STATE OF MICHIGAN

COURT OF APPEALS

FLANDERS INDUSTRIES, INC., d/b/a LLOYD FLANDERS INDUSTRIES, INC., Plaintiff-Appellant,	UNPUBLISHED November 18, 2003
v	No. 240789 Court of Claims
STATE OF MICHIGAN, DEPARTMENT OF ENVIRONMENTAL QUALITY, and RUSSELL J. HARDING, Defendants-Appellees.	LC No. 01-018002-CM

Before: Smolenski, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Pursuant to an administrative order issued on September 17, 1992 (1992 Order), by the Department of Natural Resources (DNR) (now the Department of Environmental Quality "DEQ")[1], plaintiff incurred significant costs in cleaning up the contamination of paint sludge at its facility, on the shores of Lake Michigan, and in the bottomlands of Lake Michigan. After plaintiff's satisfactory completion of the remedial action plan in January 2001, plaintiff unsuccessfully petitioned the DEQ for reimbursement of the response activity costs it incurred in relation to the contaminated submerged bottomlands, accepting liability regarding the other areas. In accordance with MCL 324.20119(5), plaintiff filed this action alleging that it was not liable for the response activity costs pertaining to the submerged bottomlands (count I) and that it was entitled to reimbursement of its costs expended before the 1992 Order was entered (count II). The court granted defendants' motion for summary disposition on count I, pursuant to MCR 2.116(C)(10), and on count II, pursuant to MCR 2.116(C)(8). Plaintiff appeals as of right. We affirm.

A trial court's decision to grant or deny summary disposition is reviewed de novo by this Court. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). "A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. The motion should be granted if the evidence demonstrates that no genuine issue of material fact

[1] MCL 324.99903, effective October 1, 1995.

exists, and that the moving party is entitled to judgment as a matter of law." *Id*.; citations omitted. Statutory interpretation is a question of law that is also reviewed de novo on appeal. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

Plaintiff asserts that it is not liable under MCL 299.612(1), which provides:

> Notwithstanding any other provision or rule of law and subject only to the defenses set forth in sections 12a and 12b, if there is a release or threatened release from a facility that causes the incurrence of response activity costs, the following persons shall be liable under this section:
>
> (a) The owner or operator of the facility.
>
> (b) The owner or operator of the facility at the time of disposal of a hazardous substance.
>
> (c) The owner or operator of the facility since the time of disposal of a hazardous substance not included in subdivision (a) or (b).
>
> (d) A person that by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of a hazardous substance owned or possessed by the person, by any other person, at the facility owned or operated by another person and containing the hazardous substance.
>
> (e) A person that accepts or accepted any hazardous substance for transport to the facility selected by that person.

Any person that falls into one of these categories is considered a potentially responsible party (PRP) and is jointly and severally liable; liability is strict. *Port Huron v Amoco Oil Co, Inc*, 229 Mich App 616, 622; 583 NW2d 215 (1998).

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003). Nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). If the language of a statute is clear, no further analysis is necessary or allowed. *Eggleston, supra* at 32.

Plaintiff's argument is two-fold: (1) the statute requires that an owner or operator is liable only if there was a release during the time of its ownership; and (2) since no releases occurred during plaintiff's ownership of the facility, it cannot be held liable for the release that occurred during Heywood-Wakefield's ownership because plaintiff is not Heywood-Wakefield's successor. Regarding plaintiff's first argument, that in order to be held liable the release must have occurred during its ownership, we agree in part. But our partial concurrence does not afford plaintiff any relief.

MCL 229.612 is a strict liability statute that imposes liability on five categories of persons "if there is a release … that causes the incurrence of response activity costs . . . ."[2] *Port Huron, supra* at 622. The statute does not provide a timeframe of when the release had to occur. Reading the statute as a whole, we believe that the specific timing of the release is irrelevant in establishing liability as a PRP under MCL 299.612. The statute only indicates that a release must occur that causes the need for response activities, the cost of which falls on the persons listed in subsection (1). Therefore, the key is the incurrence of response activity costs, not the timing of the release. In this case, as long as plaintiff is found to be the owner of the facility, it is a PRP who is liable for the cleanup costs. This conclusion is supported by the MERA's definition of a facility, which includes any area "where a hazardous substance *has been released* . . . ." MCL 299.603(m); emphasis added.

This conclusion is also supported by the Legislature's decision to structure such a comprehensive strict liability scheme that includes past and present owners/operators and provides for limited enumerated defenses. Because the MERA was "patterned after" and was similar in intent to the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 USC 9601 *et seq*., it is appropriate to look to federal case law interpreting CERCLA. *Flanders, supra* at 21. As a federal district court stated succinctly in *Lincoln Properties, Ltd v Higgins*, 823 F Supp 1528, 1536-1537 (ED Cal, 1992),

> An owner or operator of a facility, from which there has been a release, is subject to the Act, unless one of the narrowly stated defenses applies. Once liability is found, a court may apportion the cleanup costs to reflect relative responsibility. . . .
>
> CERCLA is a strict liability statute with few defenses. One of its primary purposes is to encourage cleanup. It envisions that sometimes the cleanup must be paid for by those least responsible because those who are most responsible lack funds or cannot be found. It tempers its severity with an apportionment principle and with limited defenses that are rarely available. [Citations omitted.]

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[2] Before 1995, the statutes at issue were collectively known as the Michigan Environmental Response Act ("MERA"), MCL 299.601 *et seq.* Pursuant to 1994 PA 451, effective March 30, 1995, the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.1 *et seq.*, was enacted. The MERA was repealed and its statutes were recodified in Part 201 of NREPA. The provision under the MERA that delineated liability under the act, MCL 299.612, was substantively changed in the NREPA provision, MCL 324.20126, pursuant to 1995 PA 71, which was effective June 5, 1995. However, NREPA provided that the MERA provisions in effect on May 1, 1995, would control in any case where an administrative order was issued pursuant to [MCL 299.610f] on or before this date. MCL 324.20102a(1)(b). Therefore, all statutory references, unless otherwise noted, refer to the MERA provisions.

Thus, if plaintiff was truly only liable by virtue of it being the current owner of the facility, then it could have invoked such a defense under MCL 299.612a as an innocent purchaser.[3] To that end, the timing of the release would be relevant. But plaintiff never raised this defense.[4]

Plaintiff contends that this Court's previous decision in *Flanders Industries, Inc v State of Michigan*, 203 Mich App 15; 512 NW2d 328 (1993), sanctions its interpretation of the statute as requiring a "current" release. We find no support in *Flanders* for plaintiff's contention. Any discussion related to "releases" was in relation to plaintiff's injunctive relief request. MCL 299.615 provides that a private citizen can bring an action against the owner/operator for injunctive relief. In discussing the many proper grounds for dismissing this claim,[5] the *Flanders* Court noted that no releases were imminent. This was important because without the prospect of future releases, there was no activity to enjoin. The *Flanders* Court did not decide that a "current" release had to occur in order to hold a current owner liable as a PRP.

Plaintiff also cites *In re Acushnet River & New Bedford Harbor*, 722 F Supp 893 (D Mass, 1989), in support of its contention that it cannot be liable if no releases occurred during its ownership of the facility. Plaintiff's reliance is misplaced. In *In re Acushnet River*, the federal government brought a recovery of response costs action against several PRPs. As to one PRP, the court held that summary disposition was not proper on the issue of whether the government had incurred response costs within the meaning of 42 USC 9607 because it had not established that the response costs they incurred were caused by a release from the facility while the PRP owned it. *Id*. at 900. The critical distinction is that in *In re Acushnet River*, the other PRPs were also defendants in the case, and thus, the percentage of response costs had to be allocated among the PRPs, which necessarily required a fault inquiry. The government was not seeking to hold only one PRP jointly and severally liable.

Plaintiff asserts that it is not liable for the cleanup costs of the submerged bottomlands because it does not own the bottomlands and it did not cause the contamination there. But neither of these factors is material in this case. Causation is irrelevant because liability under the MERA is strict. *Port Huron*, *supra* at 622. And whether plaintiff actually holds title to the submerged bottomlands is immaterial because it is undisputed that plaintiff is the current owner of the facility from where the contaminants originated. MCL 299.612(1)(a).

Plaintiff attempts to bifurcate its responsibility by asserting that the uplands and bottomlands constitute two separate and distinct facilities, and because it does not "own" the

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[3] The other defenses provided for in MCL 299.612a are not applicable in this case.

[4] We note that plaintiff raised this defense in the prior related action, *Flanders*, *supra* at 23 n 4, but failed to raise it in this separate cause of action for reimbursement of the cleanup costs.

[5] The *Flanders* Court affirmed dismissal of this claim, finding that plaintiff had no standing to bring the action because MCL 299.615 provides for a cause of action to be brought only by a private citizen whose "health or enjoyment of the environment" may be adversely affected by the release. *Flanders*, *supra* at 32-34.

submerged bottomlands "facility," it is not liable as an owner under MCL 299.612.[6] Given the Legislature's express intent to hold each responsible party liable for its own response activity costs, we conclude that the MERA does not support such an interpretation; one that would allow a person to avoid liability under MCL 299.612 simply because the released contaminants traveled outside their titled property. To the contrary, the MERA's definition of owner indicates that plaintiff cannot avoid liability on a "lack of ownership" defense. An owner is one who owns a facility. MCL 299.603(u). But an owner does not include a person who can prove:

> (A) The release was caused solely by a third party, who is not an employee or agent of the person, or whose action was not associated with a contractual relationship with the person.
>
> (B) The hazardous substance was not deposited, stored, or disposed of on that person's property.
>
> (C) The person at the time of transfer of the property discloses any knowledge or information concerning the general nature and extent of the release as required in section 10c. [MCL 299.603(u)(iii).[7]]

Here, it is undisputed that the paint sludge was deposited, stored, and disposed of on the property that plaintiff undisputedly owns. Notably, the exception does not provide that the *release* has to occur on the person's property.

The MERA defines "facility" as "any area, place, or property where a hazardous substance *has been released*, deposited, stored, disposed of, *or otherwise comes to be located*." MCL 299.603(m); emphasis added. This definition is broad enough to encompass the submerged bottomlands, especially when read in conjunction with the MERA's definition of "release." Release is a broad definition that includes disposal, but also includes passive movement such as leaking, emitting, escaping, and leaching. MCL 299.603(x); *Bob's Beverage, Inc v Acme, Inc*, 264 F3d 692, 696-697 (CA 6, 2001) (interpreting release and disposal under CERCLA). Because the contaminates originated from the facility that plaintiff owns, the court correctly concluded that, for purposes of plaintiff's liability under the MERA, the affected areas constituted a single facility. Therefore, plaintiff is liable as a PRP for the cleanup costs of the submerged bottomlands and hence, is not entitled to reimbursement of response activity costs incurred pursuant to the 1992 Order. The court properly granted defendants' motion for summary disposition regarding count I.

Plaintiff also argues that *City Mgt Corp v US Chemical Co, Inc*, 43 F3d 244 (CA 6, 1994), supports its contention that it would be liable for the cleanup of the submerged

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[6] Plaintiff contends that it does not own any of the submerged bottomlands. Defendants assert that plaintiff's deed covered at least a portion of the submerged bottomlands, apparently conceding that there is a portion plaintiff does not own.

[7] The statute provides other definitions of those who are not "owners," but none are applicable to this case.

bottomlands of the lake only if it was Heywood-Wakefield's successor. However, *City Mgt* is distinguishable. In that case, the defendant US Chemical (USC) was in the business of solvent reclamation. Some of these solvents were disposed of at its facility and others were transported to off-site landfills, including the one at issue, Metamora Landfill. *Id*. at 246-247. In 1990, the plaintiff bought USC's facility and expressly assumed USC's liability for the contamination at the facility, which the plaintiff had discovered through its own investigations before executing the purchase agreement. During negotiations, USC was notified that it was a potentially responsible party for contamination at the Metamora Landfill. USC did not disclose this fact to the plaintiff. *Id*. at 247-248. When a group of the other defendants sought to impose liability on the plaintiff, plaintiff filed suit for a declaratory judgment of no liability. The Sixth Circuit held that the plaintiff was not liable for the cleanup of the Metamora Landfill as a successor corporation. *Id*. at 253.

There are two critical distinctions between *City Mgt* and this case. First, USC did not own the landfill and thus, could not be held liable under 42 USC 9607(a) as an owner or operator. UCS's liability was as a "generator" of hazardous waste under 42 USC 9607(a)(3). Second, the facility where the contamination occurred was the landfill. Therefore, the plaintiff could only be held liable if it was determined to be a successor corporation of USC. In this case, because the release occurred at plaintiff's facility, it can be held liable under MCL 299.612(1)(a) as a current owner of the facility. The issue of successorship is irrelevant.

Plaintiff further asserts that *Flanders, supra,* acknowledged that plaintiff's liability depended on its status as a successor corporation to Heywood-Wakefield. Plaintiff misinterprets the Court's analysis. The *Flanders* Court affirmed the dismissal of plaintiff's first claim, which sought a declaratory judgment of no liability, on the ground that the circuit court had no jurisdiction to hear the case because the DNR had not yet instituted a cost recovery action. *Flanders, supra* at 22. The Court noted that if the DNR instituted such an action, "plaintiff will have ample opportunity to present the defenses outlined in its complaint," which included an assertion that plaintiff was not Heywood-Wakefield's successor. *Id*. at 22-23 n 4. Plaintiff had argued that one of the reasons it was not liable was because it did not own the contaminated bottomlands. In addressing this contention, the Court stated that current ownership of the bottomlands was irrelevant for two reasons: (1) plaintiff owned the land where the contaminates were originally released from and thus, the bottomlands were part of the facility as defined in MCL 299.603(u); and (2) under a successor argument, plaintiff could be liable under MCL 299.612(1)(b), which assigns liability to the owner at the time the hazardous substance was disposed of. The *Flanders* Court did not address MCL 299.612(1)(a), which assigned liability to a person merely because it was the current owner of the facility, because it was not raised in plaintiff's complaint in that case. We conclude that *Flanders* cannot be read as sanctioning plaintiff's assertion that it can only be held liable under MCL 299.612 if it is found to be Heywood-Wakefield's successor.

Plaintiff argues that even if it is determined to be liable, it should be given the opportunity on remand to limit its liability by establishing that the harm was divisible and caused by Heywood-Wakefield. Because plaintiff is a PRP under MCL 299.612, and thus not entitled to reimbursement from the state under MCL 324.20119(5), plaintiff had two avenues for recovering the portion of its total expended clean up costs that related to the submerged bottomlands. Plaintiff could have institute a cost recovery action under either MCL 299.612 or MCL

299.612c. See *Centerior Service Co v Acme Scrap Iron & Metal Corp*, 153 F3d 344, 347 (CA 6, 1998). As the Sixth Circuit explained, interpreting the corresponding CERCLA provisions, 42 USC 9607 and 42 USC 9613 respectively,

> Any party may seek response costs regardless of its status as a liable or potentially liable party. Whether that party may seek joint and several cost recovery, or is limited to an action for contribution governed by § 113(f), however, depends on the nature of the cause of action pleaded.
>
> Cost recovery actions by parties not responsible for site contaminations are joint and several cost recovery actions governed exclusively by § 107(a). Claims by PRPs, however, seeking costs from other PRPs are necessarily actions for contribution, and are therefore governed by the mechanisms set forth in § 113(f). [*Id*. at 350.]

In this case, plaintiff's cause of action cannot be construed as a cost recovery action for joint and several response costs under MCL 299.612 for two reasons. One, we have already concluded that plaintiff is liable as a PRP and plaintiff has conceded its liability regarding contamination of the uplands and filled bottomlands. Second, in order to establish a prima facie case under MCL 299.612, plaintiff must prove:

> (1) the site is a "facility"; (2) a release or threatened release of hazardous substance has occurred; (3) the release has caused the plaintiff to incur "necessary costs of response"; and (4) the defendant falls within one of the four categories of PRPs. [*Id*. at 347-348.]

Plaintiff cannot establish the fourth element because Heywood-Wakefield is not a defendant in this case.

Plaintiff's assertion that the harm is divisible and that the costs for cleaning up the submerged bottomlands should be borne by Heywood-Wakefield is properly characterized as contribution claim under MCL 299.612c. But plaintiff's liability cannot be limited under this provision either. While plaintiff's failure to allege a contribution claim under MCL 299.612c in its complaint[8] is not fatal,[9] its failure to join Heywood-Wakefield in this suit is. Even if plaintiff had alleged a contribution claim in its complaint, Heywood-Wakefield is not a party to this suit. A contribution claim seeks reimbursement from other PRPs for the cost expended by the plaintiff over and above its pro rata share. "[T]he burden is placed on the plaintiff to establish the

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[8] In its prior related suit, plaintiff did assert a claim for contribution against the state, the dismissal of which was affirmed by this Court in *Flanders*, *supra*, "because § 612c(3) allows contribution actions only against 'person[s] who [are] or may be liable.'" *Id*. at 31. The *Flanders* Court determined that the state could not be liable under MCL 299.612. *Id*. at 29-30.

[9] A MCL 299.612c action for contribution is an action under MCL 299.612 to the extent that it seeks recovery for costs referred to in MCL 299.612. *Centerior Service*, *supra* at 353, citing *Sun Co, Inc v Browning-Ferris, Inc*, 124 F3d 1187, 1191 (CA 10, 1997).

defendant's equitable share of response costs." *Id*. at 348; emphasis added. That the party from whom contribution is sought must be a party to the action is implicit in the statutory language. MCL 299.612c(3) and (4) (these provisions outline the procedure for allocating response activity costs among PRPs). Therefore, plaintiff is not entitled to a remand in order to present its argument regarding divisibility of harm.

Lastly, plaintiff argues that the court erred in dismissing count II of its complaint pursuant to MCR 2.116(C)(8). In count II of its complaint, plaintiff claimed that it was entitled to reimbursement for response costs incurred before the 1992 Order was entered. Plaintiff alleged that denial of such costs violated its due process rights and unjustly enriched the state, challenging the statute's constitutionality in that MCL 324.20119(5) only provides for recovery of post-order costs.

This Court reviews de novo a trial court's grant of summary disposition for failure to state a claim. *MacDonald, supra* at 332. When reviewing a trial court's grant of summary disposition for failure to state a claim on which relief can be granted, an appellate court assumes all factual allegations in the nonmoving party's pleadings are true, *Maiden v Rozwood*, 461 Mich 109, 199; 597 NW2d 817 (1999), and determines whether there is a legally sufficient basis for the claim, *MacDonald, supra* at 332.

As plaintiff concedes, reimbursement for recovery costs under MCL 324.20119(5) is limited to those costs incurred "pursuant to the relevant order." Thus, according to the plain language of the statute, plaintiff is not entitled to reimbursement for costs incurred before the 1992 Order was entered. But plaintiff contends that this scheme is unconstitutional as violative of due process. "[A] statutory scheme violates due process if 'the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate [an affected party] from resorting to the courts to test the validity of the legislation.'" *Solid State Circuits, Inc v USEPA*, 812 F2d 383, 390 (CA8, 1987), quoting *Ex Parte Young*, 209 US 123, 147; 28 S Ct 441; 52 L Ed 714 (1908).[10] Here, there are no penalties for not voluntarily initiating response activities. Plaintiff could have allowed the DNR to clean up the site and then defended its nonliability position if the state instituted a cost recovery action.

Furthermore, to implicate due process concerns there necessarily must be some action by the state that affects plaintiff's liberty or property interests. See *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173; 667 NW2d 93 (2003) (substantive due process ensures that the state does not deprive a person of liberty or property by an arbitrary exercise of power); *Hanlon, supra* at 723 (procedural due process requirements limit state actions by requiring safeguards in proceedings such as notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decision-maker). The DNR requested that plaintiff engage in clean up efforts, but did not require it to do so until the 1992 Order was entered. Therefore, we conclude that there can be no violation of due process for costs

[10] Due process is defined and interpreted similarly in both Michigan's and the federal constitution. *Hanlon v Civil Service Comm*, 253 Mich App 710, 722; 660 NW2d 74 (2002).

voluntarily incurred before an administrative order that compels a PRP to engage in response activities has been entered.

In regards to plaintiff's unjust enrichment theory, we also find this argument meritless. If plaintiff could recover pre-1992 Order costs, presumably reimbursement would be according to the standard set for reimbursement of post-order costs; they must be reasonable and necessary. MCL 324.20119(5). We find that the costs at issue were not "reasonable and necessary" because they were duplicative of the state's efforts and were not legally required. See *Louisiana-Pacific Corp v Breazer Materials & Services*, 982 F2d 1436, 1447-1448 (CA 10, 1992); *US v Iron Mountain Mines, Inc*, 987 F Supp 1263, 1272 (ED Cal, 1997); *US v Hardage*, 750 F Supp 1460, 1511-1517 (WD Okla, 1990). Also, to the extent that any of plaintiff's actions were not duplicative, we find that plaintiff suffered no inequity as a result of the retention of any benefit by the state. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003) (elements of unjust enrichment claim are receipt of a benefit by the defendant and an inequity resulting to the plaintiff because of the retention of the benefit by the defendant). Accordingly, the trial court properly granted defendants' motion for summary disposition regarding plaintiff's count II.

Affirmed.

/s/ Michael R. Smolenski
/s/ William B. Murphy
/s/ Kurtis T. Wilder