STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF STATE OF MICHIGAN,

Plaintiff-Appellee,

v

Ct App No. 295275
Cir Ct Case No. 08-11574-AR

ALAN N. TAYLOR,

Defendant-Appellant.

_____/

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Brief of Amicus Curiae
Mackinac Center for Public Policy

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JURISDICTIONAL STATEMENT

Amicus curiae does not contest jurisdiction.

STATEMENT OF QUESTIONS INVOLVED

I. Does legal precedent create a presumption that every crime has a *mens rea* requirement unless the narrow criteria for a strict-liability crime are met?

Defendant responds: Yes.

People respond: Yes.

Amicus curiae responds: Yes.

II. Does violation of MCL 324.30304 require a *mens rea* element, since the crime fails to qualify as a strict-liability public-welfare offense?

Defendant responds: Yes.

People respond: No.

Amicus curiae responds: Yes.

STATEMENT OF FACTS

This case concerns whether a business owner who engages in everyday activity to expand his business can be found guilty of a crime without the government's needing to prove the owner had criminal intent.

Defendant Alan Taylor is principal owner and president of Hart Enterprises, Inc. (HEI). HEI designs specialty needles used in surgery.

HEI built a manufacturing facility and a parking lot on property that it had acquired in Sparta, Michigan. About a decade later, by May 2006, HEI's workforce had doubled, and it expanded the employee parking lot. This expansion led to charges being filed against Defendant for the allegedly improper placement of fill in wetlands. Defendant was convicted both of placing fill and of constructing a parking lot in a regulated wetland without a permit in violation of MCL 324.30304.[1]

During the trial, the court did not instruct the jury that knowledge is an element of criminal violations of the wetlands statute. Specifically, the court instructed:

> Do you understand the — just the four basic elements: wetland, contiguous, that the prosecution has proved beyond a reasonable doubt that Mr. Taylor as an individual has done the filling, and that he didn't get a permit?"

After the Circuit Court upheld the convictions, this Court denied leave to appeal. Defendant sought relief with the Michigan Supreme Court, and on October 26, 2010, the Michigan Supreme Court remanded the case to this Court "as

[1] Defendant was acquitted of one count of improperly draining a wetland without a permit.

on leave granted." Appellee's brief was filed with the Court on April 4, 2011. Pursuant to MCR 7.212(H)(1), amicus curiae Mackinac Center for Public Policy submitted a motion to file the instant brief.

ARGUMENT

I. Legal Precedent and the *Mens Rea* Presumption

A. Standard of Review

Questions of law, including questions of the applicability of jury instructions, are reviewed de novo. *People v Perez*, 469 Mich 415, 418 (2003).

B. Intent Crimes and Strict-Liability Crimes

"Criminal intent is ordinarily an element of a crime even where the crime is created by statute." *People v Lardie*, 452 Mich 231, 239 (1996). This criminal intent requirement "is no provincial or transient notion," but "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v United States,* 342 US 246, 250 (1952).

Most crimes belong to one of two categories: specific intent and general intent. The Michigan Supreme Court stated: "Specific intent is defined as a particular criminal intent beyond the act done, whereas general intent is merely the intent to perform the physical act itself." *Id*. at 240. There is a third class of crimes: strict-liability crimes. These crimes do not require the prosecution to show *mens rea* (or its synonyms scienter or intent):

> For a strict-liability crime, the people need only prove that the act was performed regardless of what the actor knew or did not know. On this basis, the distinction between a strict-liability crime and a general-intent crime is that, for a general-intent crime, the people must prove that the defendant purposefully or voluntarily performed the wrongful

> act, whereas, for a strict-liability crime, the people merely need to prove that the defendant performed the wrongful act, irrespective of whether he intended to perform it.

Id. at 240-41 (citations omitted). The question presented here is whether violation of MCL 324.30304 is a strict-liability offense.

The Michigan Supreme Court has indicated that strict-liability crimes are disfavored, but permissible:

> Statutes that create strict liability for all of their elements are not favored. Nevertheless, a state may decide under its police power that certain acts or omissions are to be punished irrespective of the actor's intent. Many of the crimes that impose strict liability have been termed "public welfare regulation."

Lardie, 452 Mich at 240 (citations omitted).

Where a statute is silent regarding criminal intent, there are two basic tests to determine whether the Legislature meant to include the *mens rea* element. First, if the statutory crime has a common-law analog, the courts presume that the Legislature meant to import that common-law crime's intent requirement. *Id*. at 241. If there is no common-law analog, courts "will infer the presence of the [*mens rea*] element unless a statute contains an express or implied indication that the legislative body wanted to dispense with it."[2] *People v Tombs*, 472 Mich 446, 454 (2005). In the absence of an "express indication," courts determine if there is an "implied indication" of strict liability — i.e., that no *mens rea* requirement exists — by applying a second test. In *People v Quinn*, 440 Mich 178 (1992), the Michigan Supreme Court identified six factors to be examined in determining whether

[2] Specifically, courts presume that the "*mens rea* requirement applies to each element of a statutory crime." *Id.* at 454-55.

violation of a particular statute was a public-welfare offense, thereby permitting the imposition of strict liability:

> (1) the statute's legislative history or its title, (2) guidance to interpretation provided by other statutes, (3) the severity of the punishment provided, (4) the severity of potential harm to the public, (5) the opportunity to ascertain the true facts, and (6) the difficulty encountered by prosecuting officials in proving a mental state.

Id. at 190 n 14 (citations omitted).

II. *Mens Rea* Is Required in the Instant Case

A. Standard of Review

Questions of law, including questions of the applicability of jury instructions, are reviewed de novo. *People v Perez*, 469 Mich 415, 418 (2003).

B. The Wetland Statute

MCL 324.30304 states:

> Except as otherwise provided in this part or by a permit issued by the department under sections 30306 to 30314 and pursuant to part 13, a person shall not do any of the following:
>
> (a) Deposit or permit the placing of fill material in a wetland.
>
> (b) Dredge, remove, or permit the removal of soil or minerals from a wetland.
>
> (c) Construct, operate, or maintain any use or development in a wetland.
>
> (d) Drain surface water from a wetland.

Id. The pertinent penalties for a violation of MCL 324.30304 are found in MCL 324.30316:

> (2) A person who violates this part is guilty of a misdemeanor, punishable by a fine of not more than $2,500.00.

> (3) A person who willfully or recklessly violates a condition or limitation in a permit issued by the department under this part, or a corporate officer who has knowledge of or is responsible for a violation, is guilty of a misdemeanor, punishable by a fine of not less than $2,500.00 nor more than $25,000.00 per day of violation, or by imprisonment for not more than 1 year, or both. A person who violates this section a second or subsequent time is guilty of a felony, punishable by a fine of not more than $50,000.00 for each day of violation, or by imprisonment for not more than 2 years, or both.
>
> (4) In addition to the penalties provided under subsections . . . [(2) and (3)], the court may order a person who violates this part to restore as nearly as possible the wetland that was affected by the violation to its original condition immediately before the violation. The restoration may include the removal of fill material deposited in the wetland or the replacement of soil, sand, or minerals.

Both MCL 324.30304 and MCL 324.30316 were enacted as part of 1995 PA 59, as were the other current wetland statutes. These statutes originally became law in 1979 PA 203 as the "Goemaere-Anderson wetland protection act."[3] 1995 PA 59 essentially just renumbered the earlier act. [4]

1. Common-law crime

In determining whether violation of the wetlands statute requires *mens rea*, the first question is whether MCL 324.30304 is the statutory embodiment of a common-law crime. If so, then the *mens rea* requirement from the common-law crime is imported into the statute.

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[3] The 1979 act was codified at MCL 280.701-722 before being moved. From 1961 to 1966, MCL 280.701-718 was home to the "inland lake improvement act of 1961," which was later renamed the "inland lake improvement act of 1966" and moved to MCL 281.901-930. 1961 PA 240; 1966 PA 345.

[4] Westlaw appears to contain an error regarding this switchover. It states that MCL 324.30304 and MCL 324.30316 were repealed as part of "§ 90103" of 1994 PA 451 and were then added as part of 1995 PA 59. There was no "§ 90103" in 1994 PA 451, however. That section was instead part of 1995 PA 59. This error does not affect the legal analysis, but might cause confusion for anyone seeking to trace the history of wetlands law in Michigan.

The current wetlands law's closest analog to a common-law crime would be the crime of public nuisance. While there are some passing references to public nuisance crimes in the Michigan Reports, no case is sufficiently similar to the instant matter to provide guidance. Therefore, *mens rea* cannot be inferred in MCL 324.30304 based on a common-law analog.

2. Intent of the Legislature

The Legislature provided no express indication that it intended a strict-liability standard for violations of MCL 324.30304. Therefore, the six *Quinn* factors must be applied to determine whether there is an "implied indication" that the Legislature intended to create a strict-liability crime in enacting MCL 324.30304.

a. Legislative history and title

As noted above, Michigan's wetlands statute was initially passed in 1979. 1979 PA 203. The House Legislative Analysis Section analyzed the proposed law twice.[5]

There was no explicit indication in either analysis that the Legislature meant to deviate from the norm of requiring *mens rea* before an individual could be convicted of a crime under the statute. It was noted that: "It is not common knowledge that wetlands are critical to both wildlife and water ecosystems." House Legislative Analysis Section, Second Analysis of Senate Bill 3 (January 17, 1980) at 1. Also, in enacting 1979 PA 203, Michigan was laying the groundwork to take over the federal government's wetland permitting as allowed under the federal

[5] Both analyses are attached.

Clean Water Act. *Id*. The federal Environmental Protection Agency had to approve any state assumption of permitting authority to assure that federal standards would be upheld. A section of the legislative analysis set out arguments both for and against the proposed statute, and this language suggested that the rush to obtain EPA approval likely prevented the Legislature from requiring completion of a statewide wetlands inventory before the law (and its criminal penalties) took effect:

> ***Against:***
>
> Many persons feel that a statewide inventory of Michigan's wetlands should be completed before a wetlands regulatory act takes effect. They fear that if all wetlands in the state are not specifically identified, many landowners will unintentionally violate the law by developing or otherwise altering land protected under the act. This is of particular concern since the penalties for violation of the act are so stringent.
>
> ***Response:***
>
> Many feel that wetlands protection need not be linked to completion of a statewide inventory. They feel that the bill adequately defines "wetlands" and that each individual has a responsibility to know what is in the law. The Federal Water Pollution Control Act which now protects Michigan's wetlands against filling does so without the benefit of an inventory, and an inventory would undoubtedly delay the state's implementation of the [federal] wetlands program.

Id. at 4.[6] The "response" section mentions "a responsibility to know," but does not indicate that the act was meant to create a standard of strict liability. This "responsibility to know" should probably be seen as equivalent to the statement that "ignorance of the law is no excuse," which the United States Supreme Court has dismissed as nothing more than a "legal cliché." *Flores-Figueora v US*, 129 SCt

[6] The first bill analysis contains identical language found for every citation mentioned in this paragraph. All of the pages for these cites match the pages cited in the main text.

1886, 1891 (2009). Thus, there is no indication in either bill analysis that the Legislature sought to enact a strict-liability criminal statute.

b. Guidance to interpretation provided by other statutes

The federal circuit courts have split on the issue of whether improperly placing pollution into regulated waters is a strict-liability crime. In *United States v Ahmad*, 101 F3d 386 (5th Cir 1996), a gasoline station owner sought to empty the water that had accumulated in a leaky gas tank. This action led to approximately 4,700 gallons of gasoline being pumped out. Some of this gasoline made it to a sewage-treatment plant, thereby creating a "tremendous explosion hazard" that could have led to "hundreds" or "thousands" of "deaths and injuries." *Id*. at 388. The defendant claimed that he thought the discharged liquid was merely water and that his jury should have been instructed that it could convict him only if it found that he knew the liquid was a pollutant — i.e., gasoline. *Id*. at 389.

The Fifth Circuit agreed, rejecting the notion that violating the federal statute was a public-welfare offense that allowed strict liability. In large part, the court rested its analysis on the United States Supreme Court's decision in *Staples v United States*, 511 US 600 (1994). In *Staples*, the Supreme Court determined whether a defendant had to know his weapon was within the statutory definition of a machine gun before he could be convicted of unlawful possession of it. The *Staples* court rejected the argument that possession of machine guns was a public-welfare offense:

> [P]ublic welfare offenses have been created by Congress, and recognized by this Court, in "limited circumstances." Typically, our cases recognizing such offenses involve statutes that regulate

> potentially harmful or injurious items. In such situations, we have reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him "in responsible relation to a public danger," he should be alerted to the probability of strict regulation, and we have assumed that in such cases Congress intended to place the burden on the defendant to "ascertain at his peril whether [his conduct] comes within the inhibition of the statute." Thus, we essentially have relied on the nature of the statute and the particular character of the items regulated to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional *mens rea* requirements.

Id. at 607 (citations omitted). In *Ahmad*, the Fifth Circuit noted that the *Staples* court did not find a machine gun to meet the "harmful or injurious" item standard. The Fifth Circuit reasoned, "Though gasoline is a 'potentially harmful or injurious item,' it is certainly no more so than are machine guns." *Ahmad*, 101 F.3d at 391.

The Ninth Circuit reached a contrary result in a case that was originally decided one year before *Staples,* but that did address that case in an amended opinion. *United States v Weitzenhoff*, 35 F3d 1275 (9th Cir 1993) as amended on denial of rehearing en banc (9th Cir 1994). *Weitzenhoff* involved the discharge of tons of toxic sewage sludge into the ocean near a popular swimming and surfing beach. The Ninth Circuit distinguished *Staples* on the basis that while gun ownership is a common, oftentimes lawful activity, sewage sludge is one of those "dangerous or deleterious devices or products or obnoxious waste materials" that falls within traditional public-welfare case law. *Weitzenhoff* F3d at 1280 (citing *Staples*, 511 US at 607). The Ninth Circuit continued:

> [T]he dumping of sewage and other pollutants into our nation's waters is precisely the type of activity that puts the discharger on notice that his acts may pose a public danger. Like other public welfare offenses that regulate the discharge of pollutants into the air, the disposal of

> hazardous wastes, the undocumented shipping of acids, and the use of pesticides on our food, the improper and excessive discharge of sewage causes cholera, hepatitis, and other serious illnesses, and can have serious repercussions for public health and welfare.

Id. at 1286.

The Ninth Circuit applied this reasoning in *United States v Hanousek*, 176 F3d 1116 (9th Cir 1999), in which a supervisor was prosecuted when a backhoe clipped an above-ground oil pipeline that then discharged heating oil into a navigable river. The defendant argued that he could not be held criminally liable for simple (as opposed to gross) negligence.

The Ninth Circuit held that under *Weitzenhoff*, the supervisor's failure was a public-welfare offense, and that since public-welfare offenses can be strict-liability crimes, they can also allow crimes based on simple negligence. *Hanousek*, 176 F3d at 1122.

The distinction between *Ahmad* and *Weitzenhoff* goes to the nature of the alleged pollutant. The *Ahmad* decision seems to be based on the fact that gasoline, like the guns at issue in *Staples*, has beneficial uses to society. Toxic sludge, the substance in *Weitzenhoff*, does not. It could be argued that heating oil also has beneficial uses and that the Ninth Circuit should have decided *Hanousek* differently. However, it is likely that the *Hanousek* panel felt itself bound by the precedent in *Weitzenhoff*, which is a prior decision of its own circuit.

It appears that inherently dangerous materials that have few beneficial uses to society are the most likely candidates for strict-liability crimes. In the instant case the defendant was charged with improperly moving dirt and laying asphalt.

Dirt and asphalt are not in and of themselves dangerous. The building of a parking lot is a common, everyday construction activity. Like guns, dirt and asphalt can be used in numerous lawful and beneficial activities. Therefore, improper movement of dirt and the construction of a parking lot should not constitute public-welfare offenses.

c. Severity of potential punishment

In *Staples*, the Supreme Court stated: "Close adherence to the early cases . . . might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense." *Staples*, 511 US at 618. But the court did not make that a categorical rule:

> We need not adopt such a definitive rule of construction to decide this case, however. Instead, we note only that where, as here, dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement. In such a case, the usual presumption that a defendant must know the facts that make his conduct illegal should apply.

Id. at 618-19.

On the first violation of MCL 324.30304, a defendant can face a stiff fine and a misdemeanor conviction. Only a subsequent conviction can lead to a felony. Clearly, the first misdemeanor conviction would provide a defendant with knowledge of the statute's requirements before the defendant could be prosecuted for a felony.

Thus, the punishment scheme of MCL 324.30304 would likely be found compatible with the requirements for a public-welfare offense. It is, however, only

one of the six elements to be considered, and it is not incompatible with an implied requirement for *mens rea*.

d. Severity of damage to public

This factor was essentially addressed above at the end of part b (see pages 11-12). As noted there, the instant case involves the alleged improper moving of dirt to create a parking lot. This is much less dangerous than the situation in *Ahmad*, where a potential explosion could have killed thousands, or the situation in *Weitzenhoff,* where tons of toxic sewage were discharged near a popular beach, thereby exposing the public to "cholera, hepatitis, and other serious illnesses." Nor is moving dirt and building a parking lot as dangerous as the improper possession of machine guns, which was the activity at issue in *Staples*.

e. Difficulty in ascertaining the true facts

There is nothing intrinsically more difficult about determining the facts regarding the alteration of a regulated wetland than there is in a multitude of other crimes. In the instant case, the facts are relatively simple: A business expanded and used fill before enlarging a parking lot. Potential fact witnesses in this — and in similar future cases — could include civil engineers, the construction company that provided the fill, and so on. While the question of what is a wetland can at times be technical, there are numerous experts in this field.

f. Difficulty encountered by prosecutors in proving mental state

This factor weighs heavily against a holding of strict liability. While prosecutors would likely find it easier to obtain convictions if there were no *mens*

rea requirement, the requirement is similar to the *mens rea* requirements they must meet on an almost daily basis. *People v Nasir*, 255 Mich App 38, 45 (2003) ("Proving an actor's state of mind is difficult in virtually all criminal prosecutions."). Showing intent to violate the wetlands law is no more difficult than showing intent in other crimes.

g. Michigan public-welfare cases

A series of Michigan cases have addressed the public-welfare question. These cases further indicate that violation of MCL 324.30304 is not a public-welfare offense.

In *People v Quinn*, 440 Mich 178 (1992), the Michigan Supreme Court looked at whether knowledge that a gun was loaded was required for a conviction under MCL 750.227c, which prohibits transportation of a loaded weapon. The court held that no such knowledge requirement was necessary. This decision was largely based on the statute's legislative history, with the court rejecting the notion that this statute was meant to work in tandem with the possession statute, which did require *mens rea*. The court also noted that the defendant would be in the best position to avoid the harm,[7] one factor typically considered necessary for a strict-liability crime.

[7] The Michigan Supreme Court's exact statement was that "the legislature correctly placed the burden of avoiding harm on the person who is in the best position to avoid it." *Quinn*, 440 Mich at 195. It should be noted that this is an unfortunate and misleading paraphrase of an important concept. Read literally, this statement would mean that all crimes could be strict-liability crimes, since the criminal is always in the best position to avoid a crime simply by not committing it.

This language originally comes from *Morissette,* where the United States Supreme Court said that public-welfare offenses "are in the nature of neglect, where the law requires care, or inaction, where it imposes a duty." *Morissette,* 342 US at 255. The court explained, "The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities." *Id.* at 256. Thus, while the ruling in *Morissette* involved a consideration of the

(Note continued on next page.)

Id. at 195. *Quinn*, however, was decided before *Staples*, in which the United States Supreme Court noted that gun ownership is an everyday occurrence that is not inherently dangerous. Whether *Quinn* should survive *Staples* is an open question.

In *People v Trotter*, 209 Mich App 244 (1995), this Court dealt with a statute allowing manslaughter prosecutions of owners of "dangerous animals" that have killed people. This Court held that the statute incorporated the common-law *mens rea* requirement of manslaughter.

In *People v Lardie*, the Michigan Supreme Court held that a potential 15-year felony for killing someone while driving intoxicated was not a public-welfare offense. The court noted that public-welfare crimes are allowed because they potentially prevent great harm:

> Generally, such statutes are designed to protect the public welfare by placing the burden of protecting society on a person "otherwise innocent but standing in responsible relation to public danger." The United States Supreme Court explained that these regulatory statutes do not require a criminal intent because the accused generally is in a position to prevent the harm.

Lardie, 452 Mich at 254. The Michigan Supreme Court noted that drunk driving was not "otherwise innocent" conduct. Further, the court noted the statute's "severe" penalty was "designed to harm a person's reputation, in order to operate as a deterrent to others." *Id.* at 255.

In *People v Jensen*, 231 Mich App 439 (1998), this Court held that an HIV-positive person's failure to inform a sexual partner of that condition was not a

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ability to prevent harm, the primary focus was on the nature of the activity (neglect and inaction) and the inherent danger and usefulness of the activity.

public-welfare offense. Relying largely on *Lardie*, this Court held that the offense was a general-intent crime. Thus, an HIV-positive person could engage in sex if his or her partner had been informed and had consented to the activity. *Id*. at 454-55.[8]

In *People v Nasir*, 255 Mich App 38 (2003), this Court held that selling cigarettes without a tax stamp was not a public-welfare offense. This Court noted that the statute was not a measure to protect the public from the dangers of cigarette smoke, but rather a "revenue provision" meant to address the "substantial and widespread smuggling of cigarettes into Michigan to circumvent the tax levied on each pack of cigarettes." *Id*. at 42-43. The potential ten-year felony conviction was described as "severe." *Id*. at 43.

In *People v Adams*, 262 Mich App 89 (2004), this Court held felony failure to provide child support is a strict-liability offense. The legislative history was key, particularly the legislative response to a prior support case from this Court, which had held that inability to pay was a valid defense against nonsupport claims. While the statute did create a four-year felony, there was an opportunity for the defendant to pay the support before sentencing. *Id*. at 98-99. Further, this Court noted that support arose only out of an earlier civil action; therefore, it was difficult for a defendant to claim a lack of knowledge of the obligation to pay. *Id*. at 100.

In *People v Tombs*, the Michigan Supreme Court rejected the argument that distribution of child pornography was a strict-liability crime. The court discussed at

[8] It is perhaps worth noting that in 1998, HIV was probably thought to be more dangerous than it might be thought today, given subsequent advances in treating AIDS. Nevertheless, no public-welfare offense was found.

length various United States Supreme Court cases that set forth the proposition that elimination of *mens rea* is disfavored but possible. The Michigan Supreme Court then applied the public-welfare test to the distribution of child pornography statute. In discussing legislative intent, the court noted that many active verbs like "promote," "finance," and "receives" were used, and that these verbs "contemplate knowing, intentional conduct on the part of the accused." *Id.* at 457. A second factor was the existence of a child pornography possession statute that required a showing of criminal intent, but involved a lesser penalty than the distribution statute. The court reasoned that these penalties would not make sense if the distribution statute did not require *mens rea.*

In *People v Schumacher*, 276 Mich App 165 (2007), this Court held that under MCL 324.16902(1), the illegal disposal of scrap tires was a strict-liability offense. It noted that the Natural Resources and Environmental Protection Act (NREPA) is "a comprehensive statutory scheme containing numerous parts, all intended to protect the environment and natural resources of this state." *Schumacher*, 276 Mich App at 171. This Court further noted that Part 169 of NREPA is "itself a comprehensive regulatory measure" meant to protect the public "from the increasing dangers of fire hazards and environmental damage attributed to growing stockpiles of scrap tires in our motor-vehicle based society." *Id.* at 171-72.

Heavy reliance was placed on the fact that a first violation of MCL 324.16902(1) was considered only a misdemeanor. *Schumacher*, 276 Mich App at 172. This Court then adopted a radical course: It turned the presumption against

strict-liability crimes in the presence of legislative silence into a presumption in favor of strict-liability crimes in the presence of legislative silence. *Tombs* was initially cited for the general rule that, "Absent some clear indication that the Legislature intended to dispense with that requirement, we presume that silence suggests the Legislature's intent not to eliminate *mens rea*." *Schumacher*, 276 Mich App at 172 (citing Tombs, 472 Mich at 456-57). It was then claimed that *Tombs* was decided not on the basis of this presumption, but on the Michigan Supreme Court's holding that the statute in that case had "affirmatively required criminal intent" — i.e., that the statute in *Tombs* was not an example of mere legislative silence, but rather an example of statutory language that left clear (even if not explicit) indications that *mens rea* was required. *Schumacher*, 276 Mich App at 172.

Returning to the tire statute, this Court then stated that MCL 324.16902(1) did not have "language from which it may be inferred that guilty knowledge is a required element for offending its mandate." *Schumacher,* 276 Mich App at 173. Relying greatly on this "lack-of-knowledge" language, this Court held that violation of the statute was a strict-liability public-welfare offense.

But as both the United States Supreme Court and the Michigan Supreme Court have noted, the lack of clear language regarding intent in a criminal statute does not mean that no intent is required. Further, this Court's reliance on the comprehensiveness of the NREPA is misplaced. The NREPA runs for hundreds of pages and covers a wide variety of topics in the field of environmental law. If the Legislature intended to override the general rule that *mens rea* is inferred in the

face of statutory silence, it needed to do so in a clear manner, *especially* given the statute's breadth. Otherwise, an immense amount of everyday activity could lead to strict-liability criminal penalties. Tens of thousands of members of the general public could be found guilty of environmental crimes involving common activities, such as moving dirt on their property, under an extensive and complex law without ever being aware that crimes were being committed. The instant case involves a single individual, but a published decision by this Court in this case would be binding and could, by effectively extending *Schumacher* to all NREPA-related activity, wipe out the *mens rea* requirement from a large number of criminal statutes.

This is not a step to take lightly. The decision in *Schumacher* was based on an incorrect reading of the controlling law, and this flaw needs to be examined before the logic of that case is extended.

If any environmental laws are going to allow for strict-liability offenses, they should be limited to those that necessarily involve obviously dangerous activity, such as the discharge of tons of toxic sludge at issue in *Weitzenhoff*. Where, however, an activity is typically innocuous and commonplace — gun ownership in *Staples*, gasoline use in *Ahmad*, or the movement of dirt and the placement of asphalt in the instant case — strict liability should be rejected absent clear Legislative intent to make it so.

Protecting the environment is a politically popular sentiment. But it should not be so popular that criminal-law principles that took centuries to develop are

casually discarded. Under these historical principles, Michigan case law, and the language of the wetland statute itself, the statutory violation of filling a wetland is not a strict-liability offense.

RELIEF REQUESTED

For the reasons stated above, amicus curiae requests that this Court hold that MCL 324.30304 is not a strict-liability offense.

Respectfully Submitted,

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Dated: April 28, 2011