Wife With A Dower Interest In Leaking Tank Site Not Liable

The Michigan Court of Appeals has reversed a lower court's ruling that the widow of the former owner of a property contaminated by leaking underground storage tanks was liable for 75% of past and future costs to clean up the contamination as an owner of the property because she held a "dower" interest in the property at the time her husband owned and operated a gasoline station on the property. Dower is an ancient property interest intended to provide for widows even when they were written out of their husband's wills. The Court of Appeals held that the widow's dower interest in the contaminated property could not have arisen until after her husband had sold the property and, even if she did have a dower interest in the property, that interest was insufficient to make her liable as an owner under Part 201 (Environmental Remediation) of the Michigan Natural resources and Environmental Protection Act (NREPA).

Geraldine Lechnar's now-deceased husband, Jack Lechnar purchased the property at issue in the case in 1979 under a land contract and operated a gas station on it until 1987, after which he leased the property to Wayne Russell, who opened a muffler shop and also sold gasoline. Mr. Russell testified that, to his knowledge, Mrs. Lechnar did not have any control over the property or help her husband operate the gas station. She did, however, sign the lease payment checks. In 1990, Mr. and Mrs. Russell purchased the property from Jack Lechnar under a land contract. The land contract was signed by both Mr. and Mrs. Russell and Mr. and Mrs. Lechnar. Mr. Lechnar, however, did not himself receive a warranty deed to the property until 1991 when he paid off his land contract with the previous owner. The warranty deed did not contain Mrs. Lechnar's name, only that of her husband. In 1993, Mr. Lechnar executed a quitclaim deed to the property to himself and his wife.

In 1994, the Russells decided to remove the underground storage tanks from the property because they had stopped selling gasoline. It was discovered at that time that soil on the property had been contaminated by releases from the tanks. The Russells retained an environmental consultant to clean up the contamination and incurred response activity costs in doing so. The Russells filed suit against Mrs. Lechnar and the prior owners and operators of the gas station formerly located on the property in 1996. Mr. Lechnar had died in 1995.

The trial court found that Mrs. Lechnar was liable as an owner of the property under Part 201 because she had a dower interest in the property at the time her husband owned and operated the property, she signed the lease payment checks, and because she was still collecting land contract payments from the Russells at the time of the trial. Because the trial court found that most of the contamination was caused during the time Mr. Lechnar operated the gas station between 1979 and 1987, the court assessed Mrs. Lechnar 75% of the past response activity costs and also declared her to be liable for 75% of all reasonable future response activity costs necessary to complete the cleanup.

Mrs. Lechnar appealed the trial court's holding that she was liable as an "owner" under Part 201. Part 201 holds liable "the owner or operator of a facility at the time of disposal of a hazardous substance if the owner or operator is responsible for an activity causing a release or threat of release." The Court of Appeals stated that because there was no evidence that Mrs. Lechnar operated the gas station, the issue for it to decide was whether she was an "owner" of the property. Under Part 201, an "owner" is defined as "a person who owns a facility," but that definition also excludes "[a] person who holds indicia of ownership primarily to protect the person's security interest in the facility, including, but not limited to, a vendor's interest under a recorded land contract, unless the person participates in the management of the facility . . . ."

The court further noted that "owner" is defined under Part 213 (Leaking Underground Storage Tanks) of NREPA as follows:

> [A] person who holds, or at the time of a release who held, a legal, equitable, or possessory interest of any kind in an underground storage tank system or in the property on which an underground storage tank system is located including, but not limited to, a trust, vendor, vendee, lessor, or lessee and who is liable under part 201.

The court also observed that Part 201 is patterned after the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and, therefore, it was appropriate to look to CERCLA case law in interpreting similar issues under Part 201.

Reviewing the transactional history of the property, the court observed that Mrs. Lechnar was never listed on the land contract or the deed. Citing 1899 Michigan Supreme Court precedent, the court stated that dower rights do not attach to a land contract vendee's (i.e., the buyer's) interest in a land contract because legal title rests in the vendor (i.e., the seller) until the land contract is paid off. Therefore, the court held that Mrs. Lechnar did not have a dower interest in the property until the land contract was satisfied by her husband in 1991. Mr. Lechnar, however, no longer operated a gas station on the property at that time because he had sold it to the Russells under another land contract in 1987. The court further noted that a federal district court has also held that dower rights to property did not make a wife an owner of the property under CERCLA. Thus, the court held that the trial court had erred in finding that Mrs. Lechnar was an owner of the property under Part 201 due to her dower interest while her husband operated the gas station up until 1987.

Because the trial court erred in holding that Mrs. Lechnar was an owner during the period of 1979 – 1987 when her husband operated the gas station, its allocation of damages to her on the basis that most of the contamination occurred during this period was also incorrect. The court next considered whether Mrs. Lechnar was ever an owner of the property between 1987

and 1990 when the Russells leased the property. The court observed that the only evidence that she was an owner during that period was that she signed the lease checks the Russells paid to Mr. Lechnar. The court observed, however, that this only showed that she and her husband shared finances – that it was not enough to show that she actually owned the property.

When Mr. Lechnar sold the property to the Russells in 1990, he added Mrs. Lechnar to the deed. The court held, however, that this did not make her an owner because her interest in the property constituted indicia of ownership held as a security interest. Part 201 excludes from the definition of owner "[a] person who holds indicia of ownership primarily to protect the person's security interest in the facility, including, but not limited to, a vendor's interest under a recorded land contract . . . ." The court also relied on the holding of a Michigan federal district court interpreting the status of a land contract vendor under CERCLA and Part 201, where the district court held that as a matter of law a person who held title to property as a land contract vendor fell within the CERCLA and Part 201 "secured creditor" exemption from the definition of owner under both statutes.

Therefore, the court found that Mrs. Lechnar was ***never*** an owner of the property and, consequently, reversed the trial court's judgment assessing her for approximately $25,000 in past costs and 75 % of future costs.

Russell v. Lechnar, *Mich. Ct. App.,*

Brian J. Negele