

STATE OF MICHIGAN
COURT OF APPEALS

WAYNE RUSSELL and JUDY RUSSELL,

Plaintiffs-Appellees,

v

GERARDINE LECHNAR,

Defendant-Appellant,

and

TOTAL PETROLEUM, INC., OBETH PACK, and
ANGELINE DYSON,

Defendants.

UNPUBLISHED
September 4, 2001

No. 221185
Wayne Circuit Court
LC No. 96-636773-CE

Before: Jansen, P.J., and Collins and Cooper, JJ.

PER CURIAM.

Defendant appeals by leave granted from a final judgment, following a bench trial, awarding plaintiffs \$25,098.70 and seventy-five percent of all reasonable and necessary future response activity costs related to contamination from underground gasoline storage tanks formerly existing on the subject property. We reverse.

On September 3, 1979, Jack Lechnar, the now-deceased husband of defendant Gerardine Lechnar, purchased property at 345 South Canton Center Road in Canton Township under a land contract. Jack Lechnar operated a gasoline station on the property from about September 4, 1979, to September 15, 1987.¹ He then leased the property to plaintiff Wayne Russell and another individual who was later released from the lease. When Wayne Russell first leased the property, it contained a shop, gas pumps, three underground storage tanks, and a waste oil tank. Wayne Russell opened a muffler shop on the property and began selling gasoline. To Wayne Russell's knowledge, defendant did not have any control over the property and did not help Jack Lechnar operate the property, but she did sign the lease payment checks plaintiffs made on the

¹ Various owners had operated a gasoline station on the property since the 1950s.

property. On August 24, 1990, plaintiffs purchased the property from Jack Lechnar by land contract. The contract was signed by plaintiffs, Jack Lechnar, and defendant. The closing of the sale of the property was the first time plaintiffs had met defendant. It was not until 1991, when Jack Lechnar's land contract with the previous owner was satisfied, that Jack Lechnar received a warranty deed for the property. This deed contained Jack Lechnar's name, but did not contain defendant's name. On April 21, 1993, Jack Lechnar executed a quitclaim deed to the property to himself and defendant.

On February 8, 1994, plaintiffs removed the underground storage tanks on the property because they had decided to stop selling gasoline. When these tanks were removed, it was discovered that the soil was contaminated due to releases from the tanks. Plaintiffs hired an environmental consulting firm to clean up the contamination and incurred response activity costs as a result. Since the discovery of the contamination, plaintiffs have sold the property by land contract, but have continued to clean up the existing contamination. In 1996, plaintiffs filed suit against defendant and the prior owners and operators of the gasoline station on the property for reimbursement of response activity costs.² Plaintiffs' claims against the former owners of the property settled, leaving Gerardine Lechnar as the only remaining defendant.

At a bench trial, the trial court found that defendant had been an owner of the property as defined in the Natural Resources and Environmental Protection Act (NREPA), MCL 324.20101 *et seq.*, because she had a dower interest in the property during the time that Jack Lechnar owned and operated the property,³ she signed the payments made by plaintiffs while plaintiffs were leasing the property, and she was still collecting land contract payments from plaintiffs at the time of the trial. The trial court found that most of the contamination of the property took place between 1979 and 1987, while Jack Lechnar operated the gasoline station on the property, and assessed defendant with seventy-five percent of the response activity costs and seventy-five percent of all reasonable future response activity costs necessary to clean up the contamination caused by the underground storage tanks. The trial court subsequently denied defendant's motion for new trial or amendment of final judgment and her motion for reconsideration or rehearing.

On appeal, defendant argues that the trial court erred in finding that she was an owner of the property under the NREPA. Statutory construction is an issue of law that is reviewed *de novo*. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). The trial court's findings of fact are reviewed under a clearly erroneous standard. MCR 2.613(C).

Initially, we address plaintiffs' contention that this issue has been waived by defendant because it is not contained in the statement of questions presented. MCR 7.212(C)(5). Defendant's first issue in her appellate brief asks whether the trial court's decision that defendant was liable under § § 201 and 213 of the NREPA or liable at all to plaintiffs constitutes reversible

² This suit was filed after Jack Lechnar died in 1995.

³ "The widow of every deceased person, shall be entitled to dower, or the use during her natural life, of 1/3 part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage, unless she is lawfully barred thereof." MCL 558.1.

error. Since the trial court's decision was based on the definition of owner under the NREPA and the issue has been clearly briefed, we find that the issue has been properly preserved and presented for appellate review.

Under the NREPA, response activity costs incurred for the clean up of releases are the responsibility of 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." MCL 324.20126(1)(b). Because there is no evidence that defendant operated the gasoline station on the property, the issue is whether defendant was an owner of the property. An owner is defined by the NREPA as "a person who owns a facility." MCL 324.20101(z). An owner does not include "[a] person who holds an 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 that person participates in the management of the facility as described in section 20101a" or "[a] person who is acting as a fiduciary in compliance with section 20101b." MCL 324.20101(z)(i) and (ii).

Further, § 213 of the NREPA provides remedies for contamination caused by leakage from underground storage tanks. See MCL 324.21301a. Under this section, an owner is:

[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. [MCL 324.21303(b).]

The NREPA was patterned after the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁴ and is construed in accordance with the CERCLA.⁵ *Kalamazoo River Study Group v Rockwell International*, 3 F Supp 2d 799, 803 (WD Mich, 1998), rev'd on other grounds 228 F3d 648 (CA 6, 2000), on remand 142 F Supp 2d 831 (WD Mich, 2001). Therefore, it is appropriate to examine federal case law involving the CERCLA in interpreting similar issues that involve the NREPA. *Gumma v D & T Construction Co*, 235 Mich App 210, 224; 597 NW2d 207 (1999).

The evidence adduced at trial indicated that, before plaintiffs' lease of the property in 1987, Jack Lechnar was a land contract vendee of the property. He had purchased the property under a land contract in 1979, but did not satisfy the land contract and obtain the deed to the property until 1991, when the property was already being leased to plaintiffs. In fact, defendant was never listed on the land contract or the deed. Dower rights do not attach to a vendee's interest in a land contract because legal title rests in the land contract vendor until the contract is

⁴ 42 USC 9601 *et seq.*

⁵ This Court has held that the Michigan Environmental Response Act (MERA), MCL 299.601 *et seq.*, (the predecessor to the NREPA) is also similar in intent to, and patterned after the CERCLA, so this Court looks to federal cases involving the same issue for guidance. *Flanders Industries, Inc v State of Michigan*, 203 Mich App 15, 21; 512 NW2d 328 (1993).

satisfied. *Stephens v Leonard*, 122 Mich 125, 128-129; 80 NW 1002 (1899). Therefore, defendant did not have a dower interest in the property until the land contract was satisfied in 1991. In 1991, defendant's husband no longer operated a gas station on the property and plaintiffs had purchased the property under a land contract and had been operating a muffler shop and gasoline station since 1987. Moreover, even if defendant did have a dower interest in the property, the federal district court has held that dower rights to property do not make a wife an owner of the property under the CERCLA. *Portsmouth Redevelopment and Housing Authority v BMI Apartments Associates*, 827 F Supp 354, 358-359 (ED Va, 1993). Therefore, the trial court erred in finding that defendant was the owner of the property pursuant to the NREPA, as a result of her dower interest, while her husband operated a gasoline station on the property until 1987.

Because the trial court erred in finding that defendant was an owner of the property while her husband operated a gasoline station on the property, the trial court's allocation of damages is also erroneous because the trial court based most of the allocation of damages on the basis that most of the contamination occurred between 1979 and 1987 when defendant's husband operated the gasoline station. Thus, we must also determine whether defendant was ever an owner of the property. As discussed, defendant was not an owner before plaintiffs leased the property in 1987. The only evidence that defendant owned the property between 1987 and 1990 was the evidence that defendant signed the lease checks plaintiffs paid to Jack Lechnar. This may show that defendant and her husband shared finances, but it is not enough to establish that defendant actually owned the property.

In 1990, defendant's husband sold the property to plaintiffs and defendant signed the land contract. Defendant was added to the deed in 1993. As discussed, an owner does not include "[a] person who holds an 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 that person participates in the management of the facility as described in section 20101a." MCL 324.20101(z)(i). In *Organic Chemical Site PRP Group v Total Petroleum Inc*, 58 F Supp 2d 755 (WD Mich, 1999), the federal district court held as a matter of law that the defendant, who held title in the property as a land contract vendor, was not an owner of the property under the CERCLA or the NREPA. *Id.* at 762-763. The federal district court held that, because a land contract vendor in Michigan holds legal title to the property only as a security interest to ensure payment on the land contract, the defendant fell under the security interest exception from being an owner of the property under both the CERCLA and the NREPA. *Id.* at 762-763.

In the present case, although defendant and her husband retained title of the property after they sold it in 1990, they no longer participated in the management of the property or had the authority to determine how the property was used. They merely received plaintiffs' payments on the land contract and retained title as a security interest in the property. Therefore, defendant was not an owner of the site after the property was sold in 1990.

Because we find that defendant was never an owner of the property at issue, we reverse the trial court's final judgment awarding plaintiffs \$25,098.70 and seventy-five percent of all future reasonable and necessary response activity costs. Because we reverse on these grounds, we need not address defendant's other arguments on appeal.

Reversed.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Jessica R. Cooper