BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter Of:	)	
	)	
JOHNS MANVILLE, a Delaware corporation,	)	
	)	
	)	
Complainant,	)	**PCB No. 14-3**
	)	
v.	)	
	)	
ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
	)	
Respondent.	)	

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on November 27, 2017, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, *Complainant's Motion for Leave to File Reply Instanter to IDOT's Response to Complainant's Brief Regarding Relevance of Discovery Sought by IDOT*, a copy of which is attached hereto and herewith served upon you via e-mail. Paper hardcopies of this filing will be made available upon request.

Dated: November 27, 2017

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

By: */s/ Lauren J. Caisman*

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on November 27, 2017, I caused to be served a true and correct copy of *COMPLAINANT'S MOTION FOR LEAVE TO FILE REPLY INSTANTER TO IDOT'S RESPONSE TO COMPLAINANT'S BRIEF REGARDING RELEVANCE OF DISCOVERY SOUGHT BY IDOT* upon all parties listed on the Service List by sending the documents via e-mail to all persons listed on the Service List, addressed to each person's e-mail address.

____*/s/ Lauren J. Caisman*
Lauren J. Caisman

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COMPLAINANT'S MOTION FOR LEAVE TO FILE REPLY INSTANTER TO IDOT'S RESPONSE TO COMPLAINANT'S BRIEF REGARDING RELEVANCE OF DISCOVERY SOUGHT BY IDOT

Complainant JOHNS MANVILLE ("JM") hereby moves, pursuant to 35 Ill. Admin. Code 101.500, for leave to file its Reply to IDOT's Response to Complainant's Brief Regarding Relevance of Certain Discovery Sought by IDOT filed November 13, 2017 ("Response") *instanter*, in order to prevent material prejudice from certain misrepresentations and/or omissions made by Respondent ILLINOIS DEPARTMENT TRANSPORTATION ("IDOT") in its Response. In support, JM states as follows:

1. On October 5, 2017, the Hearing Officer entered an order directing the parties to file briefs addressing the relevance, or lack thereof, of IDOT's Subpoenas to Commonwealth Edison ("ComEd") and Motion to Produce Scott Myers for a Second Deposition ("Motion to Produce"). The Hearing Officer also directed the parties to file response briefs by November 13, 2017.

2. JM filed its Brief Regarding Relevance of Discovery Sought by IDOT ("JM Brief") on October 27, 2017. IDOT filed its Response on November 13, 2017.

3. In its Response, IDOT misrepresents the nature of a claim brought under the Illinois Environmental Protection Act (the "Act") and then misleadingly relies on cases seeking reimbursement under the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to argue about whether the collateral source rule applies in this case involving violations of the Act. IDOT fails then to explain the differences between CERCLA and the Act or the context in which its CERCLA cases were decided, both of which make IDOT's cases inapplicable to this matter. IDOT also ignores decided Illinois state law and cases interpreting other state environmental laws that apply the collateral source rule to environmental cost recovery actions. But perhaps most importantly, IDOT mischaracterizes JM's claim as one seeking a windfall. To the contrary, JM could not possibly recover a windfall with respect to costs expended on the Southwest Sites through its limited claim against IDOT.

4. As initial matter, IDOT concedes that "the collateral source rule may be applicable in tort cases" (Response, p. 5), but completely ignores that the Illinois Supreme Court has held that a violation of the Act creates the "potential for liability in tort" because the Act provides a remedy for damages. *See, e.g.*, *People v. Brockman*, 143 Ill. 2d 351, 372 (Ill. 1991); *People v. Brockman*, 148 Ill. 2d 260, 268 (Ill. 1992) ("[T]he breach of its statutory duty [under the Act] to refrain from polluting the waters of Illinois is clearly a tort."); *see also People ex rel Dep't of Labor v. Valdivia*, 2011 IL App (2d) 100998, ¶ 22 ("The court's conclusion in *Brockman* that the Environmental Protection Act created a tort duty is consistent with the concept of a tort itself."). Thus, the collateral source rule should apply to violations of the Act and thus apply to this case.

5. The CERCLA cases IDOT cites to in its Response should not change this result. IDOT's Response notably fails to put these CERCLA cases into context. These decisions are

based upon the nature of CERCLA cost recovery claims, the policies behind CERCLA and the language of CERCLA, all of which are different under the Act. For instance, IDOT's CERCLA cases rely on the fact that CERCLA does not sound in tort. By contrast, violations of the Act are torts. Additionally, IDOT relies upon CERCLA contribution cases where a wrongdoer seeks to recover money from another wrongdoer and the application of the collateral source rule in such a case would allow a wrongdoer to profit from its illegal acts. Such is not the case here as JM has not been held to be a wrongdoer, or held to be liable, under the Act or even CERCLA. IDOT also fails to explain that, unlike the Act, CERCLA contains language expressly prohibiting double recovery, which IDOT's cases use as a rationale for declining to apply the collateral source rule. However, here, JM is not seeking a windfall – a point that IDOT leaves unaddressed.

6. Given IDOT's omissions and misrepresentations of the cases it cites, all of which belie IDOT's arguments that any collateral source payments JM received regarding the Sites are relevant to the limited issues the Board has directed be addressed at a second hearing of this case, JM files the instant Motion for Leave in order to correct the record and to provide the Hearing Officer/Board with a full and fair account of the applicable law prior to the Hearing Officer/Board's ruling on relevance so that JM will not be further prejudiced.

7. This Motion for Leave is timely as it is filed within fourteen days after service of IDOT's Response under 35 Ill. Admin Code Section 101.500(d).

8. The principles of substantial justice militate toward allowing JM filed to file its Reply in order to correct the omissions and misstatements of law made by IDOT in its Response. Material prejudice would result to JM if IDOT's Response is allowed to stand containing misrepresentations and if JM's Reply is not considered in the Hearing Officer/Board's ruling. It

would work a substantial injustice on JM if IDOT were allowed to escape the consequences of its wrongful conduct and to profit from misrepresenting the law applicable in this case to the Board. *See, e.g.*, *Elmhurst Mem. Healthcare & Elmhurst Mem. Healthcare & Elmhurst Mem. Hosp.*, PCB 09-066, 2009 WL 6506666, **1-2 (Aug. 6, 2009) (allowing filing of reply where movant alleged that material prejudice would result if movant was not allowed to rectify the non-movant's misstatements of law and fact); *In the Matter of Ameren Ash Pond Closure Rules*, R09-21, 2009 WL 6650323, *2 (June 18, 2009) (granting motion for leave to file a reply in support of motion where the movant requested that the Board accept the reply "to prevent the material prejudice that would result if the Response was allowed to stand containing such misrepresentations."); *Indian Creek Devel. Co. v. Burlington Northern Santa Fe Railway Co.*, PCB 07-44, 2007 WL 928718, **4-5 (Mar. 15, 2007) (accepting reply brief and finding that acceptance would prevent material prejudice where the non-movant's response "paints a set of facts that are not true" and where "fairness dictates that [movant] be given the opportunity to respond and set the record straight"); *In the Matter of Petition of The Metropolitan Water Reclamation Dist. of Greater C*hi., AS 95-4, 1995 WL 314608, *1 (May 18, 1995) (finding that a reply was "necessary to fully delineate the issues before the Board in this proceeding").

9. JM's proposed Reply is attached hereto as **Exhibit A**.

WHEREFORE, Complainant JOHNS MANVILLE respectfully requests that the Hearing Officer/Board enter an Order granting JM's Motion for Leave to File its Reply and consider JM's Reply *instanter* to avoid substantial prejudice.

Dated: November 27, 2017

Respectfully submitted,

BRYAN CAVE LLP

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EXHIBIT A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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JOHNS MANVILLE, a Delaware corporation,	)	
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Complainant,	)	**PCB No. 14-3**
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ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	

COMPLAINANT'S REPLY TO IDOT'S RESPONSE TO COMPLAINANT'S BRIEF REGARDING RELEVANCE OF DISCOVERY SOUGHT BY IDOT

Complainant JOHNS MANVILLE ("JM") hereby replies to portions of Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION'S ("IDOT") Response to Complainant's Brief Regarding Relevance of Discovery Sought by IDOT filed November 13, 2017 ("Response") as follows:

INTRODUCTION

Because IDOT cannot explain why the information it seeks is relevant or could lead to relevant evidence, IDOT's Response focuses on a tertiary argument advanced by JM concerning the application of the collateral source rule to this case. In doing so, IDOT fails to tell the whole story. IDOT misleadingly and selectively cites to a handful of federal CERCLA cases without explaining the differences between CERCLA and the Illinois Environmental Protection Act (the "Act") (and their underlying policy rationales) or the context in which the cited CERCLA cases were decided, both of which make IDOT's cases inapplicable to this matter. IDOT also incorrectly argues that JM is seeking a windfall in this case. In order to prevent substantial

prejudice that would otherwise be caused by IDOT's incorrect and Response, JM files this Reply.

ARGUMENT

I. Violations Of The Act Sound In Tort And Thus The Collateral Source Rule Applies.

IDOT concedes that the collateral source rule applies in tort cases (Response, p. 5), but then fails to acknowledge that the Illinois Supreme Court has held that a violation of the Act creates "the potential for liability in tort" because it provides a remedy for damages if a person breaches its duty not to contaminate the environment. *See People v. Brockman*, 143 Ill. 2d 351, 372-73 (Ill. 1991) (finding that improper disposal of hazardous waste under the Act constituted tortious conduct); *People v. Brockman*, 148 Ill. 2d 260, 268 (Ill. 1992) (on separate appeal, holding that "the breach of its statutory duty [under the Act] to refrain from polluting the waters of Illinois is clearly a tort"); s*ee also People ex rel. Dep't of Labor v. Valdivia*, 2011 IL App (2d) 100998, ¶ 22 (holding that "[t]he court's conclusion in *Brockman* that the Environmental Protection Act created a tort duty is consistent with the concept of a tort itself" and distinguishing the Prevailing Wage Act); *Ill. State Toll Hwy. Auth. v. Amoco Oil Co.*, 336 Ill. App. 3d 300 (2d Dist. 2003) (holding that the Act creates liability in tort). Because IDOT has breached its tort duties not to contaminate the environment set forth in Section 21 of the Act, IDOT's liability is in tort and the collateral source rule should apply.

IDOT relies upon cases in its Response that are premised upon the fact that CERCLA does not sound in tort and thus the collateral source rule does not apply. *See Basic Mgmt. Inc. v. U.S.*, 569 F. Supp. 2d 1106, 1124-25 (D. Nev. 208) (finding the collateral source rule is often applied in tort actions and that CERCLA does not sound in tort); *Appvion Inc. v. P.H. Glatfelter Co.*, 144 F. Supp. 3d 1028, 1030 (E.D. Wis. 2015) (reasoning that the collateral source rule

typically applied in tort cases, not CERCLA cases, i.e. that CERCLA cases were not tort cases). Here, however, since a violation of the Act is a tort, this reasoning and these cases do not apply. Rather, the fact that the collateral source rules applies in tort cases, such as those involving violations of the Act, should govern.

II. The Collateral Source Rule Has Been Applied To Similar State Law Claims.

Courts have applied the collateral source rule to non-CERCLA, cost recovery claims under other state environmental laws. For example, in *Louisiana Department of Transportation and Development v. Kansas City Southern Railway Company*, the Louisiana Supreme Court held that the collateral source rule applied to claims for recovery of remediation expenses brought under the Louisiana Environmental Quality Act. 846 So.2d 734, 740 (La. 2003) (attached hereto as **Exhibit 1**). In that case, the plaintiff, by agreement, "expended several million dollars to remove environmental pollution at a construction site" for an interstate highway and was subsequently reimbursed for ninety percent of those costs. *Id*. at 735. The plaintiff then sued several defendants alleged to have polluted the site. *Id*. The lower courts held that the plaintiff's action was limited to the ten percent of cleanup costs for which it had not been reimbursed, but the Supreme Court of Louisiana reversed, holding that the plaintiff could seek judgment for the full measure of damages caused by the defendant's pollution. *Id*. The court, choosing to apply the collateral source rule, held that the defendant could not "be exonerated from paying the full consequences of its act [of contaminating the site] simply because [the plaintiff] independently obtained reimbursement." *Id*. at 740 (also finding this was consistent with the case law of numerous federal and state jurisdictions). The court's holding, applying the collateral source rule to a claim for reimbursement of cleanup costs stemming from a defendant's violation of an environmental statute, was "commanded by the paramount public interest in ensuring that those

persons or entities responsible for harming our environment and the welfare of our citizens be held fully responsible for the consequences of their actions, and deterred from committing future violations." *Id.* In this way, "[a] cause of action arising under an environmental statute . . . presents compelling policy reasons supporting application of the collateral source rule." *Id.* at 741.

The Seventh Circuit reached a similar conclusion under in *Town of East Troy v. Soo Line Railroad*, 653 F.2d 1123 (7th Cir. 1980). There, the Seventh Circuit upheld the lower court's application of the collateral source rule to a groundwater cleanup case brought under a Wisconsin nuisance statute, allowing the town to seek the entire amount of cleanup even though it had also received federal grant money. *Id.* at 1132 ("It is not our task to analyze the wisdom of the collateral source rule. Having determined that the rule is the law of the state [Wisconsin], it is eminently clear that the [plaintiff] was entitled to recover its full damages . . .").

The collateral source rule is the law of Illinois. (*See* JM Brief, § B.) Thus, like in *Louisiana Department of Transportation and Development*, it is "paramount" to protection of the public interest in Illinois "to assure that adverse effects upon the environment are fully considered and borne by those who cause them." *Compare Nat'l Marine, Inc. v. Ill. E.P.A.*, 159 Ill. 2d 381, 386 (Ill. 1994) (emphasis added) (quoting 415 ILCS 5/2(b)) *with Louisiana Department of Transportation and Development*, 846 So.2d at 740-41. Similarly, as in *Town of East Troy*, it should be "eminently clear" that JM is entitled to recover its full damages and that IDOT should be prevented from seeking a credit for any collateral source payments JM may have received with respect to the Sites. Thus, there are compelling policy reasons supporting application of the collateral source rule to the Act and the Hearing Officer/Board should not

deviate from them now. *See Louisiana Department of Transportation and Development*, 846 So.2d at 741.

In fact, these policy reasons demonstrate a second reason why IDOT's reliance on *Appvion* is misplaced. Unlike the Act, CERCLA's top priority is the establishment of a cleanup mechanism for abandoned sites, not its "polluter must pay" general directive. *Appvion*, 144 F. Supp. 3d at 1031 (stating that "the 'polluter must pay' is among CERCLA's general directives, but surely that consideration is subservient to the actual cleanup and its funding"). Because of this, *Appvion* is inapplicable; the *Appvion* court's reasons for denying the motion for protective order in that CERCLA case do not exist in this case.

III. IDOT Fails To Explain That This Is Not A Claim For Contribution Between Two Culpable Parties.

IDOT cites to three CERCLA cases to support its primary argument that JM is seeking a windfall and that the collateral source rule should not be employed here to facilitate such a double recovery. (Response, § B.) These three cases, *Basic Management*, *FirstEnergy*, and *United Alloys* (Response, pp. 5-6), are distinguishable on many grounds. In addition to the points discussed above concerning the fact that the CERCLA does not sound in tort and that CERCLA's polluter must pay principle is "subservient" to its purpose of creating a cost recovery mechanism, IDOT's cited cases involve contribution claims. In other words, they are cases brought under a specific statute that allows a wrongdoer to recover money from another wrongdoer. *See Basic Mgmt.*, 569 F. Supp. 2d at 1124-25 (finding that collateral source rule should not apply in "this CERCLA contribution action" between "parties responsible for causing that injury [to the environment]"); *N.Y. St. Elec. and Gas Corp. v. FirstEnergy Corp.*, 766 F.3d 212, 238 (2d Cir. 2014) (relying on *Basic Mgmt.* in not applying collateral source rule in

CERCLA contribution action); *United Alloys, Inc. v. Baker*, No. 93-cv-4722, 2011 WL 2749641, *26 (C.D. Cal. July 14, 2011) (same).

Courts have been reluctant to apply the collateral source rule in CERCLA contribution cases for policy reasons. As the Tenth Circuit Court of Appeals has explained, the policy underlying the collateral source rule is to provide the benefit of a collateral source to the "innocent party" not to "culpable tortfeasors," like contribution claimants:

> We have explained that a claim for contribution is a claim "by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make . . ." *Sun Co., Inc.*, 124 F.3d at 1190 (quotations omitted). Thus, a CERCLA contribution action is not a personal injury action by an innocent plaintiff. Instead, it is a claim between two or more culpable tortfeasors, and the policy underlying the collateral source rule-to provide the innocent party with the benefit of any windfall-is simply not advanced in such cases.

Friedland v. TIC-The Indus. Co., 566 F.3d 1203, 1206-07 (10th Cir. 2009).

This same reasoning drove the decisions in the three cases upon which IDOT so heavily relies. *See Basic Mgmt.,* 569 F. Supp. 2d at 1124 (finding that the insurance company (not the plaintiff) actually incurred the costs and that "CERCLA contribution actions are not injury actions in which the injured party is seeking compensation for damages to be made whole again" and holding that to allow plaintiffs to recover the same costs twice would allow them to "profit from their own and prior contamination"); *FirstEnergy*, 766 F.3d at 238 ("[T]he policy underlying the collateral source rule—to provide the innocent party with the benefit of any windfall—is simply not advanced" in these CERCLA cases); *United Alloys*, 2011 WL 2749641, at *26 (citing to *Basic Management* for the same propositions).

But the reasoning behind the CERCLA decisions has no bearing here as JM is <u>not</u> a culpable or "responsible" party. JM has neither been found liable for violating the Act nor adjudicated liable under CERCLA. Unlike the plaintiffs in *Basic Management*, *FirstEnergy*, and

United Alloys, JM is not seeking contribution or in any way asking IDOT to contribute to a shared liability. (*See* JM Brief, p. 6; JM Response to IDOT's Brief Regarding Relevance of Certain Discovery, filed November 13, 2017, § II.) Rather, JM is seeking to be made whole for the damages it incurred as a result of IDOT's violations of the Act. Indeed, with respect to the areas at issue (areas on Sites 3 and 6 where IDOT has been found liable under the Board's December 15, 2016 Interim Opinion and Order), it is IDOT alone that has been found jointly and severally liable. As a result, IDOT's cases are inapposite and the collateral source rule should apply. *See, e.g., Wills v. Foster*, 229 Ill. 2d 393, 399 (Ill. 2008); *Segovia v. Romero*, 2014 IL App (1st) 122392, ¶¶ 19-20, 22-23; *Brumley v. Fed. Barge Lines, Inc.*, 78 Ill. App. 3d 799, 807 (5th Dist. 1979).

IV. The Act Does Not Prohibit Double Recovery Though JM Is Not Seeking Double Recovery.

IDOT's cases are also impertinent because they rely upon specific language contained in in CERCLA that precludes double recovery. As the *Basic Management* court explained, "[t]he court declines to apply the collateral source rule to the recovery of response costs in this CERCLA contribution action. The field has been preempted by the federal statutory mandate of CERCLA [against double recovery]." 569 F. Supp. 2d at 1125; s*ee also United Alloys*, 2011 WL 2749641, at *26 (providing that "various CERCLA provisions expressly prohibit a claimant from double recovery . . . The court therefore declines to apply the collateral source result to the recovery of response costs in this action"). Unlike CERCLA, the Act does not contain a prohibition on double recovery.[1] The Hearing Officer/Board need not go any further.

But even if the Act contained such a prohibition against double recovery, there is no risk

[1] In fact, courts have found that CERCLA's equitable allocation principles mandate that contribution payments between culpable parties must be offset by insurance settlements. *See, e.g., Friedland*, 566 F.3d at 1206-11. Again, that is not the situation in this case. (*See* December 15, 2016 Interim Opinion and Order, p. 22.)

of a double recovery in this case. In *NCR Corporation v. George A. Whiting Paper Company*, the Seventh Circuit found that there was no danger of double recovery when the amount the plaintiff sought to recover in contribution combined with what it had received from collateral insurance payments was less than its total "Fox River liability." 768 F.3d 682, 708 (7th Cir. 2014). This was because, as the district found, the total amount of costs plaintiff sought to recover in the lawsuit plus costs covered by insurance was less than the plaintiff's liability for all sites. *Id*. As such, "there was no danger that [plaintiff] would recover more than 100% of its share." *Id*. Importantly, the Seventh Circuit found that the lower court properly considered the plaintiff's total liability "as a whole" and for all areas of the site when making this calculation; conversely, the lower court did not, and was not required to, credit the plaintiff's insurance settlement against the defendant's contribution share or divide up liability between work done in various geographic areas. *Id*. Based upon the Seventh Circuit's reasoning, there is no risk of a windfall or double recovery here. IDOT should not be, and is not, entitled to any "credit." *NCR Corp*., 768 F.3d at 708.

CONCLUSION

WHEREFORE, for the foregoing reasons, Complainant respectfully requests that the Hearing Officer/Board find IDOT's Subpoenas and Motion to Produce irrelevant, quash IDOT's Subpoenas, deny IDOT's Motion to Produce, and prohibit IDOT from further inquiring, in discovery or at hearing, regarding these irrelevant, collateral issues.

Dated: November 27, 2017

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

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EXHIBIT 1

846 So.2d 734
Supreme Court of Louisiana.

LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT
v.
KANSAS CITY SOUTHERN RAILWAY CO., et al.

No. 2002-C-2349.
|
May 20, 2003.

Department of Transportation and Development (DOTD) brought action against previous property owners for cost of removal of allegedly hazardous material discovered during construction of interstate highway. The First Judicial District Court, Parish of Caddo, Scott J. Crichton, J., granted partial summary judgment for previous property owners. DOTD appealed. The Court of Appeal, 827 So.2d 443, affirmed. On grant of certiorari, the Supreme Court, Calogero, C.J., held that the collateral source rule applied to DOTD's attempt to recover cost of cleanup, and thus, the previous owners could not be exonerated from paying the full consequences of any liable conduct on their part.

Reversed and remanded.

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Bobby S. Gilliam, Wilkinson, Carmody & Gilliam, Shreveport; Albert M. Hand, Jr., Cook, Yancey, King & Galloway, Shreveport; Osborne J. Dykes, III, John S. Stephens, Counsel for Respondent.

Opinion

****1** CALOGERO, Chief Justice.

Louisiana Department of Transportation and Development ("DOTD") expended several million dollars to remove environmental pollution at a construction site for Interstate 49 in Shreveport, Louisiana. The United States government, through the Federal Highway Administration ("FHWA"), thereafter reimbursed DOTD ninety percent of the remediation costs. DOTD sued, among other defendants, Kansas City Southern Railway Co. ("KCS") under the Louisiana Environmental Quality Act ("LEQA") to recover the clean-up costs, alleging that KCS polluted the site. The courts below held that DOTD's action was limited to the ten percent of clean-up costs it had actually incurred, and that DOTD could not recover the portion of the costs reimbursed to DOTD by the FHWA. We reverse the lower courts and conclude that DOTD may seek judgment against KCS for the full measure of damages caused by its pollution.

FACTS AND PROCEDURAL HISTORY

Each year, Congress appropriates billions of dollars to subsidize state highway construction projects, and the FHWA apportions these funds among the states. 23 U.S.C. §§ 104(b), 118. States become eligible for their allotted federal funds by obtaining FHWA approval for a project, signing a project agreement with the FHWA, paying the full cost of construction from state funds, and, finally, requesting ****2** reimbursement from the FHWA for the federal share of the cost, which is ninety percent on interstate projects. In completing these federally funded highway projects, states must closely adhere to FHWA standards and procedures.

On June 2, 1989, DOTD entered into a project agreement with FHWA to construct a segment of Interstate 49 in Shreveport. During construction, DOTD discovered environmental contamination at the site. FHWA apportioned a share of Louisiana's federal highway construction funds to remedy the polluted site preceding construction of the highway. In disbursing these funds, the parties followed the procedure applicable to highway construction. DOTD paid the full costs of clean-up from state funds, and was thereafter reimbursed by FHWA the ninety percent federal share. DOTD filed suit to recover the cost of eliminating the pollution, naming as defendants KCS, North Louisiana Goodwill Industries Rehabilitation, Inc., Steel Erectors, Inc., Crystal Gas Storage, Inc., and the insurance carriers for these entities. KCS is the only defendant remaining in this litigation.

In its petition, DOTD alleged that KCS's responsibility for the contamination arises out of a March 31, 1966 train derailment which occurred at or near the property in question. The contents of the derailed train cars were

destroyed or disposed of at the scene of the accident. The train had allegedly been carrying hazardous materials, and the materials were buried at or near the site. DOTD brought its action under the LEQA, La.Rev.Stat. 30:2271, *et seq.,* specifically citing La.Rev.Stat. 30:2276(G)(3), which provides that a party who has incurred remedial costs in responding to a discharge or disposal of a hazardous substance covered by the Act ***737** may sue to recover such remedial costs.[1] In response to the allegation in the defendant Crystal's answer[2] ****3** that DOTD could not recover the portion of the clean-up costs reimbursed by FHWA, DOTD filed a Motion in Limine seeking to withhold from the jury evidence of FHWA's participation in DOTD's remediation.[3] In support of its Motion in Limine, DOTD argued that the collateral source rule prevented defendants from receiving a reduction in their liability simply because DOTD received funding for the remediation from an independent source. DOTD further stated that its relationship with FHWA was analogous to a partnership, giving DOTD authority to recover the full amount of damages on the partnership's behalf. DOTD pointed out that FHWA was paying, as well, ninety percent of the attorney's fees to pursue this action.

Crystal filed a Motion for Partial Summary Judgment, seeking dismissal of ****4** DOTD's claim as to the remediation costs paid from federal funds. Crystal argued that DOTD had no standing or other legal authority to recover on behalf of the FHWA the ninety percent of the damages reimbursed by FHWA. According to Crystal, allowing DOTD to seek the entire amount of incurred clean-up costs would constitute an impermissible double recovery by DOTD of the identical remediation costs. KCS joined Crystal's Motion for Partial Summary Judgment. In its Opposition, DOTD re-urged the applicability of ***738** the collateral source rule. Alternatively, DOTD asserted that FHWA had specifically authorized DOTD to act on its behalf to recover the federal portion of the clean-up costs. DOTD relied on affidavits, as well as on four documents prepared by FHWA in an attempt to prove this agency relationship.[4]

The district court granted the defendants' Motion for Partial Summary Judgment. The court found that DOTD would receive a double recovery if it were allowed to recover the ninety percent federal share of the clean-up costs after having the same costs funded by the federal government. The trial court further found insufficient evidence to indicate that a partnership existed between DOTD and FHWA or that DOTD was specifically authorized by FHWA to recover the federal money expended. After the district court entered judgment, Crystal entered into a confidential settlement agreement with DOTD.

DOTD filed a Motion for New Trial, alleging that the federal share of any remediation costs recovered would belong to the FHWA, not DOTD. Thus, DOTD ****5** would not receive a windfall or double recovery. DOTD attached in support of its motion several affidavits which had not been previously considered by the district court.[5] The district court denied DOTD's Motion for New Trial, specifically finding that no genuine issues of material fact existed with regard to its earlier conclusion that DOTD could not recover remediation costs already reimbursed by FHWA, as this would constitute a prohibited double recovery. The district court found that, according to the pleadings, DOTD sued only in its own right, not in an agency capacity on behalf of FHWA. After the district court designated its judgment as final, DOTD appealed the grant of Crystal's Motion for Partial Summary Judgment.

The court of Appeal affirmed the district court's grant of partial summary judgment, finding that allowing DOTD to recover the entire amount of remediation costs incurred would constitute an impermissible double recovery. The court of appeal held that the collateral source rule was not applicable in this action under the LEQA. Furthermore, the court found that DOTD supplied no evidence containing any special authorization from FHWA enabling DOTD to sue on its behalf to recover the federal portion of the remediation costs. We granted certiorari to review the correctness of the court of appeal's decision.

LAW AND ANALYSIS

DOTD urges this court to reverse the court of appeal and find that it has standing to seek a judgment against KCS for the entire amount of expenses made necessary by the contamination at the construction site. DOTD primarily argues that, pursuant to authority granted by the FHWA, it is suing the alleged polluter on ***739** FHWA's behalf; thus, it will not receive a double recovery.

DOTD alternatively **6 contends that the collateral source rule prevents KCS from obtaining a reduction in liability for the DOTD's removal costs, in large measure funded by FHWA.

As a preliminary matter, KCS filed a motion in this court to strike those affidavits relied upon by DOTD in its Motion for New Trial, which had not been previously entered into evidence at the summary judgment hearing. KCS urges that, pursuant to La.Code. Civ. Proc. art. 2164, an appellate court cannot consider evidence outside of the record on appeal, and DOTD did not appeal the denial of its Motion for New Trial. We note that DOTD's Motion for New Trial concerned only whether DOTD had authority to sue to recover cleanup costs on behalf of FHWA. It unnecessary for this court to address the issue of whether DOTD is suing in a representative capacity on behalf of FHWA in light of the resolution in this opinion favorable to DOTD on its alternate assignment of error regarding the collateral source rule.

[1] Under the collateral source rule, a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, because of monies received by the plaintiff from sources independent of the tortfeasor's procuration or contribution. *Warren v. Fidelity Mut. Ins. Co.,* 99 So.2d 382, 385 (La.App. 1st Cir.1957); *Williamson v. St. Francis Med. Ctr., Inc.,* 559 So.2d 929, 934 (La.App. 2d Cir.1990); *Griffin v. The Louisiana Sheriff's Auto Risk Assoc.,* 99-2944, p. 34 (La.App. 1st Cir.6/22/01), 802 So.2d 691, 713. Under this well-established doctrine, the payments received from the independent source are not deducted from the award the aggrieved party would otherwise receive from the wrongdoer. *Terrell v. Nanda,* 33,242, p. 3 (La.App.2d Cir.5/10/00), 759 So.2d 1026, 1028.

The collateral source rule is of common law origin, Restatement (Second) of Torts § 920A (1979), yet well-established in the jurisprudence of this state, *see* **7 *Warren,* 99 So.2d at 385; *Doerle v. State, DOTD,* 147 So.2d 776, 782 (La.App. 3d Cir.1962); *Thomas v. Paper Haulers,* 165 So.2d 61, 63 (La.App. 2d Cir.1964). And, it has not been altered statutorily. In fact, early Louisiana cases cite legal encyclopedias and other common law reference sources as the basis for application of the collateral source rule. *See Warren,* 99 So.2d at 385 (citing 25 C.J.S. Damages, § 99); *see also Doerle,* 147 So.2d at 782 (citing 25 C.J.S. Damages, § 99; 15 Am.Jur. Damages, § 201).

Several public policy concerns support the collateral source rule generally. The reason most often stated is that the defendant should not gain an advantage from outside benefits provided to the plaintiff independently of any act of the defendant. *Bryant v. New Orleans Public Service, Inc.,* 406 So.2d 767, 768 (La.App. 4th Cir.1981), *affirmed,* 414 So.2d 322 (La.1982). It is also clear that the collateral source rule promotes tort deterrence and accident prevention. *Suhor v. Lagasse,* 00-1628, p. 3 (La.App. 4 Cir. 9/13/00), 770 So.2d 422, 424. Moreover, absent the collateral source rule, victims would be dissuaded from purchasing insurance or pursuing other forms of reimbursement available to them. *Bryant,* 406 So.2d at 769.

[2] [3] In support of its contention that its otherwise applicable recovery under the LEQA should not be reduced by the amount of federal reimbursement, DOTD argues that the collateral source rule must be given a broad application to further the public policy considerations supporting it. DOTD notes that the "polluter pays" principle, a fundamental aspect of the public *740 policy embodied in environmental law, seeks to deter environmental contamination by placing the burden of that contamination on the polluter. *Joslyn Mfg. Co. v. Koppers Co., Inc.,* 40 F.3d 750, 762 (5th Cir.1994). DOTD alleges that the elements of the collateral source rule are present in this case: KCS is not entitled to a credit for payments to DOTD provided independently of **8 KCS's procuration or contribution.

KCS, on the other hand, asserts that courts have applied the collateral source rule only in limited contexts, specifically, in tort situations involving insurance and other proceeds procurable by the victim. KCS further argues that the LEQA is a penal statute, and that the collateral source rule cannot be applied in this case, as penal statutes must be strictly construed, citing *Goodwin v. Agrilite,* 26,601, p. 7 (La.App.2d Cir.9/21/94), 643 So.2d 249, 254.

Both courts below agreed with KCS. The court of appeal found that the collateral source rule, a tort-based concept with a limited application, did not apply in this environmental clean-up dispute, which "does not involve insurance, tort deterrence, or accident

prevention," according to them. *Louisiana Department of Transportation & Development v. Kansas City Southern Ry.,* 30,002, p. 36 (La.App.2d Cir.8/8/02), 827 So.2d 443, 461.

We reverse the court of appeal and hold that the collateral source rule applies in cases arising under the LEQA, at least where a damaged party is seeking reimbursement only for remediation expenses. If, after a trial on the merits, it is found to be legally responsible for some portion of the contamination present at the construction site, KCS cannot be exonerated from paying the full consequences of its act simply because DOTD independently obtained reimbursement in large part from FHWA for the clean-up costs incurred. This holding is not contrary to the existing jurisprudence of this state, and is consistent with the case law of numerous federal and state jurisdictions. Finally, our holding today is commanded by the paramount public interest in ensuring that those persons or entities responsible for harming our environment and the welfare of our citizens be held fully responsible for the consequences of their actions, and deterred from committing future violations of the **9 LEQA.

We recognize that the collateral source rule is most commonly applied to insurance proceeds. Under this general rule, a tortfeasor's liability to an injured plaintiff should be the same, regardless of whether or not that plaintiff had the foresight to obtain insurance. *Wooten v. Central Mut. Ins. Co.,* 182 So.2d 146, 148 (La.App. 3d Cir.1966). However, our courts have applied the doctrine to a range of situations where the collateral source is provided to the plaintiff by a government agency or even a gratuitous source.

[4] For example, a tortfeasor's liability may not be reduced by the amount of a victim's medical expenses paid by Medicare. *Womack v. Travelers Ins. Co.,* 258 So.2d 562, 568 (La.App. 1 Cir.1972); *Weir v. Gasper,* 459 So.2d 655, 658 (La.App. 4th Cir.1984); *Cooper v. Borden,* 709 So.2d 878, 882 (La.App. 2d Cir.1998). In *Francis v. Brown,* 671 So.2d 1041, 1046-47 (La.App. 3d Cir.1996), the court applied the collateral source rule and required the defendant to pay the full amount of the plaintiff's medical bills, including those amounts which had been paid by plaintiff's attorney. Additionally, a plaintiff's recovery is not reduced by the welfare payments received during period she did not work. *Bonnet For and Behalf of Bonnet v. Slaughter,* 422 So.2d 499, 502 (La.App. 4th Cir.1982).

***741** In each of the above-cited cases, the courts focused their analysis on the fact that a wrongdoer may not benefit, and an injured party's recovery may not be diminished, because of benefits received by the plaintiff from sources independent of the wrongdoer's procuration or contribution. As one court described the collateral source rule, "only payments already made by the tortfeasor can be used to grant the tortfeasor a credit towards the amount of the ... award." *Coscino v. Wolfley,* 696 So.2d 257, 264 (La.App. 4th Cir.1997).

**10 We additionally believe it is mere happenstance that the collateral source rule has been applied chiefly in the context of a conventional La. Civ.Code art. 2315 tort. The court of appeal's finding that the collateral source rule is inapplicable to this "environmental clean-up dispute" because it "does not involve insurance, tort deterrence, or accident prevention" is erroneous. Because the particular concerns presented through application of environmental law have arisen relatively recently,[6] Louisiana courts have not had the opportunity to address the impact of statutes that impose duties affecting the environment on the collateral source rule. Like conventional tort cases, environmental law statutory remedies involve claims to recover damages for harm caused by a defendant's acts.[7] For the following reasons, the logic supporting application of the collateral source rule is equally persuasive whether we are dealing with a defendant polluter under the LEQA, or a traditional "tortfeasor" whose liability arises under La. Civ.Code art. 2315, or other general tort law.

A cause of action arising under an environmental statute, such as the LEQA, presents compelling public policy reasons supporting application of the collateral source rule. Louisiana citizens, speaking through the drafters of our 1974 Constitution, have established environmental preservation as a preeminent public policy concern:

> The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety,

> and welfare of the people. The legislature ****11** shall enact laws to implement this policy.

La. Const. art. IX, § 1 (1974). When applying environmental laws, the concern prompting the collateral source rule's goals of tort deterrence and accident prevention is especially implicated, although in the context of deterring future acts in violation of the LEQA. *See Suhor,* 00-1628, p. 3, 770 So.2d at 424. The welfare of our environment and the health of our citizens command that those persons or entities which are found to have polluted our state pay full restitution for the consequences of their acts. Violators of the LEQA should not be allowed to escape the consequences of their actions because the federal government chooses to provide financial assistance to states in essential and time-sensitive clean-up operations.

***742** As we noted previously, Louisiana derives its collateral source rule from the common law; thus, we find persuasive other U.S. jurisdictions' application and interpretation of the collateral source rule. A review of the relevant case law indicates that courts do not restrict application of the collateral source rule to cases involving insurance payments and other benefits purchased by the injured party. To begin, the Restatement (Second) of Torts, § 920A provides:

> (1) A payment made by a tortfeasor or by a person acting for him to a person he has injured is credited against his tort liability, as are payments made by another who is, or believes he is, subject to the same tort liability.
>
> **(2) Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.**

(Emphasis added). The comments to § 920A specifically note that social legislation benefits, such as social security and welfare payments, are subject to the collateral source rule.

The facts of *Town of East Troy v. Soo Line Railroad Co.,* 653 F.2d 1123 (7th Cir.1980), are strikingly similar to the facts of the case at hand. A tank car and ****12** eighteen other railroad cars being transported by the defendant Soo Line derailed within the limits of the plaintiff town. *Id.* at 1125. The tank car, carrying 20,000 gallons of phenol, ruptured and spilled its contents onto the ground. *Id.* Shortly thereafter, residents of the plaintiff town, who had relied on shallow private wells for water use, began to notice signs of phenol in their water. *Id.* To remedy the problem, the town constructed a centralized deep well public water system. *Id.* The town paid the costs of construction with a $500,000 Community Development Grant from the U.S. Department of Housing and Urban Development.

The district court held defendant Soo Line responsible for the accident and awarded damages to the town. *Id.* at 1132. Soo Line argued on appeal that the town had suffered no injury because it had remedied any damage using the federal grant, and, therefore, could not recover damages. *Id.* The Seventh Circuit Court of Appeals applied the collateral source rule, holding that the town's recovery could not be reduced because of reimbursement by an independent source for damages caused by Soo Line. *Id.* The court reasoned that double recovery for a plaintiff is preferable to allowing a defendant to avoid paying the consequences of his wrongful acts, as double recovery is often "the routine result of application of the collateral source rule." *Id.*

The same federal circuit court had previously refused to reduce the liability of a defendant corporation which had sold diseased fish to a plaintiff, where that plaintiff had secured $51,000 in federal funds to compensate for the loss of the fish. *Roundhouse v. Owens-Illinois, Inc.,* 604 F.2d 990, 994 (6th Cir.1979). The *Roundhouse* court recognized that the collateral source rule is most commonly applied to insurance payments, yet concluded that the crucial component of the doctrine "is whether the source of the funds is independent of (collateral to) the ****13** wrongdoer." *Id.*

In *Hall v. Miller,* 143 Vt. 135, 465 A.2d 222, 226 (1983), the court applied the collateral source rule to a breach of warranty action against a defendant who sold the plaintiff cattle infected with brucellosis. Under state and federal indemnification programs designed to encourage prompt compliance with disposal orders and prevent further spread of the disease, plaintiff ***743** received a total payment of over $9,000. *Id.* The court reasoned that the defendant should not be allowed to argue in mitigation that someone else, with whom he has no connection, has indemnified the injured party. *Id.* The court rejected the

defendant's argument that his liability should be reduced because the plaintiff's recovery was completely fortuitous and in no way the result of the plaintiff's foresight or expense: "as between the two parties, it is better that the injured plaintiff recover twice than the breaching defendant escape liability altogether." *Id.*

In *Wheatland Irrigation District v. McGuire,* 562 P.2d 287, 302 (Wyo.1977), the plaintiff property owners brought an action to recover flood damage to their property caused by the rupture of the defendant irrigation district's dam. The court applied the collateral source rule to funds plaintiffs received from the federal government's flood relief program. According to the court, the fact that benefits have been received from governmental sources does not preclude application of the rule. *Id.* (citing *Joshmer v. Fred Weber Contractors,* 294 S.W.2d 576, 586 (Mo.Ct.App.1956) (relief payments)). *See also Alesko v. Union Pacific R.R. Co.,* 62 Idaho 235, 109 P.2d 874, 878 (1941) (holding that collateral source rule barred evidence of governmental relief benefits for flood damage caused by defendant). Additionally, in *Buckley Nursing Home, Inc. v. Massachusetts Commission Against Discrimination,* 20 Mass.App.Ct. 172, 478 N.E.2d 1292, 1299-1300 (1985), the court refused to offset welfare ****14** payments received by the plaintiff against the defendant's liability for damages. The court in *Gatlin v. Methodist Medical Center,* 772 So.2d 1023, 1032-33 (Miss.2000), also applied the collateral source rule to funeral payments made by a victim's rights fund, which were obtained through no effort of the plaintiff.

The overwhelming authority, therefore, supports our holding today in this case that the collateral source rule applies to the reimbursement DOTD received from FHWA. A wrongdoer's liability should not be reduced by the amount of collateral source payments to an injured plaintiff, even where the nature of the collateral source is a public relief provided to the plaintiff by application of federal or state law. The court of appeal and KCS erroneously focus the analysis on whether DOTD will receive a windfall if allowed to recover the full measure of damages from KCS after having been previously reimbursed by FHWA. Other state and federal jurisdictions, however, have generally not been concerned with allowing a plaintiff to receive a windfall as a result of the collateral source rule. *See e.g., Town of East Troy,* 653 F.2d at 1132; *Hall,* 465 A.2d at 226.[8] The federal Second Circuit Court of Appeals, in applying the collateral source rule to an action brought under the Carriage of Goods by Sea Act, aptly noted that "the question is not whether a windfall is to be conferred, but rather who shall receive the benefit of a windfall which already exists.... **This may permit a double recovery, but it does not impose a double burden. The tortfeasor bears only the single burden for his wrong.**" *Thyssen, Inc. v. S/S Eurounity,* 21 F.3d 533, 538 (2d Cir.1994) (citing *Gypsum Carrier, Inc. v. Handelsman,* 307 F.2d 525, 534 (9th Cir.1962)).

Similarly, in the present case, we must choose between allowing DOTD a ***744** ****15** possible windfall,[9] or allowing the liability of potential wrongdoer under the LEQA to be reduced by the 90 percent federal share. We find that the former option is preferable and is not inconsistent with existing Louisiana jurisprudence. As the court in *Griffin* determined:

> the focus of the collateral source rule is that a tortfeasor should not be allowed to benefit from the victim's foresight and prudence in securing insurance and other benefits. **Thus, the focus of our analysis should be on the nature of the write-offs *vis-a-vis* the tortfeasor, rather than *vis-a-vis* the tort victim....** To allow such a reduction in the tortfeasor's liability would indeed be a "windfall"-inuring to the benefit of the tortfeasor! **This is precisely what the collateral source rule is designed to prevent.**
> *Griffin,* 99-2944, p. 36, 802 So.2d at 714-15 (emphasis added). Although the *Griffin* court was discussing the collateral source rule's most common application to insurance payments in tort cases, the logic applies with equal force to the facts and circumstances at hand. The Fourth Circuit Court of Appeal, in discussing the collateral source rule generally, has also noted that, for policy reasons, "double recovery is justified in some cases because the tortfeasor should not receive the benefits of the victim's thrift, employment benefits, **or special services rendered by a third party.**" *Suhor,* 00-1628, p. 3, 770 So.2d at 424.

It is important to note that if DOTD eventually obtains a judgment against KCS after a full merits trial, FHWA may later seek, and indeed is likely to collect, a portion of this judgment from DOTD as reimbursement for the clean-up costs it provided.[10] Actual ownership or utilization of the proceeds from any judgment which may be rendered against KCS is an issue for another day. Therefore, it speculative at this ****16** point whether DOTD will actually receive a windfall or double recovery

by being allowed to receive a judgment against KCS for the entirety of the remediation costs.

Finally, we address KCS's contention that the LEQA is a penal statute, and thus should not implicate the collateral source rule. We take KCS's argument to be that the collateral source rule, as a permissible facilitation of multiple recovery, is defensible only if what the tortfeasor pays is the actual remedial cost imposed upon the victim by the tortfeasor's conduct. According to KCS, a statute that is penal in nature, and which imposes a greater penalty than mere remediation is not an appropriate application or extension of the collateral source rule. KCS cites *Goodwin,* 26,601, p. 7, 643 So.2d at 254, which noted that LEQA § 30:2276(G) is penal and must be strictly construed.

The *Goodwin* case did find that LEQA § 30:2276(G) was a penal statute because it speaks to double recovery of remediation costs. It is true that sections 30:2276(G)(1) and (G)(2) are penal because they provide that polluters are liable for twice their portion of the remedial costs of clean-up. However, another statutory provision, LEQA § 30:2276(G)(3), was added to the statute in 1993, after the *Goodwin* cause of action arose, and this new provision, unlike the other portions of the ***745** statute, grants an injured party a cause of action to recover remediation costs **only.** *See* La. Acts. No. 986, § 1 (1993). The *Goodwin* court specifically stated that its holding did not apply to the recent amendment adding subsection (G)(3). *Goodwin,* 26,601, p. 8, 643 So.2d at 255. DOTD's petition and brief to this court specifically recite that it is pursuing a cause of action under LEQA § 30:2276(G)(3). Thus, the fact that *Goodwin* referred to other sections of the statute as penal is of no moment to DOTD's claim. DOTD is simply seeking to hold an alleged polluter responsible for the actual damage it caused. Therefore, there is no merit to KCS's assertion that ****17** DOTD is impermissibly relying on a penal statute for its recovery.

CONCLUSION

We hold today that the collateral source rule applies to DOTD's action against KCS for the costs incurred to clean-up the highway construction site. Any judgment to be rendered by the district court against KCS should not be reduced by the ninety percent federal share of the remediation funded by FHWA. This holding is commanded by Louisiana's unique constitutionally enunciated public policy of environmental protection and preservation, coupled with the public policy supporting the collateral source rule. Persons or entities found to have violated the LEQA must pay the full measure of damages they caused, and cannot escape liability because our state is independently entitled to reimbursement of ninety percent of remediation costs from a federal agency.

We emphasize that our holding today is a narrow one addressing the applicability of the collateral source rule in the circumstances of this case. The resolution of the discrete legal issue posed at this juncture should have no bearing on whether KCS is either actually responsible for some part of the contamination, or whether it is legally bound to pay for all or part of the remediation. In fact, KCS has vehemently denied that the 1966 train derailment contributed in any way to the site's pollution. The issue of liability is to be resolved by the district court after a trial on the merits.

DECREE

Accordingly, the judgments of the lower courts are reversed, and the case remanded to the district court for proceedings consistent with this opinion.

REVERSED; REMANDED TO DISTRICT COURT.

All Citations

846 So.2d 734, 2002-2349 (La. 5/20/03)

Footnotes

1 La.Rev.Stat. 30:2276 provides in pertinent part:

A. The court shall find the defendant liable to the state for the costs of remedial action taken because of an actual or potential discharge or disposal which may present an imminent and substantial endangerment to health or the environment at a pollution source or facility, if the court finds that the defendant performed any of the following:

(1) Was a generator who generated a hazardous substance which was disposed of or discharged at the pollution source or facility.

(2) Was a transporter who transported a hazardous substance which was disposed of or discharged at the pollution source or facility.

(3) Was a disposer who disposed of or discharged a hazardous substance or hazardous waste at the pollution source or facility.

(4) Contracted with a person for transportation or disposal at the pollution source or facility.

(5) Is or was the owner or operator of the pollution source or facility subsequent to the disposal of hazardous waste.

B. The court does not have to find that the defendant was negligent, knew that the hazardous substance was being improperly disposed of, or that the activity was illegal at the time of disposal.

C. The defendant shall be responsible for his proportionate contribution to the remedial costs as defined in this Chapter.

* * *

G.

* * *

(3) In furtherance of the purpose of this Chapter, a person who has incurred remedial costs in responding to a discharge or disposal of a substance covered by this Chapter, without the need for an initial demand by the secretary, may sue and recover such remedial costs as defined in R.S. 30:2272(9) from any person found by a court to have performed any of the activities listed in Subsection A if the plan for remedial action was approved by the secretary in advance or, if an emergency, the secretary was notified without unreasonable delay and the secretary accepts the plan thereafter.

2 DOTD asserted that Crystal was liable for remedial costs of clean-up because Crystal's predecessor company owned the site, upon which an oil refinery leaked hazardous material. Crystal subsequently operated an oil refinery or barrel topping facility at which Crystal generated and disposed of additional hazardous material at the site.

3 DOTD argued that FHWA's reimbursement was irrelevant to the issue of DOTD's liability, or, alternatively, that any probative value would be substantially outweighed by the danger of jury confusion or prejudice to DOTD.

4 The documents considered by the district court in the hearing on defendants' motion for partial summary judgment were: (1) “Interim Guidance for Hazardous Site Affecting Highway Project Development,” dated August 1988; (2) FHWA letter from Virginia Cherwek; (3) FHWA letter from Jean Rogers, Regional Counsel; and (4) FHWA letter from Wilbert Baccus, Associate Chief Counsel. It is unnecessary to the disposition of this case for this court to discuss the contents of these documents. The court of appeal opinion provides a thorough description. *See Louisiana Department of Transportation & Development v. Kansas City Southern Ry. Co.,* 36,002, p. 15-18 (La.App.2d Cir.8/8/02), 827 So.2d 443, 451-54.

5 The affidavits DOTD attached to its Motion for New Trial were: (1) affidavit of William A. Sussman, the FHWA Louisiana Division Administrator; (2) affidavit of Kam Movassaghi, Secretary of DOTD; (3) affidavit of Wilbert Baccus of the FHWA.

6 The legislature passed the LEQA in 1984. Acts 1984, No. 791, § 1.

7 One court has analogized the citizen suit cause of action under the LEQA to a tort cause of action, and applied the one-year prescription applicable to torts. *See Morris & Dickson Co. v. Jones Bros. Co.,* 29, 379, p. 24 (La.App.2d Cir.4/11/97), 691 So.2d 882, 895 (citing Kenneth M. Murchison, *Enforcing Environmental Standards Under State Law: The Louisiana Environmental Quality Act,* 57 La. L.Rev. 497, 555 (1997)).

8 The comments to Restatement (Second) of Torts § 920A (1979) state “to the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff's injury.”

9 It is not likely that DOTD will actually enjoy a double recovery in light of its representation to this court and the lower courts that it will repay FHWA the ninety percent federal share of any judgment obtained.

10 DOTD asserts that it will reimburse FHWA on its own, but, even if it does not, DOTD contends that FHWA will nonetheless seek recovery of its ninety percent participation from any judgment DOTD obtains.