

CLERK OF COURTS
MAHONING COUNTY, OHIO

MAY - 5 2009

FILED
ANTHONY VIVO, CLERK

DEFENDANT

J 2359
P000580

3. Mr. Basinger is a "person" as that term is defined under R.C. §3737.01(E) and OAC 1301:7-9-02(B)(43).

4. It was undisputed that at the time of the filing of the complaint on July 10, 2007, there was one underground storage tank ("UST") as that term is defined in R.C. §3737.87(P) and OAC 1301:7-9-02(B)(66), (67) and (68) located on the Real Estate.

5. Mr. Basinger owns and/or operates, as those terms are defined in R.C. §3737.87(G) and (H) and OAC 1301:7-9-02(B)(41) and (38), the UST located on the Real Estate.

6. As the owner of the Real Estate upon which the UST is located, Mr. Basinger is considered a "responsible person," as defined in R.C. §3737.87(N), of the UST.

7. The motor fuel gasoline and waste oil contained within the UST is a type of "petroleum," as that term is defined in R.C. §3737.87(J) and OAC 1301:7-9-02(B)(44).

8. Mr. Basinger testified that the UST had been in use for the purpose of distributing motor fuel gasoline and for disposition of waste oil, both of which are a "regulated substance." The term, "regulated substances", is defined in R.C. §3737.87(L) and OAC 1301:7-9-02(B)(49).

9. The UST on the Real Estate has been out of service since an unknown date in 1997. It was undisputed that at the time of the filing of the complaint, the UST had been out-of-service for more than one year.

10. Due to Mr. Basinger's ownership and operation of the Real Estate, he was required to comply with R.C. Chapter 3737 and all regulations promulgated thereunder.

Moreover, even if the Real Estate was properly held in his name as trustee, as the beneficiary of such trust, he had a possessory and equitable interest in the Real Estate again requiring him to comply with Chapter 3737 and its accompanying regulations.

11. OAC 1301:7-9-12 requires the owner/operator or holder of a possessory or equitable interest in real estate to either place the tank back into service, remove the tank, close it in place or change the service tank at such time as the underground storage tank has been out of service for more than one year. Additionally, such section requires that such person obtain a Closure Assessment and submit a report based on such assessment to BUSTR.

12. Mr. Basinger acquired the Real Estate on November 23, 1994. Prior to that date, the Real Estate had been owned by a third party unrelated to either Mr. Basinger or his spouse, Sandra K. Basinger ("Mrs. Basinger").

13. On March 19, 2001, BUSTR, through its duly authorized inspector, conducted an inspection in which it found multiple violations of the regulations promulgated under R.C. §3737.88. These violations included a citation for the failure to remove or permanently abandon an underground storage system which had been out-of-service for more than twelve months. Ex. PX-9. Mr. Basinger was present at the time of the inspection. Ex. PX-10. A written copy of the violations as well as an Inspection Report was hand-delivered to Mrs. Basinger on March 19, 2001. Ex. PX-9.

14. In response to the Notice of Violations, Mr. Basinger informed BUSTR that he had leased the Real Estate to a third party but sought additional information from BUSTR as to the steps that must be taken in response to the Notice of Violations. Ex. PX-10.

15. Because Mr. Basinger took no steps to resolve the issue, BUSTR wrote him on September 19, 2001 and enclosed a proposed Compliance Order and Settlement Agreement ("COSA"). Ex. PX-11. Under the COSA, Mr. Basinger was required to obtain a removal permit, remove the UST from the Real Estate, submit a written closure report and pay \$375 to BUSTR as a fine. The COSA included specific dates for each action. Verne Ord, Assistant Bureau Chief at BUSTR, testified, and the Court finds, that Mr. Basinger could have negotiated a more favorable COSA.

16. Mr. Basinger chose neither to negotiate the terms of the COSA or execute it. Instead, he again informed BUSTR that he had leased the Real Estate. Additionally, he requested additional information regarding alternatives to removal of the UST. Ex. PX-12.

17. On December 19, 2001, Mr. Ord, wrote Mr. Basinger informing him of the alternatives of changing the petroleum tank to a water storage reserve tank or a heating oil tank or abandoning the UST in place. Ex. PX-13.

18. Rather than exercising one of the alternatives outlined in Mr. Ord's December 19th letter, Mr. Basinger once again wrote BUSTR stating that it was the lessee's responsibility to comply with BUSTR's laws and regulations. Moreover, he stated that he would not sign the COSA because he may "become liable for acts or failures of the Lessee that may not have been [his] responsibility." Ex. PX-14.

19. BUSTR performed an additional inspection on May 23, 2002 of the Real Estate and determined that the UST continued to be out-of-service. Ex. PX-15. Mr. Ord testified that Mr. Basinger did not respond to the second inspection report.

20. Because of Mr. Basinger's continued failure to remove the UST, on September 25, 2003, the State Fire Marshal issued his Final Findings and Orders against Mr. Basinger (the "FFO"). Ex. PX-17. Under the FFO, Mr. Basinger was required to obtain a removal permit, remove the UST, perform a closure assessment for the removal, submit a written closure report for the removal and perform corrective actions at the Real Estate in the event that laboratory analytical results exceeded action levels. Additionally, Mr. Basinger was ordered to pay a fine in the sum of \$39,000 to BUSTR. Ex. PX-17.

21. Mr. Basinger had the right to appeal the FFO. Ex. PX-17. However, there was no dispute as to the fact that he did not appeal them.

22. Mr. Basinger acknowledged that he was told by former Fire Chief Gary Borman in 2005 that the Beaver Township Fire Department did not agree to a change-in-service for the UST to a water tank.

23. BUSTR did a third inspection of the Real Estate on June 30, 2006. The UST continued to be out-of-service. Ex. PX-19. Mr. Basinger did not respond to the third inspection.

24. On November 6, 2007, Mr. Basinger caused the UST to be removed from the Real Estate. Following that, he submitted a Closure Assessment Report to BUSTR. On January 15, 2008, BUSTR issued a "No Further Action" letter regarding the removal of the UST.

25. BUSTR attempted for over six and a half years prior to the removal of the UST to obtain its removal. The UST was not removed until after this litigation was filed. During that time period and through the date of trial, more than ten employees of BUSTR worked on this matter.

26. As Mr. Basinger testified, all interactions regarding the UST were between BUSTR and Mr. Basinger. Additionally, he stated that he was the only person that dealt with third party contractors regarding removal or other alternatives regarding the UST.

CONCLUSIONS OF LAW

1. Mr. Basinger is the owner of the Real Estate. Defendant's Exhibit DX-1 did not create a trust in the Real Estate for the benefit of Mr. and Mrs. Basinger. Instead, the exhibit simply acted as title instructions to Commonwealth Land Title Insurance Company. Ex. DX-2. Mr. and Mrs. Basinger did not own the Real Estate at the time of the execution of the Title Instructions. Ex. PX-22. As such, no valid trust could be created. *Ulmer v. Fulton* (1935), 129 Ohio St. 323. In order to create a valid trust in real property, the donor must execute and deliver the deeds of conveyance to the trustee. *Cleveland Trust Co. v. White* (1837), 58 Ohio App. 339. Here, the alleged donors, Mr. and Mrs. Basinger, had no interest in the Real Estate at the time that the deed was placed in the name of J. Paul, Basinger, "trustee."

2. Since no valid trust could come into existence as to the Real Estate, the addition of the word "Trustee" to the deed is mere surplusage that cannot be considered. *Gammarino v. Hamilton County Board of Revision* (1998), 84 Ohio St. 3d 155, 702 N.E. 2d 415; *Ternansky v. Rabatin* (1957), 141 N.E. 2d 189, 1357 Ohio App. LEXIS 1088.

3. Moreover, it is apparent that Mr. Basinger must comply with the requirements of OAC 1301:7-9-12 as he held a legal, possessory or equitable interest in the Real Estate. Under OAC 1301:7-9-12, an owner, as defined by R.C. §3737.87(H) and OAC 1301:7-9-02(B)(41), is any person who holds "a legal, possessory, or equitable interest of any kind in an underground storage tank system or in property on which the

underground storage tank is located” and includes a “lessor” of the property. The evidence is clear that Mr. Basinger held a legal, interest in the Real Estate because, as stated in Conclusion of Law No. 1, no valid trust had been created. Thus, Mr. Basinger is liable for compliance as an owner.

4. In addition, even if this Court were to determine that the Real Estate was held in trust, the evidence shows that the trust was for Mr. Basinger’s benefit and that he held a possessory or equitable interest in the Real Estate. For example, Mr. Basinger admitted that he was leasing the Real Estate. See Findings of Fact 15, 17, and 19. The definition of owner in R.C. §3737.87(H) and OAC 1301:7-9-02(B)(41) includes a “lessor” of property. As such, Mr. Basinger is an “owner” of the Real Estate and was required to comply with the requirements of OAC 1301:7-9-12.

5. Finally, under OAC 1301:7-9-12, an operator, as defined by R.C. §3737.87(G) and OAC 1301:7-9-02(B)(38), of a UST is jointly and severally liable to comply with this requirements in this rule. The evidence in this case establishes that Mr. Basinger was also the “operator” of the UST at the Real Estate. See Findings of Fact 14, 15, 17, and 25.

6. Revised Code §3737.88(A) authorizes the Fire Marshal to adopt rules for implementation of the UST program and issue orders to enforce those rules. BUSTR oversees the enforcement of these rules.

7. All rules referenced in these Findings of Fact and Conclusions of Law were adopted pursuant to R.C. §§3737.88(A) and 3737.882(B).

8. Despite repeated efforts to have the UST removed by Mr. Basinger over a period of years, Mr. Basinger failed to do so requiring the State to commence this action.

9. Mr. Basinger violated the terms of OAC 1301:7-9-12 in that he failed to permanently remove the UST, close the same in place or perform a change in service after the UST became out-of-service for more than one year.

10. Mr. Basinger violated the terms of OAC 1301:7-9-12 in that he failed to obtain a Closure Assessment of the UST and submit the written report thereof to BUSTR until November 2007.

11. The Court finds that there were 2,423 days of violation commencing on March 19, 2001 through the date of the removal of the UST on November 7, 2007.

12. The Court finds that an injunction should issue barring Mr. Basinger from violating the terms of R.C. Chapter 3737 and the rules adopted thereunder.

13. Under R.C. § 3737.882(C)(2), this Court shall assess a penalty of not more than \$10,000 per day of violation. In considering what an appropriate penalty in this case would be, the Court has examined the holding in *State of Ohio ex rel. Brown v. Dayton Malleable, Inc.* (1979), Montgomery C.P., 13 ERC 2189 (see copy attached as Exhibit A); 1981 Ohio App. LEXIS 12103, 1 Ohio St. 3d 151 (1982). The Court notes that in *Dayton Malleable*, as in the instant case, compliance with the environmental statute and regulations in question had been achieved by the date of trial. In *Dayton Malleable*, the Court outlined four factors that should be reviewed by a Court in assessing penalties. They are: 1) harm or risk of harm to public health or the environment, 2) the economic

benefit gained from delayed compliance, 3) the violator's recalcitrance, defiance or indifference to requirements of the law and 4) the enforcement costs thrust upon the public due to the violations.

14. Consideration of these factors leads this Court to the conclusion that a penalty in the sum of \$35.00 per day of violation is appropriate, resulting in a penalty in the amount of \$84,805.00. While there was no actual harm, the testimony shows that there was a risk of harm in that there were drinking wells in the area of the UST. As such, a release from the UST could have harmed drinking water. Moreover, Mr. Basinger delayed his removal of the UST for more than six and a half years with the value of such delay (the cost of the removal and the purported loss of value of the Real Estate) inuring to him. Thirdly, the Court finds that Mr. Basinger intentionally and significantly delayed compliance in this matter. Mr. Basinger was aware of the violations on March 19, 2001 and was informed of the various methods of resolving the violations in writing not later than December 19, 2001. Despite this, he took no action regarding removal of the UST until after this case was filed. Finally, the testimony was that not less than 10 BUSTR employees have been involved in the process of obtaining compliance with BUSTR's laws and regulations regarding the UST. Certainly, the citizens of this State have incurred an unnecessary and extraordinary cost because of this. The penalty is particularly well-warranted here in light of the fact that the State Fire Marshal issued his Findings and Orders against Mr. Basinger on September 25, 2003 and ordered payment of a payment in the sum of \$39,000. Despite this four additional years passed before the UST was removed.

15. The Court specifically finds that the State of Ohio need not prove actual harm in order to prevail herein. *State of Ohio ex rel. Brown v. Dayton Malleable, Inc.*, 113 ERC at 2193.; *State of Ohio ex rel. Dann v. Meadowlake Corp.*, 2007 Ohio 6798 (see copy attached as Exhibit B). Additionally, the Court finds that the issuance of the No Action Letter does not bar an award of penalties. *Ackerman v. Department of Health* (1978), 55 Ohio St. 2d 51 (An injunction shall issue for violation of a statute); *State of Ohio ex rel. Brown v. Dayton Malleable, Inc.*, 13 ERC at 2190 (penalties assessed despite the fact that compliance obtained before trial).

16. Nor did BUSTR need to prove that there actually was petroleum in the UST at the time of the removal. The case of *Village of Chardon v. Lawson Ford & Mercury Inc.*, 1994 Ohio App. LEXIS 2930 (11th C.A.) is inapplicable herein. The citations to OAC 1301:7-7-28(E)(9) set forth in that case are to the Ohio Fire Code and not to those provisions of the Ohio Administrative Code applicable to underground storage tanks in Ohio. Also, a review of OAC 1301:7-7-28(E) establishes that this regulation has been significantly revised since its citation in *Village of Chardon*. Presently, the regulation deals with “aerosols” and has utterly nothing to do with underground storage tanks.

More importantly, however, as set forth in OAC 1301:7-7-01(B)(10), Ohio Fire Code 102.10, the BUSTR requirements set forth in OAC 1301:7-9 (including those at OAC 1301:7-9-12) supersede any requirements set forth in OAC 1301:7-7 (Ohio Fire Code). Inasmuch as OAC 1301:7-9-12(I) requires a closure assessment report for an out-of-service tank whether or not there is petroleum product in the UST, this section supersedes the Ohio Fire Code cited by Mr. Basinger. Finally, even if it were a

requirement, Mr. Ord's testimony was to the effect that there was approximately 1.5 inches of diesel fuel remaining in the tank. Ex. PX-19.

17. Mr. Basinger's argument that there must be petroleum in an underground storage tank for OAC 1301:7-9-12 to apply is misplaced. The purpose of the Ohio Administrative Code is to require a closure assessment report whenever an underground storage tank has been out of service for more than one year. In the vast majority of those cases, there will be no petroleum remaining in the UST. Indeed, the lack of petroleum in the UST is why the tank is out-of-service. Under Mr. Basinger's argument, BUSTR would be unable to require all of those owners/operators of underground storage tanks to ensure that there had been no release at the site. Clearly, this was not the intention of the drafters in enacting OAC 1301:7-9-12.

18. The denial of coverage by the Petroleum Underground Storage Tank Compensation Release Board ("PUSTRCB") is immaterial herein as 1) the denial was due to Mr. Basinger's failure to timely pay the annual premium to PUSTRCB and 2) PUSTRCB is a board separate and apart from BUSTR. Ex. PX-23. Mr. Basinger's citation to *Franklin Iron & Metal Corp.* (1996), 117 Ohio App. 3d 509, 690 N.E. 2d 1310 is misplaced. Moreover, PUSTRCB's refusal to issue the certificate of coverage to him because of his failure to pay the required premiums has no impact on Mr. Basinger's need to remove the UST. PUSTRCB's coverage acts as a form of insurance in the event of a release from a UST. That coverage has nothing to do with the need to remove a UST under OAC 1301:7-9-12.


19. BUSTR had the authority to revoke the permit for a change in service in 2005 pursuant to OAC 1301:7-9-10.

20. Mr. Basinger's expenses in removing the UST are not a legitimate credit against the penalty award herein as the same are a cost of owning a UST in the State of Ohio. By acquiring the Real Estate, Mr. Basinger took on the obligations to comply with BUSTR's laws and regulations. Had he not wanted to assume such obligations, he should not have purchased the Real Estate.

Based on the foregoing, it is the Decision of the Magistrate that:

- 1) that an injunction issue barring J. Paul Basinger from violating the terms of Ohio Revised Code Chapter 3737 and all regulations promulgated thereunder; and,
- 2) that an award of penalties in the sum of \$84,805.00 be granted in favor of Plaintiff and against J. Paul Basinger.

DATE: 5/4/09


MAGISTRATE
DOMINIC J. DELAURENTIS, JR.

THE CLERK SHALL SERVE NOTICE
OF THIS ORDER UPON ALL PARTIES
WITHIN THREE (3) DAYS PER CIV.R.5

000591

NOTICE TO ATTORNEYS AND PARTIES

The parties shall have fourteen (14) days from the filing of this Decision to file written objections with the Clerk of this Court. Any such objections must be served upon all parties to this action and a copy must be provided to the Court. A party shall not assign as error on appeal of the Court's adoption of any finding of fact or conclusion of law in this Decision unless the party timely and specifically objects to that finding or conclusion as required by Civil Rule 53(E)(3).

This is an appealable order and the Clerk of Courts shall serve copies of this Decision upon all parties within three (3) business days, pursuant to Civ. R. 5.