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## Kalamazoo River Study Group v. Rockwell Int'l, 3 F. Supp. 2d 815 (W.D. Mich. 1997)

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was a pollutant. Here, the defendant's involvement with the prior discharges tended to prove knowledge and familiarity with the company's industrial waste. Because Iverson was personally involved and had authority to exercise control over the illegal discharge of industrial waste, he was a responsible corporate officer and was subsequently criminally liable for the company's wastewater disposal practices.

*Eric V. Snyder*

**Kalamazoo River Study Group v. Rockwell Int'l, 3 F. Supp. 2d 815 (W.D. Mich. 1997)** (holding that summary judgment for the defendant in a suit for contribution for response costs was proper where the plaintiff could not prove the defendant caused the contamination, and where the plaintiff based its theory of liability solely on speculation and possibility).

Plaintiff, Kalamazoo River Study Group ("KRSG"), filed this suit under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the Michigan Natural Resources and Environmental Protection Act ("NREPA"). It also sought contribution for response costs incurred in response to releases of polychlorinated biphenyls ("PCBs") into the Kalamazoo River. KRSG filed this suit against eight other companies with facilities on or near the Kalamazoo River. The issue before the court was defendant Benteler Industries, Inc.'s ("Benteler") motion for summary judgment.

Based upon studies conducted between 1972 and 1989, the Michigan Department of Natural Resources ("MDNR") determined that a three mile portion of Portage Creek, from Cork Street to the Kalamazoo River, and a thirty-five mile portion of the Kalamazoo River, from this confluence downstream to the Allegan City Dam (the "Site"), contained large amounts of PCBs. In 1990, the EPA listed the Site on the National Priority List as a Superfund site pursuant to CERCLA, and the MDNR listed the Site as an environmental contamination site under the Michigan Environmental Response Act. The MDNR identified three paper companies as potentially responsible parties as a result of their past recycling operations from 1957-1971. The recycling operations included the de-inking of carbonless copy paper, which contained PCBs. James River Paper Company joined HM Holdings, Inc., Georgia-Pacific Corporation, and Simpson Plainwell Paper Company to form KRSG, an unincorporated association. KRSG alleged that the eight other companies contributed to PCB contamination and sought reimbursement or contribution for their response costs.

Benteler manufactures automobile parts. Benteler purchased the Galesburg manufacturing facility at issue in this case in 1986. The

facility was located upstream of the Kalamazoo Superfund site, about 3,200 feet from Morrow Lake. There was a drainage ditch on Benteler's property that ran from a headwall next to the Benteler parking lot south, approximately 3,200 feet toward Morrow Lake. Morrow Lake was an impoundment of the Kalamazoo River formed by Morrow Dam. Morrow Dam was approximately 4.25 miles upstream from the Site. When Benteler purchased the Galesburg facility, there were transformers and capacitors in the manufacturing buildings which contained PCBs. In the process of responding to a leak, Benteler discovered PCBs throughout the plant, in the ditch near the headwall, and in the drain lines leading to the ditch. In 1993, Benteler took remedial actions to remove PCBs from the drainage ditch, and, in 1996, the Michigan Department of Environmental Quality issued Benteler a clean closure letter.

Benteler and KRSG agreed that in order to hold Benteler liable for response costs that KRSG had and would incur at the Site, KRSG must establish that: (1) there was a release or threatened release of a hazardous substance; (2) the site of the release or threatened release was a "facility" as that term was defined in the statute; (3) the release or threatened release had caused KRSG to incur response costs; and (4) Benteler was among the statutorily-defined group of persons, which included the owner or operator of a facility. Benteler only challenged KRSG's ability to demonstrate the third element: i.e., whether PCBs from Benteler's property contributed to the contamination of the Site.

Benteler contended that the condition of the ditch and the soil were such that PCBs from its facility would not have migrated all the way down the ditch to the river and that any water running in the ditch would have been absorbed into the soil before reaching the river. Benteler also presented evidence that they confined the PCBs in Benteler's ditch to the area near the headwall.

The court stated that because Benteler had shown that KRSG could not prove the causation element, the burden shifted to KRSG to present some evidence that there was a material issue of fact that Benteler was in fact a source of PCB contamination in the Kalamazoo River. KRSG presented evidence based on a U.S. Geological Society Survey Map, stormwater discharge documents showing Morrow Lake as the discharge point for the ditch, soil samples showing PCBs at three feet and eighteen feet from Morrow Lake, and challenges to the conclusions of Benteler's experts.

The court held that summary judgment was appropriate because KRSG based its entire theory of liability upon the assumption that water flowed down the ditch to Morrow Lake. The court did not find that KRSG had presented evidence on which a jury could reasonably find Benteler liable because KRSG based their assumption solely on speculation and possibility. The court stated, "[t]he existence of a possibility does not create a material issue of fact for trial because KRSG bears the burden of proof to show that Benteler did contribute to PCBs in the Kalamazoo River, and not that it is possible that it might

have contributed to the PCBs."

Finally, the court stated that "KRSG [had] utterly failed to come forward with any evidence that would tend to show that water did in fact flow down the ditch in sufficient quantity to carry PCBs from the northern part of the ditch to Morrow Lake." The court reasoned that KRSG "did not connect the dots" to show a flow of PCBs from the Benteler facility.

*Matt Dillman*

## STATE COURTS

### ARIZONA

**San Carlos Apache Tribe v. Maricopa Superior Court**, (No. CV-95-0161-SA) 1999 WL 4128 (Ariz. Jan. 7, 1999) (holding most of the statutory changes at issue unconstitutional because they applied retroactively to affect vested property rights, thus violating the due process and separation of powers clauses of the Arizona Constitution).

The perpetual puzzle in water law: the demand for water constantly surpasses the available supply. Priority and quantification determinations attempt to alleviate this problem. In 1974, the Salt River Valley Water Users' Association filed its petition for adjudication of its water rights under A.R.S. §§ 45-231 to 45-245. (Later changed to A.R.S. §§ 45-251 to 45-260). In 1995, the Arizona Legislature enacted House Bills 2276 and 2193 which revised many statutes dealing with surface water rights and the adjudication process. The San Carlos Apache Tribe filed this special action challenging the constitutionality of these two enactments and the Arizona Supreme Court sitting *en banc* accepted jurisdiction. The court then remanded the matter to the trial court for briefing and oral argument.

The court first analyzed House Bill 2276. The primary issue dealt with the retroactivity of the statutory changes. All parties agreed on the basic rule that procedural, not substantive, changes may apply retroactively. The federal parties argued the enactments were unconstitutional because they consisted of substantive retroactive laws that impaired vested property rights thereby violating substantive due process. The state argued that all substantive changes are only prospective and that some of those appearing retroactive were actually clarifications of previously ambiguous law. The trial court stated, and the Arizona Supreme Court agreed, that the statement of the Legislature's intent in amending the adjudication process unequivocally showed that retroactivity would apply to both substantive and procedural changes. The court emphasized, however, that