

STATE OF MICHIGAN
COURT OF APPEALS

ATTORNEY GENERAL ex rel DEPARTMENT
OF NATURAL RESOURCES,

Plaintiff-Appellee,

v

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

Defendants/Cross-Plaintiffs-
Appellants,

and

THOMPSON SHOPPING CENTER and NBD
BANCORP, INC.

Defendants,

and

MARATHON FLINT OIL COMPANY,

Third-Party Cross-Defendant/
Appellee,

and

MARATHON OIL COMPANY, FLINT
PAINTERS SUPPLY, INC., MARV'S ELECTRIC
COMPANY, INC., CLARENCE D'AIGLE,
BETTY D'AIGLE, MORRIS LEIBOV, ROBERT
A. STORK, DOUGLAS GOOCH, MERLE
GOOCH, ROY DIRING, MARY DIRING,
DONALD S. THOMPSON, FRANCES A.
THOMPSON, MARGARET THOMPSON,
GERALD J. MANSOUR, GEORGE J.
MANSOUR, and PATRICIA STORK,

UNPUBLISHED
October 9, 2001

No. 224318
Ingham Circuit Court
LC No. 94-77873-CE

Third-Party Defendants.

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) appeal by leave granted the circuit court's order granting partial summary disposition in favor of cross-defendant Marathon Flint Oil Company² (Marathon Flint) and dismissing RIW's cross-claims. We reverse.

The underlying facts are largely set forth in a case submitted to this Court with the instant case, *Attorney General v Richfield Iron Works et al*, Docket No. 219654, an opinion we are issuing at the same time as the instant opinion. This appeal raises the same legal issues as those raised in Docket No. 219654, but involves a different consent decree, entered into between plaintiff and Marathon Flint.

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

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 Marathon Flint was not named as a defendant in the State's action. Thompson Shopping Center named Marathon Flint as a third-party defendant.

Before 1956, Marathon Flint and Ohio Oil owned the property at issue (RIW property) jointly. Marathon Flint and Ohio Oil installed two underground storage tanks (USTs) for operating a gasoline station at the site. Marathon Flint and Ohio Oil then sold the property to the Campbells by land contract in 1956, and Marathon Flint leased a portion of the RIW land from 1956 to 1973, for use as a gas station. Marathon Flint installed three additional USTs to hold petroleum and constructed a building over the two preexisting USTs. The existing USTs were abandoned in place and their service discontinued in 1958. These two USTs eventually leaked petroleum.

At defendant Howard Campbell's request, Marathon left the three newer USTs in place in 1973, when Marathon Flint ceased its operations at RIW.

Defendant Howard Campbell's father owned and operated Richfield Iron Works. The Campbells now lease the property to Richfield Iron Works, a metal foundry that manufactures various metal products, and has operated continuously at this site since March 1969.

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.

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 Marathon Flint. The RIW defendants cross-claimed against Marathon Flint, seeking contribution and cost recovery under the MERA.

The RIW defendants filed a motion for summary disposition as to liability to plaintiff. Marathon Flint and the State entered into a consent decree, which the circuit court approved on November 25, 1998, over the RIW defendants' objection. The RIW defendants' motion for reconsideration was denied. The circuit court issued an opinion granting plaintiff summary disposition as to liability of the RIW defendants, deeming the RIW defendants a liable party under MCL 299.612, and ordered that the matter proceed to the trier of fact.

Marathon Flint moved to dismiss the RIW defendants' cross-claims, arguing that in light of the consent decree, RIW could no longer maintain contribution or cost recovery claims against it. The circuit court dismissed the RIW defendants' cross-claims on the same basis as it had dismissed the cross-claims against the PERC defendants in Docket 219654.

I'm going to take a consistent position with the ruling I've already made [referring to the March 31, 1999 ruling dismissing the RIW defendants cross-claims against the PERC defendants in Docket No. 219654] that in fact, the settlement with the state absolves the Defendant from responsibility to other codefendants.

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 1994.⁴ 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). Emphasis added.]

The consent decree between Marathon Flint and plaintiff provides in pertinent part:

X. CONTRIBUTION PROTECTION

To the fullest extent allowable under Section 20129(5) of NREPA and to the extent provided in Section VIII (Covenant Not to Sue by Plaintiff)[sections 8.1 and 8.2], Defendant shall not be liable for claims for contribution *for the matters set forth in Paragraph 8.1 of this Decree*. 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 [CERCLA], to the extent allowable by law. . . .

Paragraph 8.1 of the consent decree provides:

In consideration of the payment that will be made by Defendant under the terms of this Decree, and except as specifically provided in this Section or Section XI (Reservation of Rights by Plaintiff), Plaintiff covenants not to sue or to take administrative action against Defendant *for claims arising for reimbursement of Past Response Activity Costs incurred by the State as set forth in Paragraph 6.1 of this Decree.*⁵ [Emphasis added.]

⁴ The RIW defendants' appellate brief refers to both past costs and future costs, stating that they "have incurred response activity costs to investigate petroleum products on its property. It will likely incur additional response activity costs as this case works its way to a final resolution." At oral argument before this Court, however, the RIW defendants stated that as to Marathon they sought a pro-rata share of the investigation costs they expended related to BTEX. Thus, we do not address the question of future costs.

⁵ Paragraph 6.1 of the consent decree states:

Within 10 days of the effective date of this Decree, Marathon Flint Oil Company shall pay the MDEQ thirty thousand dollars (\$30,000) to resolve all claims for Past Response Activity Costs relating to matters covered in this Decree.

The consent decree's definitions section provides that "Past Response Activity Costs" "shall mean those costs incurred and paid by the Plaintiff prior to the effective date of 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 Marathon Flint contribution protection for "claims arising for reimbursement of Past Response Activity Costs incurred by the State as set forth in Paragraph 6.1 of this Decree." No provision of paragraph 6.1 pertains to investigative costs incurred by the RIW defendants before the State filed its complaint in 1994.

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 1994.⁶

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 Marathon Flint would have the maximum protection under the MERA, it is not barred by subsection 12c(5) or the consent decree.

Reversed and remanded. We do not retain jurisdiction.

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

⁶ Marathon Flint asserts 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, Marathon Flint's motion for summary disposition was not brought on this basis, rather, it was brought on the ground that the consent decree extinguished as a matter of law any right to contribution of the RIW defendants.