STATE OF MICHIGAN

COURT OF APPEALS

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT, Plaintiff-Appellee, v STREFLING OIL COMPANY, STREFLING REAL ESTATE INVESTMENTS #1, L.L.C., and RONALD G. STREFLING, Defendants-Appellants.	UNPUBLISHED July 29, 2014 No. 314336 Ingham Circuit Court LC No. 11-000156-CE

Before: MURRAY, P.J., and O'CONNELL and BORRELLO, JJ.

MURRAY, P.J. (*concurring in part, dissenting in part*).

I concur in the majority's decision with respect to all issues addressed in its opinion, except for its affirmance of the order holding defendants Ronald Strefling and Strefling Real Estate Investments #1, LLC (SREI) liable under Part 213 of the Natural Resources Environmental Protection Act (NREPA), MCL 324.21301a *et seq*. As briefly detailed below, a landowner's mere allowance of the normal operation of underground storage tanks on his property is insufficient by itself to impose liability under Part 213 of the NREPA. Accordingly, I would reverse the portion of the trial court's order imposing liability on those defendants.

Since it is clear that Ronald Strefling and SREI were "owners" of "facilities" as defined in the NREPA, their potential liability turns on a discrete question: were those defendants responsible for an activity causing a release or threat of release? See MCL 324.20126(1)(a). To answer, it is first necessary to identify the activity causing the release or threat of release.

The majority locates causation in two independent events. First, the majority correctly holds that Strefling Oil's act of operating the tanks was an activity causing a release (or threat of release) of petroleum products from the tanks. It is undisputed, however, that neither Ronald

Strefling as an individual[1] nor SREI was responsible for those activities or, for that matter, for any maintenance, operation, ownership or licensure of the tanks. To the contrary, those responsibilities rested solely with Strefling Oil. Liability to Ronald Strefling and SREI therefore may not attach on this ground.

The majority goes on to conclude that a second activity caused a release (or threat of release): namely Ronald and Frieda Strefling's permitting Strefling Oil to operate the tanks on their land coupled with their knowledge of the tanks' operation and their familiarity with the oil industry. This is problematic for two reasons.

First, knowledge and familiarity are not an "activity" since they are not "specific deed[s]," much less "action[s], function[s], or sphere[s] of action." Rather, they are states of being. They cannot be activities by definition, and the Legislature has focused on an owner's activity, not on his or her general knowledge of the oil industry. Second, merely permitting the tanks to exist on property is not what caused the release or threat of release; the operation of the tanks did. As mere owners of the land on which the tanks were located, Ronald Strefling and SREI are simply not responsible for an activity causing a release or threat of release.

The majority maintains that Ronald and Frieda Strefling were responsible for causing a threat of release because they should have reasonably anticipated that the mere use of underground storage tanks on their land could result in a release. This is equivalent to saying that just because one knows how underground storage tanks operate, one is responsible for any release from underground storage tanks on one's property – even if one did not operate the tanks. Applied here, this means that the *only* way Ronald Strefling and SREI could avoid liability for a potential release was to outright prohibit the operation of the underground storage tanks on their land because the "circumstance that may reasonably be anticipated to cause a release," MCL 324.20101(vv), was their permitting the tanks to be used on their property. That is strict liability.[2] And, since it is clear from the statute's plain language that a causation rather than strict liability standard governs, the majority's interpretation runs afoul of the very canon of statutory construction it purports to apply. *In re AJR*, __ Mich __, __; __ NW2d __ (2014), slip op at 6.

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[1] The record is clear that to the extent Ronald Strefling delivered fuel to or performed maintenance on the underground storage tanks, he did so *as an employee of Strefling Oil*. Accordingly, the majority does not lodge Ronald Strefling's liability in the performance of these duties, alone, but only insofar as those duties contributed to his knowledge and understanding of the oil business.

[2] *Black's Law Dictionary* (7th ed) defines strict liability as "[l]iability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe."

Before concluding, one final point is in order. Specifically, although Part 201's unambiguous language renders recourse to legislative history unnecessary,[3] it bears emphasis that the language at issue, as enacted in 1994 PA 451, amended the prior strict or status based liability standard of Michigan's Environmental Response Act (MERA), MCL 299.601 *et seq*. See House Legislative Analysis, HB 4596, May 19, 1995. The prior standard, known as the "polluter's pay" law, provided in pertinent part that an owner of a facility was liable "if there is a release or threatened release from a facility that causes the incurrence of response activity costs . . . ." MCL 299.612(1); see also *City of Port Huron v Amoco Oil Co, Inc*, 229 Mich App 616, 619; 583 NW2d 215 (1998). The status-based liability which this plain language imposed was clear, and under *that* framework landowners like Ronald Strefling and SREI would have been strictly liable for the release or threat of release at issue. The applicable language of Part 201 simply does not admit to this interpretation.

For these reasons, I respectfully dissent from the portion of the majority's opinion affirming Ronald Strefling and SREI's liability under the NREPA.

/s/ Christopher M. Murray

[3] *In re Certified Question*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003).