STATE OF WISCONSIN CIRCUIT COURT CALUMET COUNTY

STATE OF WISCONSIN,

Plaintiff,

-vs-

GERALD SCHMALZ and
WEISELER CONSTRUCTION, INC.,

Defendants,

and

ALLIS-CHALMERS CORPORATION,

Defendant and
Third Party Plaintiff,

-vs-

CITY OF MENASHA,

Third Party Defendant.

DECISION

Case No. 79-CV-104

REC'D DNR
JUL 16 1981
GREEN BAY

The Plaintiff, State of Wisconsin, has brought an action against the Defendant, Allis-Chalmers Corporation, and others alleging violations of certain Wisconsin Administrative Code and Wisconsin Statute sections which control the transport and deposit of hazardous wastes. Specifically, as it relates to the Defendant, Allis-Chalmers, the State's complaint alleges that as a generator of PCBs (polychlorinated biphenyls), a hazardous waste, Allis-Chalmers failed to engage a licensed transporter and failed to see that the wastes were deposited in a facility licensed to receive them. Violations of the rules and statutes controlling the deposit of such wastes impose daily forfeitures while the violations continue. The complaint also asserts that the alleged violations constitute a public nuisance and, therefore, requests removal of the wastes by the Defendants as well as imposition of the forfeitures.

After investigation and discovery which followed commencement of the action, the Defendant, Allis-Chalmers, has, by Third Party Summons and Complaint, brought the City of Menasha into the case as Third Party Defendant, alleging that the City, at times prior to the alleged violation by Allis-Chalmers, also deposited materials containing PCBs into the unlicensed waste disposal site in

question. The purpose of the Third Party complaint is, of course, to demand contribution and indemnification from the City of Menasha on the allegation that the deposit of PCBs by the City was the cause of or added to the PCB contamination.

Following its impleader, the City of Menasha has brought motions before the Court requesting: (1) Disqualification of Foley & Lardner, Allis-Chalmers' attorneys, on the ground that the firm's prior and continuing representation of the City of Menasha constitutes a conflict of interest, and (2) Dismissal of the Third Party Complaint against Menasha because the same, in demanding contribution and indemnification, has failed to state a claim upon which relief can be granted. Those motions are the subject of this decision and will be considered in reverse order to their submission.

I

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

The Defendant, Allis-Chalmers, asks that the City of Menasha contribute to and wholly compensate and indemnify Allis-Chalmers for any liability in this action resulting from the presence of any PCBs in the subject site including any and all liability under the State's claim for injunctive relief. The basis for these claims for contribution and indemnity is the claim by Allis-Chalmers that the presence of PCBs, if any, in its demolition material, is due to contamination from PCB laden material deposited earlier in the site by the City of Menasha.

Menasha, in its brief in support of the motion for dismissal, correctly asserts that the claim for indemnity is not proper since there is an absence of the contractual, agency or other relationship between Allis-Chalmers and Menasha which is necessary to support a shift of responsibility under the doctrine of indemnity. Allis-Chalmers agrees with that interpretation and says that its third party action is not based upon indemnity but rather is one for contribution between joint tort feasors.

The State's action asks for forfeitures based upon violations of the statutes and administrative rules and in addition requests injunctive relief founded upon the claim that a public nuisance was created. Allis-Chalmers, impliedly at least, agrees that no contribution could be invoked with regard to the payment of forfeitures, but argues because: (1) a nuisance has been alleged by the State; and

(2) nuisance is in the field of tort liability; and (3) Menasha is alleged to be negligent, that, therefore, all of the necessary requirements to substantiate a claim for contribution under the applicable Wisconsin case law have been met.

It is apparent, then, that Allis-Chalmers predicates its claim for contribution from Menasha on the theory of tort liability based on negligence. Controlling Wisconsin law on this subject provides that the right of contribution in negligence cases requires that both parties must be joint negligent wrongdoers and must have common liability because of such negligence, Farmers Mutuals -vs- Milwaukee Auto, 8 Wis. 2d 512; Hartford Fire -vs- Osborn, 66 Wis 2d 454. The common liability necessary to support the cause of action for contribution is to be determined as of the time the accident occurs, Reddington -vs- Beefeaters, 72 Wis. 2d 119.

Since an element of contribution is the existence of joint negligent tort feasors, the State's complaint was examined to determine whether it alleges or is founded upon the negligence of Allis-Chalmers, and the only conclusion this writer cound come to is that it does not. The complaint alleges violations of statutes and administrative rules and asks for the imposition of forfeitures and the removal of the illegally deposited PCBs. It is not a complaint for damages based upon negligence and does not sound in tort, but is, in fact, a quasi criminal cause of action based upon the State's police powers.

Even if the State's complaint could be interpreted as alleging negligence on the part of Allis-Chalmers, there still would appear to be an absence of the second necessary element to the right of contribution, i.e., common liability. There is no allegation in the Third Party Complaint as to the existence of common liability based upon simultaneous or concurrent negligence which caused a single injury. Allis-Chalmers, in fact, alleges that if its demolition material contains any PCBs the same result solely from contamination by PCB laden deposits made by Menasha "prior to February 1979". Where then is the single injury caused by joint negligent tort feasors? Allis-Chalmers is saying in effect, that it is not responsible for the presence of PCBs and that someone else placed them in the landfill. If that is a fact and can be proved, Allis Chalmers will

have a perfectly good defense to the action and would be exonorated. On the other hand, if it is demonstrated on trial that both Allis-Chalmers and the City of Menasha deposited PCBs there can be no contribution because of the inability to show simultaneous or concurring negligence which caused a single injury.

Accordingly, this Court concludes that under the circumstances as alleged in the pleadings, neither a right to indemnification nor contribution has been demonstrated. It is, therefore, the order of the Court that the Third Party Complaint of Allis-Chalmers against the City of Menasha must be and hereby is dismissed.

II

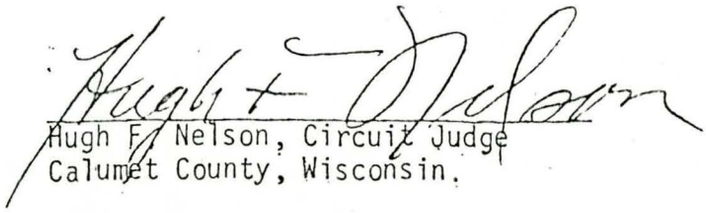
MOTION TO DISQUALIFY FOLEY AND LARDNER

It is felt that the above ruling on the Motion for Dismissal rendered moot any decision on the Motion to Disqualify. However, for what it is worth the briefs, Affidavits and Exhibits submitted by both parties on the question of disqualification have been reviewed with the result that this Court is not satisfied that a continuing attorney-client relationship between Foley and Lardner and the City of Menasha has been demonstrated. The Neenah-Menasha Sewerage Commission, it seems clear, is separate and distinct from the City of Menasha and the legal work done for it by Foley and Lardner does not create an attorney-client relationship with the city. Likewise, the legal work done as bond counsel on a periodic basis does not create a continuing relationship from which it could be deduced that Foley and Lardner is Menasha's attorney.

To disqualify Foley and Lardner on the basis of Menasha's protestations after the former has been involved in this case for almost two years would be unwarranted. Third Party Defendant's Motion to Disqualify is, therefore, denied.

Dated this 3rd day of July, 1981.

BY THE COURT:



Hugh F. Nelson, Circuit Judge
Calumet County, Wisconsin.