

BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE

APPEAL OF:)
THOMAS V. SPANO) No.
and)
T. V. SPANO BUILDING CORPORATION) On Remand From Superior Court
1991)

FINAL ORDER

This matter came before the Environmental Appeals Board on March 26, 1991. The following members were present: Thomas J. Kealy, Chairman, Clifton H. Hubbard, Jr., Mary Jane Willis, Ray K. Woodward, Edward Cronin and Joan Donoho. Ann Marie Johnson, Deputy Attorney General advised the Board. Richard D. Allen and Palmer L. Whisenant represents appellants, Thomas V. Spano ("Spano") and T. V. Spano Building Corporation ("Spano Corp."). The Department of Natural Resources and Environmental Control ("DNREC") was represented by Deputy Attorney General Kevin P. Maloney.¹

PROCEDURAL HISTORY

The Board originally heard this matter on November 16, 1987. It rendered an Opinion on March 23, 1988 (hereinafter referred to as "Opinion"), which was appealed to Superior Court. In a decision dated June 15, 1990, the Superior Court reversed the decision of the Board on legal grounds and

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By agreement of the parties, this matter was submitted to the Board on stipulated evidence and through briefs. The parties waived their rights to any live testimony or statement.

remanded the case to the Board with instructions to review the evidence according to the standards proposed in the Opinion and Order. By agreement, the parties submitted additional evidence into the record and each submitted memoranda of law. As neither party requested an opportunity to argue or present live witness testimony, there was no additional hearing before the Board.

The Court affirmed the Board's interpretation of "hazardous waste" as defined under 7 Del. C. sec. 6302(7) and the Board's finding that the buried waste at the site was hazardous waste. Opinion at pp. 9-10. The Court, finding that the appellants had failed to recognize the breadth of the statutory definition of hazardous wastes, stated that solid waste that poses the "potential of being a hazard when it was improperly disposed of,...[is] at the time of its disposal...hazardous waste." Id. at 9.

It further found that the facts "show that the buried material probably generated the methane that seeped into the houses. Therefore the buried material was hazardous waste when it was buried." Id. It also confirmed the Board's finding that an imminent hazard existed at the time the Order issued, and that the Secretary was authorized to act under 7 Del. C. sec. 6308. Id. at 11.

The Court did take issue with the Board's decision to limit the evidence in the record to those facts available to the Secretary prior to his October 1 Order. While this was

appropriate in determining the Secretary's authority to act under 6308 (as to whether an imminent hazard existed), the Court reasoned that evidence after October 1 was relevant to the determination of the cause of the methane gas, and of the responsible parties under sec. 6308(d). Thus, the Court remanded to the Board for the purpose of considering additional evidence on the issue of responsibility. Because the hearing before the Board was the first full hearing afforded the appellant, the Court reasoned that the following issues were relevant to the determination by the Board:

Issues that may be raised before the Board on the Order in this case may include the nature of the buried substances, whether the substances possessed hazardous characteristics as defined in 7 Del. C. sec. 6302(7), who are the parties involved, and whether the action of the Secretary was reasonable and justified. In deciding those issues the hearing should be open to the presentation of all available information as of the time of the Board hearing. It shall not be limited to information available to the Secretary when he entered the Order.

Id. at 15.

Finally, the Court, reading the Board's finding that there was insufficient evidence to hold that Mr. Spano was personally responsible under sec. 6308(d), concluded that the Board had misapplied the law of the liability of corporate officers. The Court remanded the decision for reconsideration on this issue and directed the Board to apply the standard for tortious conduct of corporate officers, and the law of agency. With

these standards in mind, the Board has reviewed the additional evidence.

SUMMARY OF THE EVIDENCE

T. V. Spano submitted twelve additional exhibits which were admitted as Appellant's Exhibit 4. Parts six through twelve were EPA Polrep Reports.² The evidence indicated that materials removed from the trenches at the site of Raintree Village, once removed, did not exhibit hazardous characteristics under federal law (as identified in 40 C.F.R. of the Federal Register), and therefore could qualify for disposal at the Corado Brothers, Inc., waste facility. The subsequent Polrep Reports placed into evidence document that materials were removed from the trenches and taken to the landfill for a period of time starting March 24, 1988 through June 17, 1988.

The Board also reviewed the October 1987 Tetrattech Richardson Preliminary Report (hereinafter "Report") which had been submitted at the prior hearing but was not reviewed by the Board because it was issued after the date of the Secretary's Order. See Chronology, Exhibit 5. This report was written as a condition of the Secretary's Order and stated that the optimal conditions of the formation of methane includes "the presence of a high percentage of biodegradable materials (food,

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While some of these documents were already in evidence they will be addressed here as part of Exhibit 4 for purposes of discussion.

garbage, wood, paper); (2) high moisture conditions greater than 80% optimal and (3) warm temperatures of 85 degrees to 95 degrees." Report at 33-34. The report stated that it takes approximately 1.5 to 2.0 years to reach phase 4 methane production, but that "shorter methane development times are possible." Id. The Report went on to conclude that all of the optimal conditions for methanogenesis were present at the site, including a high percentage of biodegradable material, high moisture content because of the low grade of the pits and warm temperatures. Id. It speculated that the rapid rate of methanogenesis in this area appeared to be related to the presence of sewage and stated:

Since domestic sewage is predominantly bacteria, the introduction of sewage to an area will significantly increase the micro-organism population in a given area. If abundant organic material and other optimal conditions are present, methane is produced at an accelerated rate. This appears to be the situation in the sub-surface fill areas at Raintree Village. The source of sewage is uncertain at this time. High fecal coliform counts...were observed in all three sub-surface fill areas..., indicating a potential widespread sewage source.

Emphasis added. Report at 34.

The final Tetrattech Report issued December 1, 1987 (hereinafter "Final Report") made similar findings:

It appears that the combination of tree materials, sewage that was detected in the fill areas, and optimum soil and moisture conditions has enabled significant methanogenesis to occur in a relatively short period of time. Once produced, the methane had migrated through the

development through permeable sub-surface strata which are present at the site.

Final Report at 124.

The Final Report went on to conclude that given the life expectancy of fecal coliform, in which organisms do not usually survive any longer than three to four months outside the human body under optimal conditions, it was probable that the sewage was introduced into the sub-surface fill area in the three to four months prior to testing. Final Report at 161. It goes on to state that:

No conclusion can be made to the source of the sewage at this time. The most recent fill material appears to have been placed there three to four months ago so the excavation of this area is a potential pathway for the introduction of sewage to the sub-surface.

It is possible that sewage was placed in this excavation but no evidence was available to support this source. Another potential source is a New Castle County sanitary sewer that does intersect the site near the sub-surface fill areas. This is a potential source because this sewer is greater than twenty years old. However, limited sewer information obtained and evaluated in this investigation 'discloses no structural defects in the sewer.'

Final Report at 161.

The Report noted that the sewer investigation consisted of an evaluation of available information provided by New Castle County and included construction plans, flow calculations and video tapes of the sewer sections from Manhole 5(a) to Manhole 4 which are located in the sub-division.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board, having reviewed the additional evidence, makes the following findings with regard to Spano Corporation's "responsibility" pursuant to 7 Del. C. sec. 6308(4).

Responsibility of Spano Corporation

1. The construction debris was improperly disposed of by burial at the Spano site.
2. The material was hazardous waste when buried because of its potential to be a hazard as a result of improper disposal.
3. Methane gas resulted from the burial of the material because of its degradation after burial. The Tetratech reports indicate that the degradation was probably accelerated by the existence of certain sewage organisms, which tests indicated were present in the pits.
4. The Tetratech Report indicates that the source of the sewage is uncertain and may have been either from a leaking sewer line or from use at the site. Tetratech was unable to locate a leak in the sewer line.
5. Without the improper burial of the construction debris, the methane gas would not have been produced. The buried construction materials were the substantial cause of the methane gas at Raintree Village. As a result, the buried materials had to be removed.
6. The materials were buried by the sub-contractor and agent of Spano Corporation. Spano Corporation directed that

the site work which resulted in the burial be conducted by the sub-contractor, and oversaw the burial. Spano employee, Ronald T. Hewes, Project Coordinator, testified that he was aware that the debris pits existed and participated in the decision-making process that led to the burial of wastes in the debris pits.

By a vote of seven to zero, the Board concludes that T. V. Spano Corporation was properly held to be responsible party for emergency clean-up and remedial measures.

Personal Liability of Thomas Spano

The Board additionally makes the following findings with regard to Mr. Spano's personal conduct:

1. Mr. Spano relied upon the recommendation of his sub-contractors, his attorney and his employees in determining whether or not all licensing requirements with regard to burying waste were met.
2. Spano testified that he visited the site once or twice a week, but the actual management was overseen by his building superintendent, who reported to Hewes. While, as President of Spano Corporation, he may have intended that site work was to be completed, there is no evidence that Mr. Spano personally directed his workmen to bury the waste, or otherwise participated in the decision-making process that led to this manner of waste disposal. Although he did testify that he became aware of the existence of the pits after they were being dug, this knowledge alone was not sufficient to create the requisite participation necessary to create personal liability.

The Court, citing the Second Restatement of Agency section 343, states that:

An agent is subject to liability, as he would be for his own personal conduct, (sic) for the consequences of another's conduct results from his directions if, with his knowledge of the circumstances, he intends the conduct or its consequences....

Opinion at p. 17. The Court also relies upon Fletcher, Cyclo-
pedia Corporation, which states, in relevant part:

The general, if not universal, rule is that an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefor; but that an officer of a corporation who takes no part in the commission of the tort committed by the corporation is not personally liable to third persons for such a tort, nor for the acts of other agents, officers or employees of the corporation in committing it, unless he or she specifically directed the particular act to be done, or participated, or cooperated therein.

* * * *


Officers of a corporation are not held liable for the negligence of the corporation merely because of their official relation to it, but because of some wrongful or negligent act by such officer amounting to a breach of duty which resulted in an injury.... To make an officer of a corporation liable for the negligence of the corporation there must have been upon his part such a breach of duty as contributed to, or helped to bring about, the injury; that is to say, he must be a participant in the wrongful act. And this is the rule prevailing in most of the jurisdictions.


3A Fletcher, Cyclopeda Corporation sec. 1137 at 275-76. These authorities stand for the proposition that an officer of a

corporation cannot be held personally liable for acts of the corporation by virtue of his corporate status alone, and alternatively, he can not use his corporate status to shield himself from liability for his own wrongful conduct. The evidence does not indicate that Spano intended that materials be buried, or that he otherwise participated in the decision-making process.

This is consistent with federal environmental law, and the law of other states, which interpret statutory standards of "responsibility" for improper hazardous waste disposal or the illegal acts taken by corporate officers. See, United States v. Northwestern Pharmaceutical, 810 F.2d 726, 745 (8th Cir. 1986) (Corporate officers of waste disposal company who directly ordered waste disposal and President of company, who had specific authority over waste disposal, had personally participated in wrongful acts and were personally liable); Scribner v. O'Brien, Inc., Conn. Supr., 363 A.2d 160, 168 (1975) (Building company President who personally oversaw and supervised work on a daily basis had personally participated in wrongful acts, and was personally liable); Mahoney v. McClure, Pa. Super., 568 A.2d 682 (1990) (Corporate officer cannot be held liable for corporate employee's unpaid wages, because he was not actively involved in corporation's decision-making process).

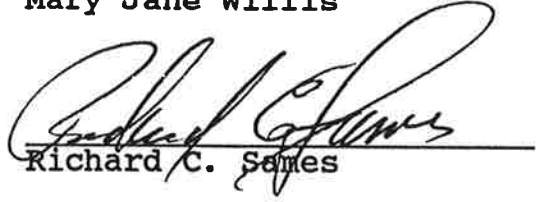
As a result of these findings, the Board, by a vote of 4 to 3 reverses the Secretary's findings that Thomas Spano was personally responsible under sec. 6308(d) for clean-up costs. (Hubbard, Woodward and Donoho dissenting).


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