STATE OF MICHIGAN

COURT OF APPEALS

MKM INVESTMENT LIMITED PARTNERSHIP,

Plaintiff-Appellant,

v

ERICKSON & LINDSTROM CONSTRUCTION COMPANY,

Defendant-Appellee.

UNPUBLISHED
January 17, 1997

No. 186584
Genesee Circuit Court
LC No. 94-026706-CE

Before: McDonald, P.J., and Murphy and J. D. Payant*, JJ.

PER CURIAM.

Plaintiff, MKM investment limited partnership, appeals as of right from a judgment of no cause of action in this action filed under Michigan's Environmental Response Act (MERA), MCL 299.601 et seq, MSA 13.32(1) et seq.[1] We affirm.

This case involves an action based on MERA for damages associated with the cleanup of hazardous substances at 1935 West Genesee Street in Lapeer County, which defendant, a contractor, allegedly discovered on the premises, but failed to dispose of, while doing construction work for a lessee before plaintiff acquired title to the property. Following a bench trial, the court entered a judgment of no cause of action. Plaintiff appeals seeking reversal of the trial court's decision on the issue of liability and a remand for a determination of the amount of damages. We find no merit to plaintiff's arguments and affirm.

The trial court correctly found defendant was not a responsible party under MERA. Plaintiff claims defendant was liable pursuant to MCL 299.612(1); MSA 13.12(1), which reads in pertinent part:

> 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**

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* Circuit judge, sitting on the Court of Appeals by assignment.

from a facility that causes the incurrence of response activity costs, the following persons are liable under this section:

* * *

(b) The owner or **operator** of the facility at the time of disposal of a hazardous substance. (Emphasis added.)

The pertinent statutory definitions, as stated in MCL 299.603; MSA 13.32(3), are:

(t) **"Operator"** means a person that is in control of or responsible for the operation of a facility.

* * *

(x) **"Release"** includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of a hazardous substance into the environment, or the abandonment or discarding of barrels, containers, and other closed receptions containing a hazardous substance. (Emphasis added.)

In concluding defendant was not liable the trial court did not clearly err in finding no "release" had occurred. Plaintiff's theory at trial was that the removal of two barrels containing a liquid substance as well as additional barrels filled with soil from the construction site, to a cement pad located within the same property constituted a release and abandonment of hazardous substances to an uncontaminated area. Although plaintiff is correct in arguing a "disposal" is not limited to the initial introduction of hazardous materials onto property, see Kaiser Aluminum & Chemical Corp v Catellus Development Corp, 976 F2d 1338, 1342(CA 9, 1992), mere storage is not disposal. United States v Fleet Factors Corp, 821 F Supp 707, 723(SD Ga, 1993).[2] Here defendant moved closed barrels containing what was later determined to be a hazardous substance to a cement pad. The trial court was satisfied that this movement occurred within the zone of contamination and there was no evidence submitted indicating any land or structure was contaminated by the moved barrels. Although plaintiff now argues on appeal there was a "release" of vapors into the air, this argument was not raised below and plaintiff has failed to demonstrate that the alleged "release" into the air caused plaintiff to incur response activity costs. Plaintiff's claim was for soil and water contamination. Under MCL 299.612(1); MSA 13.32(12)(1), it is not enough that a release occur. Liability requires that the release from the facility cause the incurrence of response activity costs.[3] The trial court did not clearly err in finding no release in terms of a disposal to the environment.

Likewise, the court did not err in concluding there had been no abandonment by defendants. As the court noted, to abandon something you must first have it in your control or in your possession. Here the court found the removal of the barrels was always the responsibility and obligation of Hamady, the lessee of the property, and that Hamady, through its agent, acknowledged this responsibility and directed defendant's actions with regard to the barrels. Thus, because defendant never assumed control of the barrels, it could not have abandoned them.

We also reject Plaintiff's newly raised argument that a "threatened release" occurred. A "threatened release" means "any circumstance that may reasonably be anticipated to cause a release." The proofs did not establish defendant's act of moving barrels, which were not leaking, to the cement pad, with knowledge Hamady was taking steps to have the barrels disposed of, was a circumstance that could reasonably be anticipated to cause a release. In any event, plaintiff has failed to show that a "threatened release" caused it to incur response activity.

Finally, even had a "release" occurred, defendant would not have been liable because it was not an "operator" at the facility at the time of the alleged disposal. The activity causing the alleged "release" in this case was the movement of hazardous materials to the cement pad. Based on the trial court's finding defendant was expected to follow the lessee's directions with respect to this activity, defendant could not meet MERA's definitions of "operator" and "facility". Defendant was not an "operator" because defendant was not in control of, or responsible for, the operation of the area, place or property where the hazardous substance was allegedly released, deposited, stored, disposed of, or otherwise came to be located on the property.

Because we find the trial court correctly concluded defendant was not liable under the statute, we need not address plaintiffs remaining claims on appeal.

Affirmed. Costs to defendants.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ John D. Payant

[1] MERA has been repealed by 1994 PA 451 and recodified as part of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 et seq.; MSA 13A.101 et seq. Amendments to MERA, as set forth in NREPA, have not been given retroactive effect. See Cipri v Bellignham Frozen Foods, Inc. 213 Mich. App 32; 539 NW2d 526 (1995).

[2] Because the intent of MERA is similar to that of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 USC 9601 et seq., it is appropriate to examine federal case law interpreting similar issues in determining the intent of MERA. See Flanders Industries, Inc. v Michigan 203 Mich App 15; 512 NW2d 328 (1993).

[3] Although NREPA does not apply in this case, we note that this recodified act now specifically addresses circumstances where there has been an "exacerbation" of an existing contamination. See e.g. MCL 324.20101(k); MSA 13A.20101(k)(exacerbation means a contamination that migrates beyond the boundaries of the property which is the source of the release or a change in facility conditions that increase response activity costs). Moreover, MCL 324.20102; MSA 13A.20102 now contains a legislative finding and declaration that "liability for response activities to address environmental contamination should be imposed upon those persons who are responsible for the environmental contamination."