STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL and DEPARTMENT OF ENVIRONMENTAL QUALITY,

Plaintiffs-Appellees,

v

RICHMOND SANITARY LANDFILL, INC., OSCEOLA COUNTY WASTE SERVICES, and ENVIRONMENTAL REHAB, INC.,

Defendants-Appellants,

and

WILLIAM G. MCCARTHY,

Defendant/Counter-Defendant/Counter-Plaintiff-Appellant,

and

KIP D. ANDERSON,

Defendant,

and

RON JONES,

Defendant/Counter-Plaintiff/Counter-Defendant.

UNPUBLISHED
September 13, 2002

No. 231608
Osceola Circuit Court
LC No. 95-006765-CE

Before: Murphy, P.J., and Hood and Murray, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's judgment granting summary disposition to plaintiffs pursuant to MCR 2.116(C)(10). We affirm.

All defendants were, at one time, owners or operators of a landfill in Osceola County known as the Richmond Sanitary Landfill. In 1991, to address certain environmental violations, the operator of the landfill, Richmond Sanitary Landfill, Inc. (Richmond I) entered into a consent order with the Department of Natural Resources (DNR). In 1992, defendant McCarthy became president of Richmond I. In September 1992, Richmond I was restructured for tax reasons and merged into Richmond Sanitary Landfill, Inc. II (Richmond II). In 1995, the mortgage for the landfill was foreclosed, and Osceola County Waste Services, L.P. (OCWS) purchased the landfill at the foreclosure sale. Environmental Rehab, Inc (ERI) was OCWS' general partner and McCarthy was OCWS's limited partner. In addition, McCarthy was the sole officer, shareholder, and director of ERI. In 1995, the DNR filed suit, seeking to hold all defendants liable for violations of the consent order and various portions of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*.

A ruling on a motion for summary disposition brought pursuant to MCR 2.116(C)(10) is reviewed de novo on appeal. *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 251; 632 NW2d 126 (2001). In *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999), our Supreme Court, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), enunciated the following standards concerning a (C)(10) motion:

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show 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. In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. [Citations omitted.]

Defendants first argue on appeal that the trial court improperly granted summary disposition against defendants OCWS and ERI, asserting that they had no obligation to comply with the consent order. We disagree.

The 1991 consent order states that it is "binding on the parties to this action, their officers, servants, and employees, and those persons in active concert or participation with them who receive actual notice of this Consent Order." We agree with plaintiffs and the trial court that OCWS and ERI had actual notice of the consent order when they acquired their interests in the landfill. McCarthy was aware of the consent order no later than May 1992. Because McCarthy was the sole shareholder, director, and officer of ERI, ERI also had knowledge of the consent order when OCWS acquired the landfill. *The Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 214; 476 NW2d 392 (1991) (The knowledge possessed by a corporation about a particular thing is the sum total of all the knowledge which its officers and agents, who are authorized and charged with the doing of the particular thing, acquire while they are acting under and within the scope of their authority.) Because ERI is OCWS's general partner, and McCarthy

is OCWS's limited partner, McCarthy's knowledge of the consent order was also imputed to OCWS. *Id.*

We additionally find that there is no issue of fact that OCWS and ERI were in active concert or participation with Richmond I and Richmond II. Because Richmond II was the direct successor of Richmond I and acting in concert with Richmond I, both corporations were obligated under the consent order and under MCL 450.1724, and therefore later, OCWS and ERI became obligated because of their connection to Richmond I and II. The term "active concert or participation" refers to someone legally identified with the party or, at least, deemed to have aided or abetted the party in the conduct in question. *Microsystems Software, Inc v Scandinavia Online AB*, 226 F 3d 35, 43 (CA 1, 2000); *Thompson v Freeman*, 648 F2d 1144, 1148 (CA 8, 1981) (active concert or participation requires identity of interests or control). McCarthy's pervasive and controlling presence in all of the corporations involved in this case established as a matter of law that OCWS and ERI were in active concert and participation with Richmond I and II, thereby subjecting OCWS and ERI to the terms of the consent order.

Defendants next argue that the trial court improperly granted summary disposition against McCarthy, finding him personally liable for the environmental violations and violations of the consent order. We disagree.

In *Attorney General ex rel Director of Dep't of Natural Resources v ACME Disposal Co*, 189 Mich App 722, 726-727; 473 NW2d 824 (1991), an action concerning environmental liability at a landfill, this Court concluded that an individual officer or director of a corporation could be personally liable if that person possessed an element of control and had knowledge of the environmental violation or nuisance. Finding personal liability for a specific individual, this Court stated that "[t]here was ample evidence that he was in a position of authority within the corporation and that he should have known, through the exercise of ordinary diligence, of [the company's] activities at the landfill, particularly while he was acting as president." *Id*. at 727. A federal court also addressed this issue, holding that a corporate officer could be personally liable where he actively participated in the waste handling practices. *Kelley v Tiscornia*, 827 F Supp 1315, 1323-1324 (WD Mich, 1993). However, the federal court also stated that "[a]ctive participation is not limited to actual disposal, but extends to decisionmaking and supervision such that an officer could be considered an active individual participant in the unlawful conduct." *Id*. at 1325.

The evidence adduced below demonstrates that McCarthy did not handle any of the day-to-day waste management and that he had no expertise to personally direct or undertake the required environmental actions. To the contrary, waste management services were retained to operate the landfill. However, McCarthy was responsible for hiring the waste management companies. Moreover, the record indicated that McCarthy was personally involved in negotiating compliance issues with the DNR. The evidence further indicated that McCarthy invested $3.8 million in the landfill and served as Richmond II's president from September 24, 1992 until August 24, 1995. McCarthy also served as president of Richmond I, at least in May 1992. Later, McCarthy was OCWS' limited partner and the sole officer, director, and shareholder of OCWS' general partner, ERI.

Viewing the evidence in the light most favorable to defendants, we conclude that defendants failed to introduce any evidence creating a genuine issue of fact concerning

McCarthy's control of the landfill. To the contrary, all evidence established that McCarthy was aware of the environmental issues and was actively involved in supervision and decision-making that controlled the landfill's response to those issues. Therefore, we conclude that summary disposition related to McCarthy's personal liability was appropriate.[1]

Defendants also attempt to raise an issue related to the admissibility of a certain report, citing a failure to attach an affidavit supporting the report's veracity. However, this issue was not raised below, and the case cited by defendants in support of their position, *Marlo Beauty Supply, Inc v Farmers Ins Group of Companies*, 227 Mich App 309, 320-322; 575 NW2d 324 (1998), is inapplicable because it concerned an unsworn expert opinion rather than documentary evidence, and defendants presented no evidence that the report was false or tampered with. Therefore, appellate review is precluded absent manifest injustice not found here. *Cornforth v Borman's, Inc*, 148 Mich App 469, 483; 385 NW2d 645 (1986).

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Christopher M. Murray

[1] Defendants argue that summary disposition was improper because further discovery was necessary. We disagree. Summary disposition is appropriate before discovery is completed if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). If a party opposes a motion for summary disposition on the ground that discovery has not been completed, the party must assert that a dispute does exist and support that allegation by some independent evidence. *Id.* at 567. Here, defendants argue that McCarthy's deposition was only partly completed and other individuals needed to be deposed. However, defendants do not even state, specifically or in general, what evidence might develop with further discovery, which might create an issue of fact. We find that further discovery would be futile.