter is before the court on Plaintiff B.F. Goodrich's claim for declaratory relief. Plaintiff seeks a declaration construing the liability of Defendant Commercial Union Insurance Company on anticipated claims for future damages at the Calvert City site.

The courts finds upon the evidence, the answers to interrogatories and the pleadings, that Plaintiff has established the damages at the Calvert City site are covered damages in accordance with the terms of the contract of insurance, that such damages continue to accrue and that Plaintiff may incur liability for such damages and that Commercial Union Insurance Company is obligated to pay such claims as they are presented to it in accordance with the contract of insurance.

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The court further states that the jury verdict does not establish a limit on damages since they were to determine only the amount of damages incurred to date and were not asked to determine an amount of future damages.

This court retains jurisdiction for the determination and enforcement of its judgment.

It is so ordered.

JUDGE JANE BOND

cc: Attorney Robert V.P. Waterman, Jr.
Attorney Paul Rose
Attorney Dennis Bartek
dle 99-0410-3

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

B.F. GOODRICH COMPANY

Appellant

v.

COMMERCIAL UNION INS., et al.

Appellees
C.A. No. 20936

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 1999 02 0410

DECISION AND JOURNAL ENTRY

Dated: September 25, 2002

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BATCHELDER, Judge.

{¶1} Appellant, The B.F. Goodrich Company ("Goodrich"), appeals from a judgment of the Summit County Court of Common Pleas that granted summary

judgment to several defendant insurers on the issue of coverage ("the excess insurers")[1]. We reverse and remand.

{¶2} On February 2, 1999, Goodrich filed a complaint against several insurance carriers with whom it had held umbrella and excess liability insurance policies from 1955 through 1986. In addition to claims for breach of contract and bad faith, Goodrich sought a declaration that each of these insurers had a duty to defend and/or indemnify it against claims filed by the federal government under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the Resource Conservation and Recovery Act ("RCRA"). The environmental claims stemmed from soil and groundwater contamination caused by Goodrich's prior waste water disposal practices at its manufacturing facility in Calvert City, Kentucky.

{¶3} Goodrich notified most of its excess insurers about its potential environmental liability at its Calvert City site during June of 1989. One defense to coverage raised by many of the excess insurers was that Goodrich's notice to them was unreasonably late. They claimed that Goodrich knew at a much earlier date, and thus had a duty to notify them then, that its environmental liability at this site would exceed the coverage limits of its primary insurance policies. According to

[1] Although there are other excess insurers in this case, for ease of discussion, we will use the term "the excess insurers" to refer only to the appellees in this case, the excess insurers who were granted summary judgment, and will confine our discussion to those insurers.

Goodrich, it was not until 1989 that it estimated its liability for government-required cleanup to total approximately $17 million. The excess insurers, however, maintained that Goodrich knew during the early to mid-1980s that its environmental liability at the site would exhaust its primary insurance coverage and that, therefore, its notice to them was unreasonably late. The excess insurers moved for summary judgment on that ground as well as others.

{¶4} The trial court granted summary judgment to the excess insurers, finding that Goodrich's notice to them was unreasonably late. Goodrich appeals, raising three assignments of error.

First Assignment of Error

{¶5} "THE TRIAL COURT INCORRECTLY GRANTED SUMMARY JUDGMENT ON CLAIMED LATE NOTICE."

{¶6} As its first assignment of error, Goodrich contends that the trial court erred in granting summary judgment to the excess insurers. Pursuant to Civ.R. 56(C), summary judgment is proper if:

{¶7} "(1) [N]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that

conclusion is adverse to the nonmoving party." *State ex. rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589.

{¶8} Doubts must be resolved in favor of the nonmoving party. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 686. A party moving for summary judgment bears an initial burden of pointing to "some *evidence* of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. (Emphasis sic.) When a moving party has met this initial burden, the nonmoving party "may not rest on the mere allegations of her pleading, but [its] response *** must set forth specific facts showing the existence of a genuine triable issue." *State ex rel. Burnes v. Athens Cty. Clerk of Courts* (1998), 83 Ohio St.3d 523, 524.

{¶9} All evidence must be construed in favor of nonmovant. In ruling on a motion for summary judgment the trial court is not permitted to weigh the evidence or choose among reasonable inferences. *Dupler v. Mansfield Journal Co.* (1980), 64 Ohio St. 2d 116, 121. Rather, the court must evaluate the evidence, taking all permissible inferences and resolving questions of credibility in favor of the non-moving party. Id.

{¶10} The excess insurers separately moved for summary judgment. Commercial Union Insurance Company filed the primary motion, asserting that Goodrich had no coverage under the applicable policies for several reasons: (1)

Goodrich's notice to the excess insurers was unreasonably late; (2) the known loss doctrine prevented recovery; (3) there was no "occurrence" under the policies because Goodrich expected the damage to occur; (4) a pollution exclusion in some of the policies prevented recovery; and (5) Goodrich's bad faith claim failed as a matter of law because the insurers had a reasonable justification for denying coverage to Goodrich. Several of the other excess insurers joined in this motion in whole or in part.[2]

{¶11} Because the trial court disposed of the motion on the issue of late notice, we will begin by addressing that ground. Proper notice is a condition precedent to insurance coverage. See *American Emp. Ins. v. Metro Reg. Transit Auth.* (C.A.6, 1993), 12 F.3d 591, 595, citing *Kornhauser v. National Surety Co.* (1926), 114 Ohio St. 24, paragraph three of the syllabus.

{¶12} The policies at issue in this case required Goodrich to promptly notify each excess insurer when it had information from which it could reasonably conclude that coverage under the excess policies would be triggered. In other words, it had a duty to promptly notify these insurers when it reasonably believed

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[2] Rather than discussing each and every problem with the multiple motions that were filed, for ease of discussion, we will focus on the basic issue in summary judgment, whether the excess insurers established that there was no genuine issue of material fact on the issue of late notice. There are many other problems that, although not specifically addresssed, have not gone unnoticed. For example, some of the insurers failed to meet their burden under *Dresher* to point to supporting evidence (the policy's notice provision, the attachment point of the policy, when

that its environmental liability would exhaust its coverage under its primary insurance policies.

{¶13} It is also important to note that the policies at issue are excess insurance policies. Although the trial court found that the distinction between primary and excess policies was immaterial to the analysis of this issue, we disagree. The holder of a primary insurance policy typically has the duty to notify its insurer as soon as it realizes that it is liable for any environmental cleanup and remediation costs. An insured's duty to notify its excess insurance carrier, on the other hand, is not triggered until the insured has reason to believe that its environmental liability will exhaust its coverage under its primary policies. It must have knowledge not only of potential liability but it must also have reason to believe that the extent of its liability will exceed the coverage limits of its primary insurance policy.

{¶14} In *Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau* (2000), 88 Ohio St.3d 292, 300, the Ohio Supreme Court held that, although the question of late notice is usually a question for the jury, "an unexcused significant delay may be unreasonable as a matter of law." Id. at 300. In *Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co.* (2002), 95 Ohio St.3d 512, 2002 Ohio 2842, the Ohio Supreme Court reversed the decision of this court that affirmed a

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Goodrich gave notice, etc.) and some who were granted summary judgment on this ground failed to even articulate any independent argument on this issue.

directed verdict for the insurers on the issue of late notice. The Supreme Court again stressed that this issue is typically one for the jury, noting that "[i]nformation and events were unfolding over time with such complexity that only the factfinder may resolve the issue of whether Goodyear's notice was unreasonable." Id. at 518, 2002 Ohio 2842, at ¶17.

{¶15} The primary motion for summary judgment, in which most of the other excess insurers joined, was filed by Commercial Union Insurance Company. It argued that Goodrich first notified its excess insurers in June of 1989. It contended that Goodrich knew years earlier that it would be responsible for environmental cleanup at Calvert City and that its liability would exceed $20 million, the attachment point of the Commercial Union policies.[3] The excess insurers contended that the "undisputed evidence" established that Goodrich's duty to notify its excess insurers about its environmental liability at Calvert City was triggered at least five years before it issued notice, a delay which, according to the excess insurers, was unreasonable as a matter of law. They pointed to evidence to establish that Goodrich had known since the mid-1960s that it had been contaminating the groundwater at Calvert City and that it knew by the early

[3] On appeal, the parties have refined their arguments to address the differing attachment points of the various excess policies. Because these arguments were not articulated below, nor were they considered by the trial court, this court will not address them on appeal. Although this court conducts a de novo review of summary judgment, that review is limited to the arguments and evidence that the

1980s that it would be held liable for remediation and that its potential liability for cleanup costs would exhaust its primary insurance coverage.

The Excess Insurers' Evidence

{¶16} To establish that Goodrich had long known that its environmental liability at Calvert City would exceed $20 million, the excess insurers pointed to evidence that included the following.

{¶17} **1960s** - The testimony of several different witnesses who were employed at the facility during the 1960s revealed the following facts. These employees were aware that the facility's well water was contaminated with ethylene dichloride (EDC) during the early to mid-1960s because, according to one witness, that is what he was told. Other witnesses testified that the well water either smelled or tasted of EDC and that the plant switched to bottled water and then to the city water supply as alternative sources of drinking water. The plant manager during that period testified that he was aware then that chlorinated hydrocarbons were seeping into the groundwater.

{¶18} Goodrich internal memoranda discussed the results of tests on the wells. The tests had revealed the presence of chlorinated hydrocarbons and other chemicals in the groundwater under the plant, suggesting that these chemicals had seeped from one or more of the storage ponds. The authors of the memoranda

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parties presented to the trial court. See *Chester Properties, Inc. v. Hoffman* (Oct. 26, 2001), 11th Dist. Nos. 2001-G-2333 and 2001-G-2334.

expressed concern about groundwater contamination and discussed whether and how Goodrich should take measures to prevent the seepage.

{¶19} 1970s - Goodrich internal reports and memoranda generated during the 1970s discussed the problems with the high presence of EDC, oil, and heavy metals in the ponds and the fact that the ponds were leeching contaminants into the groundwater under the facility.

{¶20} One witness agreed that the term "boiling cauldron" described the condition of one storage pond during the early to mid-1970s. He also agreed that offensive fumes came from the ponds. He described one incident in which a duck landed on the pond and "it ate his feet off." He explained that, although this became a story that traveled throughout the plant, he personally observed it and helped to pull the duck from the pond.

{¶21} 1980s - During the early 1980s, internal memoranda and reports were generated by Goodrich that indicated that Goodrich was aware at that time that, pursuant to RCRA, the government might require it to clean up the contamination from the storage ponds and that continued operation of the ponds could be costly. The memoranda, noting Goodrich's uncertainty about what the government would require it to do, explored different options that Goodrich might pursue to minimize its costs. Goodrich was aware that Kentucky state law prohibited pollution of the groundwater and that the "[p]resence of chemicals in groundwater at Calvert City plant could be interpreted as violation of present

Kentucky Environmental Control laws[.]" These documents further indicated that Goodrich was aware that federal superfund reporting requirements would also apply to the Calvert City underground water quality.

{¶22} **Estimated Liability** - A 1980 Goodrich internal memorandum estimated the cost of cleaning up and closing the storage ponds at $27 million. In 1981, Goodrich estimated the cost at somewhere between $27 million and $33 million. During 1982, Goodrich was notified by the state of Kentucky that its Calvert City site was a potential candidate for the CERCLA national priority list and, in 1982, the site was placed on the national priority list.

{¶23} During the mid-1980s, Goodrich was designated a potentially responsible party under CERCLA. In November 1985, Goodrich entered into an Administrative Order on Consent with the United States Environmental Protection Agency, in which it agreed to pay for the cleanup of the Calvert City site. Goodrich closed the storage ponds during the late 1980s. On July 18, 1988, Goodrich executed a consent decree with the USEPA in which it agreed to clean up the site.

{¶24} By the time Goodrich notified its excess insurers in 1989, it had spent nearly $23 million at the Calvert City site. Goodrich's 1989 notice to its excess insurers, however, indicated that, at that time, it estimated its cleanup costs to be approximately $17.5 million, which it characterized as a liberal or high estimate of the costs.

Goodrich's Evidence

{¶25} In opposition to summary judgment, Goodrich argued, among other things, that there were genuine issues of material fact on the notice issue. It pointed to evidence that, detail by detail, contradicted much of the evidence submitted by the excess insurers. Its evidence included the following.

{¶26} 1960s - The former plant environmental engineer testified that, although Goodrich did switch the water supply for the Calvert City facility from wells to the Tennessee River and eventually to the city water supply, the change was not due to any concern that the groundwater was contaminated with EDC. Another witness, the plant manager at that time, explained that the water source was switched because the wells, and then the river, could not produce sufficient capacity to meet Goodrich's needs.

{¶27} During the time that the supply came from the river, changes in the direction of the flow of the river could affect the taste of the water until the river resumed its normal flow. The plant supplied coolers of city water for drinking during those periods. The former plant manager testified that he did not recall smelling or tasting EDC in the water at the plant.

{¶28} The former plant environmental engineer explained that during 1967, Goodrich sampled the groundwater at the facility. Although the presence of EDC was detected, it was not believed to be at a dangerous level and Goodrich believed that it was in compliance with all state and federal laws. He further

attested that the groundwater under the Calvert City facility was not a source of drinking water for anyone.

{¶29} **1970s** - The fact that one of the storage ponds was described as a "boiling cauldron" was explained by one of Goodrich's witnesses. During the mid-1970s, Goodrich used an emergency shutdown system for one of the plants. During such a shutdown, gases from the plant were vented into one of the storage ponds. During this process, the pond would appear to bubble and boil.

{¶30} That same witnesses testified that "[i]t is simply untrue that a duck landed on the pond at Goodrich's Calvert City and the duck's feet were burned off due to the chemicals in the pond. In reality, there were occasions where ducks nested near the ponds and the snapping turtles which lived in the ponds ate ducklings and bit the ducks' legs when they were in the pond."

{¶31} In 1977, the state of Kentucky asked industry to participate in a well drilling program to test the integrity of earthen ponds as a method for treatment of industrial wastewater. Goodrich began drilling of monitoring wells in 1978 and sent its monitoring data to the state. The data showed the presence of some contaminants in the groundwater. Goodrich hired a consultant to conduct a hydrological study. The consultant found that, although some substances had apparently seeped from the ponds, there was no danger of the substances migrating into the public water supply.

{¶32} **1980s** - The former plant manager testified that, in 1984, RCRA was enacted. Among other things, RCRA would require Goodrich to either modify its existing storage ponds to continue to operate them or it would have to close them. Goodrich weighed the costs associated with each alternative and decided that it would be too expensive to continue to operate the storage ponds, so it decided to close them.

{¶33} **Estimated Liability** - Exhibit by exhibit, the former plant engineer explained the cost figures from the early 1980s to which the excess insurers pointed as evidence that Goodrich had projected the Calvert City cleanup costs to exceed $20 million. He testified that the figures in excess of $20 million "do not in any way relate to remediation costs claims being pursued in this action, but, rather, relate solely to costs incurred by Goodrich as costs of doing business under RCRA regulations relating to the continued operation or closure of the [ponds]." These figures included approximately $15 million dollars in pond closure costs, which were totally unrelated to any groundwater remediation that Goodrich was required to take.

{¶34} Another former Goodrich employee, a financial analyst in its risk management department, testified that, at the time Goodrich was incurring the pond closure costs, she did not believe that these were the types of expenses "that would give rise to an insurance claim because Goodrich was undertaking this work under RCRA regulations, not as a result of any governmental cleanup or

enforcement action or any other claim being made against Goodrich." The witness further explained that if the risk management department had become aware of any third party claims, it would have promptly notified its general liability insurers.

{¶35} According to the vice president and counsel of Risk International Services, Inc., which functioned as Goodrich's insurance department, it was not until June and November of 1989 that Goodrich realized that its liability at Calvert City would exceed $17 million.

Conclusion on Late Notice Issue

{¶36} As indicated above, the material facts on this issue were sharply in dispute. At the heart of the notice issue is when Goodrich realized that its environmental liability would exhaust its primary insurance coverage. The dollar estimates presented through Goodrich documentation by the excess insurers were explained by Goodrich witnesses to improperly include approximately $15 million in pond closure costs. Goodrich witnesses explained that Goodrich was not currently seeking insurance coverage for the pond closure costs nor did its risk management department ever believe that it could.

{¶37} In a purported attempt to demonstrate an absence of dispute on this material fact, the excess insurers submitted reply briefs and pointed to additional evidence. Specifically, the excess insurers presented evidence that suggested that Goodrich apparently believed at one time that it could recover pond closure costs

from its insurers. Although the parties disputed below and again on appeal whether the trial court should have considered this evidence, we need not answer that question. This rebuttal evidence, even if it could be properly considered by the trial court, served only to further demonstrate that this particular material fact was disputed. The trial court, however, assigned greater weight to the rebuttal evidence and, in effect, used it to completely discount the fact testimony of some of Goodrich's witnesses.[4] Evidence must be construed in favor of the nonmovant and it is impermissible on summary judgment for the trial court to weigh the evidence or pass on its credibility. See *Dupler*, supra. The material facts on this issue were disputed and summary judgment was not proper.

Alternative Grounds for Summary Judgment

{¶38} Although the trial court erred in granting summary judgment on the ground of late notice, because the excess insurers raised additional grounds for summary judgment, we would typically review the other grounds and affirm summary judgment if any of the other grounds supported it. See *McKay v. Cutlip* (1992), 80 Ohio App.3d 487, 491. Goodrich contends, however, that we should not address the other grounds raised by the excess insurers because the trial court

[4] The trial court found Goodrich's "argument" that it was not seeking insurance coverage for its pond closure costs to be "completely without merit." It then proceeded to recount the documentary evidence that was favorable to the excess insurers on this issue, but completely ignored the relevant testimony presented by Goodrich. Clearly, a genuine dispute as to material facts exists as to this issue.

did not. Among the authorities it cites is *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356.

{¶39} In *Murphy*, the Supreme Court held that the trial court committed reversible error when it stated on the record that it had not reviewed the summary judgment materials submitted by the parties and then proceeded to issue its ruling without allowing any time within which to conduct such a review. The *Murphy* court held, in its syllabus:

{¶40} "Civ.R. 56(C) places a mandatory duty on the trial court to thoroughly examine all appropriate materials filed by the parties before ruling on a motion for summary judgment. The failure of a trial court to comply with this requirement constitutes reversible error." 65 Ohio St.3d 356, at syllabus.

{¶41} The *Murphy* court stressed that, although an appellate court conducts a de novo review of summary judgment, it is nonetheless a *review* of what happened in the trial court. "A reviewing court, even though it must conduct its own examination of the record, has a different focus than the trial court. If the trial court does not consider all the evidence before it, an appellate court does not sit as a reviewing court, but, in effect, becomes a trial court." Id. at 360.

{¶42} Faced with appellants arguing reversible error under *Murphy*, most appellate courts have applied a basic presumption of regularity in the proceedings below. In other words, absent an affirmative demonstration on the record that the trial court failed to review all of the summary judgment materials before it, an

appellate court will presume that it did. See, e.g., *Montgomery v. John Doe* 26 (2000), 141 Ohio App.3d 242; *Sadi v. Alkhatib* (Aug. 28, 2001), 10th Dist. No. 01AP-125; *Reagan v. Ranger Transp., Inc.* (Aug. 9, 1996), 11th Dist. Nos. 95-P-0123 and 95-P-0124; *McNeil v. Case Western Reserve Univ.* (Aug. 7, 1995), 8th Dist. No. 67651.

{¶43} On the other hand, where the record affirmatively demonstrates a failure by the trial court to fully consider summary judgment materials submitted by the parties, appellate courts have reversed and remanded the cause to the trial court for a proper Civ.R. 56 summary judgment examination. See, e.g, *Swymn v. Owners Ins. Co., Inc.* (Apr. 7, 1999), 4th Dist. No. 98CA2582; *Kerr-Morris v. Ramada Hotel Mgt.* (Apr. 23, 1999), 1st Dist. No. C-980625; *Wissel v. McDonalds Corp.* (Jan. 21, 1998), 9th Dist. No. 2702-M; *Norwalk v. Cochran* (Dec. 29, 1995), 6th Dist. No. H-94-040.

{¶44} In this case, although the trial court stated near the conclusion of its order that it would not consider the excess insurers' alternative arguments for summary judgment because they were moot, it had indicated earlier in its order that it was considering only the issue of late notice and not the other grounds raised for summary judgment by the excess insurers. Specifically, two of the defendant insurers who moved for summary judgment had raised the alternative grounds raised by the other insurers (known loss, no occurrence, and pollution exclusion) but had not raised the issue of late notice. The trial court explicitly

indicated in a footnote that these insurers remained parties in the case because they "did not make arguments with respect to late notice." Although the portion of the order denying the summary judgment motions of those two insurers is not final and appealable and is not subject to appellate review at this time, the court's statement serves as an affirmative demonstration that the trial court did not consider any of the alternate grounds for summary judgment raised by the excess insurers. That abrogation of its duty under Civ.R. 56 constituted reversible error. The first assignment of error is sustained.

Second Assignment of Error

{¶45} "THE TRIAL COURT INCORRECTLY DENIED GOODRICH'S MOTION TO STRIKE DEFENDANT'S REPLY BRIEFS OR, IN THE ALTERNATIVE, TO FILE A SURREPLY."

Third Assignment of Error

{¶46} "GOODRICH NEED NOT PREVAIL ON ITS COVERAGE CLAIMS TO HAVE AN ACTIONABLE CLAIM FOR BAD FAITH."

{¶47} Because the second and third assignments of error have been rendered moot by our disposition of the first assignment of error, they will not be addressed. App.R. 12(A)(1)(c).

Judgment reversed and remanded.

WILLIAM G. BATCHELDER

FOR THE COURT

BAIRD, P.J.
CARR, J.
CONCUR

APPEARANCES:

PAUL A. ROSE, SALLIE CONLEY LUX AND CLAIR E. DICKINSON, Attorneys at Law, 500 First National Tower, Akron, Ohio 44308, for Appellant.

CATHERINE J. SERAFIN, STEPHEN M. GOLDMAN AND LOUIS KOZLOFF, Attorneys at Law, 1900 K Street, N.W., Washington, D.C. 20006, for Appellant.

ROBERT V.P. WATERMAN, JR. AND THOMAS D. WATERMAN, Attorneys at Law, 220 North Main Street, Suite 600, Davenport, Iowa 52801, for Appellee, Commercial Union Insurance Company.

CLIFFORD C. MASCH AND BRIAN D. SULLIVAN, Attorneys at Law, 113 St. Clair Building, Cleveland, Ohio 44114-1273, for Appellee, Commercial Union Insurance Company.

MICHAEL J. BAUGHMAN, Attorney at Law, 525 West Monroe Street, Suite 550, Chicago, Illinois 60661, for Appellees, Century Indemnity Company and Insurance Company of North America.

JAMES W. BARNHOUSE, Attorney at Law, 1400 Bank One Center, Cleveland, Ohio 44114, for Appellees, Century Indemnity Company and Insurance Company of North America.

MARIA G. ENRIGUEZ AND ELLEN J. ZABINSKI, Attorneys at Law, 333 West Wacker Drive, Suite 900, Chicago, Illinois 60606, for Appellees, American Reinsurance Co. and Highlands Insurance Co., Attorneys at Law, 2500 Terminal Tower, 50 Public Square, Cleveland, Ohio 44113-2241, for Appellees, American Reinsurance Co. and Highlands Insurance Co.

J. THOMAS CHUTE, Attorney at Law, 55 West Wacker Drive, Suite 1000, Chicago, Illinois 60601, for Appellee, American Bankers Insurance Group.

JOSEPH J. GOLIAN, Attorney at Law, 1654 East Broad Street, Columbus, Ohio 43202, for Appellee, American Bankers Insurance Group.

THOMAS K. HANEKAMP, Attorney at Law, 233 South Wacker Drive, 22nd Floor, Chicago, Illinois 60606-6308, for Appellee, Allstate.

JOHN B. HAARLOW, MICHAEL P. COMISKEY, HUGH C. GRIFFIN AND HUGH S. BALSAM, Attorneys at Law, 115 South LaSalle Street, Chicago, Illinois 60603, for Appellees, Certain Underwriters at Lloyd's London, Yasuda Fire and Marine Co. of Europe, Ltd. and Equitas Limited and Equitas Reinsurance.

DENNIS J. BARTEK, Attorney at Law, 2300 East Market Street, Suite E, Akron, Ohio 44312, for Appellees, Certain Underwriters at Lloyd's London, Yasuda Fire and Marine Co. of Europe, Ltd. and Equitas Limited and Equitas Reinsurance

MARGARET J. ORBON, SUSAN CONDON AND MARK W. ZIMMERMAN, Attorneys at Law, 10 South LaSalle Street, Suite 1600, Chicago, Illinois 60603, for Appellees, American Home Assurance Co., Granite State Ins. Co., The Insurance Co. of the State of Pennsylvania, Lexington Ins. Co. and New Hampshire Indemnity Co.

STEVEN G. JANIK, Attorney at Law, 9200 South Hills Boulevard, Suite 300, Cleveland, Ohio 44147, for Appellees, AIU Insurance Co., National Union Insurance Co., American Home Assurance Co., Granite State Ins. Co., The Insurance Co. of the State of Pennsylvania, Lexington Ins. Co. and New Hampshire Indemnity Co.

ANDREW DORMAN, Attorney at Law, 8223 Brecksville Road, Cleveland, Ohio 44141, for Appellees, AIU Insurance Co., National Union Insurance Co., American Home Assurance Co., Granite State Ins. Co., The Insurance Co. of the State of Pennsylvania, Lexington Ins. Co. and New Hampshire Indemnity Co.

JAMES S. STICKLES, JR., FREDERICK C. GOODWILL, II AND LAURA J. MCGRATH, Attorneys at Law, 120 North LaSalle Street, 24th Floor, Chicago, Illinois 60602, for Appellee, The Home Insurance Company.

TIMOTHY D. JOHNSON AND ADAM GIMBEL, Attorneys at Law, 2500 Terminal Tower, 50 Public Square, Cleveland, Ohio 44113, for Appellee, The Home Insurance Company.

STEVEN G. ADAMS, Attorney at Law, 233 Broadway, New York, New York 10279-0118, for Appellees, First State Insurance Co. and Royal Indemnity Co.

THOMAS HARDIN, Attorney at Law, 132 Fair Avenue, NW, New Philadelphia, Ohio 44063, for Appellees, First State Insurance Co. and Royal Indemnity Co.

MATTHEW J. GEHRINGER, Attorney at Law, 224 South Michigan Avenue, Suite 1300, Chicago, Illinois 60604, for Appellees, International Insurance Co. and North River Insurance Co.

GREGORY J. DEGULIS, Attorney at Law, 812 Huron Road, Cleveland, Ohio 44115, for Appellees, International Insurance Co. and North River Insurance Co.

JOSEPH B. ROYSTER, Attorney at Law, Santa Fe Building, Suite 1300, 224 South Michigan Avenue, Chicago, Illinois 60604, for Appellee, Stonewall Insurance Company.

GARY HERMANN AND ADAM M. FRIED, Attorneys at Law, 1301 East Ninth Street, Suite 500, Cleveland, Ohio 44114, for Appellee, Stonewall Insurance Company.

MICHAEL J. BALCH AND TIMOTHY G. REYNOLDS, Attorneys at Law, 4 Times Square, New York, New York 10036, for Appellee, General Reinsurance Corporation.

LAWRENCE R. BACH, Attorney at Law, 1500 One Cascade Plaza, Akron, Ohio 44308, for Appellee, General Reinsurance Corporation.

JAMES F. MATHEWS, Attorney at Law, 400 South Main Street, North Canton, Ohio 44720, for Appellee, Atlanta International Insurance Co.

SEGUROS LA REPUBLICA, SA, Paseo De La Reforma 383, Mexico 5, D.F.

SEGUROS LA REPUBLICA, SA, C/O AROMOTORA DE OCCIDENTO, SA, General Molinos Del Campo 23, Mexico 18, D.F.