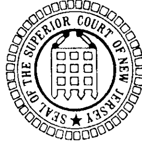

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY

COUNTIES OF
ATLANTIC AND CAPE MAY

CAROL E. HIGBEE, J.S.C.

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MEMORANDUM OF DECISION

CASE:	**6400 Corporation v. Chevron USA**
DOCKET #:	**ATL-L-872-02**
TRIAL DATE:	**October 4, 2004**
ATTORNEYS:	**Stuart J. Lieberman – Plaintiff** **Matthew S. Slowinski - Defendants**

Having carefully reviewed the papers submitted and oral arguments presented, I have ruled on the above Motion as follows:

This is an action brought by plaintiff owner of a gas station property in Margate, New Jersey for contribution from the defendant Gulf/Chevron for costs incurred for past clean-up of the property and for allocation of responsibility for future clean-up costs. The action was brought under N.J.S.A. 58:10-23.11f(a)(2).

This case was presented in two trials since the pretrial motion Judge ordered a bifurcation of liability and damages. This court heard the first trial testimony and rendered a decision. In the liability decision, the court has set forth the history of this matter. The court made a decision that the plaintiff had proven that part of the contamination of the property occurred during the period of time that Gulf/Chevron, the defendant, owned the property. In fact, Gulf/Chevron

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owned the site from 1950 to 1983 but plaintiff's expert testified he could only opine contamination had occurred as early as 1973 based on soil samples and data he had. This would include a 10 year period when the defendant owned the property from 1973 to 1983.

The Legislature passed the Spill Compensation and Control Act N.J.S.A. 58:10-23.11. They recognized in the statute itself that the protection and preservation of the land and water resources of this State is very important to the health, safety and welfare of the people of the State of New Jersey. The Act specifically states that "The Legislature finds and declares that the discharge of petroleum products. . . . constitute a threat to the economy and environment of this State." N.J.S.A. 58:10-23.11a

In this action, the plaintiff in 1996 purchased a property in Margate, New Jersey which had been operated as gas station for over 40 years. There was a spill from an oil tank in the rear of the property in 1997. State and County officials came to the site. Plaintiff proceeded to hire Target Environment Inc. to remove the oil tanks in the rear of the property and the gasoline tanks in front of the station. These were underground storage tanks, or USTs. Target found petroleum products were contaminating the property. Target removed the tanks but they also recommended excavation of the front of the property to the street because of contamination.

The plaintiff paid for the entire front of the property to be excavated and had the contaminated soil removed. He had clean fill brought in to replace it. Target found the contamination had spread beyond the property line. They found petroleum products in borings done in the street and across the street. Plaintiff hired an expert, Gil Oerdijk, who investigated the property. He testified there was free floating petroleum product on the water table. From soil samples plaintiff's expert determined the contamination at the edge of the property contained a compound MTEL used in gasoline which was not sold after 1980.

The Court will not review all the liability issues since this was a bifurcated trial and in the liability trial the Court decided that Gulf/Chevron was a responsible person under the "Spill Act" for the contamination of the property. The Act states:

> N.J.S.A. 58:10-23.11c of the Spill Act provides: "The discharge of hazardous substances is prohibited." "Discharge" is defined as "any intentional or unintentional action or omission resulting the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances into the waters or onto the lands of the State..." N.J.S.A. 58:10-23.11b(h). "Hazardous substances" includes petroleum products. N.J.S.A. 58:10-23.11b(k).

Now that the Court has found that Gulf/Chevron is a responsible party who is responsible for the contamination, they are jointly and severally liable for all clean-up costs.

> N.J.S.A. 58:10-23.11g(c)(1) provides: "Any person who has discharged a hazardous substances, or is in any way responsible for any hazardous substances, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred."

The language of the statute makes it clear that the defendant Gulf/Chevron is responsible for all needed future clean-up costs required by the D.E.P., as is the plaintiff. This action was brought by the plaintiff for contribution from Gulf/Chevron for an equitable share of past costs incurred and for an allocation of responsibility for contribution for future costs.

N.J.S.A. 58:10-23.11f(a)(2) controls this action and states:

> Whenever one or more dischargers or persons cleans up and removes a discharge of a hazardous substance, those dischargers and persons shall have a right of contribution against all other dischargers and persons in any way responsible for a discharged hazardous substance or other persons who are liable for the cost of the cleanup and removal of that discharge of a hazardous substance. In an action for contribution, the contribution plaintiffs need prove only that a discharge occurred for which the contribution defendant or defendants are liable pursuant to the provisions of subsection c. of section 8 of P.L.1976, c. 141 (C.58:10-23.11g), and the contribution defendant shall have only the defenses to liability available to parties pursuant to subsection d. of section 8 of P.L.1976, c. 141 (C.58:10-23.11g). In resolving contribution claims, a court may allocate the costs of cleanup and removal among liable parties using such equitable factors as the court determines are appropriate.

The testimony of the plaintiff was he paid out in checks $80,316.33 for the environmental clean-up to date. The invoices he had did not match the checks, but the Court accepts that cancelled checks are better proof of what was spent. At the damage hearing, both parties agreed that additional future work of some type is necessary, even if it's just monitoring, and that it is almost impossible to predict future costs.

The Court finds the testimony of the plaintiff was credible and the amount of costs to date for clean-up was $80,316.33 based on the checks. The invoices were not reliable and were not considered by the court in awarding damages.

As to these costs, defendant argues that plaintiff had to remove the USTs anyway because they had been out of use for over 12 months. Actually, the prior owners, the Tabassos, who owned the property between Gulf/Chevron and the plaintiff should have removed the tanks. Under N.J.A.C. 7:14B-9.1(b) the Tabassos were required to remove the tanks when they had been closed for more than 12 months. The defendant argues that since the tanks had to be removed by plaintiff regardless of any contamination of the property, they should not be responsible for the cost. The plaintiff argues he may never have removed the tanks but installed "bells and whistles" to bring them up to compliance.

The Court finds the reasonable amount of costs that would have been spent to get rid of the tanks if there wasn't the substantial contamination that was discovered would have been approximately $21,500. The defendant's expert agreed this was the reasonable cost of just tank removal. The court will deduct $21,500 from the $80,316.33, to leave $58,816.33 as the cost of remediation of the property because of contamination. The Court will set this figure as the past cost of clean-up.

The Court rejects defendant's argument again that they have no responsibility for this clean-up. The Court found that based on the evidence in the first trial that defendant was a responsible party. As to allocation, the Court finds defendant's argument that the contamination from their petroleum products discharges were not actionable based on lead levels to be without merit. Plaintiff's expert testified MTEL is an extremely toxic and hazardous compound and not the same hazard as lead alone. He further testified in his opinion the future clean-up costs may involve areas beyond the property line where the defendant's product has most likely spread.

The Court accepts this testimony and accepts plaintiff's allocation based on years. Plaintiff's expert allocated costs 42% to defendant and 58% to plaintiff based on the years of ownership from 1973 until the tanks were removed. This is not a precise division but an equitable and logical one. The defendant offered no alternative allocation except 0% and 100%. There is no precision in determining exact dates but the span of years and division is an equitable one. The Court rejects the defense argument that the years they caused contamination are less than from 1973-1983. The Court accepts plaintiff's expert testimony on this issue. It is very equitable to attribute 10 years to the defendant and in fact, the Court finds this a conservative number since defendant owned the property for 40 years while petroleum products were being used and stored on the property.

The Court finds the defense argument that plaintiff only examined soil samples and not the groundwater and therefore has proved only responsibility for soil clean-up and not future groundwater clean-up to be without merit. Plaintiff's expert found free gasoline product on the water table and in the soil above the water table. Plaintiff's expert found product dating from the time of the defendant's ownership. If future groundwater remediation is needed, the defendant is a responsible party.

The defendant also argues without merit that because N.J.S.A. 58:10-23.11(b) defines "clean up and removal" costs as costs incurred "with written approval from the department", that plaintiff's past costs incurred without approval of the State DEP can't be the subject of contribution. The Court finds this is not supported by the statute. N.J.S.A. 58:10-23.11f(a)(2) states that there is right of contribution against all other dischargers "in any way responsible for a discharged hazardous substance" by any person who cleans up and removes a discharge of a hazardous substance. There is no requirement for written DEP approval. In fact, the 1991 Senate Committee Statement, that was reported with the 1991 amendment of the statute which created the private right of an action for contribution used the following language holding that the right of contribution is available "to those acting independent of a DEP order or directive to perform a cleanup and removal." The statute is remedial and must be liberally interpreted. No DEP action is required.

The Court orders that the defendant Gulf/Chevron must pay 42% of $58,816.33, or a total of $24,702.86, for past clean-up costs and 42% of all costs for future remediation costs.*

CAROL E. HIGBEE, J.S.C.

*The court notes that the McKay Development Co., Inc. v. Jenny Oil opinion relied upon by defendant was specific to the facts in that case. It is distinguishable and most important, it is not a published opinion and is not legal precedent.

XXXX The appropriate Order shall be submitted by Plt's counsel within 10 days.