2011 IL App (3d) 091026-U

Order filed July 27, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

COMMUNITY LANDFILL CO., an Illinois corporation, EDWARD PRUIM and ROBERT PRUIM,	)	Administrative Review of the Orders of the Illinois Pollution Control Board
Petitioners-Appellants,	)	
v.	)	Appeal No. 3-09-1026 Charge Nos. 97-193, 04-207 (cons.)
ILLINOIS POLLUTION CONTROL BOARD, and PEOPLE OF THE STATE OF ILLINOIS ex rel. LISA MADIGAN, Attorney General of the State of Illinois,	)	
Respondents-Appellees.	)	

JUSTICE McDADE delivered the judgment of the court.
Justice Schmidt specially concurred, joined by Justice Holdridge.

ORDER

¶ 1 *Held*: Where the State produced evidence of corporate officers' personal involvement in violations of Illinois Environmental Protection Act, Illinois Pollution Control Board's order affixing personal liability to corporate officers for corporation's violations of the Act was affirmed and the cause remanded for an apportionment of the penalties.

¶ 2 Petitioners, Community Landfill Co., an Illinois corporation (CLC), and Edward Pruim

and Robert Pruim, individually, appeal the decision of respondent, the Illinois Pollution Control Board (Board), finding the Pruims individually liable for violations of the Illinois Environmental Protection Act (Act) and state regulations, and imposing joint and several liability on the corporation and the Pruims. The Board held the Pruims personally liable for some, but not all, of the violations of the Act alleged against CLC, based on their personal involvement and active participation in the acts that led to those violations. The Board did not find the Pruims personally liable for violations resulting from daily landfill operations. For the following reasons, we affirm in part, reverse in part, and remand.

¶ 3 BACKGROUND

¶ 4 CLC operates the Morris Community Landfill. The City of Morris owns the landfill and CLC leases the landfill. The Pruims are the sole owners and officers of the corporation. Beginning in May 1997, the State initiated proceedings against CLC for alleged violations of the Act and state regulations. The Board docketed those proceedings under case number 97-193. By the time the State filed is second amended complaint in November 1999, the proceedings involved twenty-two counts against CLC. In December 2003, the State sought leave from the Board to file a third amended complaint to add the Pruims as individual respondents, and to allege that they were personally liable for the corporation's violations. The Board denied the State's motion to file a third amended complaint.

¶ 5 Following hearings on the parties' cross motions for summary judgment, seven counts (counts I, II, VI, XV, XVII, and XX, and XIX) remained pending against CLC. In May 2004, before the hearing on the remaining counts, the State filed a new complaint against the Pruims in their individual capacity for violations of the Act and state regulations with regard to the

operation of the Morris landfill. The Board docketed the State's complaint against the Pruims individually under case number 04-207. The allegations against the Pruims parallel the allegations in the second amended complaint against CLC. The State admits that it sought to impose personal liability on the Pruims for the same violations it alleged against CLC. Some of the allegations are for violations stemming from daily operations at the landfill while some counts alleged liability for financial and filing violations. The complaint against the Pruims in their individual capacities contains nineteen counts.

¶ 6 The Pruims filed a motion to consolidate the proceedings and the Board granted the motion. The Pruims filed a motion to dismiss the complaint against them individually, which the Board denied in its entirety. The State filed a motion to dismiss some counts in its complaint against the Pruims individually, which the Board granted. Following prehearing proceedings, fourteen counts remained pending against the Pruims in their individual capacity.

¶ 7 In December 2008 the Board held a hearing on the consolidated complaints. Testimony pertaining to the Pruims' personal liability focused on their personal involvement with or direct participation in the alleged violations. Following the hearing, the Board issued a single decision addressing all of the allegations against CLC and the Pruims individually, and assessing a single penalty for all of the violations. CLC does not dispute its liability for the violations of the Act and state regulations. The only challenges on appeal are the findings of the Pruims' personal liability and the judgment of joint and several liability against the corporation and the Pruims individually.

¶ 8 Edward Pruim testified that he had no knowledge that Parcel B was filled over height restrictions until the company received notice from the State. Jim Pelnarsh was the site operator

at the Morris landfill. He testified that he conducted the day to day operation of the landfill, including the decision of where, when, and how to place waste on parcels A and B. Pelnarsh reported to the Pruims. He was not involved in arranging financial assurance and had no control over finances. Pelnarsh did not have responsibility for permit applications and did not have the authority to shut down the landfill. Shutting down the landfill required Edward or Robert's approval. Inspectors with the Illinois Environmental Protection Agency testified that Pelnarsh was their on site contact and that they never dealt with the Pruims.

¶ 9 The Pruims testified that their signing of any permit applications, capacity reports, and arranging for financial assurance was done as corporate officers as part of their normal duties as officers. The Illinois Environmental Protection Agency requires landfill operators to provide annual landfill capacity certifications recording the number of cubic yards of waste accepted during the prior year and the remaining disposal capacity. The January 1995 capacity report stated that Parcel B of the Morris landfill had zero remaining capacity. The Pruims each signed annual landfill certification reports. Edward signed a January 1995 landfill capacity certification for Parcel B of the Morris landfill. Edward signed as secretary of CLC and not in his individual capacity. Robert signed a January 1996 landfill capacity certification. Robert signed as president of CLC and not in his individual capacity. The January 1996 report states that the Morris landfill had no remaining capacity.

¶ 10 Neither report mentions that Parcel B was over height restrictions. Neither report provides information regarding the height of waste in the landfill or landfill activities above the permitted height. The forms included a certification by the signatory warranting that the information was true and accurate to the best of his or her knowledge. The State adduced

testimony that although the report stated that Parcel B had zero remaining capacity, Parcel B still took in waste. The Pruims testified they did not tell Pelnarsh to place waste above capacity.

¶ 11 At the hearing, Robert testified that at the time he signed the report, he personally disputed the engineer who prepared the landfill certification report's conclusion that the landfill had no remaining capacity. Andrews Engineering prepared the landfill certification reports in question. The engineer who prepared the report also told him that due to various factors a discrepancy existed in the amount of remaining capacity. The engineer told Robert that the discrepancy would be accounted for in future capacity reports "once Parcel A was added to the certification." Robert testified that the 1997 report took the discrepancy into account and calculated a remaining capacity of 1,774,000 cubic yards. The State adduced testimony that the 1997 report actually states capacity for Parcel B combined with Parcel A. Previous reports, stating the lack of capacity, did not reflect capacity on Parcel A.

¶ 12 CLC was required to file an application for significant modification of the landfill. The modifications would involve operational revisions to comply with more strict landfill regulations. CLC's application was originally due in 1993 but it obtained a judgment from this court directing the Board to allow a variance to the original deadline. In 1996, CLC filed an application for a permit for a significant modification of Parcel B. The application includes an elevation diagram showing that the height of Parcel B exceeds 580 feet. Roger Pruim signed that application as president of CLC. In 1997, CLC filed an addendum to that application which also shows that Parcel B was over height. Robert, Edward, and Pelnarsh opined that Parcel B is not filled above permitted capacity. They each testified that Parcel B has remaining capacity where an office and garage are currently located, and on the east side of the parcel. Edward estimated that Parcel B

had a remaining capacity of 100,000 to 200,000 cubic yards.

¶ 13 In April 1993 the IEPA issued a permit requiring CLC to post a specific dollar amount of financial assurance, to ensure payment of closure cost and cost of post-closure care costs for the landfill, within 90 days. The IEPA received a bond for the amount in June 1996. In October 1996 the IEPA issued a supplemental permit that required the financial assurance be increased within 90 days, and requiring a second increase before operation of a planned gas extraction system began. The parties presented conflicting evidence of when the gas management system began operating. An inspector observed the gas collection system in operation in March 1999, without any increase in financial assurance. Pelnarsh testified that the company that owned and operated the gas collection system was merely testing the engines at that time. The inspector testified at the hearing that she had no proof the system was running other than hearing its engines. Robert testified that he expected the company that owned and operated the system to pay for the increase in financial assurance. Edward testified that it was his understanding that the company that operated the system was responsible for financial assurance. The Pruims both testified that they had no personal involvement with the operation of the landfill or the failure to provide adequate financial assurance prior to the operation of the gas collection system.

¶ 14 The IEPA received a rider to the previous bond increasing financial assurance in September 1999. The Pruims provided personal guarantees for the payment of dumping royalties. CLC paid Morris for the disposal of specific volumes of waste. The Pruims also provided personal guarantees on bank loans CLC obtained and surety bonds supplied as the financial assurance for the landfill.

¶ 15 The Board found against the Pruims on counts IV (failure to provide and maintain

adequate financial assurance, V (failure to file required significant modification), counts VII, VIII, IX, and X (overheight violations as to Parcel B), XVII (failure to timely provide increased financial assurance), and XIX (failure to provide revised cost estimate). The Board found that waste on Parcel B of the landfill exceeded the 580 foot elevation allowed under the permit for that location. The Board found that the Pruims were not personally liable for violations resulting from daily management of the landfill because, it found, "the record contains no evidence that the Pruims directed the day to day operations of the site."

¶ 16 However, the Board did find the Pruims liable for allowing waste to be placed above height restrictions on Parcel B. The Board based that decision on its finding that only they could stop accepting waste at the landfill and, therefore, the Pruims were "actively participating in acts that resulted in the landfill being filled beyond the permitted capacity." The Board held that "the signatures of the Pruims on the forms and applications establish that the Pruims are responsible for the alleged [height] violations." There was evidence that the State and the City of Morris could close the landfill.

¶ 17 The Board found the Pruims personally liable for failing to provide adequate financial assurances and failing to increase financial assurance in a timely manner. The Board determined that the gas management system was operating months before CLC provided the increased assurance. The Board also found the Pruims personally liable for failing to file a significant modification (count V), and failing to provide a revised cost estimate (count XIX). The evidence was that the Pruims were responsible for and signed the required permits. The Board found that the cost estimates were within the purview of the corporate officers. The Board determined that the Pruims were the only individuals authorized to sign checks for CLC, and had provided

personal guarantees for financial assurance bonds, bank loans, and royalties. Based on this "direct mingling of personal and corporate finances" the Board concluded that the Pruims had personal and active involvement in CLC's financial matters. The Board also found that the Pruims were solely responsible for CLC's permitting.

¶ 18 The Board found against CLC on six counts of the complaint against it in case number 97-193. The Board imposed joint and several liability on CLC and the Pruims for a single financial penalty based on all counts in both complaints. In imposing the penalty, the Board found that several factors weighed in favor of a significant penalty, including a "significant degree of interference with the protection of health and general welfare," as well as the fact that many violations continued for years and constituted substantial violations. The Board ultimately determined that its penalty would "aid in the enforcement of the Act, recoup the economic benefit accrued [from the violations] and deter [future] violations."

¶ 19 This appeal followed.

¶ 20 ANALYSIS

¶ *21* We must first note that, although this case appears to effect a departure from "some of the principles underlying corporation law in Illinois," including that "in most instances, the law immunizes corporate officers from corporate liabilities" (*People ex rel. Madigan v. Tang*, 346 Ill. App. 3d 277, 284 (2004)), this court, in *People ex rel. Burris v. C.J.R. Processing, Inc.*, 269 Ill. App. 3d 1013, 1015 (1995), considered whether a corporate officer may be held individually liable for a corporation's violations of the Act. The court found that the officer could be held liable under limited circumstances; *i.e.*, when he or she was personally involved or actively participated in the violations *C.J.R. Processing, Inc.*, 269 Ill. App. 3d at 1018.

¶ *22* *C.J.R. Processing* is premised entirely on *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F. 2d 726 (8th Cir. 1986). The *Northeastern Pharmaceutical* court found that, "[a]s defined by statute, the term 'person' includes both individuals and corporations and does not exclude corporate officers and employees." *Northeastern Pharmaceutical,* 810 F. 2d at 745. As a matter of legal construction of a term in a statute, the court reasoned that "[a]s with the CERCLA definition of 'person,' Congress could have limited the RCRA definition of 'person' but did not do so." *Id.* This court mirrored that reasoning, stating that "our General Assembly could have explicitly excluded corporate officers from section 3.26 but it did not do so." *C.J.R. Processing*, 269 Ill. App. 3d at 1016. However, strictly as a policy concern, the court wrote that "[m]ore importantly, imposing liability upon only the corporation, but not those corporate officers and employees who actually make corporate decisions, would be inconsistent with Congress' intent to impose liability upon the persons who are involved in the handling and disposal of hazardous substances." *Northeastern Pharmaceutical,* 810 F. 2d at 745.

¶ 23 First, as to either legislative body's "neglect" to exclude corporate officers from the definition of "person" within the statutes, the courts' reasoning would have the legislative bodies define a term in a statute in the negative, when it was not necessary to do so. Second, as to Congress' intent, the court should limit its attempt to effectuate that intent to giving effect to the language Congress used, not the language Congress did not use. *Botz v. Omni Air International*, 134 F. Supp. 2d 1042, 1047 (D. Minn., 2001) ("The best evidence of Congress' *** intent [is] the words of a statute"). See also *In re Mehta*, 310 F. 3d 308, 311 (3d Cir. 2002).

¶ 24 The Eighth Circuit would have had Congress expressly write that a "person" for purposes of the RCRA is "not" a corporate officer acting in his corporate capacity, and now uses their

failure to do so to support finding that a "person" for purposes of environmental laws *is* a corporate officer acting in his or her corporate capacity. But such a statement by Congress or our General Assembly would, before *Northeastern Pharmaceutical*, have appeared wholly self-evident. Traditionally,

> " '[u]nder Illinois law, a corporation is a legal entity that exists separate and distinct from its shareholders, officers and directors.' [Citation.] Generally, corporate officers and directors are not individually liable for the *** obligations of the company. [Citation.]" *Dismuke v. Rand Cook Auto Sales, Inc.*, 378 Ill. App. 3d 214, 218 (2007).

This includes the company's tortious and statutory liability. See, *e.g.*, *Garcia v. Overland Bond & Investment Co.*, 282 Ill. App. 3d 486, 496 (1996) ("the general rule in Illinois is that corporate employees are not vicariously liable for tortious acts of the corporation in which they do not participate. Under common law, therefore, an employee may be individually liable only if he actively participates in the wrongdoing"). See also *Froehlich v. J. R. Froehlich Manufacturing Co.*, 93 Ill. App. 3d 179, 184 (1981) (finding that defendant was not the alter ego of the corporation and thus distinct from it for purposes of liability).

¶ 25 In most contexts, officers and directors may be held liable for the acts of the corporation only " 'when the corporation is merely the alter ego or business conduit of a governing or a dominating personality.' [Citation.]" *Dismuke*, 378 Ill. App. 3d at 218. The contrary construction of the Act employed here has in fact created what the Illinois courts later recognized to be "[t]he primary difficulty in cases like this one[,] *** identifying the officer's actions and

determining whether they were personal acts or acts of the corporation." *Tang*, 346 Ill. App. 3d at 286. However, no such difficulty should exist, because an officer's actions on behalf of and for the corporation have always been acts of the corporation and had, heretofore, never been personal acts. Moreover, this application of the Act to the corporation and its officers, separately and simultaneously, has led to the absurd result we can (and will) redress here, where the Board has attempted to impose joint and several liability on the Pruims for violations it found it they did not commit.

¶ 26 But, since *C.J.R. Processing*, the court has continued to find that:

> "in order to state a claim for personal liability against a corporate officer under the Act, a plaintiff must do more than allege corporate wrongdoing. Similarly, the plaintiff must allege more than that the corporate officer held a management position, had general corporate authority, or served in a supervisory capacity in order to establish individual liability under the Act. The plaintiff must allege facts establishing that the corporate officer had personal involvement or active participation in the acts resulting in liability, not just that he had personal involvement or active participation in the management of the corporation." *Tang*, 346 Ill. App. 3d at 289.

See also *United States v. Conservation Chemical Co.*, 733 F. Supp. 1215, 1221 (N.D. Ind. 1989) ("The court notes first that it has already found that Hjersted, as a corporate officer of CCCI, may be held liable under RCRA regardless of whether he himself qualifies as an 'operator,' as long as

he was actively involved in the alleged violative activity").

¶ 27 In this case, the Pruims argue that the Board's decision is against the manifest weight of the evidence because there is a lack of evidence that they were personally involved in acts that led to the alleged violations, and there is affirmative evidence that they were not involved in those acts. They argue that the evidence proves no more than their participation in the management of the company.

> "We will reverse the Board's decision only if it is against the manifest weight of the evidence. [Citation.]" *Community Landfill Co. v. Pollution Control Board*, 331 Ill. App. 3d 1056, 1060 (2002) (citing *ESG Watts, Inc. v. Pollution Control Board,* 286 Ill. App. 3d 325 (1997)).
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> "When reviewing a decision of the Illinois Pollution Control Board, the court's function is not to reweigh the evidence or make an independent assessment of the facts. [Citation.] Therefore, to meet the manifest weight of the evidence standard, the Board's decision will be upheld on appeal when 'any evidence in the record fairly supports the action taken by an administrative agency.' [Citation.]" *Illinois Environmental Protection Agency v. Illinois Pollution Control Board*, 386 Ill. App. 3d 375, 383 (2008).

¶ 28 PRECEDENTIAL BACKGROUND

¶ 29 The Pruims rely primarily on two decisions of the appellate court that decided the issue of whether a corporate officer had sufficient personal involvement in acts that led to a violation, or

actively participated in acts that led to a violation. In one, *People v. Petco*, 363 Ill. App. 3d 613 (2006), the court affirmed the decision that the corporate officer was *not* personally liable for the acts that led to the violation. In the other, *People v. Agpro*, 345 Ill. App. 3d 1011 (2004), the court found that the corporate officer *did* have personal involvement with and actively participated in acts that led to the company's violations. The Pruims contend that the evidence against them is more like that in *Petco* than the evidence against the corporate officer in *Agpro*.

¶ 30 The Pruims argue that, comparing the evidence in those two cases to the evidence in this case, this court should find that the State failed to establish their personal liability. The Pruims argue that their failure to file a required significant modification, to provide and maintain adequate financial assurances, and to provide revised cost estimates, are not enough to establish personal liability under *Petco*. The Pruims imply that *Petco* establishes the standard that conduct by a corporate officer acting in his or her corporate capacity is not conduct the court recognizes as subjecting a corporate officer to personal liability.

¶ 31 The State argues that *Petco* and *Agpro* are distinguishable in that both involved violations more in the nature of operational infractions. To that extent, the Board actually followed both decisions here, where the Board determined that the Pruims were not liable for violations relating to day-to-day operations. Regardless, the State argues, the Board could still find that the Pruims had personal involvement in the overheight, financial assurance, cost estimate, and delayed modification permit application violations. The State argues that the Board's order demonstrates that its finding of liability is not based on their status as corporate officers, but on their personal involvement or active participation in the acts that led to the violations, including the overheight violations. The State argues that under *C.J.R. Processing*, the Pruims cannot use their corporate

officer status to evade personal liability.

¶ 32 In *Petco*, 363 Ill. App. 3d at 625, the State attempted to prove that the trial court's finding, that the president of the defendant oil company was not personally liable for violations of the Illinois Oil and Gas Act (225 ILCS 725/1 through 28.1 (West 2000)) as a responsible corporate officer, was manifestly erroneous.

> "In particular, the State point[ed] to evidence that showed the following: (1) as Petco's president, Bergman exercised overall control over the company, including making significant financial decisions; (2) Bergman was directly involved in 'many aspects of the oil production operation,' ***; (3) Bergman received reports on operational matters and occasionally visited the fields; (4) Bergman knew about many of the spills and leaks that occurred between 1998 and 2000 in the Louden and Dix fields; ***; and (7) Bergman failed to implement a policy of spending money on maintenance that would prevent leaks." *Petco*, 363 Ill. App. 3d at 624.

¶ 33 The appellate court found that the trial court's finding that defendant Bergman was not personally liable was not manifestly erroneous. *Petco*, 363 Ill. App. 3d at 625. The defendant cited certain evidence which the appellate court agreed led to the conclusion that, "under the appropriate standard of review *** the trial court's finding that [the] defendant was not personally liable as a responsible corporate officer did not contain error that was 'clearly evident, plain, and indisputable.' " *Petco*, 363 Ill. App. 3d at 625.

¶ 34 In *Agpro*, the State brought an action against the defendant pesticide company and defendant Schulte, its president, individually, for violations of the Environmental Protection Act (415 ILCS 5/1 *et seq*. (West 1994)). *Agpro*, 345 Ill. App. 3dat 1014.

> "The trial court concluded *** that Schulte was personally liable under the Act for the violations Agpro committed when Schulte was president of Agpro. The trial court found that Schulte caused or allowed the contamination of the Agpro site and had control over the pollution or was in control of the area from where the pollution occurred and did not take precautions to prevent the pollution." *Agpro*, 345 Ill. App. 3d at 1017.

On appeal, Schulte argued that the State failed to demonstrate that he actively participated in the contamination so as to make him personally liable. *Agpro*, 345 Ill. App. 3d at 1027-28. The *Agpro* court ultimately held that "the trial court did not err in finding Schulte individually liable under the Act" (*Agpro*, 345 Ill. App. 3d at 1029), but its reasons for doing so seem contradictory.

¶ 35 The *Agpro* court began by citing *C.J.R. Processing, Inc.*, 269 Ill. App. 3d at 1018, for the proposition that " 'corporate officers may be held liable for their personal involvement or active participation in a violation of the Act.' [Citation.]" *Agpro*, 345 Ill. App. 3d at 1028 (quoting *C.J.R. Processing, Inc.*, 269 Ill. App. 3d at 1018). The *Agpro* court found that "[t]his 'personal involvement' or 'active participation' does not, as defendants seem to suggest, mean that the corporate officer has to perform the actual physical act that constitutes a violation in order to be held individually liable." *Agpro*, 345 Ill. App. 3d at 1028. The *Agpro* court found that its finding, that individual liability of a corporate officer is not required to be based on "the actual

physical act that constitutes [the] violation" (*Agpro*, 345 Ill. App. 3d at 1028), was

> "demonstrated by the *C.J.R. Processing, Inc.* court's reliance upon *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F. 2d 726 (8th Cir. 1986), where the vice president of the corporation was held individually liable for violations of a federal environmental protection statute because he arranged for the disposal of waste products, and the corporation's president was held individually liable because he was personally responsible for all of the corporation's operations and had the ultimate authority to control the disposal of its waste products." *Agpro*, 345 Ill. App. 3d at 1028.

¶ 36 In that case, the trial court had based its judgment against Schulte individually on its findings that:

> "Schulte was personally liable *** for the violations Agpro committed when Schulte was president of Agpro. The trial court found that Schulte caused or allowed the contamination of the Agpro site and had control over the pollution or was in control of the area from where the pollution occurred, and did not take precautions to prevent the pollution." *Agpro*, 345 Ill. App. 3d at 1028.

¶ 37 After it stated the bases for (and apparently indicating its agreement with) the *trial court's* findings that Schulte was personally liable for violations Agpro committed when he was

president (*Agpro*, 345 Ill. App. 3d at 1028), the court went on to find as follows:

> "The evidence also showed that Schulte personally ran Agpro's operations at the Agpro site, spent a great deal of time at the site, directly supervised his employees, and personally applied fertilizer and pesticides to farm fields by operating a floater. This is exactly the type of 'personal involvement' or 'active participation,' referred to in *C.J.R. Processing, Inc.*, required to hold a corporate officer individually liable under the Act. In addition, the trial court did specifically find that Schulte admitted in a July 1988 conversation with an IEPA inspector that he intentionally rinsed out the floaters on the gravel at the Agpro site." *Agpro*, 345 Ill. App. 3d at 1028-29.

¶ 38 However, the appellate court in *Agpro*, perhaps in an overabundance of caution, also stated that it found "the holding in *Browning Ferris Industries of Illinois, Inc. v. Ter Maat*, 195 F. 3d 953 (7th Cir. 1999), *** instructive." *Agpro*, 345 Ill. App. 3d at 1028.

> "*Browning-Ferris Industries of Illinois, Inc.*, was a contribution action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. § 9601 et seq. (1994)) where the individual liability of a president and principal shareholder of two corporations was at issue. [Citation.] The Seventh Circuit said that:
>
> 'if [the president and

> principal shareholder] operated the landfill personally, rather than merely directing the business of the corporations of which he was the president and which either formally, or jointly with him (as well as with each other), operated it, he is personally liable.' [Citation.]"

Agpro, 345 Ill. App. 3d at 1028 (quoting *Browning-Ferris Industries of Illinois, Inc.*, 195 F. 3d at 956).

¶ 39 The *Agpro* court did not specify whether it based its judgment (that the trial court did not commit manifest error in finding Schulte individually liable) on the evidence that Schulte *did* perform some of the "actual physical act[s] that constitute[ed] a violation," or whether that finding was merely superfluous in light of the trial court's findings that "Schulte caused or allowed the contamination of the Agpro site and had control over the pollution or was in control of the area from where the pollution occurred, and did not take precautions to prevent the pollution." *Agpro*, 345 Ill. App. 3d at 1028.

¶ 40 The *Agpro* court's reliance on *C.J.R. Processing, Inc.*, for the proposition that " 'personal involvement' or 'active participation' does not *** mean that the corporate officer has to perform the actual physical act that constitutes a violation in order to be held individually liable" *Agpro*, 345 Ill. App. 3d at 1028 (citing *C.J.R. Processing, Inc.*, 269 Ill. App. 3d at 1018) suggests the latter. The *Agpro* court's reliance on *Browning-Ferris Industries of Illinois, Inc.*, and the

statement that Schulte, by personally applying fertilizer and pesticides and operating equipment demonstrated "exactly the type of 'personal involvement' or 'active participation' referred to in *C.J.R. Processing, Inc.*, required to hold a corporate officer individually liable" (*Agpro*, 345 Ill. App. 3d at 1028-29), suggests the former.

¶ 41 The *Agpro* court's reliance on, and application of, the holding in *Browning-Ferris Industries of Illinois, Inc.*, contradicts its earlier finding that the appropriate grounds for personal liability is stated in *C.J.R. Processing, Inc.*, which the *Agpro* court accepted and applied. Moreover, *C.J.R. Processing, Inc.*, does not stand for the proposition that an actual physical act leding to a violation is necessary for a finding of personal liability. In *C.J.R. Processing, Inc.*, the State charged the defendants, including the president of C.J.R. individually, with causing or allowing various violations of the Environmental Protection Act and its regulations. *C.J.R. Processing, Inc.*, 269 Ill. App. 3d at 1014. The president moved to be dismissed as a defendant on the grounds "he acted solely in his capacity as a corporate officer" and the Act ([citation]) did not expressly include [a] corporate officer in its definition of 'person.' " *C.J.R. Processing, Inc.*, 269 Ill. App. 3d at 1015.

¶ 42 The *C.J.R. Processing, Inc.* court addressed separately the questions of whether a corporate officer is a 'person' under the Act, and whether a corporate officer may be held individually liable for a corporation's violations of the Act "when he or she is personally involved or actively participates in those violations." *C.J.R. Processing, Inc.*, 269 Ill. App. 3d at 1015. The first question is not an issue in this case. In addressing the second question, the court did not address the actual conduct involved to determine whether it constituted "personal involvement or active participation in the activities which caused the violations of the Act."

C.J.R. Processing, Inc., 269 Ill. App. 3d at 1018. Nonetheless, in reaching its holding, the *C.J.R. Processing, Inc.*, court expressly found the reasoning in *United States v. Northeastern Pharmaceutical and Chemical Co.*, 810 F. 2d 726 (8th Cir. 1986), "particularly persuasive in construing the [Illinois] Act." *C.J.R. Processing, Inc.*, 269 Ill. App. 3d at 1018. In *Northeastern Pharmaceutical and Chemical Co.*, "the president and vice president of the corporation were held individually liable for violations of [the Federal Resource Conservation and Recovery Act (RCRA)]" *C.J.R. Processing, Inc.*, 269 Ill. App. 3d at 1017 (citing *Northeastern Pharmaceutical*, 810 F. 2d at 745).

¶ 43 The *Northeastern Pharmaceutical and Chemical Co.* court did not cite any physical acts by the president or vice president that constituted the actual violation. Rather, the *Northeastern Pharmaceutical and Chemical Co.* court found that one of the corporate officers "actually participated in the conduct that violated RCRA [because] he personally *arranged* for the transportation and disposal of hazardous substances that presented an imminent and substantial endangerment to health and the environment." (Emphasis added.) *Northeastern Pharmaceutical and Chemical Co.*, 810 F. 2d at 745.

¶ 44 The *Northeastern Pharmaceutical and Chemical Co.* court went further away from requiring physical involvement or participation when it imposed liability on the second corporate officer, whom it expressly found "was not personally involved in the actual *decision* to transport and dispose of the hazardous substances." (Emphasis added.) *Northeastern Pharmaceutical*, 810 F. 3d at 745. The court found, however, that he, "[a]s *** corporate president and as a major *** shareholder, *** was the individual in charge of and directly responsible for all *** operations, *** and he had the ultimate authority to control the disposal of *** hazardous

substances." *Northeastern Pharmaceutical and Chemical Co.*, 810 F. 3d at 745. Therefore, the court held, he too was personally liable for the violation of RCRA. *Northeastern Pharmaceutical and Chemical Co.*, 810 F. 3d at 746.

¶ 45 The *Northeastern Pharmaceutical and Chemical Co.* court justified its holding by noting that "imposing liability upon only the corporation, but not those corporate officers and employees who actually make corporate decisions, would be inconsistent with Congress' intent to impose liability upon the persons who are involved in the handling and disposal of hazardous substances." *Northeastern Pharmaceutical and Chemical Co.*, 810 F. 3d at 745. Our *C.J.R. Processing, Inc.* court found this reasoning persuasive, and further noted that our own "General Assembly intended to impose liability on those responsible for harming the environment." *C.J.R. Processing, Inc.*, 269 Ill. App. 3d at 1017.

¶ 46 We adhere to the holding in *C.J.R. Processing, Inc.*, affirmed in *Agpro*, and find that individual liability of a corporate officer for the company's violations of the Act need not be predicated on the performance of "the actual physical act that constitutes [the] violation." *Agpro*, 345 Ill. App. 3d at 1028 (citing *C.J.R. Processing, Inc.*, 269 Ill. App. 3d at 1019). Rather, such liability can be based on the individual's control over the corporation when the violations were committed. *C.J.R. Processing, Inc.*, 269 Ill. App. 3d at 1018 (citing *Northeastern Pharmaceutical and Chemical Co.*, 810 F. 3d at 745).

¶ 47 APPLICATION TO CURRENT FACTS

¶ 48 In this case, the Pruims' reliance on *Petco* is unpersuasive. There, the court simply found that the trial court's decision finding that the corporate officer had no active participation or personal involvement in the acts that constituted the violation was not against the manifest

weight of the evidence. The *Petco* court simply noted that the evidence on the individual's level of day to day control conflicted, but it did not discuss the nature of that evidence itself. The *Petco* court held that it could not "under the appropriate standard of review" find that the trial court's finding that the defendant was not personally liable as a responsible corporate officer contained error that was " 'clearly evidence, plain, and indisputable.' " *Petco*, 363 Ill. App. 3d at 625. Here, on the contrary, the Pruims do not dispute the evidence that they were the responsible for day to day control of CLC's activities. Here, the evidence more than fairly supports the action taken by the Board. *Illinois Environmental Protection Agency v. Illinois Pollution Control Board*, 386 Ill. App. 3d 375, 383 (2008) ("Board's decision will be upheld on appeal when 'any evidence in the record fairly supports the action taken by an administrative agency' ").

¶ 49 The Board found that the Pruims had personal involvement and actively participated in acts that led to the failure to provide and maintain adequate financial assurance within 90 days as required by a permit (count IV), the failure to file an application for a required significant modification permit (count V), all of the counts related to a violation of the height restrictions imposed by permit on Parcel B at the landfill, including the deposit of waste in an unpermitted portion of the landfill (count VII), the conduct of a waste disposal operation without a permit (count VIII), open dumping (count IX), violating heigh restrictions (count X), the failure to timely increase financial assurance within 90 days and, subsequently, before operation of a gas management system as required by a permit (count XVII), and the failure to provide revised cost estimates of closure and postclosure costs as required by Board rules (count XIX). The Board's decision was not against the manifest weight of the evidence.

¶ 50 Because the Pruims were the only parties involved in permitting within CLC, Pelnarsh

would have no reason to know Parcel B's permitted height or whether it had been exceeded. By contrast, the Pruims' permit filings acknowledge that Parcel B was overheight. Nor did the Board find that simply signing the capacity report and permit applications, effectively acknowledging the overheight violations, established their personal liability. The Pruims were the only parties with authority to close Parcel B and who could stop accepting waste on Parcel B. Despite knowledge that Parcel B was in violation of their permit and Board regulations, the Pruims continued to accept waste at Parcel B. The Board reasonably relied on the capacity reports and evidence that, despite a lack of capacity, the landfill continued to accept waste, to find that the violation occurred and the Pruims are personally liable for that violation. The reports provided evidence in support of the Board's order.

¶ 51 The evidence asserted by the Pruims to the contrary--the alleged discrepancy noted by the engineer and the allegation that capacity remains where a building is currently located--is not so conclusive as to leave a firm conviction that the Board committed an error. The additional capacity in the revised estimate is arguably the result of the inclusion of Parcel A. The Board has broad deference to affix liability, and what evidence it considers is purely discretionary. *Ellison v. Illinois Racing Board*, 377 Ill. App. 3d 433, 443 (2007) ("admission of evidence in [administrative] hearing is purely discretionary"). That authority is not without limits, as the court has held that "[t]he findings of the administrative agency *** must rest upon competent evidence ***, and an agency may not consider a matter which is not in the record." *Rigney v. Edgar*, 135 Ill. App. 3d 893, 899 (1985). Here, however, the Pruims do not argue that the Board considered evidence *dehors* the record. Nor, in this context, do the Pruims argue that the matters the Board relied on were not competent evidence, or fail to provide substantial proof that the

alleged violations occurred.

¶ 52 The State argues, and we agree, that the Pruims' argument that capacity remains on Parcel B in areas where buildings are presently located is irrelevant to whether the violation currently exists (which the Pruims do not directly dispute); or whether they actively participated in acts that led to that violation because they had sole authority to stop accepting waste when they learned of the lack of capacity. *Northeastern Pharmaceutical and Chemical Co.*, 810 F. 3d at 745. The decision in *Northeastern Pharmaceutical and Chemical Co.* is instructive.

¶ 53 There, the corporate officer's liability was based on the fact he "arranged" for the disposal of hazardous materials in violation of the RCRA. The second officer was found liable simply because he was the corporate officer responsible for those acts. The Pruims' defense is that their conduct leding to the violations was "their normal, and required acts as corporate officers." The Pruims' arguments denying personal liability are premised on their steadfast belief that they cannot be held personally liable for their participation or involvement in acts constituting a violation when their participation or involvement stemmed from their role as corporate officers and they did no more than manage and control the company. Based on the foregoing analyses of existing precedent, those arguments must fail. The Pruims were no less responsible for the acts for which the Board held them personally liable than were the corporate officers in *Northeastern Pharmaceutical and Chemical Co*.

¶ 54 The Pruims' arguments that they simply acted as corporate officers, under the authorities cited, amounts to an admission of their personal responsibility for CLC's conduct for which the Board found them personally liable. The Pruims clearly had control over the landfill operations for which the Board found them personally liable, and they did not take precautions to prevent

the violations. That conduct is sufficient grounds to impose personal liability for the violations of the Act. *Agpro*, 345 Ill. App. 3d at 1028.

¶ 55 Moreover, the order exonerating the Pruims on some counts and holding them liable on others was within the Board's discretion.

> "[C]ourts reviewing the decision of an administrative agency "generally accord the agency broad discretion when making decisions ***." *Hollinger International, Inc. v. Bower*, 363 Ill. App .3d 313, 328 (2005).

"Administrative agencies are given wide latitude in fulfilling their duties." *Wilson*, 317 Ill. App. 3d at 64. The Pruims do not argue that the Board did not act within its discretion to determine liability on each count of the complaint against them individually, although they are dissatisfied with the outcome. Further, the Board's exoneration on some counts and not others is not sufficient to create a firm conviction that the Board erred. Rather, the Board's findings reflect its consideration of the facts and the application of its discretion to determine what acts constituting a violation the Pruims had personal involvement or active participation in, and those they did not.

¶ 56 "To find a determination against the manifest weight of the evidence requires a finding that all reasonable people would find that the opposite conclusion is clearly apparent." *Ellison*, 377 Ill. App. 3d 433, 440 (2007). "Simply put, if there is evidence of record that supports the agency's determination, it must be affirmed." *Ellison*, 377 Ill. App. 3d at 440. The Board's order finding the Pruims personally liable is not against the manifest weight of the evidence. The State has pointed to evidence of the Pruims' daily control of CLC's operations. We find that, as a matter of law, that evidence need not include proof that either of them directed the actual

physical placement of any particular waste to impose personal liability. Rather, under *Agpro*, *C.J.R. Processing, Inc.*, as well as under *Northeastern Pharmaceutical and Chemical Co.*, it is their control of CLC's operations as the responsible corporate officers while the company committed the violations, and their failure to prevent them, which forms the basis of their personal liability. For all of the foregoing reasons, the Board's order finding the Pruims personally liable is affirmed.

¶ 57 Next, the Pruims argue that the Board erroneously imposed a gross penalty against CLC and themselves individually for all of the violations in both complaints and erred in imposing joint and several liability for that penalty. They argue that all of their violations are identical to CLC's violations, but CLC committed some violations (five counts) for which the Board exonerated the Pruims of personal liability. The Pruims argue that the Board should have attributed a portion of the penalties to the violations committed by CLC only, then reduced their joint and several liability for that portion of the penalty. They also assert that an itemization of the penalties for individual violations is necessary to facilitate review should this court determine that the State failed to prove a violation. They also suggest that the penalty itself is too great in that the Board failed to consider evidence in mitigation, or the dismissal of counts related to violations that occurred many years ago.

¶ 58 Although the State complains that the Pruims cite no supporting case law, and that nothing in the Act required the Board to itemize the penalties, its only support for the proposition that the Board may impose an aggregate penalty is the "broad remedial authority" given the Board under the Act, and the courts' finding that the board is "vested with broad discretionary powers in the imposition of civil penalties" (see, *e.g.*, *Roti v. LTD Commodities*, 355 Ill. App. 3d

1039, 1054 (2005) ("While the Board is vested with broad discretionary powers in imposing penalties, the assessment may not be arbitrary")).

> "[C]ourts defer to the expertise and experience of the administrative agency in determining what sanction is appropriate to protect the public interest. [Citation.] Penalties imposed by an administrative agency should not be reversed unless they are arbitrary or unreasonable." *Wilson v. Illinois Department of Professional Regulation*, 317 Ill. App. 3d 57, 66 (2000).

¶ 59 The Pruims failed to point this court to any evidence that the Board failed to consider any evidence in mitigation. Nor do they argue that the penalty was based on the surviving counts rather than an aggregate of the surviving and dismissed counts, or point to evidence of that conclusion.

> "The party appealing the administrative agency's decision bears the burden of proof and providing a sufficient record to support any claims of error." *Board of Education of Rich Township High School District No. 227, Cook County v. Brown*, 311 Ill. App. 3d 478, 486 (1999).

It is not this court's function to reweigh the evidence to determine what the proper penalty should be.

> "On review, we are to determine whether the Board's decision is against the manifest weight of the evidence. [Citation.] That a different conclusion may be reasonable is insufficient; the

opposite conclusion must be clearly evident, plain or indisputable." *Turlek v. Pollution Control Board*, 274 Ill. App. 3d 244, 249 (1995).

The Pruims failed to demonstrate that the conclusion that Board's penalty is excessive is "clearly evident, plain, or indisputable." Nonetheless, "[t]he existence of a single, indivisible injury is necessary to establish that multiple defendants are jointly and severally liable." *Sakellariadis v. Campbell*, 391 Ill. App. 3d 795, 801 (2009).

¶ 60 The Board's order imposing personal liability on the Pruims for some of CLC's violations, and finding that the Pruims are not personally liable for other violations, proves that the total injury caused by CLC's violations is, in at least one respect, divisible[1]. Therefore, we reverse the Board's order imposing joint liability on CLC and the Pruims for *all* of CLC's violations, and remand with instructions to the Board to apportion the penalty between the violations for which CLC is liable and those for which both CLC and the Pruims are personally liable. The Board may then impose joint liability on the violations concurrent to CLC and the Pruims individually. *Agpro*, 345 Ill. App. 3d at 1018 (affirming joint and several judgment against corporate and individual defendants). But it is axiomatic that the Board may not impose a penalty on the Pruims personally, for which it found they were not personally liable.

¶ 61 CONCLUSION

¶ 62 The order of the Illinois Pollution Control Board finding the Pruims personally liable for certain violations of the Act by CLC is affirmed. The order imposing joint and several liability

[1] The Board found CLC liable on 17 counts of the complaint and the Pruims liable on 8 counts of their complaint. Seven counts against the Pruims are identical counts alleged against CLC.

for all of the violations in the consolidated proceedings is reversed, and the cause remanded for the Board to clarify its penalty to impose joint and several liability only for those counts for which CLC and the Pruims were both found liable, with liability attaching only to CLC for the remaining counts for which the Board found the Pruims were not personally liable.

¶ 63 Affirmed in part, reversed in part, and remanded with instructions.

¶ 64 JUSTICE SCHMIDT specially concurred, joined by Justice Holdridge.

¶ 65 I concur in the judgment.