[Cite as *Garrett Well, L.L.C. v. Frick-Gallagher Mfg. Co.*, 2021-Ohio-160.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

GARRETT WELL LLC,	:	
	:	Case No. 19CA0012
Plaintiff-Appellant,	:	
	:	
v.	:	DECISION AND JUDGMENT
	:	ENTRY
THE FRICK-GALLAGHER	:	
MANUFACTURING COMPANY,	:	
ET AL.,	:	
	:	
Defendant-Appellee.	:	

APPEARANCES:

Kristina S. Dahmann, Ice Miller LLP, Columbus, Ohio and Brent W. Huber, Ice Miller LLP, Indianapolis, Indiana, for Appellant Garrett Well LLC.

Scott E. North, Porter, Wright, Morris & Arthur, LLP, Columbus, Ohio and Robert L. Joyce, Littleton Joyce Ughetta Park & Kelly LLP, Purchase, New York, for Appellee Arrowood Indemnity Co.[1]

Smith, P.J.:

{¶1} Garrett Well LLC ("Appellant") appeals the July 8, 2019 decision and order of the Jackson County Court of Common Pleas which found that Appellant had not met its burden of proof on its claims in an action against Arrowood Indemnity Co., ("Appellee"). The supplemental action was filed because Appellant sought reimbursement from Appellee for a default judgment granted for

[1] Attorneys Huber and Joyce were granted permission to appear pro hac vice.

costs of environmental remediation which occurred at the Frick-Gallagher Manufacturing Company site in Wellston, Ohio. Having reviewed the record, we find no merit to Appellant's second assignment of error that the trial court erred by finding that the owned property exclusion applied to the facts of this case, thus barring coverage for Appellant's claims. As a result, Appellant's remaining assignments of error have been rendered moot and we decline to consider them. Accordingly, we overrule Appellant's second assignment of error and affirm the judgment of the trial court.

FACTS

{¶2} We draw heavily from the pretrial stipulations of the parties and the trial court's findings of fact. The trial court performed "yeoman's work" in sifting through the pleadings, testimony, and exhibits to reduce the facts and evidence presented in this case into a concise and complete 13-page decision and order.

{¶3} The Frick-Gallagher Manufacturing Company ("Frick"), owned a manufacturing business located in the center of the City of Wellston, Ohio. Frick conducted manufacturing operations from the 1930's until approximately 2004. Frick manufactured metal storage products for industrial use. During the manufacturing process, Frick used chemicals as part of its cleaning process.

{¶4} When Frick closed its business, the property was abandoned. The buildings descended into disrepair and the factory site became a danger and an "eyesore." According to the testimony of City Engineer, Timothy Wojdacz, City of Wellston (hereinafter "City" or "Welston") took pro-active steps to remediate the site. The City began by exploring the "Clean Ohio Program" as a source of funding.[2] The City also obtained ownership of the property so it could access the funding for the remediation process. Wellston eventually participated in a Voluntary Action Plan ("VAP.") The VAP program allows a site owner to conduct a voluntary cleanup of the site and then have the cleanup results reviewed. The goal of the VAP process is to obtain two documents as proof that the site is clean and able to be developed: a "no further action letter" (NFA) from the federal and state environmental protection agencies (EPA); and a covenant not to sue from the federal EPA. The City obtained both documents.

{¶5} The VAP process required investigation of the Frick site through a sampling and evaluation process in order to obtain a detailed understanding of environmental concerns of the site. The investigation assists in determining what actions must be taken in order to bring the property up to federal and state environmental regulations. The City of

[2] The Clean Ohio Revitalization fund supports the assessment and cleanup of polluted properties as a catalyst for redevelopment. See http://development.ohio.gov/cleanohio/.

Wellston hired Keramida, an environmental health and safety consulting company which conducted the site evaluation. During a two-year period in which Keramida conducted soil and water sampling, the investigation uncovered contamination in the buildings at the site, the building materials, and in the soil and groundwater. Keramida issued a report of its findings. Keramida found that in manufacturing metal bins, which required cleaning and bending of metal and painting operations, there were paint-related wastes on the site. Chemicals of concern ("COC's) found at the site included dioxin, a highly toxic compound produced as a byproduct of industrial processes, asbestos, and trichloroethylene (TCE), a chlorinated solvent. Keramida billed Wellston for its services.

{¶6} Thereafter, Wellston entered into a partnership with Appellant to remediate the site in accordance with the VAP. Appellant paid 25% of the remediation costs. Government funding provided the remainder of the remediation costs. Keramida also conducted the site remediation.[3] The groundwater contamination was treated by injecting a solution into the soil and groundwater to degrade the chlorinated solvent, TCE.[4] Additional work

[3] Under the VAP process, a certified professional (C.P.) supervises the remediation work. A C.P. must obtain training and participate in continuing education through the Ohio EPA.

[4] According to the testimony at trial, chlorinated solvents were used by a majority of manufacturers in the metal fabrication industry beginning in the 1930's to degrease metal parts. Chlorinated solvents were inexpensive and effective. According to the parties' stipulations, the solution injected into the soil was highly-concentrated "CL-OUT, a solution of live strains of naturally occurring biological microorganisms which would degrade the chlorinated solvents.

was performed to excavate impacted soil from the site and to demolish and dispose of impacted building materials. Underground storage tanks were also removed from the site.

{¶7} After the State of Ohio and the City of Wellston took steps to remediate the contamination at the Frick site, the entities assigned their rights to pursue an action for reimbursement of remediation costs to Appellant. Appellant filed an action styled *Garrett Well LLC v. The Frick-Gallagher Manufacturing Co.*, Jackson County Case No. 13CIV0140. As previously set forth, the Frick site was abandoned after 2004. The Frick Company was defunct and did not appear or defend the suit. The Jackson County Court of Common Pleas eventually entered a default judgment in favor of Appellant in the amount of $1,351,911.90. Pursuant to R.C. 3929.06(B), Appellant thereafter filed the current action against Appellee and Firemen's Fund Insurance Company of Ohio, former insurers of Frick, for the events which gave rise to the default judgment.[5]

{¶8} Appellee filed an Answer to the Complaint, asserting among other affirmative defenses, two policy exclusions. Appellee claimed the policy excluded coverage for pollution, unless such pollution is found to be "sudden and accidental." Appellee also claimed the policy excluded

[5] Prior to the bench trial, Appellant and Fireman's Fund resolved their mutual claims.

coverage for property owned by Frick. The parties engaged in motion practice and the trial court denied Appellant's motion for summary judgment. The matter then proceeded to a bench trial. In the parties' pretrial stipulations, the parties stipulated to the accuracy and admissibility of the applicable commercial general liability policies, the policy numbers, the policy limits, and the relevant dates of coverage. The parties agreed the focus date of claims was between 1981-1985.

{¶9} At the bench trial, Appellant called Michael Heitz, one of the three members of Garrett Well LLC (Appellant). Mr. Heitz testified Garrett Well was formed in 2010 to acquire contaminated properties and to take advantage of Clean Ohio Funds to remediate the contaminated properties through the VAP process. He testified that Garrett Well retained Keramida to perform the remediation work at the Frick site.

{¶10} During Mr. Heitz testimony, Appellant attempted to introduce a document known as the "Avendt report." The report came from Appellee's (formerly "Royal Insurance's") claims' file. The Avendt report was an environmental report prepared by the Avendt Group, Inc. The report, dated May 1990, documented an investigation into dioxin contamination at the Frick plant. Appellee's counsel objected to the admissibility of the report.

The trial court reserved ruling on the matter until the court had heard evidence of the report's relevancy.

{¶11} Heitz testified that after the remediation of the Frick site was completed, Garrett Well received the NFA letter and the covenant not to sue. Unfortunately, Heitz and the other members of Garrett Well were unable to find a buyer or a project for the Frick site. Appellant subsequently donated the property back to the City of Wellston.

{¶12} Appellant also played the video deposition of Michael May, a senior engineer with Keramida. Mr. May testified he had a bachelor's degree in chemical engineering, along with 30 years of environmental experience in consulting and research. May testified he was a C.P. pursuant to the Ohio VAP program. He became the C.P. of record for the Frick project late in the process, in October 2013, and therefore, his testimony regarding knowledge of the project would be from his review of Keramida files.

{¶13} Mr. May testified that Keramida collected and analyzed soil samples. These samples demonstrated that chlorinated compounds were found in the groundwater at the Frick site. There were also RCRA metals in

the soil.[6] The remedial action plan was to excavate the soil and remove the soil that was deemed contaminated.

{¶14} May also testified polychlorinated byphenyles (PCB's) were located in the concrete flooring.[7] All the PCB-related remediation involved the removal of impacted concrete.

{¶15} Mark May also testified that Keramida did not determine how the COC's came onto the site. Keramida's reports suggested that much of the "fill material" associated with the Frick property, material widespread throughout the site, contained the contaminants. Mr. May did not know the source of the fill material and the Keramida records did not speculate on the source of the fill. May also testified that there was not another source for the COC's, other than fill material which was identified in the Keramida records. May testified it was very difficult to determine the nature of a release of contaminants into the environment. Keramida records did not have sufficient information. He would be speculating on the nature of the release, whether it was sudden or acute. He also did not recall seeing any information in Keramida's records about any explosions.

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[6] RCRA refers to the Resource Conservation and Recovery Act, our primary federal law governing the disposition of solid and hazardous waste. The Act was signed into law in October 1976. See https://www.epa.gov./rcra. RCRA metals are a group of eight highly toxic metals, including arsenic and lead.

[7] PCB's consist of carbon, hydrogen, and chlorine atoms. PCB's were domestically manufactured from 1929 until banned in 1976. Due to their non-flammability, chemical stability, high boiling point and electrical insulating properties, PCBs were used in hundreds of industrial and commercial applications. See https://epa.gov.pcbs/learn-about-polychlorinatedbyphenyles.

{¶16} May further testified that he did not see any indication "one way or another" in the Keramida records that any of the chlorinated compounds had migrated off the Frick site. He testified that Keramida would not have been notified about a third-party issue, if any other property had been impacted by any release from the Frick property, but to his knowledge, he did not see in the Keramida records that other properties had been impacted by release.

{¶17} May testified that to his knowledge, Keramida did not remove any soil from outside of the Frick site and did not perform any work off the Frick site. He also testified that to his knowledge, none of Keramida's remedial activities were outside the boundaries of the Frick site. May testified that the asbestos identified was sampled from a location within two facilities at the Frick site.

{¶18} On cross-examination, Mr. May acknowledged that if a sample of groundwater had been taken immediately offsite, it would probably have detected the same COC's as the groundwater in the southeast corner of the Frick property. He testified that it would be speculative, but mathematically, one could suggest that the chlorinated compounds in the groundwater did not simply stop at the property line.

{¶19} Appellant also presented testimony from an expert, Carl Rhodes. Mr. Rhodes was employed for an environmental consulting firm, Tetra Tech of Cincinnati. His job involved supporting clients with investigation and remediation of hazardous waste and petroleum sites. Mr. Rhodes testified to 29 years of consulting experience. Mr. Rhodes was deemed an expert in the fields of geology and hydrogeology (the study of groundwater). He was also VAP certified.

{¶20} Mr. Rhodes testified that dioxin is a by-product of industrial processes, mostly associated with high-temperature applications. Dioxin typically moves through water or other liquids. As an example, Mr. Rhodes explained dioxin would be attracted to organic material found throughout the Wellston Wastewater Treatment Plant system. Rhodes also had experience with RCRA metals, asbestos, and chlorinated solvents. Rhodes noted that arsenic and lead were two of the RCRA metals found at the site. Rhodes explained that chlorinated solvents are a class of solvents typically used for degreasing and metal cleaning in industry. Mr. Rhodes also explained that TCE, a volatile organic compound and chlorinated solvent, was one of the COC's discovered at the Frick site.

{¶21} Mr. Rhodes also testified that fill material is an issue at nearly every industrial site he has investigated. Fill material can be a migratory

pathway for "whatever is being investigated," or it can be a source of contamination. He explained that before the 1970's, people did not understand the impact of disposing of things on and in the ground and as a result they did not pay much attention to what was in the fill material they were dumping or spreading on their properties.

{¶22} The trial court summarized Mr. Rhodes' testimony as follows:

> [T]he dioxin pollution was not from ordinary use. He believes the material was placed directly into the Wellston sewer either thru [sic] direct disposal or cleaning of vats, containing dioxin materials. Mr. Rhodes believed that the spill or release was due to a massive slug being placed into the sewer system. * * * [T]he property was polluted due to fill material. The placement of the fill material on the property caused an immediate release which created instant damage.

{¶23} After Rhodes' testimony, Appellant moved to admit its exhibits. The trial court again reserved ruling on the Avendt report. Appellant rested. Appellee presented one witness, its expert Mark Flavin.

{¶24} Mr. Flavin testified he was an environmental consultant and a hydrogeologist. Mr. Flavin also worked for a consulting firm, Rambol Environ. He had spent his 28-year career investigating by collecting samples of soil, groundwater, surface water and air, assessing the nature and extent of contamination, comparing to criteria for appropriate remediation goals, and developing plans to restore, remediate, or correct contaminated property to meet goals. Flavin was designated an expert in geology,

hydrogeology, and environmental assessment and remediation. Mr. Flavin testified that he had relied upon the Avendt Report, the Keramida Report, Michael May's deposition testimony, public records, Carl Rhodes' testimony, and Rhodes' reports.

{¶25} Flavin testified that TCE was the most commonly used degreasing agent in the metal fabrication industry during the 1940's, 1950's and 1960's. According to Mr. Flavin, 94% of the metal fabrication industry used TCE. In the 1980s, the industry moved away from TCE to the use of other degreasing agents. Sixteen samples from the Frick site were positive for TCE. Of the 16 samples, 15 were found under the fabrication finishing buildings where metal parts were degreased. TCE was found only in the top two feet of the soil. Flavin indicated that the location of the TCE in the soil demonstrated that the source was above ground. Flavin also testified there was evidence that Frick used TCE in the 1980s.

{¶26} Flavin further testified that the location of the TCE pollution at the 0-2 feet depth made it more likely that the Frick manufacturing process was the source of pollution and not the fill. Flavin also testified that dioxin was found at 4-6 parts per billion in the waste sludge tested. Dioxin was found in the concrete floor where the product occurred as part of the

manufacturing process. The trial court made these observations from Flavin's testimony:

> There was no evidence any polluted fill was brought into the Frick property. ***[T]here was no evidence of any abrupt release of any pollutant into the soil or groundwater. * * * [T]here was no evidence of any sudden discharge of dioxin into the sewer system. Dioxin was found in the concrete floor were [sic] the product used in the manufacturing process.

{¶27} The trial court found a number of substances and chemicals were found on the site and subject to the cleanup process and summarized as follows:

> Dioxin Contamination
>
> Dioxin was detected in the soil. * * * Frick used a hot striping process it manufactured of metal parts. A strip[p]ing compound would be mixed in a tank with hot water. The parts would be dipped into the tank to strip off paints. The parts would then be removed from the tank. The parts would be wet and dripping a solution which contained dioxins. In the room in which the hot strip[] process occurred was a manhole which was part of Wellston's sewer system. High levels of dioxins were found in the manhole located in the hot strip room as well as Wellston's Water Treatment Plant.
>
> Chlorinated Solvents
>
> * * * Chlorinated solvents were found in 16 of 66 soil samples taken at the site. 15 of the 16 samples which tested positive for chlorinated solvents were found near or under the buildings on the site. * * * The chlorinated [solvent] found at the site was trichloroethylene (TCE).
>
> Heavy Metals
>
> * * * Arsenic and lead heavy metals were found on the site. Heavy metals are highly toxic * * *. Heavy metals are associated with

> foundry operations. Prior to Frick acquiring the property in 1933, a foundry operation was operated on the site. The ground water was tested and heavy metals were found at 3 of the test sites.

{¶27} In reaching its conclusions, the trial court commented that the parties' experts had very different theories as to how the Frick site became contaminated. The trial court cited *Hybud Equipment Corp., v. Sphere Drank Insurance Company, Ltd.,* 64 Ohio St. 3d 657, 597 N.E.2d 1096 (1992), which discussed the definition of "sudden" within the meaning of pollution exclusion language in a liability insurance policy. The trial court found as follows:

> [P]laintiff has not met its burden of proof concerning the sudden and accidental issue of dioxin. * * * Concerning the TCE pollution issue, the Court also finds that Plaintiff has not met its burden to demonstrate that there was a sudden and accidental discharge. * * * The Plaintiff's theory is based upon speculation and not supported by evidence. * * * The Court also finds that the owned property exclusion applies based upon the facts of this case.

This timely appeal followed. Where pertinent, additional facts are set forth below.

ASSIGNMENTS OF ERROR

> "I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY EXCLUDING EVIDENCE REGARDING ARROWOOD'S BREACH OF ITS DUTY TO DEFEND, AND THE LEGAL CONSEQUENCES THEREOF.
>
> II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE OWNED PROPERTY EXCLUSION APPLIED TO BAR COVERAGE FOR THE JUDGMENT.

III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE POLLUTION EXCLUSION APPLIED TO BAR COVERAGE FOR THE JUDGMENT.

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE 'SUDDEN AND ACCIDENTAL' EXCEPTION TO THE POLLUTION EXCLUSION DID NOT APPLY TO PROVIDE COVERAGE FOR THE JUDGMENT.

V. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING ARROWOOD'S EXPERT TO OFFER PREVIOUSLY UNDISCLOSED EXPERT OPINIONS ABOUT DIOXIN AND SPECULATIVE OPINIONS ABOUT TCE WHEN THERE WAS NO EVIDENCE FRICK EVER USED TCE IN ITS ROUTINE MANUFACTURING PROCESSES AND INSTEAD USED ITS STRIP TANK AND PHOSPHATIZERS FOR DEGREASING."

{¶29} For ease of analysis we will consider the Assignments of Error out of order.

ASSIGNMENT OF ERROR TWO

{¶30} We begin by consideration of assignment of error two, which we find to be dispositive of the appeal. Did the trial court err by finding that the owned property exclusion applied to the facts of this case? Appellant first argues that the owned property exclusion does not apply because the judgment against Frick constitutes a third-party liability. Appellant also argues that the owned property exclusion should not apply because the costs were incurred to protect the public and the environment. Appellant also contends that the owned property exclusion does not apply to liability pursuant to the Ohio VAP. For the reasons which

follow, we agree with the trial court's finding that "[t]he owned property exclusion applies based upon the facts of this case."

STANDARD OF REVIEW

{¶31} " ' "[T]he interpretation of an insurance contract is a matter of law, which we review de novo." ' " *Artisan &Truckers Casualty Co. v. United Ohio Insurance Co.,* 2019-Ohio-3, 127 N.E. 3d 333, (4th Dist.) at ¶ 12, quoting *Comisford v. Erie Property Cas. Co.,* 4th Dist. Gallia No. 10CA3, 2011-Ohio-1373, quoting *Siegfried v. Farmers Ins. of Columbus, Inc.,* 187 Ohio App.3d 710, 933 N.E.2d 815, 2010-Ohio-1173, (9th Dist.) at ¶ 11, citing *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995).

LEGAL ANALYSIS

{¶32} Contract terms are to be given their plain and ordinary meaning. *Gomolka v. State Auto. Mut. Ins. Co.,* 70 Ohio St.2d 166, 167–168, 436 N.E.2d 1347 (1982). If provisions are susceptible of more than one interpretation, they "will be construed strictly against the insurer and liberally in favor of the insured." *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 519 N.E.2d 1380 (1988), syllabus. Additionally, "an exclusion in an insurance policy will be interpreted as applying only to that which is *clearly* intended to be excluded." (Emphasis sic.) *Sharonville v. Am. Employers Ins. Co.,* 09 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, at ¶ 6; *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.*, 64 Ohio

St.3d 657, 665, 597 N.E.2d 1096 (1992). Prior to trial, the parties stipulated that all the Arrowood primary insurance policies between January 1, 1981 and December 31, 1985 contained the same coverage conditions and exclusions.

{¶33} Appellant's complaint was filed pursuant to R.C. 3929.06, which provides that one obtaining a judgment may file a supplemental complaint alleging that liability insurance should be applied to satisfaction of a final judgment. R.C. 3929.06 (C)(1) further provides that in a civil action that a judgment creditor commences in accordance with divisions (A)(2) and (B) of this section against an insurer that issued a particular policy of liability insurance, the insurer has and may assert as an affirmative defense against the judgment creditor any coverage defenses that the insurer possesses and could assert against the holder of the policy. Appellee points out that all the relevant Arrowood policies also contained an "owned property exclusion." This exclusion, contained in its "Broad Form Property Damage Liability Coverage" section, excludes coverage for property damage to "property owned or occupied by or rented to the insured." The policy language further provides that for the coverage under the relevant policies to apply, there must be "property damage," as that term is defined in the policy, and the property damage must have occurred during the policy period. In this case, the parties do not dispute the language contained in the policy exclusion for owned

property. Nor does Appellant contend that the language of the exclusion is ambiguous or unclear.

{¶34} Appellant first argues that the owned property exclusion does not apply because the judgment against Frick constitutes a third-party liability. However, Appellee responds that there is no dispute that the site buildings and structures are property owned or occupied by Frick. Further, Appellant did not provide evidence of any damage to third-party property. Appellant also provided no evidence of costs incurred to remediate any property besides the Frick property, which are clearly excluded by the owned property exclusion.

{¶35} We have reviewed the voluminous record in this case and agree with the trial court's finding that the owned property exclusion of Appellee's policies applied to bar coverage, based upon the facts presented in this case. The city engineer, Timothy Wojdacz, testified that the City of Wellston started the assessment process in 2008. The City was concerned about "potential migration off-site" and thus undertook a "targeted Brownfield assessment to assess off-site groundwater migration."[8] Mr. Wojdacz specifically testified on cross-examination that "we did confirm that there was no migration of anything off-site."

{¶36} Michael May also testified, as a representative of Keramida and pursuant to his review of the Keramida records, on the issue of whether there was

[8] "Brownfield" is a term used to describe a property of which redevelopment or reuse may be complicated by the presence of a hazardous substance or pollutant. See https://epa.gove/brownfields/overview.

any remediation or remediation costs for property off the Frick site. May specifically testified that their Keramida records did not contain information that any other properties had been impacted by a chemical release. The Keramida records did not indicate whether or not any chlorinated compounds had migrated off the Frick site. To his knowledge, Keramida did not remove any soil from outside of the Frick site, asbestos was located within the Frick site, and Keramida did not perform any remedial work outside the boundaries of the Frick site.

{¶37} Appellee's expert Mark Flavin testified that in all of the documentation he reviewed in preparation for his testimony, he did not see any evidence that any of the remediation costs incurred by Keramida were to remediate any portion of the Wellston city sewer system. Even Appellant's expert Carl Rhodes testified that there were no costs incurred by Keramida with respect to dioxin in the Wellston city sewer system. The trial court, in ruling that the owned property exclusion applied, noted that "All of the cleanup efforts were directed to property owned by Frick."

{¶38} On appeal, Appellant also argues that the owned property exclusion should not apply because the costs were incurred to protect and mitigate the threat of harm to the public and the environment. However, Appellee responds that even if Appellant could establish that the conditions at the site posed a threat of harm to the public and surrounding environment during the relevant policy period,

Appellant still would not be entitled to overcome the owned property exclusion. We agree.

{¶39} Appellant has not cited to any Ohio case holding that the owned property exclusion is inapplicable where there is potential or threatened harm to a third-party property. In fact, both parties have directed us to the only Ohio court to address the proposition, a common pleas case, *The Lamson & Sessions Home Indemnity Co.*, 1996 WL 33501685, C.P. (Sept. 11, 1996). *Lamson* held that the exclusion does apply where there is no actual damage to third-party property.

{¶40} The Lamson and Sessions Company claimed coverage from insurance company defendants from policies containing general liability provisions for environmental remediation costs at a facility in Brooklyn, Ohio. As here, the Home Indemnity Company asserted applicability of an "owned property" exclusion because the contamination was limited to its property and did not threaten abutting land. In the decision finding that the owned property exclusion did apply, the common pleas judge in *Lamson* wrote:

> The Court has reviewed the exhibits relating to this question and finds that there is no evidence tending to establish that any contaminants in fact leached or migrated from the site, either while it was owned by L&S or at any subsequent time prior to the remediation.

{¶41} Relating to this, Appellant also argues that the owned property exclusion does not apply to liability for the judgment under the Ohio VAP. However, Appellee responds that compliance with the Ohio VAP has no

bearing on whether the work is covered under the insurance policies. And, Appellant has pointed to no Ohio case law to support its arguments that the owned property exclusion is inapplicable to potential or threatened harm to third-party property where (1) the cleanup was voluntarily undertaken and (2) there is no actual damage to third-party property. The *Lamson* court further observed that "[i]t is undisputed that no abutting or neighboring property owner has sued or claimed damages for such pollutants and no government agency ever issued any findings or ordered remediation to correct such environmental impact." *Lamson* held:

> Clearly, potential injury to neighboring property, even if imminent, does not constitute injury to such property so as to obligate [a plaintiff] to pay damages. * * * [A]bsent evidence of actual injury resulting from contamination, an abutting property owner would have had no cause of action in damages [against L&S] for future injury to its land based upon the possibility that contaminants might migrate or leach.

{¶42} Based upon our de novo review and the evidence contained in the record, we agree with the trial court's conclusion that the owned property exclusion applies to bar coverage for Appellant's claims. The trial court's decision cited Appellant's expert's testimony (Carl Rhodes) on cross-examination admitting that no costs were incurred concerning the cleanup process of the site as it related to the Wellston sewer system. The trial court also noted the Wellston city engineer's (Timothy Wodjcaz) testimony that

there was no evidence that pollutants had migrated off the Frick property. Our review of the trial transcript verifies this evidence appears in the record, as well as Michael May's considerable testimony from his review of Keramida files and on behalf of Keramida. Finally, Appellee's expert (Mark Flavin) corroborated this testimony.

{¶43} In sum, Appellee has pointed to the evidence which demonstrates that the remediation was performed only on the Frick site and that Keramida's costs were incurred for remediation performed only on the Frick site. Appellant's evidence to the contrary is speculative at best. It is not enough for a plaintiff to speculate that a defendant's action or failure to act might have caused an injury. *See Clough v. Watkins,* 4th Dist. Washington No. 19CA20, 2020-Ohio-3446, at ¶ 31, (Court discussed the causation element of a negligence claim and cited *Gedra v. Dallmer Co.,* 153 Ohio St. 258, 91 N.E.2d 256 (1950), paragraph two of the syllabus.) *See also Holliday v. Oberhouser*, 7th Dist. Belmont No. 1213, 1977 WL 198737 (May 24, 1977), at *2, (Although conditions where adjoining landowner defendants' livestock ran loose and trespassed upon plaintiffs' land were distasteful and not conducive to good health, trial court correctly found that plaintiff presented no proof of injury).

{¶44} For the foregoing reasons, we find no merit to Appellant's second assignment of error. The trial court properly found that the owned property exclusion applied to bar coverage. Competent credible evidence supports the trial court's conclusion. As such, the second assignment of error is hereby overruled.

Assignments of Error Three and Four

{¶45} Under Assignment of Error Three, Appellant asserts that the trial court erroneously concluded that the pollution exclusion applied. Under Assignment of Error Four, Appellant asserts the trial court erroneously concluded that the "sudden and accidental" exception to the pollution exclusion did not apply. However, because we have already found that the owned property exclusion applies to bar coverage for Appellant's claims, these arguments are rendered moot and we decline to address them. *See Mustard v. Owners Insurance Company,* 2014-Ohio-865, 6 N.E.3d 1235, (4th Dist.), at ¶ 23; *Haimbaugh v. Grange Mut. Cas. Co.,* 10th Dist. Franklin No. 07AP-676, 2008-Ohio-4001, at ¶ 40; *Am. Family Mut. Ins. Co. v. Scott*, 2nd Dist. Miami No. 07CA28, 20008-Ohio-1865, at ¶ 25. *See also* App.R. 12(A)(1)(C).

Assignment of Error One

{¶45} Under Assignment of Error One, Appellant asserts the trial court

erroneously excluded evidence regarding an alleged duty to defend owed by Appellee. In this case, Appellee filed a Motion in Limine requesting the court to exclude any evidence or argument regarding Appellee's "purported" duty to defend Frick in the underlying litigation. The trial court granted Appellant's motion in limine.

{¶46} However, in this case, we have previously found that the trial court properly determined that the owned property exclusion applied to bar coverage. Accordingly, no duty to defend arose because Appellant's claims were excluded from coverage. *See Lamson, supra,* at *6, citing *Hybud, supra,* at 661, 597 N.E.2d 1096, ("Sphere Drake was not under an obligation to defend the insureds in the * * * underlying actions because the claims in those actions were excluded from coverage * * *.") Therefore, we find no merit to Appellant's First Assignment of Error.

Assignment of Error Five

{¶46} Under Assignment of Error Five, Appellant asserts that the trial court erred by allowing previously undisclosed expert opinions from Appellee's expert into evidence at trial. Ordinarily, we review trial court decisions on evidentiary issues for abuse of discretion. *Brown v. Burnett,* 2020-Ohio-297, 144 N.E.3d 475 (2nd Dist.) at ¶ 20, citing *Miller v. Bike Athletic Co.,* 80 Ohio St.3d 607, 616, 687 N.E.2d 735 (1998). Appellant's

evidentiary arguments raised here relate to Appellee's expert's opinion regarding the source of dioxin and TCE contamination. These opinions were given to counter Appellant's argument that the sudden and accidental exception to the pollution exclusion did not apply. Given our finding that the owned property exclusion applied and thus, assignments of error three and four are rendered moot, the evidentiary issue raised under assignment of error five has also become moot. *See Bailey v. Topline Restaurants, Inc.,* 10th Dist. Franklin No. 11AP-359, 2012-Ohio-1759, at ¶ 31; *State ex rel Huth v. Village of Bolivar,* 5th Dist. Tuscarawas County, No. 2018AP030013, 2018-Ohio-3460, ¶ 50. We therefore decline to address Appellant's fifth assignment of error.

CONCLUSION

{¶48} We have considered Appellant's second assignment of error and determined that the trial court correctly found the owned property exclusion to be applicable in this case. As a result, the assignments of error three, four, and five have been rendered moot. We have also found no merit to the first assignment of error. Accordingly, we overrule the first and second assignments of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the **JUDGMENT BE AFFIRMED** and that costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. and Hess, J. concur in Judgment and Opinion.

For the Court,

_____
Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.