Court of Appeals: Evidence of Cleanup's Cost Effectiveness Admissible in Cost Recovery Trial

The Michigan Court of Appeals has held that in a cost recovery lawsuit under the former Michigan Environmental Response Act (MERA), the defendant was allowed to use evidence of whether a cleanup was cost-effective in the trial because the parties disputed whether the Michigan Department of Natural Resources (MDNR) had actually approved the cleanup method that the plaintiff used.

In 1987, Paul Carollo bought a parcel of land for use by his manufacturing operation, RCO Engineering, Inc. (RCO), from ACR Industries, Inc. (ACR), an aerospace equipment manufacturer. ACR had operated an underground storage tank for petroleum products on the site.

During ACR's term operating the site, the storage tank leaked, releasing hazardous substances into the ground. In 1991, RCO removed the leaking tank and cleaned up the contaminated soil. RCO consulted with the MDNR to discuss the appropriate type of cleanup that should be used on the site. In its discussions with the MDNR, the MDNR led the company to believe that the preferred level of cleanup was "Type A," the most stringent cleanup level, which would require the contaminated soils to be removed to the point where hazardous substances were reduced to levels as clean as "background," a barely detectable level.

RCO completed the Type A cleanup even though a "Type B" cleanup might also have been considered acceptable and cost less than the Type A cleanup. The Type B cleanup would reduce the amount of hazardous substances in the soil to levels that do not

pose an unacceptable risk, even if the concentrations are not as clean as background levels. In all, RCO spent approximately $1.5 million on the Type A cleanup.

RCO then sued ACR to recover the $1.5 million cleanup cost. One of the arguments ACR sought to use in the trial was that a Type B cleanup would have cost less than $1 million, and that the Type B cleanup was good enough. Thus, according to ACR, ACR should be liable for no more than the cost of a Type B cleanup.

ACR planned to introduce trial evidence in its defense to show that RCO's cleanup costs were too high. But RCO objected to admission of any cost evidence from ACR and introduced a motion at the beginning of the trial asking the trial court to refuse to allow ACR to use the cost evidence. To support its position, RCO argued that the MDNR had "expressly approved" the Type A cleanup used by RCO, and that the court should not second-guess the MDNR's conclusion.

The trial court allowed ACR to use its evidence that the cleanup should have been done at lower cost. The jury found that, although ACR was liable for the cleanup, it only required ACR to pay RCO $990,000, the cost of a Type B cleanup.

RCO appealed to the Court of Appeals, arguing that the evidence regarding the cost effectiveness of RCO's cleanup should not have been admitted in the trial over RCO's objection. In 1999, the Court of Appeals ruled that the evidence was properly admitted in the trial. *RCO Engineering, Inc. v. ACR Industries, Inc.*, 235 Mich. App. 48 (1999). RCO then appealed to the Michigan Supreme Court, which threw out the Court of Appeals' prior ruling and ordered the Court of Appeals to consider whether it should have excluded the cost evidence despite the MDNR's "approval" of a Type A cleanup.

The Court of Appeals noted that a previous court decision had found that, in a lawsuit to recover cleanup costs in Michigan, the cleanup costs must have been 1) necessary and 2) incurred consistent with MDNR rules. *Port Huron v. Amoco Oil*, 229 Mich. App. 616 (1998). The Court of Appeals pointed out that MDNR's cleanup rules list the factors that should be considered by the agency in assessing cleanup alternatives. Among the many factors to be considered are the following:

- The effectiveness of the cleanup alternatives in protecting health and the environment;
- The goals of the State's environmental cleanup law as well as the State's hazardous waste law;
- The characteristics of the hazardous substances;
- The potential health effects of exposure to the hazardous substances;
- The reliability of the cleanup alternatives;
- Potential threats to health and the environment associated with the cleanup methods; and
- The *costs* of the cleanup alternatives.

Mich. Admin. Code r. 299.5603(1).

The cleanup rules also include a specific caveat with respect to the cost factor to be considered when assessing alternatives:

> The cost of a remedial action shall be a factor only in choosing among alternatives which adequately protect the public health, safety, welfare, and the environment and natural resources.

Mich. Admin. Code r. 299.5601(3).

The Court of Appeals also pointed out that provisions under MERA do not allow a court to consider challenges to MDNR's selection or approval of a cleanup method.

M.C.L. § 324.20137(4). Instead, court challenges are limited mainly to lawsuits to recover costs from other responsible parties, and other lawsuits filed *after a cleanup is completed*. This is to ensure that cleanups are not delayed in the courts.

But ACR argued that RCO erroneously *assumed* that the MDNR would insist on a Type A cleanup, but that the agency had not actually *selected or approved* that cleanup level. In fact, evidence presented at trial did not show that the MDNR had rendered any decision at all with respect to RCO's cleanup plans. The MDNR had simply declined to discuss with RCO the option to performing a Type B cleanup because the agency preferred Type A cleanups.

The Court of Appeals observed that if the MDNR had actually approved RCO's selection of a Type A cleanup, cost-effectiveness evidence would not have been admissible. But the court concluded that evidence about the relative costs of Type A and Type B cleanups was introduced as part of the argument at trial as to whether the MDNR had approved RCO's cleanup method. Therefore, the court concluded that it was not an error for the trial court to permit evidence of cost-effectiveness to be admitted in the trial.

Because the Court of Appeals did not consider the trial court's admission of evidence that RCO's Type A cleanup method was not cost-effective to be in error, the Court of Appeals affirmed the trial court's jury award of $990,000 rather than the $1.5 million that RCO demanded from ACR for RCO's cleanup cost.

RCO Engineering, Inc. v. ACR Industries, Inc., 235 Mich. App. 48 (1999).

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