STATE OF MICHIGAN

COURT OF APPEALS

B & B ASSOCIATES,

Plaintiff-Appellee/Cross-Appellant,

v

AMOCO OIL COMPANY,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
January 4, 2000

No. 208588
Wayne Circuit Court
LC No. 93-314569 CE

Before: Smolenski, P.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment, following a bench trial, awarding plaintiff $250,000 in this private cost recovery action under the former Michigan Environmental Response Act (MERA), MCL 299.601 *et seq*.; MSA 13.32(1) *et seq*.[1] Plaintiff cross-appeals, challenging the trial court's order granting defendant summary disposition on its claim for intentional interference with a contract. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff filed the instant action alleging that defendant is liable for environmental remediation damages with respect to a parcel of property now owned by plaintiff and once owned by defendant. Defendant owned the property from 1967 until 1983 and, throughout its ownership, a gas station was operated on the property. The gas station contained underground storage tanks, piping associated with the tanks, and gasoline dispensers located on a pump island. In 1983, defendant sold the property to Dawn Donuts Systems, Inc., who, without conducting any business on the property, leased it back to defendant. In 1985, Dawn Donuts sold the property to plaintiff, who operated a restaurant on the property until 1990. As a result of environmental testing performed in 1990, in connection with a possible sale of the property, gasoline contamination was discovered in the former underground storage tank area and in the vicinity of the former pump island.

On appeal, defendant first argues that the trial court erred in awarding plaintiff $250,000 to cover future costs for response activity (i.e., those costs not yet incurred), under § 12 of the MERA, MCL 299.612; MSA 13.32(12). We agree.

The interpretation and application of statutes presents a question of law that we review de novo. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998); *Watson v Bureau of State Lottery*, 224 Mich App 639, 644; 569 NW2d 878 (1997). The primary goal of judicial interpretation is to ascertain and give effect to the intent and purpose of the Legislature. *Id.* The first criterion in determining intent is the specific language of the statute. *House Speaker v State Administrative Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993); *Watson*, *supra* at 644. Unless defined in the statute, every word or phrase should be understood according to the common and approved usage of the language, taking into account the context in which the words are used. MCL 8.3a; MSA 2.212(1); *Yaldo v North Pointe Ins Co*, 217 Mich App 617, 621; 552 NW2d 657 (1996). If statutory language is clear, judicial construction is normally neither necessary nor permitted; the statute must be enforced as it is written. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992); *Watson*, *supra* at 644.

Once liability is established under the MERA, the recoverable damages are set forth in subsections 12(2) and (3) of the act, which provide:

> A person described in subsection (1) shall be liable for all of the following:
>
> (a) All costs of response activity lawfully *incurred* by the state relating to the selection and implementation of response activity under this act.
>
> (b) Any other necessary *costs of response activity incurred* by any other person consistent with rules relating to the selection and implementation of response activity promulgated under the act.
>
> (c) Damages for the full value of injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing the injury, destruction, or loss resulting from the release.
>
> (3) The *costs of response activity* recoverable under subsection (2) shall also include:
>
> * * *
>
> (b) Any other necessary *costs of response activity* reasonably *incurred* by any other person prior to the promulgation of rules relating to the selection and implementation of response activity under this act. A person seeking recovery of these costs has the burden of establishing that the costs *were* reasonably *incurred under the circumstances that existed at the time the costs were incurred*. [MCL 299.612(2) and (3); MSA 13.32(12)(2) and (3) (emphasis added).]

The plain language of the statute provides for the recovery of response activity costs "*incurred*." The term "incurred" is past tense. Section 12 contemplates costs that have already been expended to clean up a site. In subsection 12(3)(b), the Legislature indicated that a person seeking recovery of response costs must establish that the costs "*were* reasonably *incurred* under the

circumstances that *existed* at the time the costs *were incurred*." (Emphasis added.) The clear language of the statute simply does not support an award for future costs, i.e., those costs not yet incurred.

Apart from the plain language of the statute, a reading of the statute as encompassing only costs already incurred is also consistent with the general intent of the MERA. See *Port Huron v Amoco Oil Co, Inc*, 229 Mich App 616, 632; 583 NW2d 215 (1998). Such a reading also comports with federal cases construing an analogous provision of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 USC 9607(a).[2] See, e.g., *Stanton Road Associates v Lohrey Enterprises*, 984 F2d 1015, 1021 (CA 9, 1993); *In re Dant & Russell, Inc*, 951 F2d 246, 249-250 (CA 9, 1991); *Boeing Co v Cascade Corp*, 920 F Supp 1121, 1133 (D Ore, 1996). Therefore, plaintiff is not entitled to an award of future costs for response activity.[3] Rather, it is only entitled to costs already incurred.[4]

Defendant next argues that the trial court's finding that it is responsible for the contamination is clearly erroneous. We disagree.

We review a trial court's findings of fact in a bench trial for clear error. MCR 2.613(C); *Featherston v Steinhoff*, 226 Mich App 584, 588; 575 NW2d 6 (1997). We will not overturn a trial court's findings of fact unless they are clearly erroneous. *Port Huron, supra* at 636. A finding is clearly erroneous when, although there is evidence to support it, we are left with the definite and firm conviction that a mistake has been made. *Id*.

The MERA imposes liability where there has been (1) a release of a hazardous substance, (2) at a facility, (3) causing the plaintiff to incur response costs, and (4) the defendant is a responsible party. MCL 299.612(1) and (2)(b); MSA 13.32(12)(1) and (2)(b); *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 5; 596 NW2d 620 (1999). A responsible party includes the owner of the facility, its operator, a person who arranged for disposal or treatment of a hazardous substance, and a person who accepts such a substance for transportation to a facility. MCL 299.612(1); MSA 13.32(12)(1); *Farm Bureau Mut Ins Co v Porter & Heckman, Inc*, 220 Mich App 627, 637, 639-641; 560 NW2d 367 (1996).

Here, plaintiff's expert opined that the gasoline contamination found under the site originated from the operation of a gasoline station on the land. Further, a report submitted by one of *defendant's* consultants indicated, in part:

> Based on the analytical data presented in this and referenced investigation reports, soil quality data indicates that residual concentrations of benzene, toluene, ethyl benzene, and xylenes (BTEX) . . . *resulting from a gasoline underground storage tank system* release are present . . . [Emphasis added.]

Defendant owned the property from 1967 until 1983, and operated a gas station on the premises. The facility included four underground storage tanks, piping associated with the tanks, and gasoline dispensers located on a pump island. Although the property was sold to Dawn Donuts in

1983, and later sold to plaintiff in 1985, defendant was the only owner/operator of the property to handle any petroleum products on the premises. See *Sunnen Products v Chemtech Industries*, 658 F Supp 276 (ED Mo, 1987).

Defendant claims that the land could have been contaminated in 1986, when plaintiff hired a contractor to remove the underground storage tanks and backfill the opening. However, plaintiff's expert testified that the procedure used by the hired contractor was a normal and acceptable way to remove underground storage tanks. Moreover, a report submitted by defendant's consultants indicated that the tank area "reflects hydrocarbon concentrations in soil prior to the excavation," and "the hydrocarbon-impacted soils were removed and *backfilled with clean sand*." (Emphasis added.) In addition, contamination was also located in an area where no backfill was provided.

Defendant also claims that there are other possible sources of the gasoline contamination besides their operation of a gas station on the premises. However, no evidence was presented to support these possibilities. Further, the report generated by defendant's consultants never mentioned an off-site source. Plaintiff's expert explained that all gas stations have leaks that come from the tanks, piping associated with the fuel delivery system, the pumping mechanisms, discharge from customers who inadvertently overfill their vehicles, or by releases associated with loading and unloading the product. Based on the evidence presented, we conclude that the trial court's finding that defendant is responsible for contaminating the property is not clearly erroneous.

On cross-appeal, plaintiff argues that the trial court erred in granting defendant summary disposition on its claim for intentional interference with a contract. We disagree.

We review de novo the grant or denial of a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Int'l Brotherhood of Electrical Workers, Local Union No 58 v McNulty*, 214 Mich App 437, 442; 543 NW2d 25 (1995). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider any affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties, and construe them in the light most favorable to the opposing party. MCR 2.116(G)(5). Summary disposition under MCR 2.116(C)(10) is proper if the documentary evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10) and (G)(4); *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

The elements of tortious interference with a contract are (1) a contract, (2) a breach, and (3) an instigation of the breach without justification by the defendant. *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 95-96; 443 NW2d 451 (1989). With regard to the third element, a party "must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Formall, Inc v Community Nat'l Bank of Pontiac*, 166 Mich App 772, 779; 421 NW2d 289 (1988).

Plaintiff cannot establish the second and third elements of its cause of action. The contract at issue is a January 14, 1991, purchase agreement for the property between plaintiff and Ingram Limited

Partnership ("Ingram"), which owns real property that it leases to White Castle restaurants. In the purchase agreement, plaintiff and Ingram agreed to a number of conditions precedent, which if not satisfied, excused either party from performing the agreement. Among those conditions were White Castle's complete satisfaction with the property and its condition and White Castle's receipt of certain environmental assurances from plaintiff.

The evidence shows that Ingram lawfully terminated the purchase agreement pursuant to factors independent of the contamination. The evidence established that White Castle was not willing to give the unilateral certifications required by the purchase agreement for the sale to proceed. White Castle's vice president of real estate testified that White Castle visited the area and determined that the property was not suitable for White Castle's business purposes. White Castle also conducted a detailed inspection of the building to determine whether the property was acceptable to White Castle, and determined that the building had sustained substantial vandalism damage. As a result, White Castle advised plaintiff that a reduction in price was necessary, to which plaintiff never agreed.

In addition, there is no evidence that defendant's actions were either done with malice or unjustified in law for the purpose of invading plaintiff's contractual rights or business relationship with Ingram. That defendant chose a different environmental remediation plan than plaintiff sought does not equate to the intentional interference of a contractual relationship that plaintiff had with Ingram. We therefore conclude that the trial court did not err in granting defendant summary disposition on plaintiff's claim of intentional interference with a contract.

Affirmed in part, reversed in part and remanded. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck
/s/ Brian K. Zahra

[1] The MERA has been repealed by the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*.; MSA 13A.101 *et seq*., effective March 30, 1995. However, the provisions in effect at the time of the events in question govern this case. MCL 324.102; MSA 13A.102.

[2] Because the intent of Michigan's statutory scheme is similar to the CERCLA, it is appropriate to examine federal cases addressing similar issues. *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 228; 532 NW2d 903 (1995); see also *Pitsch v ESE Michigan, Inc*, 233 Mich App 578, 593; 593 NW2d 565 (1999).

[3] Because we conclude that plaintiff is not entitled to future costs for response activity, we need not address defendant's claim that the trial court clearly erred in its determination of future costs.

[4] We reject plaintiff's estoppel argument because plaintiff failed to plead this claim in the complaint. MCR 2.111(B); *Dacon v Transue*, 441 Mich 315, 327-329; 490 NW2d 369 (1992).