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Groundwater Contamination/Dry Cleaners: Alaska Supreme Court Addresses Whether Seller Had a Duty to Disclose

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The Alaska Supreme Court ("Court") addressed in a December 30th opinion issues arising out of the purchase of a property that had groundwater contamination. See *Gavora, Inc. v. City of Fairbanks*, 502 P.3d 410.

The Court addressed the buyer's contentions that the seller misrepresented the property's environmental status.

Gavora, Inc. is a Fairbanks-based real estate holding company that has owned properties in Alaska, Hawaii, and Washington. In 1974 Gavora acquired a commercial mall business that held a lease for property owned by the City of Fairbanks ("City"). The City approved the lease's assignment to Gavora in 1976.

Gavora subsequently exercised the lease's purchase option. Therefore, it purchased the property from the City in 2002.

A dry-cleaning business was a mall tenant prior to the assignment of the lease to Gavora. Gavora continued subleasing to dry-cleaning tenants for about 35 years. The dry-cleaning tenants contaminated groundwater with tetrachloroethylene ("PCE") and trichloroethylene ("TCE").

The Alaska Department of Environmental Conservation ("ADEC") notified the City and Gavora in 2009 that they were potentially liable for environmental remediation related to the groundwater contamination.

Gavora subsequently filed an action against the City in federal district court to apportion liability for environmental contamination remediation costs under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The federal district court concluded that under CERCLA the City and Gavora were jointly and severally liable for the groundwater contamination's environmental remediation costs. It established the City's share of liability at 55% and Gavora's share of liability at 45%. A substantial majority of the contamination was determined to have been caused by Gavora's dry-cleaning tenants.

The federal district court concluded that between 80% and 90% of the total on-site contamination was from dry-cleaning operations from 1976 to approximately 2001.

Gavora also filed an action against the City in Alaska Superior Court alleging:

- Misrepresentation
- Fraud
- Breach of contract
- Breach of implied covenant of good faith and fair dealing
- Breach of implied warranty of fitness for public use
- Implied indemnity
- Negligence

Gavora alleged that the City either intentionally, negligently, or innocently misrepresented the mall property as environmentally clean or by omission misrepresented it as uncontaminated prior to its purchase.

The parties agreed that the federal district court's factual findings developed in the CERCLA action were binding. However, additional evidence was introduced. The Superior Court ruled for the City on all major issues.

In addressing the appeal, the Court first held that a fiduciary duty or similar relation of trust did not exist between the City and Gavora. The City was deemed to have no reason to know that Gavora did not know about the contamination. The City therefore had no duty to disclose the contamination. The Court determined that the record reflected that Gavora and the City formed a standard business relationship by engaging in an arm's-length commercial real estate transaction between self-interested parties. Both parties were represented by real estate professionals and the contract contained an "as-is" clause. The environmental information was the type which Gavora would be expected to discover by ordinary inspection and inquiry.

Second, the Court affirmed the Superior Court's finding that the City and its primary negotiator did not actively deceive Gavora. This supported the conclusion that the City was not liable for failing to disclose the dangerous condition.

The primary negotiator had testified that he made no connection between the contamination of an apartment complex near the property, the property contamination, and the sale. This testimony was deemed credible by the Superior Court. It reasoned that the negotiator did not connect the dots because he negotiated the sale more than a year after learning about the contamination. Further, Gavora's agent testified that no City employee represented the property was uncontaminated. Consequently, Gavora was held to not have been actively deceived by the City.

Third, the Court found that Gavora had reason to be aware of the groundwater contamination. Gavora was identified as:

- A sophisticated real estate buyer
- Experienced in commercial real estate transactions
- Aware of environmental issues commonly affecting commercial properties
- Represented by counsel
- Experienced at dealing with ADEC.

The mall's property contamination status was easily discoverable by ordinary inquiry. Gavora did not need to independently discover the contamination because the property was added to ADEC's publicly available list of contaminated sites in 2000. This occurred well before the sale negotiations. Therefore, Gavora had reason to know about the groundwater contamination on the property.

Fourth, the Court concurred with the Superior Court's finding that there was no physical harm after purchase of the property. This supported the conclusion that the City was not liable for failing to disclose a known dangerous condition.

Gavora had argued that trial testimony established the groundwater contamination plume's continued expansion. It argued that the Superior Court disregarded the human health hazard and property damage from contaminant vapors arising after Gavora purchased the mall property.

The Superior Court disagreed that credible trial evidence indicated the groundwater contamination plume may have continued to expand as it migrated off the mall property. However, it held there was insufficient evidence indicating contamination at the site grew worse after 1999.

The Superior Court was bound by the federal district court's findings that 80% to 90% of the contamination was caused by Gavora's dry-cleaning tenants from 1976 to 2001. Also, no dry-cleaning establishment operated after Gavora purchased the property in 2002.

The Court agreed with the finding that all of the physical harm to the land occurred before Gavora took possession of the property. The City would be liable to Gavora only for physical harm caused by the contamination after Gavora had taken possession.

The Court determined that the seller did not have a duty to disclose groundwater contamination to the buyer of property.

A copy of the opinion can be downloaded [here](#).