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RE: Case No. 16-0457 DATE: 6/22/2018
COA #: 03-15-00428-CV TC#: D-1-GV-06-000627
STYLE: STATE v. MORELLO

Today the Supreme Court of Texas denied the motion for rehearing in the above-referenced cause.

MS. JACQUELINE LUCCI SMITH
LUCCI SMITH LAW, PLLC
2550 GRAY FALLS DRIVE, SUITE 395
HOUSTON, TX 77077
* DELIVERED VIA E-MAIL *

# IN THE SUPREME COURT OF TEXAS

NO. 16-0457

THE STATE OF TEXAS, PETITIONER,

v.

BERNARD MORELLO, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

**Argued December 7, 2017**

JUSTICE JOHNSON delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE GUZMAN, JUSTICE LEHRMANN, JUSTICE BOYD, JUSTICE DEVINE, and JUSTICE BROWN joined.

JUSTICE BLACKLOCK did not participate in the decision.

This case involves Bernard Morello's challenge to the assessment of civil penalties against him under the Texas Water Code for actions that he performed as an employee of White Lion Holdings, L.L.C., after White Lion was assessed penalties under the same section based on his actions. The trial court concluded that both Morello and White Lion could be assessed penalties. The court of appeals disagreed and reversed. We agree with the trial court. Accordingly, we reverse the court of appeals' judgment and reinstate that of the trial court.

## I. Background

Vision Metals, Inc., owned and operated a pipe manufacturing facility that caused groundwater contamination. The predecessor to the Texas Commission on Environmental Quality, the Texas Water Commission (collectively, TCEQ), issued Vision a hazardous waste permit and compliance plan governing both the closure of hazardous wastewater impoundments located on the property where the manufacturing facility was located and the post-closure care of the property. This plan included the requirement that an acid neutralization treatment system (ANTS) be used to treat recovered groundwater. The compliance plan obligated Vision to (1) implement a corrective action program, (2) reduce the groundwater contamination as well as monitor and file reports detailing corrective actions and results of tests on the groundwater, and (3) provide assurance to the TCEQ that Vision was financially capable of conducting the corrective action program.

Vision eventually filed for bankruptcy. In a 2004 bankruptcy auction, Bernard Morello agreed to purchase the property for $650,000. After Morello learned of the environmental obligations accompanying the property, he sought to renegotiate the deal. The parties agreed to a reduced price of $150,000 and the bankruptcy court approved the agreement.

Morello formed White Lion Holdings, L.L.C., to own and hold title to the site. He was the only member of the company. The day before closing, Morello assigned to White Lion all of his rights, duties, and obligations associated with the property. Morello personally paid for the property, but Vision transferred the property, along with the permit and its accompanying compliance plan, directly to White Lion. The TCEQ has several requirements with which owners must comply in order to transfer property that is the subject of a permit and compliance plan. *See* 30 TEX. ADMIN.

CODE § 305.64. Morello completed applications to transfer the permit and the compliance plan to White Lion in accordance with these regulations. On July 23, 2004, the TCEQ approved the transfers.

In December 2004, the TCEQ notified White Lion and Morello of violations of the compliance plan. These included failing to perform a groundwater monitoring program and failing to comply with reporting requirements. The TCEQ also sent a notice of enforcement based on White Lion's failure to provide assurance of its financial ability to fulfill the plan. The TCEQ continued sending notices to Morello of the violations until April 2006, when the State sued White Lion. In its suit, the State alleged that White Lion did not meet the requirements of the compliance plan, including the requirement to provide assurance of financial capability. Later, the State amended its petition and added Morello as a defendant. It alleged that both Morello and White Lion were required, and failed, to comply with the compliance plan and provide assurance of financial capability to fulfill it.

In August 2013, the State moved for summary judgment against White Lion. It asserted that for over nine years, White Lion had deliberately failed to maintain and monitor the groundwater remediation system. The State sought civil penalties of $50 per day, for a total of $325,600. *See* TEX. WATER CODE § 7.102. The State also sought, contingent on the trial court's granting summary judgment against White Lion, severance of the claims against it from those against Morello and final judgment against White Lion. The trial court granted summary judgment; awarded civil penalties, the outstanding hazardous waste facility fees, and attorney's fees; and severed the claims against White Lion from those against Morello. White Lion appealed and the court of appeals affirmed.

*White Lion Holdings, L.L.C. v. State*, No. 01-14-00104-CV, 2015 WL 5626564 (Tex. App.—Houston [1st Dist.] Sept. 24, 2015, pet. denied).

Over a year after the trial court granted summary judgment against White Lion and while White Lion's appeal was pending, the State sought summary judgment against Morello. In its motion, it asserted that it is a violation of the Water Code for a "person" to "cause, suffer, allow, or permit a violation of a statute within the commission's jurisdiction or a rule adopted or an order or permit issued under such a statute." *See* TEX. WATER CODE § 7.101. The State alleged that Morello was personally and substantially involved with operating, managing, and making decisions concerning White Lion's facility, and indeed was the sole decision maker for White Lion. The State also asserted that Morello personally removed the ANTS, removed the facility's domestic wastewater treatment plant, and threw away (or directed to be thrown away) monitoring well protective housing caps. Those actions, the State asserted, amounted to causing, suffering, allowing, or permitting a violation of law under Water Code section 7.101.

In response, Morello maintained that third parties who purchased personal property at Vision's bankruptcy auction damaged the remediation system as they were removing the property. He also claimed that all of his actions were performed in his capacity as White Lion's agent, and not in his individual capacity; thus, he was not personally responsible for any of White Lion's failures to comply.

The trial court granted the State's motion for summary judgment and awarded civil penalties in the amount of $367,250, based on the minimum fine of $50 per day for each day the statute was violated. *See* TEX. WATER CODE § 7.102. After the trial court denied Morello's motion for new

trial, he appealed. He asserted three issues: (1) the State failed to establish that he was personally liable; (2) the trial court erred by not granting his motion for new trial based on the erroneous severance of the State's claims against him from those against White Lion; and (3) the trial court erred by denying his motion for new trial based on newly discovered evidence.

The court of appeals reversed. ___ S.W.3d ___ (Tex. App.— Austin 2016). It reached only Morello's first issue, holding that the State failed to establish as a matter of law that Morello was individually liable for the alleged violations. *Id.* at ___. The court began by recognizing that the formation of a limited liability company is intended to shield members from the company's liabilities and obligations, *id.* at ___ (citing TEX. BUS. ORGS. CODE § 101.114), while also noting the common law principle allowing a corporate officer to be held individually liable when the officer "knowingly participates in tortious or fraudulent acts . . . even though he performed the act as an agent of the corporation." *Id.* at ___ (quoting *Nwokedi v. Unlimited Restoration Specialists, Inc.*, 428 S.W.3d 191, 201, 210 (Tex. App.—Houston [1st Dist.] 2014, pet. denied)). The court concluded there had been no showing that "the alleged failures to satisfy the terms of the compliance plan and failure to provide financial assurance are tortious or fraudulent conduct of Morello individually or that those failures to comply should somehow be treated as if they were." *Id.* at ___. The court held that because the State failed to establish that Morello could be held individually liable as a matter of law, the trial court erred by granting the State's motion for summary judgment. *Id.* at ___.

In this Court, the State challenges the court of appeals' conclusion that a member of a limited liability company cannot be held liable for violations of environmental laws where the member was

personally involved in the violations. The State argues that, as reflected by the plain language of the Water Code, the Legislature expressly intended for individuals, as persons, and not only corporations, to be liable for environmental violations under section 7.102. Thus, according to the State, the proper question is whether section 7.102 applies to the actions Morello took, not whether Morello can invoke the corporate shield to escape liability. The State also claims that the severance issue is not properly before this Court because it should have been raised (if at all) in White Lion's appeal. In any event, the State urges that neither Morello nor White Lion objected to the severance, so the issue has been waived.

Morello responds that the court of appeals correctly held that corporate officers cannot be held individually liable for actions taken on behalf of the company. He claims he is not individually liable because he did not own the property, was not a party to the compliance plan, and never undertook any obligations related to the compliance plan. He also asserts that the State improperly severed the case against him from the one against White Lion, thereby avoiding a judgment for joint and several liability that would have allowed only a single recovery for the same acts. He maintains that where a single claim is improperly severed into separate claims against different parties, as this one has been, the second appeal should be dismissed for lack of jurisdiction. Finally, Morello argues that assessing fines against each of two parties substantively doubles the allowable fine, and because there is no relationship here between the fines imposed and the offense, the fines are unconstitutionally excessive.

## II. Discussion

### A. Personal Liability

Morello's claim that he cannot be held personally liable is based on the premise that "a member or manager is not liable for a debt, obligation, or liability of a limited liability company," including single member limited liability companies. TEX. BUS. ORGS. CODE § 101.114; *see id.* § 101.101(a). But the State's position is not based on the Business Organizations Code; it is based on the Water Code. The State says that Water Code sections 7.101 and 7.102 apply directly to Morello individually—he is liable because of his own actions and liability under the statute, not because of the company's liability.

We begin by examining the Water Code. Our review is de novo to the extent the review is based on statutory interpretation. *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325 (Tex. 2017). We determine and give effect to the Legislature's intent by, first and foremost, relying on the plain meaning of the statute's words. *Id.*

Section 7.101 provides:

> A person may not cause, suffer, allow, or permit a violation of a statute within the commission's jurisdiction or a rule adopted or an order or permit issued under such a statute.

TEX. WATER CODE § 7.101. And section 7.102 provides:

> A person who causes, suffers, allows, or permits a violation of a statute, rule, order, or permit relating to any other matter within the commission's jurisdiction to enforce . . . shall be assessed for each violation a civil penalty not less than $50 nor greater than $25,000 for each day of each violation . . . .

*Id.* § 7.102.

Morello asserts that section 7.102 is inapplicable to him personally because the term "person" in this section of the Water Code excludes an individual. However, Chapter 7 of the Water Code does not define "person." *See id.* § 7.001. That being so, we determine the meaning of "person" as we generally determine the meaning of words used in, but not defined by, a statute: we read them in context and construe them according to rules of grammar and common usage. *Cadena Comercial USA Corp.*, 518 S.W.3d at 325 (*citing* TEX. GOV'T CODE § 311.011). And "person" according to its common usage is an individual. *See* BLACK'S LAW DICTIONARY 1324 (10th ed. 2014) (defining "person" as "[a] human being").

Morello asserts that "person" in section 7.102 does not include an individual because the definition of "person" in the Solid Waste Disposal Act, which he claims is applicable here, includes only corporations, organizations, business trusts, and other legal entities. *See* TEX. HEALTH & SAFETY CODE § 361.003(23). But we need not decide whether the definitions in the Solid Waste Disposal Act apply to Water Code section 7.102 enforcement actions. That is because even if they do, the definition of "person" in that Act includes individuals: "'Person' means an individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity." *Id.* Thus, because there is no statutory definition *excluding* individuals from the definition of person, we interpret the term as it applies in common usage—to include individuals. Under the plain language of the Water Code, an individual may be assessed a penalty for causing, suffering, allowing, or permitting a violation of a permit relating to the TCEQ. TEX. WATER CODE § 7.102.

Morello argues that he never assumed, nor did the State ever transfer to him, any obligations under the permit. But nothing in the language of the Water Code (1) limits the number of persons to whom its penalties apply, (2) provides that only one penalty may be assessed per occurrence or per violation, or (3) permits an enforcement proceeding only against a landowner or the permit holder. The language is broad and applies to "a" person who causes or allows the violation of a permit, not "the" person holding the permit. Therefore, under the plain language of the statute, if Morello caused or permitted a violation of White Lion's permit, the State could assess a penalty against him regardless of whether White Lion or others might also be subject to penalties arising from violations and regardless of who had obligations under the permit.

The court of appeals concluded, and Morello argues, that he cannot be held individually liable because he was acting as an agent of White Lion; agents may only be held individually liable for "tortious" or "fraudulent" acts they commit; and his actions cannot be characterized as either of those types. ___ S.W.3d at ___. The State responds that courts have recognized a corporate officer who personally participates in violating a statutory provision may be personally liable. For example, under the Texas Deceptive Trade Practices Act (DTPA), a corporate agent acting in the scope of his employment can be held personally liable for violations of that statute. *Miller v. Keyser*, 90 S.W.3d 712, 716 (Tex. 2002). In *Miller*, homeowners sued Barry Keyser, the sales agent for a homebuilder, for making false statements to them about the size of their lots. *Id.* at 715. Keyser claimed that he could not be personally liable for acts taken in the scope of his employment because he was acting solely on behalf of the homebuilder. *Id.* at 716. We rejected this argument, concluding that based on the plain language of the DTPA permitting a claim against "any person," Keyser was liable for

DTPA violations where he personally made the misrepresentations to the homeowners. *Id.* at 716–17.

The court of appeals in this case considered *Miller* to be inapplicable, stating that our decision "focused on how the [DTPA] is designed to protect consumers and is construed in favor of consumers" and that our conclusion "comport[ed] with Texas' longstanding rule that a corporate agent is personally liable for his own fraudulent or tortious acts." ___ S.W.3d at ___ (quoting *Miller*, 90 S.W.3d at 716). While we acknowledged these issues in *Miller*, they were not the focus of our decision. Rather, we noted multiple times that the questions posed were whether Keyser could be liable under the language used by the Legislature in the DTPA and whether he personally made misrepresentations. 90 S.W.3d at 716–17, 720. Here, the question is the same: does the language used by the Legislature in the Water Code apply to Morello's personal actions? We conclude that it does.

As the State points out, at least one court of appeals has interpreted the Water Code as making individuals responsible for violations of environmental laws. In *Ex parte Canady*, the court concluded that employees of a company that paid an administrative penalty for Water Code violations could be prosecuted individually for violations of the Code. 140 S.W.3d 845, 850–51 (Tex. App.—Houston [14th Dist.] 2004, no pet.). The court stated, "It is clear the legislators intended the Water Code to impose more stringent standards when dealing with hazardous waste disposal and to assure that each person be accountable for his actions that violate a provision of the code." *Id.*

And previously, in *State v. Malone Service Co.*, the same court of appeals rejected the assertion that the president and a plant manger of a company could not be individually liable for Water Code violations because they did not hold the permit. 853 S.W.2d 82, 84 (Tex. App.—Houston [14th Dist.] 1993, writ denied). The court described the conduct at issue in that case as an "environmental tort" and concluded that an environmental tort was analogous to a situation where a corporate officer may be personally liable for participation in a tort and that "[l]iability is based on the agent's own actions, not his status as an agent." *Id.* at 85 (citing *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984)).

The court of appeals in this case declined to follow *Malone*. ___ S.W.3d at ___. The court did not necessarily agree that corporate officer liability could extend to an "environmental" tort and also did not see Morello's conduct in this case as aligning with environmentally tortious conduct because he did not deposit or discharge hazardous substances. ___ S.W.3d at ___. However, the language of the statute does not distinguish between depositing or discharging hazardous substances and other violations for which a penalty may be assessed. TEX. WATER CODE § 7.102.

Further, federal and state courts have consistently rejected the position that where an environmental statute applies to a "person," corporate officers can avoid individual liability for violating the statute if they personally participated in the wrongful conduct. *See, e.g., Riverside Mkt. Dev. Corp. v. Int'l Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir. 1991) (concluding that the federal act "prevents individuals from hiding behind the corporate shield" when they "actually participate in the wrongful conduct"); *U.S. v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 745 (8th Cir.1986), *cert. denied*, 484 U.S. 848 (1987) ("[I]mposing liability upon only the corporation, but not those

corporate officers and employees who actually make corporate decisions, would be inconsistent with Congress' intent to impose liability upon the persons who are involved in the handling and disposal of hazardous substances."); *T.V. Spano Bldg. Corp. v. Dep't of Natural Res. & Envtl. Control*, 628 A.2d 53, 61 (Del. 1993) (concluding that the State could impose personal liability on an officer who "directed, ordered, ratified, approved, or consented to the improper disposal"); *People ex rel. Burris v. C.J.R. Processing, Inc.*, 647 N.E.2d 1035, 1039 (Ill. App. Ct. 1995) ("[C]orporate officers may be held liable for violations of the [state environmental act] when their active participation or personal involvement is shown."). While these cases involved different statutes than the one at issue here, our view accords with theirs that under an environmental regulation applicable to a "person," an individual cannot use the corporate form as a shield when he or she has personally participated in conduct that violates the statute. And Morello was not held liable for a debt, obligation, or liability of White Lion as he asserts is prohibited by the Business Organizations Code. *See* TEX. BUS. ORGS. CODE § 101.114. Rather, he was held individually liable based on his individual, personal actions. We disagree with the court of appeals' conclusion otherwise.

**B. Severance and Constitutionality of Fines**

Morello next argues that the trial court's improper severance of the case against him from the one against White Lion deprived the court of appeals of jurisdiction. Morello also asserts that the severance resulted in two judgments based on identical theories of liability and facts and that such result violates his constitutional rights to equal protection and due course of law by imposing excessive fines leading to, essentially, a double recovery for the State. Although the court of appeals did not reach these issues, in the interest of judicial economy, we will consider them instead of

remanding them to the court of appeals. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 97 (Tex. 2012) ("The court of appeals did not address the Hospital's claim of immunity. Rather than remanding the case to the court of appeals for it to do so, however, we address the issue in the interest of judicial economy.").

In regard to Morello's first contention—that improper severance deprived the court of appeals of jurisdiction to consider his appeal—he references *Dalisa, Inc. v. Bradford*, 81 S.W.3d 876 (Tex. App.—Austin 2002, no pet.). There, the court of appeals held that because the claims had been improperly severed, the resulting judgments were interlocutory and not final. *Id.* at 882. Because the appeal was from an interlocutory order, the court dismissed it for want of jurisdiction. *Id.* The State first claims Morello waived any objection to the severance by failing to assert the objection below. But challenges to lack of subject matter jurisdiction may be raised for the first time on appeal. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993).

And as to the merits of Morello's challenge, "[a]ny claim against a party may be severed and proceeded with separately." TEX. R. CIV. P. 41. Trial courts have broad discretion to sever claims, and a severance is improper only if the trial court abused its discretion in ordering the severance. *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007). Severance is proper when (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of an independently asserted lawsuit, and (3) the severed claim is not so interwoven with the remaining action that the actions involve the same facts and issues. *Id.*

Here, the controversy involves more than one cause of action—the State asserted separate claims against White Lion and Morello. Further, the State could have asserted its claims against

Morello and White Lion in separate lawsuits. And while the two cases are factually intertwined, they are not so interwoven as to override proper severance. The State's case against Morello involved evidence of his personal actions that was not presented in the case against White Lion, such as his personal removal of the facility's domestic wastewater treatment plant and the ANTS, as well as his personal actions in throwing away the monitoring well protective housing caps. Therefore, the trial court did not abuse its discretion by severing the claims against White Lion from those against Morello. *See Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 733–34 (Tex. 1984) (holding severance was proper in a case against two defendants after summary judgment had been granted against one defendant). That being so, the judgment against him was not interlocutory, but final and subject to appeal.

Morello further contends that the severance violates his constitutional rights to equal protection and due course of law by imposing excessive fines resulting in, essentially, a double recovery for the State. We disagree.

Article 1, Section 13 of the Texas Constitution provides that "[e]xessive bail shall not be required, nor excessive fines imposed." TEX. CONST. art. I, § 13. The term "fines" includes civil penalties of the type at issue here. *See Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980). "[P]rescribing fines is a matter within the discretion of the legislature." *Id.* We will "not override the legislature's discretion, 'except in extraordinary cases, where it becomes so manifestly violative of the constitutional inhibition as to shock the sense of mankind.'" *Id.* (quoting *State v. Laredo Ice Co.*, 73 S.W. 951, 953 (Tex. 1903)). Here, the State sought the minimum statutory fine against White Lion and did the same regarding Morello. While the fine imposed against Morello is not

insubstantial, the statute is clear that the amount accrues daily. TEX. WATER CODE § 7.102. The TCEQ notified Morello of the compliance plan violations in 2004. His own delay in compliance resulted in the continued accrual of civil penalties. Therefore, the amount of the fine does not "shock the sense of mankind." *See Pennington*, 606 S.W.2d at 690.

Further, the severance of the claims did not result in a double recovery for the State as Morello asserts. It is true that the civil penalties against Morello and White Lion are to be paid to the State. But they are not recoveries in the sense that they are to reimburse the State for loss or damage. As Morello argues, the monetary assessments are designed to *penalize* Morello and White Lion. They are not recoveries designed to make the State whole for damages it suffered and undertook to prove, much less are they two separate recoveries for the same damages the State suffered. Thus, the civil penalties assessed against Morello are constitutional.

## III. Conclusion

Morello is a "person" subject to penalties under the Water Code individually; the court of appeals had jurisdiction over his appeal; and the penalties assessed against him are not unconstitutional. We reverse the judgment of the court of appeals and reinstate that of the trial court.

Phil Johnson
Justice

**OPINION DELIVERED:** February 23, 2018