

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2019

PHILADELPHIA, FRIDAY, SEPTEMBER 13, 2019

VOL 260 • NO. 52

An **ALM** Publication

ENVIRONMENTAL LAW

NJ Court Holds Public Trust Doctrine Trumps Exclusivity Element of Trespass Claim

BY MARIA C. SALVEMINI

Special to the Legal

Last month, the Atlantic County Superior Court in New Jersey issued its ruling in *New Jersey Department of Environmental Protection v. Deull Fuel*, No. ATL-L-1839-18 (N.J. Super. Ct. Law Div. Aug. 8, 2019), denying a motion to dismiss the state of New Jersey's common law trespass claim but granting the motion to limit the plaintiffs' remedy for public nuisance to abatement. The *Deull Fuel* case is one of the pending lawsuits in which the state is seeking to recover natural resource damages (NRDs) pursuant to its role as trustee of the state's natural resources. NRDs compensate the state for injury to natural resources caused by a discharge of hazardous substances.

In *Deull Fuel*, the court held that the public trust doctrine supersedes the exclusivity element of a common law trespass claim and, therefore, the state could assert a common law trespass claim despite not having exclusive possession of the land at issue. The decision splits from a Middlesex County decision issued Dec. 21, 2018, in which the court found the plaintiffs' lack of exclusive possession fatal to their trespass claim and dismissed the count, see *New Jersey Department of Environmental Protection v. Hess*, MID-L-4579-18 (N.J. Super. Ct. Law Div. Dec. 21, 2018). The ruling creates a split in decision



MARIA C. SALVEMINI

is an attorney with the environmental, energy, safety and land use law and litigation firm of Manko, Gold, Katcher & Fox, located just outside of Philadelphia. She can be reached at msalvemini@mankogold.com

or 484-430-2322.

at the trial court level about whether the state, acting pursuant to the public trust doctrine, can successfully assert a claim for trespass of privately owned land.

BACKGROUND

After a decade-long hiatus, the state of New Jersey revitalized its NRD initiative in August 2018 with the filing of three lawsuits seeking to recover NRDs. The New Jersey Department of Environmental Protection (NJDEP), commissioner of the NJDEP, and the administrator of the New Jersey Spill Compensation Fund (collectively, the plaintiffs) asserted claims under the New Jersey Spill Compensation and Control Act, Water Pollution Control Act, and common law trespass and public nuisance. The plaintiffs also asserted a strict liability claim in *Hess*. The defendants in the three pending NRD cases each moved to dismiss the plaintiffs' common law claims on various grounds. Rulings have been issued in two of the matters.

“ In *Deull Fuel*, the court held that the public trust doctrine supersedes the exclusivity element of a common law trespass claim and, therefore, the state could assert a common law trespass claim despite not having exclusive possession of the land at issue. ”

In the *Hess* case, on Dec. 21, 2018, Judge Thomas McCloskey granted defendants Hess' and Buckeye Partners' motion dismissing the plaintiffs' trespass and common-law strict liability claims, and public nuisance claim to the extent the count seeks damages beyond abatement. The court held that the plaintiffs could not assert a trespass claim because they lacked exclusive possession over the privately owned land. With respect to the plaintiffs' public nuisance claim, the court found that abatement was the only form of relief for common law public nuisance. The court also dismissed the plaintiffs' strict liability count because the plaintiffs failed to allege that the defendants engaged in

an abnormally dangerous activity. The plaintiffs sought interlocutory appeal of McCloskey's decision, which is currently pending before the appellate court.

More recently, defendants South Jersey Gas, Verizon New Jersey, Deull Service and Deull Fuel (collectively, the Deull defendants) moved to dismiss the plaintiffs' common law claims for trespass and public nuisance. The Deull defendants argued that the plaintiffs could not assert a trespass claim because they lacked exclusive possession over the privately owned land, and, the public nuisance claim should be dismissed to the extent that the plaintiffs are seeking a remedy beyond abatement because abatement is the only available remedy. The plaintiffs countered that they did not need exclusive possession because they had authority pursuant to the public trust doctrine. Additionally, they asserted that the Deull defendants were trying to improperly limit abatement remedies to those that do not involve money. Oral arguments in *Deull Fuel* occurred Jan. 11, and by order dated Aug. 8, Judge Julio Mendez denied the motion with respect to the plaintiffs' trespass claim but granted the motion to limit damages to abatement for public nuisance.

The court declined to dismiss the plaintiffs' trespass claim, finding that the public trust doctrine defeated the exclusive possession element. The court explained that it did not find any state case law on point aside from unpublished decisions that the court found unpersuasive and distinguishable on the basis that the cases did not analyze the impact of the public trust doctrine on a trespass claim in an environmental case. Although the court acknowledged that the land at issue in the case was privately owned, it explained that the state, on behalf of the people, is the trustee of the land. To legally require the state to take ownership of polluted land in order to sustain a trespass claim is contrary to the intent of the legislature

and the broad principles of environmental protection embodied in the public trust doctrine. The state has the fiduciary obligation to protect all of New Jersey's natural resources.

Mendez found the Middlesex decision and unpublished *Bayway* decision—which the Deull defendants and McCloskey relied on—unpersuasive, (citing *Hess*, MID-L-04579-18 (N.J. Super. Ct. Law Div. Dec. 21, 2018) and *New Jersey Department of Environmental Protection v. Exxon Mobil*, No. UNN-L-3026-04, (N.J. Super. Law. Div. Aug. 29, 2008) (referred to as *Bayway*)). The court explained that while the Middlesex and *Bayway* courts dismissed the trespass claims after finding that the state lacked exclusive possession, the analysis should not end there. The court found that, considering the legislature's emphasis on preserving the state's land and water, it would not make sense to limit the state's ability to protect these resources merely because the state does not exclusively own them. Instead, the court found persuasive the U.S. District Court for the District of Rhode Island's decision in *Rhode Island v. Atlantic Richfield*, 357 F.Supp.3d 129 (D.R.I. 2018), in which the court held that the state of Rhode Island "could properly proceed as *parens patriae* to protect its pseudo-sovereign interest in the welfare of its citizens and integrity of its natural resources." Finding that *parens patriae* is similar to the public trust doctrine analysis, Mendez explained that the Rhode Island court was presented with the same issue and reached the same conclusion with regards to whether the state can assert a trespass claim over privately owned land. Accordingly, the court held that "the public trust doctrine trumps the exclusivity element of a trespass claim."

Turning to the plaintiffs' public nuisance claim, the court agreed with the Deull defendants that any damages are limited to abatement. Mendez found the

New Jersey Supreme Court's decision in *In re Lead Paint Litigation*, 924 A.2d 484 (N.J. 2007), "clear and unambiguous," and could not "find that the state through the NJDEP is entitled to any other form of relief for its common law claim for public nuisance other than that of the injunctive remedy of abatement."

The *Deull Fuel* court is permitting the parties to file an interlocutory appeal of its decision so it can be decided with the Middlesex County case or file the appropriate motion after the appellate court renders its decision.

IMPACT

The *Deull Fuel* decision creates a split at the trial court level with respect to whether the state can assert a trespass claim over privately owned land. Because the *Hess* and *Deull Fuel* opinions are not binding on other trial courts, there may be rulings in the other NRD cases on the same issues before the appellate division renders its decision. The viability of the state's common law claims may also impact how the NRD cases will be litigated if they go to trial, as the state demanded a jury. Whether the state is entitled to a jury trial may hinge on whether its common law claims survive a motion to dismiss. It is unclear how the appellate court will land on the common law challenges, however, the decision will not only impact the litigation in the existing NRD cases but will shape the state's authority to assert common-law claims when acting pursuant to the public trust doctrine moving forward. •

MANKO | GOLD

KATCHER | FOX LLP

AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

Reprinted with permission from the September 13, 2019 edition of THE LEGAL INTELLIGENCER © 2019 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382, reprints@alm.com or visit www.almreprints.com. # TLI-09242019-417008