STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL ex rel DEPARTMENT OF ENVIRONMENTAL QUALITY,

Plaintiff/Appellee,

v

RICHFIELD IRON WORKS, INC., HOWARD D. CAMPBELL, and WILMA M. CAMPBELL,

Defendants/Cross-Defendants/ Counter-Defendants-Appellants,

and

THOMPSON SHOPPING CENTER, INC.,

Defendant/Cross-Plaintiff/Third-Party Plaintiff-Appellee,

and

NBD BANK,

Defendant,

and

GERALD MANSOUR and GEORGE MANSOUR,

Third-Party Defendants/Cross-Defendants/Counter-Defendants-Appellees,

and

ROBERT A. STORK, PATRICIA A. STORK, CLARENCE A. D'AIGLE and BETTY D'AIGLE,

Third-Party Defendants/Cross-Plaintiffs/Counter-Defendants-

UNPUBLISHED
October 9, 2001

No. 219654
Ingham Circuit Court
LC No. 94-077873-CE

Appellees,

and

ROY DIRING and MARY DIRING,

Third-Party Defendants/Counter-Defendants-Appellees,

and

MARATHON OIL COMPANY,

Third-Party Defendant/Cross-Defendant/Cross-Plaintiff/Counter-Plaintiff,

and

MARATHON FLINT OIL COMPANY, MARV'S ELECTRIC COMPANY, MORRIS LEIBOV, DOUGLAS GOOCH, MERLE GOOCH, and MARGARET THOMPSON,

Third-Party Defendants/Cross-Defendants,

and

FLINT PAINTERS' SUPPLY, INC.,

Third-Party Defendant/Counter-Defendant.

Before: Griffin, P.J., and Neff and White, JJ.

PER CURIAM.

In this case brought under Michigan's Environmental Response Act (MERA), MCL 299.601 *et seq.*,[1] defendants Richfield Iron Works, Inc., Howard D. Campbell and Wilma M. Campbell (collectively RIW defendants[2]) appeal by leave granted the circuit court's order

[1] After this suit was filed, the MERA was recodified as Part 201 of the Natural Resources Environmental Protection Act (NREPA), MCL 324.20101 *et seq.*, effective March 30, 1995.

[2] The Campbells own the property on which Richfield Iron Works is located. Richfield Iron Works is a metal foundry that manufactures various metal products, and has operated continuously at this site since March 1969.

dismissing their cross-claims against defendants Thompson Shopping Center and third-party defendants Clarence D'Aigle, Betty D'Aigle, Robert A. Stork, Patricia Stork, Roy Diring, Mary Diring, Frances A. Thompson, Margaret Thompson, Gerald J. Mansour and George J. Mansour, under MCR 2.116(C)(10). We reverse.

I

Following a 1986 complaint of residential water contamination, the Genesee County Health Department and, eventually, the Michigan Department of Natural Resources (DNR),[3] undertook investigations in Genesee Township in an area known as the Richfield and Term Streets contamination area (Richfield site). Around 1989, the DNR ordered the removal of several underground storage tanks (USTs) from the Campbells' property, and that soils be tested underneath the USTs for chlorinated solvents, while two USTs that had been installed in 1940 by the Ohio Oil Company and Marathon-Flint, the then-owners of the property, were left in place to prevent subsidence. In April 1994, the DNR sent a letter to a number of persons, including Richfield Iron Works, the Campbells, Thompson Shopping Center and NBD, formally notifying them of their legal responsibility relating to the Richfield contamination area, and demanding payment of past and future costs incurred by the State for responding to the release of hazardous substances and requesting the responsible parties to undertake response activities to address the contamination. The letter stated that each responsible party was legally responsible for the full amount of the state's response activity costs, i.e., $791,005.15 plus $209,598.94 in interest, unless such person could prove that the harm was divisible and there was a reasonable basis for apportionment of liability among the responsible parties.

Later in 1994, the DNR initiated a cost recovery action under the MERA against the RIW defendants, Thompson Shopping Center and NBD Bancorp, Inc., arising out of contamination at the Richfield site. Plaintiff sought reimbursement for response activity and costs incurred in the investigation, mitigation, and remediation at the Richfield site, and alleged that defendants were strictly, jointly and severally liable for incurred costs, as well as future response activity costs associated with full remediation of the site.

Defendant Thompson Shopping Center (TSC) filed a third-party complaint against various alleged former owners/operators/lessees at the shopping center, including Margaret Thompson, and the Stork, D'Aigle, Diring and Mansour parties (collectively, with TSC, referred to as PERC[4] defendants). The RIW defendants cross-claimed against the PERC defendants, seeking contribution and cost recovery under the MERA, and also asserting common law claims of nuisance and trespass.[5]

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[3] Effective October 1, 1995, the powers of the MDNR's Environmental Response Division were transferred to the newly created Department of Environmental Quality (DEQ). MCL 324.99903.

[4] Appellees state that they use this term because a contaminant called perchloroethylene or "perc," was found under the shopping center site.

[5] The RIW defendants alleged nuisance and trespass against the Mansours, and nuisance against TSC. However, the RIW defendants conceded at oral argument before this Court that the common law claims were properly dismissed, and we thus do not address them.

The RIW defendants filed a motion for summary disposition as to liability to plaintiff on September 10, 1998. However, before the hearing, the PERC defendants settled all claims asserted against them by the State, and filed a joint motion with the State to approve a consent decree. The RIW defendants objected. The circuit court heard oral argument on the motion to approve the consent decree on September 28, 1998. The circuit court approved the consent decree by order dated October 30, 1998, and denied the RIW defendants' motion for reconsideration.

The circuit court issued an opinion granting plaintiff summary disposition as to liability of the RIW defendants, and ordering that the matter proceed to the trier of fact.

The PERC defendants then moved to dismiss the RIW defendants' cross-claims, arguing that in light of the consent decree, the RIW defendants could no longer maintain contribution or cost recovery claims against them.

The circuit court dismissed the RIW defendants' cross-claims, after the following colloquy:

> MR. SMITH [*counsel for the Mansours*]: [] the Perk [sic] Defendants have settled with the state. This Court has entered an order approving the consent decree. That consent decree provides for the payment of past costs to the State. And the Perk [sic] Defendants actually acting through the Thompson Shopping Center have agreed to implement any additional future work, monitoring work at the site. So we've agreed basically to decree both past costs and to do future work. What is before the Court today is whether or not, in light of this consent decree that's been entered in the Court, whether Richfield can continue to sue the Perk [sic] Defendants for either contribution or cost recovery under MERA and in addition against my clients and Mr. Hadden's clients. There are pending state law claims, as well.
>
> First of all, the language of the consent decree the contribution protection that's included in there was broadly drafted to include all claims asserted by the State in this litigation. In other words, the contribution protection afforded to the Perk Defendants was for everything that the state is suing for in this lawsuit. And so we think it's very clear that it covers both past costs and anything that may be incurred in the future because that was actually the intent of the parties. And what we tried to incorporate into the –
>
> THE COURT: Anything incurred by the State?
>
> MR. SMITH: Any relief sought by the State.
>
> THE COURT: I understand.
>
> MR. SMITH: And the relief was both future costs and future injunctive relief, as well as past costs.

THE COURT: Okay.

MR. SMITH: To my – and so we think it's clear that under that contribution provision we're entitled to summary judgment on Count I of the cross-claim, which was for contribution under the statute. Count II was a cost recovery claim asserted by Richfield. And again, we've cited to the Court a number of cases. Virtually every case decided by the appellate courts under CERCLA has held that any cost recovery claim is also barred by a sub – by a judicially approved consent decree. To my knowledge that specific issue has not been addressed by the appellate courts of Michigan, but certainly the policy behind the ability to settle here is to encourage people to settle. I mean, if you can settle with the State of Michigan that brought this action and you still have to continue in the lawsuit there's really no reason to settle. So think that our settlement with the State precludes any cost recovery, as well as contribution claims.

* * *

[] We've reached a settlement [with the State of Michigan] that this Court has already found to be fair. And let me perhaps in closing say, I went back and reread your opinion from December, and I don't see, if we are dismissed from the case, how Richfield is even hurt in this action because –

THE COURT: The discussion here in the courtroom about this issue, too? [sic?]

MR. SMITH: Right. You have held – what they are essentially saying is if the Perk [sic] Defendants caused the chlorinated solvent contamination, it's unfair to make us pay for it. And as I read your December 22 opinion in this case, what you've held is they will have the burden of proof at trial with the State, but if they can prove that there is a divisible harm here and that the Perk Defendants caused this problem, they are not going to have liability for it anyway. So what is the purpose of keeping us in the case? They are going to still have that burden of trying to prove that, you know, we, in effect, become the empty chair here. If they can prove that we did it, that the Perk [sic] parties caused this problem, they are not going to have liability. There's no reason for us to be in the case anymore.

THE COURT: All right. Anyone want to add to any of that or do you all stand on Mr. Smith's comments?

MS. LORD [*counsel for the Storks and D'Aigles*]: Just one thing, Your Honor.

* * *

. . . to the extent under Count I of the cross-claims on the contribution that the Richfield party does, in fact, get that monies' offset [sic]. And that's the only thing I think we didn't say.

THE COURT: Sure. It's automatic.

MS. LORD: Right.

THE COURT: All right. Comment, gentlemen?

MR. LAVALLE [*co-counsel for the RIW defendants*]: It's all in the briefs, but my only oral argument really with regard to this whole thing is that it's a bit ludicrous to suggest, it seems to me, that the State can foreclose our private remedies. If you read the language of Section 23 of the Consent Judgment, it doesn't talk about our private remedies. It talks about the Defendant shall not be liable for claims of contribution for matters set forth in Paragraph 21.1. Reading 21.1 it talks about all the stuff that's incurred by the State and talks about things that the Plaintiff has sought. That is the State. There are some discreet [sic] costs that we want to be able at least maybe some day to recover. **We have expended sums of money originally chasing down this solvents thing that apparently at least we –**

THE COURT: You talking about **expenses for determining the harm**?

MR. LAVALLE: **Exactly**. And **determining whether they were ours, whether they came from somebody else,** et cetera, et cetera. So there are some expenses that some day we may want to recover. Depending on what happens between the State and us, this all may become, may become a moot issue. I don't know. We just don't want to be foreclosed. So that's what we are here for.

THE COURT: Well, the Act as written does foreclose you, Counsel. I think you and I have discussed it before. You have no damages. You have no losses. **Your client hasn't gone out and done a remediation of this property and sued anybody** under the new Act for cleanup expenses. And I might add, those are not foreclosed necessarily because they changed the law.[6] Usually the client had gone out, found all this contamination on their property, did all this cleanup and they can come in and sue anybody they want, but this is an action by the State for the recovery of costs. And as pointed out by Mr. Smith very ably here and we've gone over it a hundred times, what's the big deal here? It's pretty clear that unless the State has the capacity to deal with individual defendants individually and settle their individual claims, we'll never have a case settle. This is for their costs. . . . .

* * *

[] . . . my position is that the State has the right to settle with individual parties. And **you do not have a right of recovery against them in the action brought**

[6] The circuit court was apparently referring to the Legislature's decision to amend Part 201 of the NREPA in 1995 to state the existence of a private cause of action in clearer terms, MCL 324.20126a(7). See *Pitsch v ESE Michigan, Inc*, 233 Mich App 578, 589 n 3; 593 NW2d 565 (1999).

by the State. **If you brought your own action for damages that you incur for cleanup, that may be something different under the Act**, but at this point you have no action. You looked at me funny.

MR. LAVALLE: We have, we believe, cross-claims that are separate from the State action. They are part of the State action because the State sued us to begin with.

THE COURT: It's the same property, same cleanup, same everything. How many thousands of pounds of stuff has your client removed from this property?

MR. LAVALLE: It hasn't removed any.

THE COURT: That's exactly what I'm telling you.

MR. LAVALLE: Some tanks and some soil.

THE COURT: The DNR has done all the work. They've spent all the money.

MR. LAVALLE: On what? The only thing the DNR spent money on was investigations and putting in a water line that may provide water that's as dangerous as your bottle.

THE COURT: Did they put in wells?

MR. LAVALLE: So did we.

THE COURT: Okay. Anyway, you got no right to sue them. Case dismissed. Do an order. [Emphasis added.]

This appeal ensued.

II

We review the circuit court's determination under MCR 2.116(C)(10) de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Interpretation of the MERA is a question of law we review de novo. *Port Huron v Amoco Oil Co*, 229 Mich App 616, 624; 583 NW2d 215 (1998). The MERA imposes liability "where there has been (1) a release of a hazardous substance, (2) at a facility, (3) causing plaintiff to incur response costs, and (4) defendant is a responsible party." *Cipri v Bellingham Foods*, 235 Mich App 1, 5; 596 NW2d 620 (1999); MCL 299.612(1).

There is no dispute that all parties involved in this appeal are potentially responsible persons (PRPs) under MCL 299.612(1). The extent of a PRP's liability is stated in subsection 12(2) of the MERA, which provided at pertinent times:

(2) A person described in section (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 the 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.

Before July 1, 1991, the MERA defined "response activity" as:

> an activity necessary to protect public health, safety, welfare, and the environment and includes but is not limited to, evaluation, cleanup, removal, containment, isolation, treatment, monitoring, maintenance, replacement of water supplies, temporary relocation of people as determined to be necessary by the governor or the governor's designee, and reimbursement for certain expenses as provided for in section 11. [MCL 299.603(j), as amended by 1984 PA 388.]

The MERA's contribution provision provided at pertinent times:

> A person may seek contribution from any other person who is liable or may be liable under section 12 **during** or following a civil action brought under this act. . . . This subsection shall not diminish the right of a person to bring an action for contribution in the absence of a civil action by the state under this act. [MCL 299.612c(3).]

A

Although the parties address broad issues under the act, e.g., whether a PRP can maintain a separate cost recovery action, the issue in this appeal is far more limited. Specifically, the RIW defendants seek to recover only past costs that they, on their own, had incurred in evaluating the extent, nature and source of the pollution, before the State filed its complaint in 1994. The RIW defendants argue that the protection from contribution claims contained in subsection 12(c)(5) of the MERA, MCL 299.612c(5), and in the consent decree is not so broad as to reach their claim for these past costs.

Subsection 12c(5) of the MERA provided at pertinent times:

> A person who has resolved his or her liability to the state in an administrative or judicially approved consent order is not liable for claims for contribution **regarding matters addressed in the consent order**. The consent order does not discharge any of the other persons liable under section 20126 unless the terms of

the consent order provide for this discharge, but the potential liability of the other persons is reduced by the amount of the consent order. [MCL 299.612c(5).]

The consent decree between the PERC defendants and the State provides in pertinent part:

XXIII. CONTRIBUTION PROTECTION

Pursuant to Section 20129(5) of NREPA, Defendants shall not be liable for claims for contribution for the matters set forth in Paragraph 21.1 of this Decree, **or as to other matters for which plaintiff seeks relief in this action**. Entry of this Decree does not discharge the liability of any other person(s) that may be liable under Section 20126 of NREPA and/or the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9607 and 9613, to the extent allowable by law. . . .

Paragraph 21.1 of the consent decree provides:

In consideration of the actions that will be performed and the payments that will be made by Defendants under the terms of this Decree, and except as specifically provided in this Section . . . Plaintiff covenants not to sue or to take administrative action against Defendants for claims arising:

(a) Performance of the approved response activities by Implementing Defendants under the Decree;

(b) Reimbursement of Past Response Activity Costs incurred by the State as set forth in Paragraph 19.1 of this Decree; and

(c) Payment of oversight costs incurred by the State as set forth in Paragraph 19.2 of this Decree.

Paragraph 19.1 provides:

Within twenty-eight (28) days of the effective date of this Decree, Defendants shall pay the MDEQ fifty thousand dollars ($50,000) to resolve all claims for Past Response Activity Costs relating to matters covered in this Decree.

Paragraph 19.2 provided:

Implementing Defendant shall reimburse Plaintiff for all Oversight Costs incurred by the Plaintiff in overseeing the remedial activities of Implementing Defendant for matters covered in this Decree. As soon as possible after each anniversary of the effective date of this Decree, pursuant to Sections 20119(4) and 20137(1) of NREPA, MCL 324.20119(4) and MCL 324.20137(1), the MDEQ will provide Defendants with a written demand of Oversight Costs lawfully incurred by Plaintiff. Any such demand will set forth with reasonable specificity the nature of the costs incurred.

Paragraph 4.11 of the consent decree provides:

> "Past Response Activity Costs" shall mean those costs incurred and paid by the Plaintiff prior to the effective date of the Decree.

Paragraph 4.9 of the consent decree provides:

> "Oversight Costs" mean costs that are related to the State's oversight, enforcement, monitoring and documentation of compliance with this Decree. Oversight Costs may include costs incurred to monitor response activities conducted in connection with compliance with this decree; observe and comment on field activities; review and comment on Submissions; collect and evaluate samples; purchase equipment and supplies to perform monitoring activities; attend and participate in meetings; prepare cost reimbursement documentation; and enforce, monitor and document compliance with this Decree.

B

Subsection 12c(5) of the MERA, quoted *supra*, provides for protection from contribution claims "regarding matters addressed in the consent order." The consent decree by its terms affords the PERC defendants contribution protection for "matters set forth in Paragraph 21.1 of this Decree, or as to other matters for which plaintiff seeks relief in this action." No provision of paragraph 21.1 pertains to investigative costs incurred by the RIW defendants *before the State filed its complaint in 1994.* Nor did plaintiff's complaint seek relief for such matters, as the expenditures were not made by the state, and the investigative work at issue had already been done.

Accordingly, the circuit court erred in dismissing the RIW defendants' cross-claims to the extent that they sought to recover costs the RIW defendants incurred on their own, before the State filed its complaint in 1994.[7]

The parties spend much time discussing whether a private action for recovery of response costs is available to a PRP under the MERA. We note that the RIW defendants brought the instant cross-claims as part of the State's action. We also note that in *Pitsch v ESE Michigan, Inc,* 233 Mich App 578; 593 NW2d 565 (1999), the plaintiff was a PRP. Nonetheless, we need not determine whether the claim here can be maintained as something other than a contribution claim because we conclude that even if it is a contribution claim, as to which the PERC defendants would have maximum protection under the MERA, it is not barred by subsection 12c(5).

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[7] The PERC defendants assert that this Court should affirm the dismissal of the RIW defendants' cross-claims in any event, because the RIW defendants did not present documentary evidence below substantiating these costs. However, the PERC defendants' motions for summary disposition were not brought on this basis, rather, they were brought on the ground that the consent decree extinguished as a matter of law any right to contribution of the RIW defendants.

Reversed and remanded. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Helene N. White