D8390 - A47

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION

STATE OF OHIO ex rel. NANCY H. ROGERS, ATTORNEY GENERAL OF OHIO, et al.,	][	**CASE NO. 07CVH07-9067**
PLAINTIFFS,	][	**JUDGE CAIN**
vs.	][	**MAGISTRATE McCARTHY**
CENCI ENTERPRISES, INC., et al.,	][	
DEFENDANTS.	][	

MAGISTRATE'S DECISION FOLLOWING DAMAGES HEARING

This matter came on as scheduled for a damages hearing on October 20, 2008 Plaintiffs appeared by counsel Defendant did not appear or contact the court concerning his possible inability to appear

By way of pertinent background, the court granted a default judgment against defendants for injunctive and other relief on August 14, 2008 and referred this action to the magistrate in order to determine the amount, if any, of additional fees and civil penalties to be assessed against defendants, the owners and operators of a former gasoline station As owners and operations of the filling station, defendants owned underground gasoline storage tanks from which gas was pumped to fill the gas tanks of customers Five of such tanks were at one time in place, but three were removed in 2000

At about that time, according to David Israel, an inspector with the state fire marshal's office, it was discovered by third parties that gasoline either had leaked or was leaking from one or more of the tanks Defendants had an inspection performed, but because of certain shortcomings with the analysis, they were

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ordered to have a more comprehensive evaluation or analysis conducted Defendants did undertake to have this analysis accomplished, but it did not meet all of the state code requirements, according to Israel Thereafter, defendants were requested to submit to the state fire marshal's office information concerning, inter alia, ground water data and operational and maintenance records Those requests were ignored and in response, the state fire marshal advised defendants that they were noncompliant and were about to incur significant penalties, Israel testified

In November 2006, Israel inspected the premises and found that the above ground gas pumps had been removed and the underground storage tanks remained, but had not been used for more than two years Following that inspection, defendants were issued a notice of violations of specific regulations of the state fire marshal's office Those violations were for failures to register the tanks, failure to manage out-of-service tanks, and failures to procure the necessary financial responsibility coverage in connection with the ownership of underground storage tanks

Also to testify was Starr Richmond She identified herself as the executive director of the underground storage tank release compensation board and testified about the financial security requirements mandated on those owning or operating underground storage tanks In shorthand terms, owners and operators of underground storage tanks must register them and pay into a fund, the financial assurance fund, fees to be collected and disbursed to those claimants who suffer

demonstrable loss in connection with gasoline that escapes from the underground tanks

With specific reference to the defendants, Richmond testified that they paid the required fees from 1989 through 2000, but have not paid the required fees and penalties thereafter, despite receiving annual orders of assessment The claimed arrearage to the petroleum underground storage tank release compensation board is $27,200, according to Richmond The court's order entering the August 14, 2008 default finding establishes that this amount (updated to the time of the damages hearing) be awarded in the final judgment

As to the other elements of damage determination, the notion of discretionary civil penalty comes into play In this action, plaintiffs have elected to have this court consider the evidence and determine what penalties, if any should be imposed Civil penalties are a tool that can be used to implement a regulatory program *State ex rel Brown v Howard* (1981), 3 Ohio App 3d 189, 191, 444 N E 2d 469, citing *United States ex rel Marcus v Hess* (1943), 317 U S 537, 87 L Ed 443, 63 S Ct 379 In cases such as the one at bar, a civil penalty is used as an economic sanction to deter violations of the Revised Code *State v Tri-State Group, Inc* , 2004 Ohio 4441, 2004 Ohio App LEXIS 4036 (Ohio Ct App , Belmont County, Aug 20, 2004)

When determining the appropriate amount to be awarded as a civil penalty, this court should consider the following factors 1) the harm or threat of harm posed to the environment by the person violating R C Chapter 3737, 2) the level of recalcitrance, defiance, or indifference demonstrated by the violator of the law

(also referred to in case law as the defendant's good or bad faith), 3) the economic benefit gained by the violation, and, 4) the extraordinary costs incurred in enforcement of R C Chapter 3737 See, *State ex rel Brown v Dayton Malleable, Inc* (Apr 21, 1981), 2d Dist No 6722, 1981 Ohio App LEXIS 12103, partially reversed on other grounds (1982), 1 Ohio St 3d 151, 158, 1 Ohio B 185, 438 N E 2d 120 , *Mentor v Nozik* (1993), 85 Ohio App 3d 490, 494 While making this determination, the court must remember that because a civil penalty is an economic sanction designed to deter violations of the Revised Code, the penalty must be large enough to damage the offender *State ex rel Celebrezze v Thermal-Tron, Inc* (1992), 71 Ohio App 3d 11, 19, *Howard* at 191 See also, *State ex rel Dann v Meadowlake Corp* , 2007 Ohio 6798, 2007 Ohio App LEXIS 5949 (Ohio Ct App , Stark County, Dec 17, 2007)

In the instant action, and considering the first enumerated factor, the threat of harm appeared and may appear great While this conclusion is not certain, much of the uncertainty as to the potential for harm exists as a consequence of defendants failing to have the property properly inspected and by failing to have the proper scientific analyses performed On counterbalance, however, exists the circumstance that if the potential for harm were of a huge magnitude, it must be presumed that the state fire marshal's office would have used its police and other powers of to rectify or ameliorate the situation in a more prompt fashion

In considering the level of recalcitrance, defiance, or indifference demonstrated by defendants, it is found to be elevated as demonstrated by what appears to be a gross disregard of and respect for adherence to the regulations in

place to protect, particularly, members of the public If justification for continued inaction existed, defendants have failed even to attempt to make such a showing Negative inferences may be drawn in such circumstances

Where relevant evidence is within the control of a party whose interest it would naturally be to produce it and he fails to do so without a satisfactorily explanation, the finder of fact may draw an inference unfavorable to him 42 Ohio Jurisprudence 3d (1983) 391, Evidence and Witnesses, Section 137, *Christy v Douglas,* 1 Wright 485 And see, *Nationwide Mut Ins Co v Allard,* 1989 Ohio App LEXIS 4772 (Ohio Ct App , Defiance County, Dec 21, 1989)

On the matter of the economic benefit gained by defendants as a result of the violations, there is a lack of evidence The evidence exists that for several years now, the underground tanks have not been used and one may assume that defendants' business operation no longer functions as a traditional gasoline station In short, it appears that defendants did not accrue any recognizable unjust benefit from their failure to comply with applicable regulations

Concerning the fourth factor of the extraordinary costs incurred in enforcement of R C Chapter 3737, there once again is a paucity of evidence On the evidence presented, it appears that some effort was made to acquire defendants' compliance Those efforts were largely administrative in nature, consisting principally of correspondence to defendants There were a couple of inspections of the premises that could be said to be out of the usual realm In short, it does not appear that exorbitant costs or notably extraordinary expenses were involved in the enforcement involved in this case

At the damages hearing, plaintiff's[1] request for damages was ideally presented by the use of a graphic depicting three categories of damage assessment The court is not bound by the assessments suggested by plaintiff, but finds them helpful in knowing how plaintiff views damages from its perspective

Considering the first damage category, namely, defendants' failure to register the underground storage tanks since 2002, plaintiff appears to seek damages in excess of what the magistrate finds to be just For the years from 2002 to the present, plaintiff would have the court impose overlapping penalties For example, the fine for failing to register for the year 2002 extends past June 30, 2003 and is sought to be imposed to the present day For example, for the given day of September 12, 2002 plaintiff would have this court impose a penalty equating with six times what one would consider a proper daily fine or penalty (plaintiff suggests $5 00 per day)

Presumably, the rationale behind this approach is that of penalizing not only the failure to timely register in 2002, but in failing to register the tanks each and every day since that time Taking the September 12, 2002 date as an example, plaintiff seeks $31 37 as a penalty for that single day whereas the failure to have registered tanks on September 12, 2008 is a mere $5 for that day The magistrate finds this method of computation draconian in this particular case

Clearly, the failure to register the tanks is a serious matter The magistrate would impose a fine of $15 00 per day for *each single day* defendants permitted

[1] Now and hereinafter "plaintiff" refers to the attorney general's office, environmental enforcement section

the tanks to be unregistered Employing this manner of penalty the magistrate would assess damages in this category for the sum of $34,350

Moving on to the next classification of damages, the failure to obtain a certificate of financial coverage for petroleum escape loss, the same duplicating method of computing damages is suggested by plaintiff With respect to this particular item, however, the suggested approach appears, as a practical matter, overtly suspect The notion of unfairly weighing failures of past conduct was just addressed in the previous category With that approach being used with respect to financial responsibility coverage, the unfairness becomes more pronounced and apparent

For defendants failing to have the required demonstrable financial responsibility on September 12, 2002, for example, plaintiff seeks to have the court impose on defendants a penalty of $145 48 for that single day However, if plaintiff or the state fire marshal's office had determined that the matter presented a situation of greater urgency than apparently it did and filed this action in 2004, for example, then the penal sum would have equated with $85 42 for the same day [2]

In other words, by choosing to recognize this matter as one of less than the highest urgency and waiting six years to file a suit, plaintiff unfairly caused the "cost" of a single day's past noncompliance to significantly increase This, in the absence of any evidence that the risk sought to be covered probably existed and

[2] A court may consider as a mitigating factor in the calculation of penalties the government's actions in the matter See, *State ex rel Petro v Maurer Mobile Home Court, Inc*, 2007 Ohio 2262, 2007 Ohio App LEXIS 2103 (Ohio Ct App, Wood County, May 11, 2007), citing the civil penalty policy from the United States Environmental Protection Agency BNA Environmental Reporter, April 21, 1978 at pages 2011, et seq

was increasing but, rather, with the passage of time the risk was appearing to decrease inasmuch as no known claims have been made In short, it is found the method suggested by plaintiff is unjust given the facts of this case [3]

Once again recognizing that the demonstration of the existence of financial responsibility for damages is a very important matter and one that should not be taken lightly by defendants or by this court, it is the case that a more fair approach should be employed given the facts of this case The magistrate would concur with plaintiff that a fine or penalty of $20 per day is reasonable Using that sum, a penalty of $53,100 should be imposed in this category of damages

The last category of damages relates to defendants' failure to perform corrective actions to abate, assess or cleanup a gasoline leak Here, plaintiff suggests $100 per day for the failure to obtain the necessary site evaluation and report concerning same, $50 per day for the failure to remove the non-utilized storage tanks, and $50 per day for the failure to conduct a closure assessment followed by a report of same

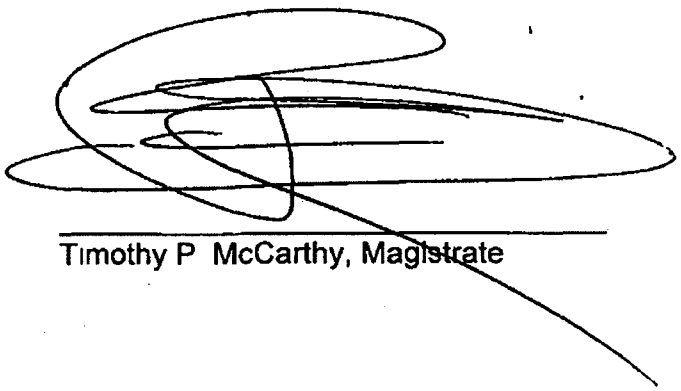
Upon consideration, the magistrate does agree with the first two mentioned items in this category of damages The relatively high daily penalty for the failure to acquire the necessary analytical investigation is a reflection of the critical nature of that effort It would appear that much of the fall out in this case could well have been prevented by a proper inspection and perhaps prompt remediation, if required

[3] The magistrate recognizes that plaintiff could turn the suggested methodology "upside down" and impose *increasing* penal sums as time passes This method, too, bears infirmities that would result in an injustice This would be particularly so when considering a highly inflated (caused by the ever-increasing penalty) present penalty for a failure to demonstrate current financial responsibility in the face of no demonstrable claims exposure and no apparent claims history

The magistrate does not concur with the third item, the failure to conduct a closure assessment, and finds that due to impossibility of performance, it would be unjust to impose sanctions for this item while imposing a sanction for the failure to remove the tanks Thus, on this last category of damages, the magistrate would award the requested and approved sums totaling $220,550

Accordingly, and upon a full consideration, the magistrate would award a judgment in favor of the petroleum underground storage tank release compensation board in the sum of $27,200 and a judgment in favor of the attorney general's office, environmental enforcement section (or other appropriate state agency) the sum of $308,000, plus costs Counsel for plaintiffs shall prepare the necessary judgment entry and submit it to the court

A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ R 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ R 53(D)(3)(b) Any party may file written objections to this decision within fourteen days from the date this decision is filed



Timothy P McCarthy, Magistrate

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