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SUPREME COURT OF NEW JERSEY
DOCKET NO. 22,746-A267-83T2

FILED
SUPREME COURT
JUN 11 1984
Stephen Townsend Clerk
By
DJ

DEPT. OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, et. al.,

Plaintiff-Respondents

_VS_

A TO Z CHEMICAL RESOURCE RECOVERY INC., et al.,

Defendant-Petitioner

Civil Action

PETITION FOR CERTIFICATION TO THE SUPERIOR COURT APPELLATE DIVISION

SAT BELOW:
MELVIN P. ANTELL, J.S.C.
WILLIAM T. MCELROY, J.S.C.

PETITION FOR CERTIFICATION ON BEHALF OF DEFENDANT JERSEY SANITATION

RICHARD M. PISACANE, ESQ.
ATTORNEY FOR DEFENDANT_PETITIONER
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ATTORNEY FOR DEFENDANT-PETITIONER

SUPREME COURT OF NEW JERSEY
DOCKET NO.: 22,746
A267-83T2
TERM:

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, et al.,

Plaintiff-Respondent

-vs-

A TO Z CHEMICAL RESOURCE RECOVERY, INC.: et al.

Defendant-Appellant

CIVIL ACTION

PETITION FOR CERTIFICATION
THE SUPERIOR COURT APPELLA
DIVISION by DEFENDANT JERSE
SANITATION

SAT BELOW:

MELVIN P. ANTELL, J.S.C.
WILLIAM T. McELROY, J.S.C.

TO THE HONORABLE, THE CHEIF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NEW JERSEY:

DEFENDANT-PETITIONER, JERSEY SANITATION COMPANY INC., Edgeboro Road, East Brunswick, New Jersey, respectfully shows:

STATEMENT OF THE MATTER INVOLVED

The Defendant-Petitioner Jersey Sanitation Company, Inc. seeks a review of the Appelate Division decision of the eighth day of May 1984 affirming summary judgment entered against Petitioner by the Superior Court Chancery Division for damages and penalties in the amounts of $1,327,410.15 and $800,000.00 creating a first priority lien claim by Plaintiff encumbering the proprietary interests of Petitioner. The $1,327,410.15 award for damages represents clean up costs through the application of the Spill Compensation and Control Act, N.J.S.A. 58: 10-23.11 et seq. due to the alleged illegal discharge of hazzardous waste eminating from the property of co-defendant A to Z Chemical Resource Recovery, Inc..

The $800,000.00 award to Plaintiff against Petitioner as illegal discharger results in penalties imposed pursuant to N.J.S.A. 13:18-9 and N.J.S.A. 58:10A-10.

The Defendant-Petitioner is one of three defendants made a party to this action as a joint tort feasor.

Petitioner has been charged and assessed for damages through the illegal acts of its two employees co-defendants John Albert and Eugene Conlon. The acts of said Defendants were imputed to be one and the same with petitioner. These Defendants made no appearance before the trier of fact to settle as a matter of record the nature and scope of their acts and the relationship with petitioner. Petitioner who challanges their scope and authority had no opportunity to examine the nature of the acts of Conlon and Albert challanging the evidence presented against it. Petitioner was penalized for the acts of its employees by the virtue of their title and interests contrary to the law regarding Principal and Agency, Abeles v. Adams Engineering Co., Inc., 64 NJ Super 167 (Appellate Division 1960.) modified 35 N.J. 411 (1961).

The damages and penalties that were assessed to Petitioner in a summary manner deprived him of a full examination of the proportional amount of harm done by the acts of each defendant. The Appellate decision affirming the summary judgment award denied Defendat-Petitioner a fair opportunity to contest the negligence of a servant in a master servant relationship Wilmington Star Min. Co. v Fulton 27 S.Ct. 412 (19), 205 US 60, 51 L. Ed 708.

In regard to the assessment of damages pursuant to the Spill

Compensation and Control Act N.J.S.A.58:10-23.11f a states:

> ...Nothing in this section is intended to preclude removal and clean-up operations by any person threatended by such discharge, provided such persons coordinate and obtain approval for such actions with ongoing State or Federal operation. No action taken by any person to contai or remove a discharge shall be construed as an admission of liability for said discharge. No person who renders assistance in continuing or removing a discharge shall be liable for any Civil damages to Third parties resulting soley from acts or omissions of such person rendering such assistance except for acts or omissions of gross negligence or willfull misconduct.

Said act was wrongfully applied against Petitioner since the damages were charged without giving said Petitioner fair notice or an opportunity to mitigate the costs as the statute provides.

This cause of action concerns the award of damages and penalties as the result of liability caused by an illegal discharge of toxic waste. The damages and penalties are controlled by statutory enactment. Where the legislature has the power to set fines and penalties, it is the proper function of the Judicialry to enforce such penalties after a fair opportunity to be heard has been afforded one who is so charged Thome v Lynch, (D.C. Minn,)269 F 995. Petitioner has been charged with the hereinmentioned fines in a summary manner without a fair opportunity to challange the acts imputed to be theirs nor has Petitioner been afforded a fair opportunity to challange the damage or mittigate its costs.

QUESTIONS PRESENTED

1. Has Petitioner been afforded due process of law when damages, fines, and levies have been imposed in a summary manner as the result of actions of his agents "virtute offici" whithout proper examination of their acts, their nature or scope before a trier of fact?

2. Has N.J.S.A. 58:10-23.11 et seq. (The Spill Compensation and Control Act) been propperly applied when Petitioner, assessed for damages under said act, had not been afforded proper notice or an opportunity to mittigate or challange the damages as provided by said law?

3. Was Petitioner denied both due process and equal protection under the law when civil penalties attatched pursuant to N.J.S.A. 58:10A-10 in a summary manner without a full review of the acts of the culpable parties or an opportunity to examine those parties directly responsible for the illegal acts?

4. Has said judgment imposed on petitioner in a summary manner freezing his assets and creating a priority lien deprived Petitioner of his property without due process of law?

ERRORS COMPLAINED OF:

1. The Appellate Court failed to use its supervisory discretion in assuring Defendant-Petitioner was not deneid both equal protection and due process of law in that:

(a) Petitioner has been held accountable for the acts of its agents in a summary manner "virtute offici" without a proper examination of said agents acts their nature or scope contrary to what has been previously decided by that court and all common law principals holding principal liable for acts within the scope of employment. Abeles v Adams Engineering Co., 64 NJ Super 167 (Appellate Division 1960) modified 35 N.J.411 (1961) Beach v Palisade Realty etc., Co., 86 N.J.L. 238 (E & A 1914), Hill Diedging Corp. v Risley 18 N.J. 501 (1955) Carlson v Hannah 6 N.J. 202 (1951).

(b) Summary judgment was awarded absent the opportunity for Petitioner to challange the acts of their agents denying Petitioner a fair opportunity to be heard on the charges therein Wilmington Star Min. Co. v Fulton 27 S. Ct. 412, 205 U.S. 60, 51 L.E.d. 708.

2. The Appellate Division has decided a question of substance concerning the application of N.J.S.A. 58:10-23.11 et seq. N.J.S.A. 13:18-9 and N.J.S.A. 58:10A-10 which has not been fairly or correctly applied to

Petitioner.

3. The Appellate Division has failed to recognize Petitioners right to a fair opportunity to be heard contesting the charges by the acts of those making no appearance and resulting in the forfeiture of Petitioner property Wilmington Star Min. Co. v Fulton 27 S.Ct. 412, 205 U.S. 60, 51 L. Ed. 708.

REASONS FOR CERTIFICATION

1. Petitioner raises questions involving constitiutional issues such as the denial of due process or a fair opportunity to be heard that should be settled by this court.

2. The Appellate Division has decided a question of substance dealing with the application of N.J.S.A. 58:10-23.11 et seq., N.J.S.A. 13:18-9 and N.J.S.A. 58:10A-10 which has not been and should be settled by this court.

3. The Appellate Division has decided an important question of law concerning a principal and the liabilities of his agent, that has not been but should be settled by this court.

4. The Appellate Division failed to give due regard to Petitioners right and opportunity to fully examine the damages assessed against it and the evidence used against it by way of the acts of co-defendants.

ARGUMENT

POINT I

THE SUMMARY JUDGMENT ENTERED BY THE SUPERIOR COURT CHANCERY DIVISION AND AFFIRMED BY THE APPEL LATTE DIVISION DENIED PETITIONER DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW.

A) PETITIONER WAS DENIED A FAIR OPPORTUNITY TO CONTEST AND EXAMINE THE ACTS OF ITS ALLEGED AGENTS.

Legislative enactment may impose liabilities on a Principal as a result of the acts of its agents but only the Judiciary can see that such an imposition is carried to its end after a careful review affording the Principal a fair opportunity to challange said liabilities Wilmington Star Min. Co. v Fulton 27 S. Ct. 412, 205US 60, 51 L.Ed. 708.

Where statutory provision requires forfeiture or seizure of property unusual delay or a denial of a fair opportunity to be heard amounts to a denial of due process and should be avoided on Constitutional grounds. Fuentes v Shevin 407 US 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972); Bell v Burson, 402 US 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971).

In the case at bar Petitioners' assets have been frozen and a first priority lein has been levied on his property. All due to the aforementioned Judgment entered applying N.J.S.A.58:10-23.11 et seq. N.J.S.A. 13:18-9, N.J.S.A.58:10A-10 to the acts of co-defendants John Albert and Eugene Conlon. The within judgment is predicated on the assumption that said defendants were acting for Petitioner. Petitioner disclaims this allegation yet while Albert and Conlon made no appearance before the treir of fact it was found that their liability was one and the same with the Petitioner.

Summary judgment was awarded without a favorable light on Defendant and despite an incomplete record as to the facts ignoring genuine material issues raised as to the nature and scope of the acts of Albert and Conlon Judson v Peoples Bank & Trust Co. of Westfield, 17 NJ 67 (1954).

B) PETITIONER AS PRINCIPAL WAS FOUND LIABLE BY THE ACTS OF ITS AGENTS "VIRTUTE OFFICI" CONTRARY TO THE LAW OF AGENCY.

In regard to a Principals liability for the acts of its agents it has been established law in New Jersey that the principals and law on agency applies holding the principal liable only for those acts of his agent performed within the scope of his employment, Abeles V adams Engineering Co. Inc. 64 NJ Super 167 (Appellate Division 1960) (modified) 35 N.J. 411 (1961). their nature.

A principal cannot be held liable for those acts of its agent without a proper examination of those acts merely because of the title or office of the agent holds. Elblum Holding Corp. v Mintz, 120 NJL 604 (Sup. Ct. 1938)

The Petitioner was held accountable for the acts of co-defendants Eugene Conlon and John Albert by virtue of the status they held in the corporation. The nature, scope and extent of their acts were never examined. Petitioner was thus denied the proper application of the law and a fair opportunity to both present and contest genuine issues of material fact. A fair opportunity to be heard was not afforded.

C) PETITIONER WAS DENIED A FAIR OPPORTUNITY TO CHALLANGE THE DAMAGE ASSESSED AS THE RESULT OF THE ACTS OF CO-DEFENDANTS.

This action involves the imposition of damages and fines to Petitioner as the result of the hazardous discharge eminating from the property of co-defendant A to Z Chemical Resource Recovery Inc.
This Petitioner was brought into this action three months after the original compalint was filed against co-defendants A to Z, John Albert and Eugene Conlon (see Da 30 of Petitioners Appellate Brief). Petitioner was charged as a contributing tort feasor while no proper record exists of the proportionate harm caused by this Petitioner in comparison to the total harm and liabilities rsulting therein. In regard to distinct or devisible harm caused by joint tort feasors the Restatement, Second, Torts §s881 states:

> If two or more persons acting independantly, tortiously cause distinct harms or a single harm for which there is a reasonalble basis for division according to the contribution of each; each is subject to liability only for the portion of the total harm he has himself caused.

Petitioner has not been afforded a fair opportunity to contest the damages involved by challanging those culpable acts of co-defendants to show the proper proportion of liability. Therefor a proper judicial proceeding was not afforded Petitioner violating due process and equal protection under the law. People ex Rel. Lemon v Elmore, 245 N.Y.S. 95, 230 Appellate Division 543 Affirmed People ex. Rel Lemon v Elmore, 177 N.E. 14, 256 N.Y. 489, 75 ALR 1292.

POINT II:

THE STATUTORY PROVISIONS OF N.J.S.A. 58:10-23.11 et seq. WERE WRONGFULLY APPLIED SINCE PETITIONER WAS NOT AFFORDED NOTICE OR A FAIR OPPORTUNITY TO MITIGATE THE DAMAGE.

The Spill Comensation and Control Act N.J.S.A. 58:10-23.11f in part states:

> ...Nothing in this section is intended to preclude removal and clean-up operations by any person threatened by such discharge, provided such persons coordinate and obtain approval for such actions with ongoing State of Federal operation. No action taken by any person to contain or remove a discharge shall be construed as an admission of liability for said discharge. No person who renders assisstance in continuing or removing a discharge shall be liable for any Civil damages to Third parties resulting soley from acts or omissions of such person rendering such assistance except for acts or omissions of gross negligence or willful misconduct.

Petitioner, as previously noted, was made a party to this action three months after the filing of the complaint seeking the recovery of damages for clean-up costs already performed. Petitioner has not had an opportunity to mitigate said costs as the statute provides.

N.J.S.A. 58:10-23.11f (f) further provides:

> Any expenditures made by the administrator pursuant to this act shall constitiute a first priority paramount to all other claims and upon the revenues and all real and personal property of the discharger whether or not the discharger is solvent.

The Petitioner herein through the Judgment entered below and affirmed by the Appellate Division has had the above statute wrongfully applied freezing all corporate assests and imposing unreasonable and burdening costs which

amounts to the forfeiture of property. The application of said act is contrary to its intended purpose and violates First amendment principals in denying Petitioner his proprietary interests without a fair and proper opportunity to be heard. United States v One Motor Yact Named Mercury, 527 F.2d 1112 (1 Cir. 1975) States Marine Lines, Inc v Shultz, 498 F2d 1146 (4th Cir. 1974); Sarkisian v United States, 472 F 2d 468 (10th Cir.), cert den. 414 U.S. 976 Fuentes v Shervin 407 U.S. 67, 92 S Ct. 1983, 32 L. Ed. 2d 556 (1972)

CONCLUSION

Wherefore the Defendant-Petitioner prays, for the reaons set forth herein, that this Court grant Certification. 10

Respectfully submitted,

Counsel for Defendant-Petitioner
Richard M. Pisacane

DATED: June 11, 1984

CERTIFICATION

I hereby certify that the foregoing petition presents a substantial question meriting Certification, and that it is filed in good faith and not for purposes of delay.

Counsel for Defendant-Petitioner
Richard M. Pisacane

DATED: June 11, 1984

(May 24, 1984)

RICHARD M. PISACANE, ESQ.
205 Route 46
Totowa, New Jersey 07512
(201) 785-2213
Attorney for Defendant/
Jersey Sanitation Co.

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, Plaintiff -v- A to Z CHEMICAL RESOURCE RECOVERY INC., et al Defendants	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A 267-83T2 NOTICE OF PETITION FOR CERTIFICATION

Notice is hereby given that the Defendant/Jersey Sanitation Co., will petition the Supreme Court of New Jersey for Certification to the Appellate Division to review the final Judgment of the Appellate Division, entered on the 8th day of May, 1984.

Richard M. Pisacane

DATED: May 24, 1984

RICHARD M. PISACANE, ESQ.
205 Rout 46
Totowa, New Jersey 07512
(201) 785-2213
Attorney for Defendant/
Jersey Sanitation Co.

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Plaintiff

-v-

A to Z CHEMICAL RESOURCE RECOVERY INC., et al

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A 267 - 83T2

Civil Action

PROOF OF SERVICE

STATE OF NEW JERSEY)
)
COUNTY OF PASSAIC) ss:

I, Frances Landy, of full age, being duly sworn upon my oath depose and say:

1. I am a Secretary in the office of Richard M. Pisacane, attorney for the Defendant-Jersey Sanitation Co.

On May 29, 1984, I mailed a copy of a Notice of Petition for Certification in the Post Office in Totowa, New Jersey to the following:

John M. Mayson, Clerk
Superior Court of NJ
CN 971
Trenton, NJ 08625

Clerk of the Supreme Court
Hughes Justice Complex
CN 970
Trenton, NJ 08625

Larry Bronson, Esq.
540 Kennedy Blvd.
Bayonne, NJ 07002
Atty. for Defs. A to Z Chomical
and John Albert

Clerk of the Appellate Division
Superior Court of NJ
CN 006
Trenton, NJ 08625

Dept. of Env. Protection
Ronald P. Heksch, D.A.G.
CN 112
Trenton, NJ 08625

Ralph Mayo, Esq.
73 Paterson St.
New Brunswick, NJ 08903
Atty. for Def./Eugene Conlon

Frances Landy
Frances Landy

Sworn and Subscribed to
before me on this 29th
day of May, 1984.

Attorney at Law

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

(May 8, 1984)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-267-83T2

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, et al.,

Plaintiff-Respondent,

v.

A TO Z CHEMICAL RESOURCE RECOVERY, INC., et al,

Defendant-Appellant.

Submitted April 17, 1984 -- Decided MAY 8 1984

Before Judges Antell and McElroy.

On appeal from Superior Court, Chancery Division, Middlesex County.

Richard M. Pisacane, attorney for appellant (Mr. Pisacane on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for respondent (Deborah T. Poritz, Deputy Attorney General, of counsel and Ronald P. Heksch, Deputy Attorney General, on the brief).

PER CURIAM.

Defendant Jersey Sanitation Company, Inc. ("Jersey") appeals from an order for summary judgment dated June 30, 1983 for $1,327,410.15 representing cleanup costs incurred by the Department of Environmental Protection of the State of New Jersey because of defendant's illegal discharge of

hazardous wastes on the lands of co-defendant A to Z Chemical Resource Recovery, Inc. Recovery was allowed under the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. Also presented for review are penalties of $800,000 which were imposed on Jersey pursuant to N.J.S.A. 13:18-9 and N.J.S.A. 58:10A-10.

Jersey is a hauler of hazardous wastes. It contends on this appeal that it is not answerable for the cleanup costs for the reason that sole responsibility for the illegal spill lay with two employees of the company, John Albert and Eugene Conlon, who were acting outside the scope of their authority in furtherance of their personal interests.

It is undisputed that Conlon and Albert were Jersey's president and vice president. They had been hired for the express purpose of managing and carrying on the day-to-day business of the company. In combination they owned 50% of the corporation's outstanding shares of stock and both served on its five member board of directors. The hazardous wastes which had been illegally discharged had been hauled on Jersey's trucks in performance of a toxic waste hauling contract with National Starch Company for which service it received payment from National Starch.

The judgment under review is affirmed substantially for the reasons stated by Judge Richard S. Cohen for the Chancery Division in his oral opinion of June 17, 1983 supplemented by his letter opinion of June 20, 1983.

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION

CHAMBERS OF
RICHARD S. COHEN
JUDGE

MIDDLESEX COUNTY COURT HOUSE
NEW BRUNSWICK, NEW JERSEY 08903

June 20, 1983

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RE: Department of Environmental Protection of the State of New Jersey, et al v. A to Z Chemical Resource Recovery, Inc., et al
Docket C-1799-78

Gentlemen:

On Friday, June 17, I rendered judgment against defendants Albert, A to Z, and Jersey Sanitation under the Spill Fund Act and other legislation concerning water pollution and toxic wastes. Since a reviewing court may desire it, I will set forth here some of the considerations that led me to the judgment I entered. This is intended to supplement rather than supplant what I said on the record on June 17.

There is no dispute about the following facts: John Albert and Eugene Conlon were the owners of a combined 50% of the Shares of Jersey Sanitation. They were brought into the corporation, whose business was waste disposal, in order to conduct its day to day operations. They were two of the five directors. Jersey Sanitation had a contract with National Starch to dispose of toxic wastes. Such activity is closely regulated by the State. Abuse of regulations governing the manner of disposal can create and in recent years has created grave public health dangers in many areas of the state.

Instead of disposing of the wastes properly, Jersey Sanitation's officers transported them to a site owned by A to Z, a corporation owned by them, and did nothing further with them. The transportation was in Jersey Sanitation trucks, and was ostensibly in fulfullment of Jersey Sanitation's contract with National Starch. Jersey Sanitation was paid for the removal of the material from National Starch. Apparently Albert and Conlon caused Jersey Sanitation to pay A to Z for the ultimate disposal

of the material.

Albert and A to Z are plainly subject to a judgment of three times the cost of removal by DEP after ignoring DEP's vaild order to them to remove the material from A to Z's land. In addition, they are plainly subject to maximum penalties under two separate statutes. I did not impose penalties for the full period for which they are liable becuase of the treble judgment under the Spill Fund Act and because, as a matter of practical fact, there is no reason to suppose that either the corporation or Albert will ever be able to satisfy these judgments, let alone any greater ones.

Jersey Sanitation's situation is different in three respects. The first is that, even though it is a discharger under the statutory definition, it was not notified by DEP of any duty on its part to clean up the A to Z site. For that reason, treble damages may not be imposed on Jersey Sanitation. Second, although we know that a substantial portion of the toxic waste on the A to Z site was brought by Jersey Sanitation trucks from National Starch, and we know that the rest was transported in Jersey Sanitation trucks, we do not know whether Jersey Sanitation received any revenue from the other contributors. That does not relieve Jersey Sanitation of any responsibility for the rest of the deliveries, but it does affect the quality of its blameworthiness. A corporation whose executive officers and 50% shareholders use corporation equipment and employees to transport toxic waste from corporate customers and others is responsible for cleanup costs and statutory penalties. Third, it must be assumed, for the purpose of this motion, that the other shareholders and directors of Jersey Sanitation did not know what the officer were doing. That is not to say that a corporation whose president, vice president, 2 of 5 directors, and the holders of half the corporate stock commit serious offenses with corporate equipment, customers, employees and contracts can avoid culpability on the thesis the corporation had no knowledge and on the claim, however valid, that the officers were acting for their own benefit. There may be a very good claim over, but as to the public there is liability. Having said all of that, it is still to be considered that the other stockholders did not know what was taking place in the

company whose affairs they entrusted to Albert and Conlon.

In fixing the level of penalties imposed on Jersey Sanitation, I had in mind all of the factors described above. In addition, I centrally considered the gravity of the offenses involved and the potential health hazards that could have been created. In addition, I considered what I was able to gather from the record before me about the financial situation of Jersey Sanitation. At one time it was an active and prosperous operation. It has since contracted a good deal, I am sure, but that may well be due to the absences of Albert and Conlon or the consequences of their activities or the result of substantial distributions to shareholders over the course of the relevant years. If there is further information on that score, or on the financial situation of Jersey Sanitation generally, that counsel thinks I should know, I would entertain a motion for reconsideration on that basis. It should, of course, be accompanied by the financial information counsel believes should be considered.

Yours very truly,

Richard S. Cohen
J. S. C.

RSC/cja

OK

SUPREME COURT OF NEW JERSEY
DOCKET NO. 22,746

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, et al.,	
Plaintiffs-Respondents,	Civil Action
v.	On Petition for Certification to the Superior Court, Appellate Division
A TO Z CHEMICAL RESOURCE RECOVERY, INC., et al.,	Sat Below: Antell and McElroy, JJ.A.D.
Defendants-Appellants.	

BRIEF OF RESPONDENTS, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND NEW JERSEY SPILL COMPENSATION FUND IN OPPOSITION TO PETITION FOR CERTIFICATION

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Of Counsel

RONALD P. HEKSCH
Deputy Attorney General
On the Brief

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COUNTERSTATEMENT OF THE CASE

This matter involves an illegal chemical waste disposal facility operated by John Albert, Eugene Conlon, A to Z Chemical Resource Recovery, Inc. (hereinafter "A to Z"), and Jersey Sanitation Co., Inc., in the City of New Brunswick. Jersey Sanitation Co., Inc. is a New Jersey corporation which had been in the business of transporting and disposing of solid and hazardous wastes (T31-23; T33-16; Aa77-12 to 16; Ra2; Ra5 to Ra10).* During the time period relevant here John Albert and Eugene Conlon owned fifty percent of the stock of Jersey Sanitation Co., Inc., were officers and directors of the company, and were responsible for its daily operation.

Hazardous waste disposal by A to Z, Jersey Sanitation Co., Inc., John Albert and Eugene Conlon at the New Brunswick site commenced sometime prior to August 8, 1977 (Ra25). Thereafter, A to Z was notified by the New Jersey Department of Environmental Protection (hereinafter "DEP") on several occasions of the necessity for obtaining state approval before commencing waste disposal operations at the subject facility (Ra30 to Ra35). Notice to A to Z was in fact notice to Jersey Sanitation Co., Inc., inasmuch as the individuals involved with the former company were fifty percent owners, president and vice president, and operators of the latter company. Additionally, one of the notices sent to John Albert and A to Z was sent to Jersey Sanitation Co., Inc., at its principal

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* Aa refers to the Appendix to the brief of Petitioner, Jersey Sanitation Co. Inc., filed in this matter in the Appellate Division. Ra refers to the Appendix to the Brief of Respondents filed in this matter in the Appellate Division.

place of business on Edgeboro Road, East Brunswick, New Jersey (Ra32). Despite these notices Jersey Sanitation Co., Inc., continued to take thousands of drums of toxic and chemical wastes to the New Brunswick site and A to Z accepted them for disposal (Aa65 to Aa68; Ra20).

Throughout 1977 and 1978 chemical wastes were received and stored in drums, in storage tanks, in tank trucks and in numerous other bins, pails and open piles located at the site (Ra27 to Ra28; Ra37 to Ra38; Ra42 to Ra43). Many of the drums containing chemicals and chemical wastes were leaking, open, unsealed, toppled over, and otherwise haphazardly stored in a manner which permitted their contents to be unlawfully released into the environment (Ra27 to Ra28; Ra37 to Ra39; Ra43 to Ra44; Ra47 to Ra52; Ra54 to Ra57). The chemical wastes stored and/or disposed of at the site included, but were not limited to: toluene, lead, mercury, cyanide, cadmium, copper, nickel. zinc, 4 chloro - 3 methyl phenol; zylene, methylene chloride, thallium, benzene, ethyl benzene. All of these substances are considered hazardous by DEP (Aa73 to Aa75).

When it became clear that the original defendants below had no intention of responding to the various administrative directives issued them and, further, planned to continue using the A to Z facility in an unlawful manner, DEP initiated this action by filing an Order to Show Cause with Temporary Restraints and a Verified Complaint on January 12, 1979 (Aa1 to Aa12). The complaint alleged that A to Z, John Albert and Eugene Conlon violated N.J.S.A. 13:1E-1 et seq., N.J.S.A. 58:10A-1 et seq., N.J.S.A. 23:5-28, N.J.S.A. 26:2C-19 and the rules and regulations promulgated

pursuant thereto as a result of their owning and operating an unlicensed hazardous chemical waste disposal facility in the City of New Brunswick, New Jersey. The complaint further alleged that these defendants were responsible for creating and maintaining a nuisance. DEP sought injunctive relief as provided by the cited statutes, abatement of the nuisance created and maintained by defendants, and maximum statutory penalties (id.). By Order to Show Cause with Temporary Restraints issued on January 12, 1979, the original defendants were restrained from accepting any additional chemicals or chemical wastes at their facility and, further, from allowing any additional discharges of chemicals or chemical wastes onto the soil and floor in and about the New Brunswick site (Aa13).

Thereafter, DEP obtained several orders from the trial court requiring the defendants to: permanently cease accepting any additional chemicals or chemical wastes at the facility; immediately close same; submit information to DEP identifying the total number and contents of the drums, storage tanks, and tank trucks at their site, and identifying other materials which had leaked or spilled from containers located there; submit a plan for the removal of all chemical waste materials from the site in question, and, subject to DEP approval, to implement said plan (Aa17; Aa22). While defendants ceased operating at the site in question they failed to submit or implement a cleanup plan. On or about August 17, 1979, subsequent to a hearing, the trial court ordered receivers appointed for the purpose of effectuating a complete cleanup of defendants' facility and remedying all violations of the law

(Aa24). Subsequently, it became clear that the cost of cleaning up the property in question was well in excess of the assets that the receivers were able to locate. Thus, despite efforts by the receivers, conditions at the facility remained essentially the same. This being the case, DEP applied to the court below for an order appointing it to perform a cleanup of the site and further, to discharge the receivers.

On June 6, 1980, an order was entered relieving the receivers of any further responsibilities in this matter and authorizing the DEP, with money from the New Jersey Spill Compensation Fund (hereinafter "Spill Fund"), established pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., to remedy all violations of the law that existed at defendants' facility as a result of the disposal of chemical wastes there (Aa31). Said order also granted DEP permission to amend its complaint at the completion of the aforementioned cleanup, or sooner if it saw fit, to allege a cause of action under the Spill Act (id.).

On March 31, 1981 DEP filed an amended complaint which reiterated the statutory and common law violations alleged in the original complaint and, additionally, asserted a claim against the defendants A to Z, John Albert, and Eugene Conlon for all costs which the Spill Fund incurred in connection with the cleanup of the facility in question and, further, treble damages as provided by N.J.S.A. 58:10-23.11f(a) (Aa34). The amended complaint also asserted a claim against Jersey Sanitation Co., Inc., similar to that asserted against the original defendants, as a result of that

company's involvement with the transportation and disposal of chemical wastes found at the New Brunswick site.

On May 10, 1983 plaintiffs filed a motion for summary judgment against A to Z, John Albert, Eugene Conlon and Jersey Sanitation Co., Inc., seeking $3,982,230.45, which represents three times the amount of money spent to date by DEP and the Spill Fund in cleaning up the facility in New Brunswick. Additionally, plaintiffs' motion sought the imposition of penalties pursuant to the statutes cited in the amended complaint. Plaintiffs also sought an order requiring defendants to pay three times the amount of any further cleanup and removal costs incurred by DEP and the Spill Fund at the New Brunswick site (Aa61 to Aa75). Jersey Sanitation Co., Inc., was the only defendant who filed papers in opposition to the State's motion (Aa76 to Aa120).

In June 1983, in an oral decision supplemented by a letter opinion, the trial court found A to Z, John Albert and Jersey Sanitation Co. Inc., guilty of violating the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., the Spill Compensation and Control Act, N.J.S.A. 58:12-23.11 et seq. and the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. (T31 to T41; Ra1 to Ra4). Specifically with regard to the Jersey Sanitation Co., Inc., the trial court held that the company was responsible for illegally transporting and disposing of a substantial portion of the hazardous wastes found at the New Brunswick site (T33-19 to 25). Moreover, the lower court found Jersey Sanitation Co., Inc., to be a discharger of hazardous substances in violation of both N.J.S.A. 58:10-23.11 et seq. and N.J.S.A. 58:10A-1 et seq. (T35-4 to 15; Ra2

to Ra4). In other words the company was responsible for conduct that had resulted in hazardous substances being released into the waters of the State and/or being placed in a position where they were likely to flow or drain into said waters (id.). The court found the treble damages provisions of N.J.S.A. 58:10-23. 11f(a) not to be applicable to the company because of the absence of proof that it had been directed to clean up and remove its discharge prior to DEP doing so (Ra3). However, the company's unlawful activities also made it liable for statutory penalties (T36-7 to T37-14; Ra4).

Additionally, the trial court rejected the contention of Jersey Sanitation Co., Inc., that its unlawful activities were the unauthorized acts of John Albert and Eugene Conlon accomplished without the knowledge of some of the owners and that therefore the company should not be liable under the statutes in question (T31-23 to T37-15; Ra1 to Ra4). The trial court found that it was undisputed that Albert and Conlon were fifty percent owners of the company as well as its executive officers (president and vice president), and were also two of the corporation's five directors (id.). Also, the court determined that they were responsible for running the daily affairs of the company during the time it was engaging in unlawful activities (id.). The trial judge held that where such individuals use their company's equipment and employees to illegally transport and dispose of hazardous substances, the corporation is liable for both clean up costs and statutory penalties (id.). Summary judgment was thus entered against Jersey Sanitation Co., Inc., for the money expended to date by the Spill

Fund in cleaning up and decontaminating the New Brunswick site. Additionally, the company was assessed $800,000 in statutory penalties ($300,000 pursuant to N.J.S.A. 13:1E-9 and $500.000 pursuant to N.J.S.A. 58:10A-10).

Thereafter, Jersey Sanitation Co., Inc., filed an appeal with the Appellate Division (Aa128). On May 8, 1984 that court decided the matter and affirmed the lower court's judgment for the reasons set forth in the oral and supplemental letter opinion of the trial judge (Pa4).* Again, the appellate court rejected the contention of Jersey Sanitation Co., Inc., that Albert and Conlon were acting outside the scope of their authority and held that the corporation was liable for their unlawful acts (id.).

* Pa refers to the Appendix submitted with the Petition for Certification filed by Jersey Sanitation Co., Inc.

ARGUMENT

CERTIFICATION SHOULD BE DENIED BECAUSE THIS CASE WAS PROPERLY DECIDED BELOW AND PRESENTS NO ISSUE OF GENERAL PUBLIC IMPORTANCE.

Certification is generally granted only when an appeal presents a question of "general public importance" which should be settled by the Supreme Court; the decision presented for review conflicts with "any other decision presented of the same or a higher court;" or where exercise of the Supreme Court's supervising powers is necessary. R. 2:12-4. Moreover, certification is not permitted on final judgments of the Appellate Division "except for special reasons." Jersey Sanitation Co., Inc., has not demonstrated that this case satisfies any of these criteria and, thus, certification is inappropriate.

In the instant case it is undisputed that John Albert, Eugene Conlon and A to Z owned and operated an unlawful hazardous waste disposal facility in New Brunswick, New Jersey. Moreover, it is uncontroverted that John Albert, Eugene Conlon and Jersey Sanitation Co., Inc., a company they operated and owned a fifty percent interest in, illegally disposed of hazardous wastes at the A to Z facility. As a direct result of this unlawful activity the wastes in question threatened to pollute ground and surface waters in and about the site. After being unable to get defendants below to abate the dangerous conditions they created, DEP, with money from the Spill Fund, cleaned up and removed the hazardous wastes at the A to Z site. This being the case DEP and the Spill Fund were entitled, as a matter of law, to a judgment against Jersey Sanitation Co., Inc., for the amount expended plus statutory penalties.

The Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., prohibits the discharge* of hazardous substances. This statute also authorizes DEP to cleanup and remove hazardous waste discharges with money from the Spill Fund. N.J.S.A. 58:10-23.11f. Any person who is in any way responsible for a discharge which DEP cleans up with Spill Fund money is strictly liable, jointly and severally, without regard to fault for all cleanup and removal costs.** N.J.S.A. 58:10-23.11g(c). There is no statutory requirement, as alleged by Jersey Sanitation Co., Inc., that a discharger be notified of a DEP cleanup beforehand in order to be liable for the monies expended by the Spill Fund. Only if DEP intends to seek three times the cost of cleanup must it first direct the discharger to clean up his discharge. N.J.S.A. 58:10-23.11f(a). Thus, it is clear that the company was properly held responsible for reimbursing the Spill Fund for the cost of cleaning up the New Brunswick site.

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* "Discharge" is defined as "... any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substance into the waters of the State or onto lands from which it might flow or drain into said waters, or into waters outside the jurisdiction of the State when damage may result to the lands, waters or natural resources within the jurisdiction of the State;" N.J.S.A. 58:10-23.11b(h).

** "Cleanup and removal costs" are defined as "... all costs associated with a discharge incurred by the State or its political subdivisions or their agents or any person with written approval from the department in the (1) removal or attempted removal of hazardous substances or, (2) taking of reasonable measures to prevent or mitigate damages to the public health, safety, or welfare, including but not limited to, public and private property, shorelines, beaches, surface waters, water columns and bottom sediments, soils and other affected property, including wildlife and other natural resources;" N.J.S.A. 58:12-23.11b(d).

Similarly, the disposal of hazardous wastes at the New Brunswick site in a manner which allowed them to run off into the waters of the State or where they were likely to flow or drain into said waters was a violation of the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., which makes it unlawful to discharge any pollutants into ground and/or surface waters without DEP's approval. N.J.S.A. 58:10A-6. Any person violating this statute is liable for a penalty of not more than $10,000 per day for each such violation and each day that said violation continues constitutes a separate and distinct offense. N.J.S.A. 58:10A-10e. Moreover, DEP regulations provide that:

> Any generator, hauler, facility operator or any other person who discharges or is responsible for discharge of hazardous wastes on the land or in the waters of the State of New Jersey or at any place other than an approved special waste facility shall be subject to penalties pursuant to N.J.S.A. 58:10A-1 et seq. [N.J.A.C. 7:26-7.8(b)].

This being the case Jersey Sanitation Co., Inc., was properly penalized $500,000 pursuant to N.J.S.A. 58:10A-10.

Additionally, under the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., all waste disposal facilities in the State must be licensed and it is unlawful to dispose of solid and/or hazardous wastes at a facility which is not so approved. N.J.S.A. 13:1E-4; N.J.A.C. 7:26-2.1., N.J.A.C. 7:26-3.4(b). Again, it is clear and undisputed that Jersey Sanitation Co., Inc., was responsible for disposing of chemical and hazardous wastes at the unlicensed facility in New Brunswick. Thus, the company was properly penalized by the lower courts pursuant to N.J.S.A. 13:1E-9.

By reason of the aforementioned it is clear that there was no material issue of fact below and the State was entitled to summary judgment against Jersey Sanitation Co., Inc., reimbursing the Spill Fund for the money it spent cleaning up the illegal disposal site in question and, further, penalizing the company for violating the Water Pollution Control Act, and the Solid Waste Management Act. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1964).

In response to the undisputed facts in this case, and the clear, unequivocal provisions in the statute and regulations involved, Jersey Sanitation Co., Inc., in order to have this Court grant certification and avoid liability, contends that its unlawful conduct was the result of the unauthorized acts of Albert and Conlon. Additionally, it argues that the company's due process rights were violated by the entry of summary judgment. Its position is without merit.

It is well established that a corporation is liable for the unlawful, tortious acts of its officers and agents if those acts were conducted within the scope of their employment. Niegel v. Seaboard Finance Co., 68 N.J. Super. 542, 556-557 (App. Div. 1961); Davis v. The Trust Company of N.J., 26 N.J. Misc. 111 (Sup. Ct. 1948). Additionally, a corporation may be held liable for exemplary as well as compensatory damages if the employee who committed the wrongful act giving rise to the claim for damages was so high in authority as to be considered an executive of the corporation. Winkler v. Hartford Acc. & Ind. Co., 66 N.J. Super. 22, 25 (App. Div. 1961). Finally, a corporation when sued for a tort

cannot as a defense allege that the act out of which the tort arose was ultra vires. N.Y., L.E. & W.R.R. v. Haring, 47 N.J.L. 137 (E. & A. 1885).

In the case sub judice it is undisputed that John Albert and Eugene Conlon were fifty percent owners of Jersey Sanitation Co., Inc., during the time that the company was transporting and illegally disposing of hazardous chemicals at the A to Z facility (Ra2). Additionally, they were officers, president and vice president, of the company during this time period as well (T32-2 to 5; Ra15 to Ra19). They were also two of five members of the corporation's Board of Directors (Ra3). Of perhaps greatest significance is the fact that the owners and operators of Jersey Sanitation Co., Inc., admit that Albert and Conlon were brought into the company, which is in the waste hauling and disposal business, for the sole purpose of conducting its daily affairs and that during the relevant time period they ran the company (Aa77-66 to 22; Aa81-21; Aa100-10; Ra21-13). Having delegated the daily affairs of the company to Albert and Conlon, Jersey Sanitation Co., Inc., cannot and should not now be allowed to argue that their hauling and disposal practices were unauthorized. This is especially true where, as is the case here, the conduct complained of took place almost continuously over several years and did not stop until the State shut the A to Z facility down.

By reason of the aforementioned it is clear that the unlawful conduct of John Albert and Eugene Conlon in transporting hazardous waste from a customer of Jersey Sanitation Co., Inc. and others to the A to Z site in the company's vehicles was well within

the scope of their authority and, further, that in doing so they were acting as agents for Jersey Sanitation Co., Inc. Moreover, Albert and Conlon were so high in authority within the company that Jersey Sanitation Co., Inc., is barred from denying liability for conduct engaged in by them on the company's behalf. Thus, the holdings of the courts below that the corporation was liable for its unlawful conduct while John Albert and Eugene Conlon were operating it was entirely proper.

Finally, the judgment entered below did not violate the due process rights of Jersey Sanitation Co., Inc. There is no constitutional requirement that a discharger be advised beforehand of DEP cleanup action in order for the Spill Fund to recover cleanup and removal costs that it incurred. So long as the discharger is afforded an opportunity to be heard at some point in the proceedings the requirements of due process have been satisfied. Nickey v. Mississippi, 292 U.S. 393, 54 S.Ct. 743, 78 L.Ed. 1328 (1943); Horsman Dolls, Inc. v. Unemployment, etc. of N.J., 7 N.J. 541, 551 (1951).* In the instant case Jersey Sanitation Co., Inc., was afforded a hearing by the trial court prior to the entry of summary judgment. Thus, none of its rights were violated.

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* It should be noted that in the proceedings below Jersey Sanitation Co., Inc. submitted nothing to challenge the need for the cleanup and removal action conducted by DEP at the A to Z site or the amount of money spent. Moreover, inasmuch as Albert and Conlon were owners and operators of Jersey Sanitation Co., Inc., during the relevant time period involved here, and were fully cognizant of DEP's cleanup plans, the company also had notice of these activities and could have acted to mitigate the damages it had caused. Jersey Sanitation Co., Inc., failed to act and cannot now be heard to argue that it was prejudiced by DEP's cleanup and removal activities.

By reason of the above it is clear that there were no issues of material fact regarding the illegal disposal and discharge of hazardous wastes at the A to Z facility by Jersey Sanitation Co., Inc., and thus, the trial court properly found that company liable for the money expended by the Spill Fund in cleaning up and removing the discharge and correctly penalized it pursuant to N.J.S.A. 13:1E-9 and N.J.S.A. 58:10A-10. Accordingly, the petition for certification raises no issues deserving of this court's review and should therefore be denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certification should be denied.

Respectfully submitted,

IRWIN I. KIMMELMAN
Attorney General of New Jersey

By: Ronald P. Heksch
Ronald P. Heksch
Deputy Attorney General

DATED: June 27, 1984

C1047 SEP 1983

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY
DOCKET NO. C.1799-78

STATE OF NEW JERSEY,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Plaintiff,

vs.

A TO Z CHEMICAL RESOURCE
COMPANY, ET AL,

Defendants.

MOTION FOR
SUMMARY JUDGMENT

Middlesex County Courthouse
New Brunswick, New Jersey
June 17, 1983

B E F O R E: HONORABLE RICHARD S. COHEN, JSC

A P P E A R A N C E S:

Ronald P. Heksch, Esq.
Deputy Attorney General
For Plaintiff

Richard M. Pisacane, Esq.
Attorney for Jersey Sanitation

Stanley Grabon, CSR
Official Court Reporter

THE COURT: DEP against A to Z.

MR. HEKSCH: Ronald Heksch, Deputy Attorney General, appearing for the Plaintiffs, DEP and Spill Fund.

MR. PISACANE: Richard Pisacane on behalf of the Defendant, your Honor, Jersey Sanitation.

THE COURT: Mr. Heksch, do I understand, and I think I got the message from my law clerk, that you have no objection to an adjournment of this matter as far as Mr. Conlon is concerned because of the fact that he's not in a position to participate in our litigation at this point?

MR. HEKSCH: I do to the extent that, and I think I explained it to your honor's law clerk, that I don't know once his jail term is finished how I'm going to get service on him.

THE COURT: That process may be, or that problem may be resolved if you are satisfied that you have service on him of this motion by simply adjourning the motion for six months.

Do you want to do that?

MR. HEKSCH: If your honor feels that's appropriate, I will.

I don't think it's appropriate. That's

my only concern.

THE COURT: Tell me why not.

MR. HEKSCH: The basis for that is that no answer has ever been filed.

In essence, Mr. Conlon is in default, and we can go ahead with the default hearing the same way without notice to him, and then in essence, this is the alternate method that was chosen because of the complexity of the case.

I think that I am entitled to a judgment as a matter of law, irrespective of his availability or non-availability.

I don't think it's necessary. If your honor feels strongly about it, I don't mind putting it off for six months.

There was an answer filed to the original complaint in this case, and I am not sure that he didn't have an obligation to file the answer to the second amended complaint, and I am talking about Mr. Mayo.

There's been no substitution of attorney that was ever filed with regard to that, either.

THE COURT: Mr. Mayo ever been relieved as counsel for Mr. Conlon?

MR. HEKSCH: That's between them. I

don't know.

THE COURT: It's not between them. It's between them and me or them and this court, at any rate.

MR. HEKSCH: Well, I have no knowledge of this court ever relieving Mr. Mayo.

THE COURT: I certainly haven't since I've been here. I wonder if Judge Furman had before me.

MR. HEKSCH: To the best of my knowledge, he had not.

I think there was a letter, and I think it's documented in the pleadings that I filed from Mr. Mayo after service of the amended complaint that he no longer represented Mr. Conlon in this matter; but to the best of my knowledge, and I guess the record speaks for itself, no substitution of attorney has ever been filed or no dismissal or anything of that type.

THE COURT: You are correct.

MR. HEKSCH: I don't know. It's a little bit complicated.

I don't want to put any burden on Mr. Mayo. He's not here. He may have had an obligation to file an answer.

THE COURT: You didn't serve him with a copy of this motion?

MR. HEKSCH: Yes.

THE COURT: You did?

MR. HEKSCH: I served Mr. Mayo, and I served Mr. Conlon in prison.

Mr. Mayo I believe wrote to your honor saying that he no longer represented Mr. Conlon.

THE COURT: I thought that he had been contacted by Mrs. Conlon, though.

MR. HEKSCH: He may have. I don't know.

THE COURT: I don't know why I have that impression, but I got the impression that he had been contacted by Mrs. Conlon, and he contacted us and said that I don't represent him.

MR. HEKSCH: I'm willing to do whatever your honor feels is appropriate.

I don't anticipate any immediate efforts to collect against Mr. Conlon.

I don't know of any assets that he has in the state. I think that it's more that we get a judgment against him, and I would want to pursue that.

I don't know how your honor wants to handle it, and I am open to whatever methodology

you seem to feel appropriate.

THE COURT: There's no indication in the moving papers that alternate relief sought against Mr. Conlon is default. You never had default entered against him on the second amended complaint, have you?

MR. HEKSCH: No. His answer was stricken.

THE COURT: That's correct. I don't think that it would be appropriate to consider today's proceeding as the functional equivalent of a proof hearing on default.

If you want to take that route, you might do that and withdrawing your motion against Mr. Conlon without prejudice, and that might be the best way to handle it.

MR. HEKSCH: Your original suggestion would be more appropriate, to adjourn the motion for six months, and then send him a letter to that effect, and I will pick a date six months hence, which is a motion day.

THE COURT: I understand that he's supposed to be released in October.

I don't know whether that takes account of work time and stuff like that.

MR. HEKSCH: I have no idea.

THE COURT: Pick a date in October and recite that the matter is adjourned until then, and then advise both Mr. Conlon and Mrs. Conlon and Mr. Mayo.

MR. HEKSCH: I'm not sure that I know Mrs. Conlon's address.

THE COURT: She wrote to us and gave the address of Apartment 7B, 999 Hidden Lake Drive, North Brunswick.

MR. HEKSCH: That may have been where I served it.

THE COURT: Let me ask you with respect to Mr. Albert. Has he been represented in the past in this matter?

MR. HEKSCH: Yes.

THE COURT: And has his attorney ever been relieved?

MR. HEKSCH: No. And he also is in jail.

THE COURT: I know that.

MR. HEKSCH: So that the record is clear.

THE COURT: I have got no opposition on his behalf.

Have you?

MR. HEKSCH: No. The only opposition that I received, and I confirmed this, was from Mr. Pisacane on behalf of Jersey Sanitation.

Given that fact, I would like to not dwell too heavily on the aspects of the case that relate to A to Z, John Albert, and Eugene Conlon.

THE COURT: The real problem is whether they were acting on behalf of Jersey Sanitation at the time that they did some or all of the things that they did, I suppose.

MR. HEKSCH: If that's a problem, it seems to me --

THE COURT: That's certainly one of the problems that Mr. Pisacane raises.

MR. HEKSCH: That's correct.

And I would suggest to the court that there's an effort on Jersey Sanitation's part to create an issue of fact where none, in fact, exists.

I think a review of the record and the certifications and the excerpts of the deposition and answers to interrogatories and so on and so forth indicate clearly that at the time frame in question, which is the period of 1977 to 1980,

Mr. Albert and Mr. Conlon each owned 25 percent of the stock of Jersey Sanitation.

They were, and I think it flip-flopped, essentially president and vice president of the company.

The contract, the employment contract, which is attached to Mr. Pisacane's papers, indicates that they were acting in an executive capacity, and there's no question, but admitted by everybody to date in the material that was submitted, and I have got it clipped and can reference it if your honor wishes, that they not only were officers, they were directors and responsible for the daily operation of the company.

Jersey Sanitation was in the business of hauling hazardous and solid waste. They ran the daily operations, and clearly the type of conduct complained of here, which is the illegal disposal of hazardous waste in the site in New Brunswick, was well within the scope of their authority.

They were acting as executives.

And I think that the law is clear, and it was cited in the letter memorandum that I submitted to your honor yesterday, that where employees,

officers, directors of the corporation act within the scope of their employment or in an executive capacity, the corporation can be held responsible.

Mr. Pisacane's pleadings, papers, seem to indicate that they were acting ultra-vires.

Obviously, any officer of a corporation that commits a crime or tortious conduct is probably acting somewhat ultra vires.

I don't think that any --

THE COURT: In violation of its employment contract, anyway.

MR. HEKSCH: I would assume so.

But still the law is clear that corporations are held accountable for this type of conduct, and I don't -- we're not trying to hold the present stockholders of the corporation liable at this particular juncture.

We're trying to hold Jersey Sanitation liable for conduct that took place between 1977 and 1980, and at that time it was Mr. Conlon's and Mr. Albert's company for all intents and purposes.

The current owners and operators were minor stockholders, and for reasons not clear, buried their heads in the sand and said they

didn't know what was going on.

Is the corporation bound by the conduct of Albert and Conlon through Jersey Sanitation?

And I think it's clear, and I would submit that there's no issue of fact with regard to that matter.

If your honor has any other questions related to any other aspects of the motion, I would be glad to address them.

I do want to emphasize one thing to the court as it relates to the relief sought, and it goes to the issue of penalties.

I think it is important for the imposition of penalties in this matter for two reasons:

One, that it set an example for other people that may be involved or contemplated to be involved in this type of conduct.

But more importantly, it's my understanding that penalties, unlike a simple reimbursement to the Spill Fund, would not be dischargeable in bankruptcy, and I think that's important to make sure that Albert and Conlon and the other people involved here do not get back in business without paying their dues.

Thank you, your honor.

MR. PISACANE: Judge, Mr. Heksch submits a 120-page brief and tries to simplify the motion when it should not be simplified.

He's indicating to the court that Jersey Sanitation buried its head in the sand, but there's no evidence of that.

Jersey Sanitation was a company that was in existence since 1956, Mr. Albert and Mr. Conlon brought into the company back in 1974. They each owned 25 percent of the company, and they each had employment contracts.

The board of directors-- they were supposed to report to the board of directors, which was not Albert and Conlon, and there were other people on the board of directors.

They lied to the company.

They defrauded the company.

And as a matter of fact --

THE COURT: I don't think that I know, and maybe I should recall, but I don't, how many members of the board there were.

MR. PISACANE: Various numbers at various times.

At one time there were five: Mr. George

Katz, Mr. Frank Stamato, Jr., and Mr. Patsy Stamato, and Albert and Conlon.

Prior to Albert and Conlon being involved --

THE COURT: I don't care about that, while Albert and Conlon were involved.

MR. PISACANE: All right.

As a matter of fact, judge, our certification shows that when we became -- and I say "we", and I mean Jersey Sanitation -- when Jersey Sanitation board of directors became aware of any involvement with hazardous waste -- as a matter of fact, the certification shows they became involved with a company called Chemical Control -- Conlon, and as soon as they became aware of that, they called him to task.

As a result, they bought him out. Got rid of him.

The certification is showing that.

As a matter of fact, you'll see a letter which I'm as counsel, was directed to write to the PUC and tell them to hurry up and approve the buy-out to get rid of what we thought was the bad apple.

Having hindsight, we would have seen

that Albert was also a bad apple. There was no way of knowing that at that time, judge.

As a matter of fact, a mortgage was put on the property of Jersey Sanitation, which was personally -- and this is important now. Mr. Heksch says well, I don't understand how the stockholders would be subject to this, the minority stockholders, he says, since there's no harm done.

That's not true. My certification shows that Mr. Frank Stamato, Jr., that a mortgage was put on Jersey Sanitation's property which they personally signed to buy out Conlon.

Now, is the court going to sit here today and have the fifty percent, and not minority, but fifty percent stockholders of Jersey Sanitation further harmed? That's not equitable.

Mr. Heksch cites a case, and he mis-cites the case, by the way, judge, of Winkler vs. Hartford, Acc., Independent Company, and at Page 29.

He takes out dictum of the case, which he states in his brief, and says a corporate employer may be held for exemplary damages if its employee who committed the wrongful act or authorized or ratified it was so high in authority as to

be considered executive in capacity.

He takes dictum out of the case that deals with conversion, but he fails to quote the beginning of that paragraph which states as follows:

The plaintiff's action is against two corporations for allegedly tortious acts of their employees.

Exemplary damages may not be recovered against an employer for the wrongful act of an employee unless the act was specifically authorized, participated in, or ratified by the master.

Also, judge, I call your attention to Re-statement, Second on Agency, which is appropriate here.

And then Re-statement states as follows in regards to knowledge which is necessary to hold the corporation liable.

And then it says that the knowledge of an agent will be imputed to his principal where the agent has the duty to disclose into his principal, or he has the power or actual authority to act for the principal unless the agent was acting adversely to his principal, and where the agent was acting in his own interest, where the

agent was acting in the interest of another person, and number three, where the agent was conspiring with a third person to defraud the principal.

I don't think there's any question here that Jersey Sanitation was defrauded by Mr. Albert and by Mr. Conlon.

I don't think there's any question here that Jersey Sanitation received no benefits.

Jersey Sanitation was in the business of solid waste collection.

THE COURT: Didn't Jersey Sanitation get a copule of hundred thousand dollars in fees from the National Starch account?

MR. PISACANE: They got $155,000, and it's in our certification, over the period of time, of which there was solid waste collection and hazardous waste collection.

That wasn't all for hazardous waste, judge. Fifty percent of that was for the solid waste collection.

Of the fifty percent fees that they got from National Starch, approximately fifty-five to sixty thousand dollars, almost all of it went to A to Z for hazardous waste disposal, and another twelve thousand dollars went to Chemical Control

for hazardous waste.

You take that into consideration with what it cost them to remove men and material, and they made no money, judge.

I don't think that's disputed. I don't think Mr. Heksch disputes that.

This money went in Albert's pocket and in Conlon's pocket, which we later found out.

We have a cross claim against them, judge.

I think that really what Mr. Heksch did, and it's interesting to note that the complaint in this matter was originally filed in '79, and in his brief he talks about orders that weren't complied with of the receiver, and talks about a judgment under the Spill Compensation Fund for three million dollars.

Judge, we weren't a party to this case until March 31, 1981.

Jersey Sanitation had no way of disputing the validity of what went on before.

Are we now going to be held responsible for proceedings before Judge Furman and your honor that we had not participated in?

He attaches to his brief and his

certifications, interestingly enough, depositions taken of Mr. Albert.

We weren't a party to the litigation at that time.

We had no way of cross-examining him.

It's interesting to note, if you look at the deposition, Mr. Albert says at 71A of the defendant's brief -- and I looked at this last night, and I found it interesting. I would like to point it out to the court.

He was talking at line -- I won't read the whole thing. This is Line 19. They were talking about the buy-out of Mr. Conlon.

And then it says, Mr. Albert says I bought him out. Well, that's a lie. He didn't buy him out; Jersey Sanitation bought him out.

This just goes to show you the credibility of these people and how Jersey Sanitation was a victim.

Interestingly enough, also, judge, is that this is a motion for summary judgment.

I think what precipitated this motion and they brought in Jersey Sanitation, the reason they brought them in two years later is they said well, Conlon and Albert probably don't have assets,

or if they had any, it went south, if I may coin a phrase.

Curiously enough, I wonder what happened to the one hundred ninety thousand dollars in assets that we paid Conlon.

Did he look for that? I don't know.

Curiously enough, Jersey Sanitation, he says, is a viable company; and it was at the time, and let's make them a party to this suit, since Conlon and Albert were a stockholder, and let's bring them into the suit, and we might get money from them.

There's no justification for having a motion for summary judgment or bringing us into the case, judge.

As a matter of fact, Albert and Conlon have harmed this company. But I don't want to get into that. I don't think that's before your honor.

But then this is his motion for summary judgment; and contrary to what the attorney general tries to do, the burden is upon him to prove and come forward and show that there's no disputed facts.

There are many disputed facts, and I will try to outline just a few of them to the

court.

Interestingly enough, none of the certifications submitted, and I have reviewed them, nor the answers to interrogatories, if you want to call them that, that were submitted by the State, and I haven't made a motion for more specific answers, and so that I won't get into it, but none of that shows that Jersey Sanitation brought all of that hazardous waste to A to Z.

The only thing that Jersey Sanitation admits is that they had an account named National Starch, and Albert and Conlon arranged to be paid at that disposal site, and which Jersey Sanitation thought, and they submitted manifests, judge, which they thought was an authorized site.

But if you look in the certifications, they list a whole myriad of types of chemicals, a whole myriad of chemicals from different other companies.

Have they presented to you one iota of proof showing that Jersey Sanitation brought those items to A to Z? No.

Well, Mr. Heksch tries to obfuscate these issues in a lengthy brief in which he lumps all of

the defendants together.

You cannot do that, judge. That's one disputed fact.

The second disputed fact is that A to Z and Jersey Sanitation were two separate, distinct entities.

The only link was Albert and Conlon.

We know now that they owned A to Z. Jersey Sanitation didn't own it.

Mr. Stamato didn't own it, and Dr. Saltzburger, who is a stockholder, and his wife, they didn't own it. And Mr. Katz did not own A to Z.

Where is this linkage of Jersey Sanitation to be responsible for the Spill Compensation Fund just because they transported some hazardous waste which we don't dispute, judge?

He also attempts in his brief to lump all of the conducts of the defendants together.

You cannot do that, judge.

We dispute that we are, that the conduct of A to Z and the conduct of Albert and Conlon, at A to Z, is the responsibility of Jersey Sanitation.

Throughout his brief he keeps referring

to the defendants, plural. That cannot be done, judge.

Nowhere does he show that Jersey SAnitation was responsible for what happened at A to Z; not at all.

I can go on, judge, and I am not going to waste the court's time; and I would just like to highlight a few other disputed facts.

We dispute that Jersey Sanitation is responsible for discharging of any hazardous or toxic waste in any streams, but as a matter of fact, he hasn't proved, and I haven't seen any papers in my short time in the case, showing that the State has proved that there has been any discharge into the streams.

He doesn't show where Jersey Sanitation is responsible for air pollution. There's no affidavit submitted to that.

What I am saying to the court, and I am not going to waste any more of the court's time, but it's important to my client.

They have a large investment in this company, and the company is in a shambles as it is, judge.

THE COURT: Tell me about that. What's

going on with the company now? I understand that they have surrendered their license as of the end of this month.

MR. PISACANE: Exactly right.

What happened is that Mr. Albert --

THE COURT: Don't tell me why. What's going to happen then? Are they liquidated?

MR. PISACANE: What we're going to do is to pay our bills, pay the creditors.

We have a hundred thousand dollar mortgage which they're personally responsible for, and we want that paid off.

We are going to pay the bills that are owed by the company, and then whatever is there, keep it.

They don't want to take money out of the company and then be liable under the Fraudulent Conveyance Act of the State.

They're not looking to do that. All they're looking to do is to keep the status quo, to pay all their bills. But they also don't want to have to go into their pockets if they have anything, and I don't know what the status of the stockholders is, some of them, to have to pay this mortgage on the property, which should be paid

by Jersey Sanitation.

We don't want to be responsible for the Spill Compensation Fund, which we shouldn't be.

Mr. Heksch is asking for an appointment of a receiver. It's very interesting, and I was at one time in the attorney general's office, and we got receivers appointed.

But the only time they were appointed is when there was an ongoing utility, and as a result, the public good was needed to keep this ongoing utility to serve the public.

Actually, what Mr. Heksch is asking is for your honor to give him a prejudgment execution.

It's not proper. Nowhere does it show in his certifications that there is any reason for this receiver to be appointed.

The mere fact that Jersey Sanitation is going out of business, he doesn't show that we're trying to go south with the assets because that's not the case, judge, and I will make that representation to the court.

If the court wants, we'll even submit certifications or testimony under oath.

All the stockholders and present directors

of Jersey Sanitation want to do is to pay the debts of Jersey Sanitation and not take any money out of the company.

I have nothing further to add.

THE COURT: Mr. Heksch, I have got two questions for you.

Number one. What proofs do we have on the subject of the extent to which the toxic waste on the A to Z premises came from Jersey Sanitation?

MR. HEKSCH: There's my certification, which has annexed to it one of thirty-five or thirty-four, and if your honor is interested in reviewing them, waste manifests, hazardous waste manifests that were filled out between May and June of '78 and required by law, and which specify that certain numbers of drums, and I am not sure, and I think it was thirteen or fourteen hundred drums of hazardous waste was taken to the A to Z site by Jersey Sanitation.

Number two, in the excerpts of interrogatories -- the excerpts of depositions of Mr. Albert that's appended to the brief, and part of the appendix there's an admission by Mr. Albert that he used Jersey Sanitation to haul the waste

from National Starch to A to Z, the A to Z site.

Number three is in answers to interrogatories provided by Jersey Sanitation there's an admission that --

And again that's appended to my certification, and I will find it in a moment.

Number thirteen.

State whether or not Jersey Sanitation Company, Inc., ever transported chemical wastes to the facility of the defendant, A to Z Chemical Resource Recovery, Inc., located at a certain block and lot in New Brunswick.

And then the answer is yes.

QUESTION: The generator of the waste. National Starch.

Type of waste and amount of waste. Answers to be supplied.

When it was transported. The answer is throughout the year 1979 and the beginning of 1980.

So there are admissions by Jersey Sanitation and admissions by individuals involved with Jersey Sanitation, and Mr. Albert, interestingly enough, when his deposition was taken in 1980, he was still employed by Jersey Sanitation.

They never fired him and never got rid of him.

He was, to the best of my knowledge, employed by them until the time that he went to jail.

At the time of Mr. Stamato's deposition last June, he was at the site working. I was looking for a reference as to what his duties and functions were, but I can't find that.

I want to comment on what Mr. --

THE COURT: One other thing before you get to it.

Is treble liability on the Spill Fund Act depending upon having declined to comply with the directive to clean up?

MR. HEKSCH: I think there's a requirement that you be noticed of the problem and be advised that you have an obligation to clean it up, and that you have refused to do that.

I think that's true in this case because -- and as it relates to Jersey Sanitation at the time periods in question when Albert and Conlon clearly got that type of notice, and that's in the record, and I think it's appended.

THE COURT: Jersey Sanitation itself did not, and was not a party at the time and did

not get such a notice?

MR. HEKSCH: Not as a separate, distinct entity.

But they had constructive notice of their obligations and were fully aware of the situation.

I don't know how they can deny knowledge for an obligation to do it.

I would like to comment on the paying of the creditors and the reasons for a receiver.

As your honor knows, there's a claim, and it's in this case as well, that the Spill Fund has liens paramount and above any other creditors, and Mr. Pisacane has indicated what they want to do with the assets of the corporation is to pay off the creditors, but he doesn't view the New Jersey Spill Fund as one of those.

He wants to pay the bank and other creditors, and I am sure there are creditors, and I don't doubt that Jersey Sanitation has a lot of obligations.

But we say that our obligation goes first, and we're entitled to that money, and it's questionable after we get ours that there will be anything left for other creditors, and that's why

there's a need for a receiver.

I don't see anything, by the way, in the papers that were filed in response by Mr. Pisacane to dispute the allegations that Jersey Sanitation took waste to the A to Z site.

There's an allegation by Mr. Stamato that he didn't know, and found out subsequently, but certainly no denial, and I think that we carried our burden as far as summary judgment goes to remove any question of an issue of fact on that particular point.

MR. PISACANE: You know, judge, in all due respect to the court, Mr. Heksch has a way of making comments and of taking them down as if they're facts proven.

First of all, Mr. Albert was fired by Jersey Sanitation in '79.

THE COURT: Don't holler. Take it easy.

MR. PISACANE: Yes, judge.

He has a way of doing these things and going over matters and telling the court that they are facts.

THE COURT: What else?

MR. PISACANE: The court probably knows better than I that there was over twenty-five

thousand or thirty thousand drums on the A to Z site.

He has proofs of thirty-five manifests that he's presented to this court. And he has proof of only National Starch.

He says one thousand three hundred drums, and I will stipulate it.

Does he show you proof what was in those drums or proof at all for this motion indicating that that stuff that was in those drums is what caused the problem at A to Z?

No, not at all, judge.

What happened to the other twenty-five or thirty thousand drums?

Have they attempted to tell you what happened to them?

He misleads you. He attempts to mislead you.

Thank you.

THE COURT: Anything else?

MR. HEKSCH: Just the numbers are not accurate. About eight or nine thousand drums at the site.

THE COURT: We do know that's substantially more than was accounted from National Starch.

MR. HEKSCH: I think that we know that's more than what was accounted for in the manifests.

I think that the manifests cover a period of time that was very limited.

There's an admission in the interrogatories that there was subsequent taking to the site. We don't know how much. They don't give us that information.

The other point that should be made is that under the statutes in question, and at least under the Spill Act, there's expressed joint and several liability, and even if it is only thirteen or fourteen hundred out of eight thousand, so be it.

They're liable for it. I would submit that under the other statute and the common law there's also joint and several liability which warrants the imposition of a judgment.

THE COURT: The motion of the State is for judgment on -- judgment for liability of Jersey Sanitation under a number of statutes governing this situation.

Jersey Sanitation was a waste hauler which at relevant times was owned twenty-five percent by Eugene Conlon and twenty-five percent

by John Albert.

They were also president and vice president. And I think that's the reverse order. They were president and vice president of the company.

And according to the accounts of the other stockholders in the company, they were brought in to run its day-to-day operations in this area, which the other owners were unwilling to do any longer.

Mr. Albert and Mr. Conlon procured a site which they then used for the parking of barrels of toxic wastes. That property was the property of A to Z, which belonged to them, and which had no other relationship between it and Jersey Sanitation.

I must assume for the purposes of this motion that the other stockholders were not aware of the existence of the A to Z site, or the fact that Mr. Conlon and Mr. Albert were unlawfully disposing of toxic wastes there.

When the DEP asserted enforcement jurisdiction over the site, A to Z and Conlon and Albert were defendants and ordered to clean up; and they didn't do so, and the Spill Fund was invoked, and approximately one million three

hundred twenty-seven thousand dollars was spent on the cleanup effort.

There's no dispute here but that that money was spent, and spent to clean up the site.

Subsequently, Jersey Sanitation was made a defendant, and statutory penalties and recovery under the Spill Fund Act were asserted.

The major argument made by Jersey Sanitation is that its president and vice president were off on an enterprise of their own, which it, as much as the State, was a victim.

That the directors, majority of the board of directors, had no knowledge of what was going on, and that the other stockholders should not be penalized for the activity.

It's clear that Conlon and Albert were fifty percent stockholders and were entrusted by the others with running the corporation.

That at least in large part the toxic wastes that were unlawfully disposed of at A to Z were disposed of under a contract Jersey Sanitation had with National Starch, and the remainder of the toxic wasts were, at the very least, transported there by Jersey Sanitation, whether from National Starch or from somewhere else.

There's no question but that there's nothing before me to show that Jersey Sanitation's board of directors or stockholders met and approved what was going on.

But the two law breakers were fifty percent owners of the company and were entrusted by the remainder with the day-to-day supervision of its activities.

And in transporting of toxic wastes in Jersey Sanitation trucks, whether from Jersey Sanitation's account or not, Conlon and Albert were acting on behalf of the company, and the company is responsible for that activity.

The State asserts that Jersey Sanitation should pay three times the cost of removal under 58:10-12.11 f.a. That provision imposes treble liability against any discharger who fails to comply with the directive to remove or arrange for the removal of the discharge.

At the time the directive was issued to remove, Jersey Sanitation was not a party to the suit, and the directive was not sent to it.

The directive to Conlon and Albert was only incidentally to the officers of Jersey Sanitation.

The fact is that it was directed to them as the active wrongdoers themselves and as the owners of A to Z.

On the other hand, it is plain that under 58:10-23.11 b.h., Jersey Sanitation is a discharger.

It is not necessary that the State show that any toxic waste actually reached the waters of the state. To discharge includes any action or omission resulting in the releasing, spilling, leaking, et cetera, of any hazardous substance, either into the waters of the state or onto lands from which it might flow or drain into said waters.

And that condition is certainly satisfied here, and there is no reasonable argument about that.

As a discharger then, Jersey Sanitation is liable under the Spill Fund Act as a person responsible for the discharge; also for the amount of one million three hundred twenty-seven odd thousand dollars, which debt constitutes a first priority claim and lien paramount to all other claims and liens upon the revenues and upon all the real and personal property of Jersey Sanitation, and judgment is entered under the Spill Fund Act in that amount and declaring that that amount

constitutes a lien.

Statutory penalties are sought. I do not believe that judgment should be entered under the Air Pollution Act.

I don't believe a case has been made out as a matter of law under the Air Pollution Act.

Under 58:10A-6 and under 13:1E-9, statutory penalties should be imposed. They are expressed as daily penalties; and if one should impose the maximum, the amounts involved are staggering.

The determination as to how much to impose is a difficult one. It should take into account that there's no proof before me that the other stockholders of the company were aware of what was going on, and I do take that into account.

It also should take into account, however, that the activity involved for which this corporation is responsible was criminal, was extremely prejudicial to the health and safety of the state and its residents, has consequences that are incalculable into the future in terms of the quality of the environment in which we're going to have to live hopefully for many generations, and it is necessary to exercise the court's power to express

the gravity with which every organ of government is obliged to view the consequences of a company that permits its executive officers every latitude to indulge in any practice in an extraordinarily sensitive business.

I think that all of those considerations are best embodied in an award or a judgment under 13:1E-9 of three thousand dollars per day penalty for one hundred days, or three hundred thousand dollars.

And the penalty under the Water Pollution Control Act, whose maximum is ten thousand dollars a day, in the amount of five thousand dollars a day for one hundred days.

With respect to the request for a receiver, I will now order, and the order shall be effective upon my stating it even before a written order is entered, that Jersey Sanitation expend no monies, except for the purpose of paying current and ongoing wage claims of employees who are not stockholders or related to stockholders, and not for any past wage claims, obviously.

The company may also make such expenditures for current operating expenses as are required to permit it to complete its contract

until the end of this month.

It will dispose of no other assets or enter into no other transactions without permission of this court.

It will also provide this court with such -- with documents of such plans as it has made for liquidation, disposition of assets, winding up of business, and a copy to Mr. Heksch, by next Friday, and we can discuss next Friday at nine o'clock, if that's convenient with you both, whether or not to permit Jersey Sanitation to wind up itself or to impose a receiver on it for that purpose.

MR. PISACANE: Obviously, I will be appealing this order, and I am going to request a stay of the imposition of the order pending appeal to keep the status quo.

THE COURT: I will in the order oblige the State to take no action to execute on its judgment, but I will not stay my order with respect to ongoing business, disposition of assets and any of the rest of it.

MR. PISACANE: I need a clarification on that.

As part of the ongoing business, we have

a building which we pay a mortgage on. Are we allowed to continue to pay the mortgage?

THE COURT: No, sir. No, sir.

MR. PISACANE: Then we're going to have a foreclosure by the bank and we have no place to put the trucks.

THE COURT: You are not going to have a foreclosure in the next few weeks.

MR. PISACANE: I would like to ask another clarification.

You ordered a fund payment of one million three hundred twenty-seven thousand dollars. Was that, your honor, based on a prior judgment and disposition in this case?

THE COURT: Based upon the proofs on this motion.

MR.PISACANE: Proofs on this motion?

THE COURT: Yes. Mr. Heksch, you'll prepare the order.

MR. HEKSCH: I have one question.

Next Friday, is that to be here in person or can we do that over the telephone, or how would you want to do it?

THE COURT: You'd better be here.

MR. HEKSCH: I have a personal problem,

but somebody else will be here in my stead.

The second question that I have is you have ruled against Jersey Sanitation. You have not ruled as to Albert.

THE COURT: I'm sorry, I lost that in the shuffle.

The rulings as to Albert are for all the same reasons, the same except that Albert's liability under the Spill Fund Act is treble liability, and the judgment against him should be in the amount of three million nine hundred eighty thousand -- whatever it is. Three times.

MR. HEKSCH: Similarly as to A to Z, and that may be relevant as to the property.

THE COURT: Same as to A to Z.

MR. PISACANE: May I ask you a question in my ignorance?

THE COURT: Yes.

MR. PISACANE: How are we supposed to keep the status quo with the bank if we can't pay the mortgage?

THE COURT: Mr. Pisacane, don't be cute.

MR. PISACANE: I really mean that. I know what's going to happen.

THE COURT: I don't think it's going to

happen within the next week. If it does, it's not a problem that I created. It's a problem that this judgment simply recognizes.

Prepare the order.

MR. HEKSCH: Yes. Thank you, your honor.

Should the order that I prepare suggest the denial of the stay, or does Mr. Pisacane want to submit something separate on that?

THE COURT: It might be easier if you deny the stay except as to execution.

MR. HEKSCH: Fine.

THE COURT: And the stay is on the representation that a motion -- well, you don't need a motion. Actually, it's not final.

MR. PISACANE: It's not?

THE COURT: No, sir, because there's still claims out against co-defendants.

MR. PISACANE: I have a cross claim against Conlon and Albert.

THE COURT: Yes. Well, how do you feel about treating it as a final judgment, Mr. Heksch?

MR. HEKSCH: For the purposes of appeal or for the purposes of a stay?

THE COURT: Both. I mean one goes with

the other.

MR. HEKSCH: I would suggest that Mr. -- I don't know how to respond to that at this point. I haven't thought out the ramifications of either one.

THE COURT: One of the ramifications is whether or not Mr. Pisacane has the right to appeal at this point or whether he has got to apply for leave to appeal.

MR. HEKSCH: I understand. I'm not sure what the difference is as it relates to a stay. It's a stay pending appeal and a stay pending an interlocutory order, and I don't know if there's a difference.

MR. PISACANE: The big difference is that we won't be before the Appellate Division and get a decision, and I will have to wait until what happens here until the remaining part of the case, which is a big factor in this case.

THE COURT: It seems to me that there's no reason why this matter should not be treated as a final judgment. Judgment will be entered finally.

MR. PISACANE: Thank you, judge.

THE COURT: Okay.

CERTIFICATE

I, STANLEY GRABON, an official court reporter and notary public of the state of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of proceedings as reported stenographically by me at the time and place aforementioned.

Stanley Grabon, CSR
Official Court Reporter

NEW FOLDER BEGINS