

COURT OF APPEALS AFFIRMS APPORTIONMENT OF COSTS IN LEAKING UST CASE

In a recent unpublished opinion, the Michigan Court of Appeals upheld the trial court's determination that the State of Michigan could recover only a portion of the costs it incurred in investigating groundwater contamination and connecting residences to a municipal water supply from the owner/operator of a nearby leaking underground storage tank (UST). The State argued that Clark Refining and Marketing (Clark) should be held liable under the former Leaking UST Act (now Part 213 (Leaking USTs) of the Michigan Natural Resources and Environmental Protection Act) for all such "corrective action" costs the State incurred – i.e., that the harm caused by the released from Clark's UST was not divisible from other sources of contamination in the area. Clark also appealed, arguing that the trial court had wrongfully ordered it to pay more than its fair share of the State's cleanup costs.

Divisibility of Harm

Before analyzing the State's claim that the harm caused by Clark's leaking UST was not divisible, the Court summarily rejected the State's argument that the trial court erred by failing to find Clark jointly and severally liable because the State never raised this *legal* argument before the trial court. Instead, the State had simply made the *factual* argument that Clark had *actually caused* the State to incur all of the corrective action costs.

The Court next addressed the State's argument that Clark had failed to prove the divisibility of the harm – i.e., the amount of the corrective action costs the State incurred in response to just Clark's UST release, as opposed to contamination caused by other persons. Both the State and Clark agreed that, given the lack of case law under the Leaking UST Act, it was proper for the Court to look to cases under the federal Comprehensive Environmental

Response, Compensation, and Liability Act (CERCLA) for guidance because both CERCLA and the Leaking UST Act contain virtually identical language regarding apportionment of cleanup costs. Under CERCLA, courts have observed that whether harm is divisible is an “intensely factual” issue and that when considering divisibility of harm, courts will have to take into consideration the relative toxicity, potential to migrate, and synergistic capacity of the contaminants at issue. If a party can show divisibility, then it should be liable only for that portion of the harm fairly attributable to it.

The State argued that the contamination at the site was commingled, and, therefore, could not be divisible. The trial court found, however, that Clark had refuted this argument by showing the presence of chlorinated volatile organic compounds (VOCs) that would not be present in the gasoline released by Clark and a separate release of gasoline from the Chevron station across the street from Clark’s station.

The Court observed that the State’s own witnesses said that the chlorinated VOCs could be separately measured and that the State had for some time independently tracked the chlorinated VOCs in the groundwater. The evidence at trial indicated that the State had “distinguished, measured, monitored, and traced” the chlorinated VOCs separately from the gasoline released by Clark and had incurred costs specifically related to the chlorinated VOCs for monitoring residential wells, providing bottled water and connecting residences to municipal water. Therefore, the Court held that, under the reasoning of the CERCLA cases, the trial court correctly ruled that Clark was not responsible for all of the State’s costs because the chlorinated VOCs were distinguishable from Clark’s gasoline release and because the State clearly incurred corrective action costs to investigate and protect the residents from the chlorinated VOC contamination.

With respect to the gasoline release from the Chevron station across the street, the State argued in its complaint that the two plumes of gasoline contamination had merged into a single commingled plume. At trial, however, the State dropped this argument and simply argued that only one release had occurred and it was from Clark's station. In response to the State's position, Clark presented evidence that the State had incurred costs in investigating and monitoring two separate releases, one from Clark and the other from Chevron. Clark's expert witnesses also testified that groundwater flow and the contamination found at Chevron's station and wells in the area clearly showed that a plume of gasoline contamination emanated from the Chevron station. The Court of Appeals observed that, while the State's and Clark's experts presented conflicting testimony on the groundwater flow and interpretation of the data, it is the trial court's responsibility to determine the credibility of the witnesses and the weight of their testimony. Therefore, the Court of Appeals stated that it must defer to the trial court's observations and held that the trial court did not err in finding the harm divisible.

Post March 31, 1994 Costs

The State next argued that the trial court incorrectly held that the State could not recover from Clark any corrective action costs it incurred after March 31, 1994. The Court of Appeals held that the trial court had properly established this cutoff date.

At trial, Clark provided testimony that Clark's environmental consultant met with the State's project manager for the site in January 1994 to present a remedial action plan and told the State that Clark wanted to take over the investigation in order to avoid additional costs to the State. The State's project manager subsequently issued a letter to Clark stating that Clark's plan for further investigation was acceptable and that the State was turning over the gasoline

investigation to Clark, while the State would concentrate on investigating the chlorinated VOCs at the site.

At trial, however, the State's project manager retreated from her statements in the letter and testified that Clark did not adequately investigate the site. Clark countered this testimony with evidence that the State never expressed dissatisfaction with Clark's investigation nor did it request that Clark modify its corrective action plan.

The Court of Appeals again observed that, given the conflicting testimony, it is the trial court's responsibility to determine the credibility of the witnesses. The trial court concluded that the State had clearly relinquished investigation of the gasoline contamination to Clark in March 1994. The Court of Appeals also observed that the trial court based its decision, in part, "on its finding that [the State's] witnesses were 'very untruthful' regarding the extent of [Clark's] liability for costs incurred at the site."

Mathematical Errors Alleged

The State argued that the trial court had made mathematical errors in calculating Clark's liability. The Court of Appeals agreed with Clark that the State had failed to adequately brief the argument and appeared to simply argue that the trial court's arithmetic was "unfair," not that the trial court made any calculation errors.

In calculating the corrective action costs that the State could recover from Clark, the trial court multiplied the State's costs by a fraction based on the number of houses that required municipal water due to Clark's gasoline release (27) versus the total number of houses connected to the municipal system due to contamination at the site (199). The State argued that it was not

attempting to recover the cost of connecting all 199 of the houses and, therefore, the trial court should not have used that number. The Court of Appeals, however, observed that the evidence the State offered regarding its corrective action costs included all of the investigation it performed between 1986 and 1999 – which included expenses incurred years before Clark even owned the property, before Clark’s gasoline release occurred, and after the March 1994 cutoff date. Based on this evidence, the Court held that the trial court’s equation to determine the extent of Clark’s liability was reasonable.

Clark’s Liability For 27 Homes

Finally, the Court addressed Clark’s argument that the trial court incorrectly held it liable for the State’s cost to connect 27 homes to the municipal water system. Again the Court upheld the trial court’s determination.

The trial court held that there was a causal relationship between Clark’s gasoline release and the State’s need to take prompt action to protect the residents from the groundwater contamination. The trial court observed that, while the trial testimony did not precisely define the direction of groundwater flow at the site, the drinking water wells of the 27 houses within the general flow direction were at risk of being contaminated and that the State reasonably acted to prevent or minimize contamination by connecting the 27 homes to the municipal drinking water supply. The trial court further observed that, given the circumstances, “it was not incumbent upon the [S]tate to test the area for a significant length of time before taking action to protect the public health.” The Court of Appeals further observed that at trial, the State’s and Clark’s scientific and geological evidence conflicted on almost all critical issues.

The Court characterized Clark as essentially arguing that because it had by 1999 fully defined and contained its plume of gasoline contamination (presumably before it reached the 27 homes), the State unreasonably decided to connect the 27 homes to the municipal supply in 1994. The Court agreed with the State that it was correct for the trial court to take into account the extent of the State's knowledge at the time Clark's contamination was confirmed and the State's obligation to protect the public health. The Court of Appeals agreed with the trial court's conclusion that the State acted properly in connecting the homes that could have been foreseeably impacted by the release based upon the projected migratory path of the contamination.

Clark, however, argued that the widespread chlorinated VOC contamination in the area was what actually triggered the State's decision to connect the 27 homes to the municipal water supply. While the State's witnesses testified that the presence of the chlorinated VOCs in several residential wells contributed to the decision to connect the homes to the municipal supply, they also testified that the presence of the chlorinated VOCs alone was not a threat to public health and that the Michigan Department of Public Health did not decide to make the municipal drinking water connections until Clark's gasoline release was also discovered.

The Court of Appeals observed that the trial court's designation of the area for which Clark was liable was made difficult by the numerous types of contamination discovered in the area and multiple sources and multiple potentially responsible parties. The Court further observed that, given the data then available, the State "did not have the benefit of hindsight or the luxury of months of testing and modeling the area when it exercised its obligation to protect the public." Finally, acknowledging the difficulty of dealing with such complex environmental

issues, the Court observed “that the trial court took great pains to sort out complex data to arrive at a result that kept faith with the law and the purposes of the statute.”

Attorney General and Department of Natural Resources v. Clark Refining and Marketing, ., No. 229692 (Mich. App. Jan. 10, 2003).

Brian J. Negele

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