IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL, an Administrative Agency of Delaware,	§	No. 398, 2001
	§	Court Below—Superior Court of the State of Delaware, in and for New Castle County
Plaintiff Below, Appellant/Cross-Appellee,	§	C.A. Nos. 98C-04-161; and 01C-03 106
v.	§	
FRONT STREET PROPERTIES, a New York General Partnership; FRONT STREET PROPERTIES, a New York partnership; FRONT STREET PROPERTIES, LLC, a New York Limited Liability Corporation; and AHK PROPERTY CORP., a Delaware corporation,	§	
Defendants Below, Appellees/Cross-Appellants.	§	

Submitted: August 13, 2002
Decided: October 29, 2002

Before **WALSH**, **HOLLAND** and **STEELE**, Justices.

O R D E R

This 29th day of October 2002, upon consideration of the briefs and argument of the parties, it appears to the Court that:

1) On April 17, 1998, Plaintiff-below/Appellant Delaware Department of Natural Resources and Environmental Control filed suit in the Superior Court alleging environmental offenses pursuant to 7 *Del. C.* 7411(e) and sought civil penalties against Defendants-below/Appellees Front Street Properties, a New York Partnership, Front Street Properties, LLC, a New York Limited Liability Corporation and AHK Property Corp. ("AHK" or collectively referred to with Front Street Properties and Front Street Properties, LLC as "FSP"). DNREC's alleged violations involved three petroleum underground storage tanks at a gas station located in Milford, Delaware. The tanks were USTs[1] within the meaning of Delaware's Underground Storage Tank Act[2] and the Delaware Regulations Governing Underground Storage Tanks.

I. BACKGROUND.

2) On November 19, 1999, DNREC filed a Motion for Partial Summary Judgment and on December 3, 1999, FSP filed their Answer to DNREC's Motion for Partial Summary Judgment and cross moved for Summary Judgment. A Superior Court judge heard argument and issued an Opinion and Order granting DNREC's Motion for Partial Summary

[1] 7 *Del. C.* § 7402(20).
[2] 7 *Del. C.* §§ 7401-7419.

Judgment. The parties filed memorandums on the propriety of penalties and the judge imposed the minimum penalties but suspended a portion of the minimum penalties. More specifically, he penalized Front Street Properties $1,000 per day, with $500 per day suspended each day for 29 days, for a total penalty after suspension of $14,500. The judge penalized AHK $1,000 per day, with $990 per day suspended each day for 707 days, for a total penalty after suspension of $7,070. Both DNREC and FSP have appealed the decision to this Court.

3) By lease dated July 22, 1976, Milford Shopping Center, Inc. rented property to Highway Petroleum Sales, Inc., which operated a gas station. Highway Petroleum Sales assigned its interest in the lease to Easton Petroleum, Inc. in 1983. In early 1986, Front Street Properties acquired the shopping center, including the gas station and renegotiated the lease with Easton. On March 21, 1991, Easton filed for protection under Chapter 11 of the federal Bankruptcy Code in the United States Bankruptcy Court for the District of Maryland, but continued possessing the property and operating the gas station. Easton eventually ceased operations at the gas station on August 4, 1995. The USTs were never used after that date. DNREC regulations provide that when an UST system is out-of-service for more than 12 months, *owners and operators* must permanently remove or properly abandon the

UST system.[3] During the bankruptcy litigation, FSP purportedly demanded that Easton comply with the lease provisions regarding the USTs. On August 12, 1998, Easton removed the USTs.

II. THE TRIAL JUDGE'S DECISION TO SUSPEND THE PENALTIES ASSESSED TO FSP.

4) DNREC claims that the trial judge erred as a matter of law when he suspended a portion of the penalties assessed to FSP. 7 *Del. C.* § 7411(e) provides "[t]hat any person who violates a provision of this chapter … shall be liable for a civil penalty of not less than $1,000, nor more than $25,000 for each day of violation."

5) DNREC asserts that the trial judge has no inherent authority to suspend the penalties because: (1) fixing fines for a "crime" is a matter for determination by the General Assembly; (2) even if the application of a minimum mandatory "sentence" leads to excessively harsh results, it is for the General Assembly to review its express prohibition against suspension in such cases; (3) the Delaware courts should follow the law of several of our sister states holding that a trial judge has no inherent authority to suspend sentences and fines; and (4) even if the General Assembly allows the courts to suspend criminal sentences and

[3] UST Reg. Part B § 3.01 C.

fines, the court's inherent authority does not carry over to *civil* penalties. We reject all four arguments.

6) Unless the General Assembly otherwise provides,[4] Delaware courts have the inherent authority to suspend sentences and fines if the interest of justice so requires. First, the Delaware cases cited by DNREC to support the assertion that Delaware courts lack the authority to suspend sentences and fines involved statutes where the General Assembly expressly prohibited suspension, probation or parole.[5] 7 *Del. C.* § 7411(e) contains no express direction that a court may not suspend any penalties imposed. Second, we are not bound by the relationship between the legislature and courts of other states concerning suspension of sentences and fines or civil penalties declared by their statutes or case law. In addition, we note that several state courts have held that a trial court has the inherent authority to suspend a sentence or fine.[6] Finally, DNREC offers no compelling reason why Delaware courts may suspend criminal fines but not civil penalties. The General Assembly could choose to deny our courts the power to suspend civil penalties as it has done in specific, narrow instances with certain criminal statutes. Nevertheless, the General Assembly did not do so in 7 *Del. C.* §

[4] *See e.g.* 11 *Del. C.* § 4205(d), 16 *Del. C.* § 4751(d), 21 *Del. C.* § 4177(d).
[5] Appellant's Op. Br. at 11 (citing ***State v. Ayers***, 260 A.2d 162, 169 (Del. 1969); ***State v. Cannon***, 190 A.2d 514 (Del. 1963); ***Mack v. State***, 312 A.2d 319, 321-322 (Del. 1973)).
[6] *See* John D. Perovich, Annotation, *Inherent Power of Court to Suspend for Indefinite Period Execution of Sentence in Whole or in Part*, 73 A.L.R. 3d, §§ 9-13 (1976).

7411(e).[7] Unless the General Assembly prospectively specifically provides otherwise, we see no sound policy reason prohibiting a trial judge from exercising the court's inherent, discretionary authority to suspend a penalty if that action is required to do justice to the parties and public.

7) In this case, the trial judge did not abuse his discretion when he concluded that justice required suspension of a portion of penalties imposed on FSP. First, the judge noted that when the General Assembly wishes to limit the court's authority to suspend a sentence, it says so. Second, the judge determined that the risk of unjust and anomalous results are reduced by interpreting 7 *Del. C.* § 7411(e) consistently with the courts' traditional power to suspend sentences and fines under criminal statutes. Third, the judge concluded that if a court decides to suspend a portion of the penalty that could be imposed under 7 *Del. C.* § 7411(e), the court will most likely attach strong conditions on the civil penalty because of the "not less than $1,000 day minimum" language in the statute. Fourth, the judge stated that the civil penalty imposed on FSP would be sufficient to notify the regulated community that DNREC must be taken seriously. Finally, the judge noted that FSP had no history of environmental violations and that their actions caused no demonstrable environmental harm. The trial judge carefully and

[7] Ironically, the General Assembly specifically contemplated that when the Secretary of DNREC considers assessing an administrative penalty pursuant to a compliance order, he is to be "reasonable, taking into account the seriousness of the violation and any good faith efforts to comply…." 7 *Del. C.* § 7411(d).

thoughtfully examined FSP and AHK's conduct in light of the public policy behind the statutory scheme. He then articulated a coherent and persuasive rationale for modifying the penalties that could be imposed and instead of blindly imposing minimums, he, within his authority and in the exercise of his discretion, assessed appropriate penalties. We cannot conclude, given these factors, that there is any basis to suggest, much less conclude, that he abused his discretion.

III. WHETHER THE TRIAL JUDGE ERRED IN FINDING FSP LIABLE UNDER DELAWARE'S ENVIRONMENTAL LAWS.

8) FSP denies liability under Delaware's environmental laws and raises several arguments before this Court, all of which were raised before the trial judge. FSP asserts the trial judge wrongly decided each issue. As we must, we address each that arguably rises to the level of a colorable claim of error. We do not address arguments that do not meet that threshold and affirm the trial judge on the basis of his Opinion and Order granting DNREC's Motion for Partial Summary Judgment on those issues.[8]

9) First, FSP claims they were neither the "owner" nor "operator" pursuant to the regulations applicable to the USTs at issue. Second, FSP claims that UST Regulation Part B § 2.01 C provided a December 1998 cut-off date for compliance with the UST Regulations and that Easton's removal of the UST's in

[8] *DNREC v. Front Street Properties*, No. 98C-04-161-FSS, 2000 WL 1611099 (Del. Super. Aug. 21, 2000).

August 1998 complied with the cut-off date of the regulation. Third, FSP claims that Easton's bankruptcy action preempted DNREC's and the Superior Court's action. Finally, FSP claims that DNREC should be estopped from asserting its "retroactive" claim because DNREC agreed to await the outcome of the bankruptcy proceedings, regardless of whether, in hindsight, the bankruptcy court actually had jurisdiction over the property.

10) We reject FSP's argument that they were neither the "owner" nor "operator" pursuant to the regulations applicable to the USTs at issue. The Delaware Underground Storage Tank Act broadly defines who is a responsible party. A responsible party includes any person who owns or has a legal interest in a UST or a facility containing a UST.[9] Delaware's environmental laws require responsible parties to make their USTs inert when the USTs have been abandoned[10] or after they have been out of service for more than twelve months.[11]

11) The trial judge determined that the lease between Easton and FSP provided that FSP owned any fixtures on the property. The trial judge also stated "the Court cannot see how a buried underground storage tank containing highly

[9] 7 *Del C.* § 7402(16). "Responsible party" means, in pertinent party, any person who:
   a. Owns or has a legal or equitable interest in a facility or an underground storage tank;
   b. Operates or otherwise controls activities at a facility or an underground storage tank;
   c. At the time of storage of regulated substances in an underground storage tank, operated or otherwise controlled activities at the facility or underground storage tank, or owned or held a legal or equitable interest therein… .

[10] 7 *Del. C.* § 7402(10).

[11] UST Reg. Part B § 3.01 C.

regulated substances is not a fixture for the purpose of environmental liability." The 1976 lease provides:

> All constructions, additions and improvements, whether temporary or permanent, fixed or movable, made and maintained in or on the premises, either by the LESSEE or LESSOR shall be sole property of the LESSOR … In each and every such case the fixtures shall become and remain the property of the LESSOR and the LESSEE shall have no right to remove them.[12]

Pursuant to our Underground Storage Tank Act, a responsible party includes any person who "[o]wns or has a legal or equitable interest in a facility or an underground storage tank."[13] The fact that Easton operated the gas station did not transform Easton into the USTs' owner, nor did it divest FSP of the proprietary interest in, and their responsibility for their property, including the buried USTs that they leased to Easton. Accordingly, we reject FSP's argument that they were neither the "owner" nor "operator" pursuant to the applicable regulations.

12) We reject FSP's interpretation that UST Regulation Part B § 2.01 C allows FSP to ignore Part B § 3.01 C. UST Regulation Part B § 2.01 C *Schedule for Upgrading Corrosion Protections System*, provides:

> Not later than December 22, 1998, all components of an existing UST system must be in compliance with the corrosion protection requirements under § 2.02 A (2) of this Part or be in compliance with the removal/abandonment requirements of §3 of this Part

[12] *DNREC v. Front Street Properties*, No. 98C-04-161-FSS, 2000 WL 1611099 at *6 (Del. Super. Aug. 21, 2000).
[13] 7 *Del. C.* § 7402(16)(a).

> including applicable requirements for hydrogeologic investigation and/or corrective action under §4 of this Part.

Part B § 3.01 C provides: "When an UST system is out-of-service for more than twelve (12) months, owners and operators must permanently remove or properly abandon the UST system if it does not meet the requirements for new UST systems in §1 of this Part or the upgrading/retrofitting requirements in §2 of this Part…."

13) Part B § 2.01 C plainly means in relevant part that corrosion protections upgrades are required by December 22, 1998 if the tanks have not been removed permanently or properly abandoned by filling with inert material in accordance with law, including in accordance with the twelve month maximum period allowed for out-of-service USTs in Part B § 3.01 C. FSP made no effort to comply with the requirement to remove or properly abandon the USTs within twelve months after they were no longer in service. Read together, the provisions did not contemplate a blanket exception to remove or abandon unused tanks as late as December 22, 1998. The December deadline only applied to the corrosion protection upgrades and did not constitute an extension to the 12 month requirement for removal. It makes no sense in the overall regulatory framework to read § 2.01 C as a blanket exemption, and it makes no sense to read it to repeal by implication the more specific requirements of Part B § 3.01 C.

14) We reject FSP's argument that Easton's bankruptcy action in the United States Bankruptcy Court for the District of Maryland preempted DNREC's action. Contrary to FSP's assertion, the December 22, 1998 deadline set by the Bankruptcy Court for Easton to remove the USTs did not absolve FSP of its responsibilities under Delaware's environmental laws. 11 *U.S.C.* 1334(e) grants exclusive jurisdiction to the district court in which the title 11 case is pending or commenced (and, therefore, the bankruptcy court) over all the property of the debtor. The United States Supreme Court has held that § 1334(e) extends beyond the property of the debtor to encompass property of the estate.[14] Property of the estate includes all legal or equitable interests of the debtor in property, wherever located or by whomever held, as of the commencement of the case.[15] "Thus, if a debtor owned the property involved in the matter at the time the petition was filed, then bankruptcy jurisdiction exists over the matter."[16]

15) The USTs subject to the bankruptcy action were owned by FSP. The only bankruptcy estate property was Easton's leasehold interest in the real estate under which the USTs were buried. The lease between Easton and FSP ceased being property of the estate once Easton terminated the lease.[17] Under 11 *U.S.C.* §

[14] *United States v. Nordic Village*, 503 U.S. 30 (1992).
[15] 11 *U.S.C.* § 541(a)(1).
[16] *Wayne Film Sys. v. Film Recovery Sys. Corp.*, 64 B.R. 45, 49 (Bankr. N.D. Ill.1986).
[17] *See Front Street Prop. v. Easton Petroleum Co., Inc.*, No. 97-1619, 1997 WL 745832 at *2 (4th Cir. December 3, 1997).

541(a)(1), property of the estate does not include a terminated lease.[18] Thus, the bankruptcy court would not have exclusive jurisdiction over the action under § 1334(3) because the lease ceased being property of the estate once Easton terminated the lease. Accordingly, we reject FSP's argument that Easton's bankruptcy action in the United States Bankruptcy Court for the District of Maryland preempted DNREC's action.

16) FSP's argues that DNREC should be estopped from asserting its "retroactive" claim because DNREC agreed to await the outcome of the bankruptcy proceedings, regardless of whether, in hindsight, the bankruptcy court actually had jurisdiction over the property. We disagree. We find the DNREC statements that FSP cites in support of its argument to be more of a limited accommodation for timing reasons than an indefinite postponement of any enforcement action:

> You are entirely correct that I informed you of our decision at one point not to get involved in the bankruptcy. I had obvious concerns about the logistical and other complications in such involvement. I was indeed inclined to remain above the bankruptcy litigation so that it was not surprising I gave that impression. However, I reasonably expected you would understand that such a decision was always and still is subject to reevaluation and change.[19]

[18] *See Robinson v. Chicago Housing Auth.*, 54 F.3d 316 (7th Cir. 1995).
[19] Appellee's Answering Br. at 28 (letter from DNREC's counsel to FSP's counsel of December 8, 1997).

17) The doctrine of equitable estoppel may be invoked "when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment."[20] To establish estoppel, it must be shown that the party claiming estoppel lacked knowledge of the truth of the facts in question; relied on the conduct of the party against whom estoppel is claimed; and suffered a prejudicial change of position as a result of his reliance."[21] More importantly, when DNREC's position is examined at face value, we conclude that no reasonable person would rely upon a statement that DNREC would not participate in the bankruptcy to be an abandonment of a right to pursue an enforcement action. "An estoppel … may not rest upon an inference that is only one of several possible inferences."[22] FSP's reliance on DNREC's ambiguous statement about its participation in the bankruptcy litigation and FSP's self serving conclusion that it amounted to a waiver of further enforcement action was not, in our view, reasonable. Under the circumstances, "reliance upon the conduct of the party against whom the estoppel is raised must be reasonable and justified under the circumstances."[23] Accordingly, FSP's argument lacks merit.

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[20] *Waggoner v. Laster*, 581 A.2d 1127, 1136 (Del. 1990) (quoting *Wilson v. American Ins. Co.*, 209 A.2d 902, 903-904 (Del. 1965).
[21] *Id.*
[22] DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 11-1 (Release 3, December 2001); s*ee also*, *Employees Liability Assurance Corp. v. Madric*, 183 A.2d 182, 188 (Del. 1962).
[23] *Monterey Inv., Inc. v. Healthcare Properties, L.P.,* C.A. No. 15519, 1997 Del. Ch. LEXIS 98, Steele, V.C. (Del. Ch. June 20, 1997), mem. op. at 13 (quoting *Two South Corp. v. City of Wilmington*, C.A. No. 9907, 1989 Del. Ch. LEXIS 78, Jacobs, V.C. (Del. Ch. July 18, 1989)).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

_/s/ Myron T. Steele____
Justice