STATE OF OHIO)
) SS.
COUNTY OF LAKE)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

CITY OF MENTOR,

Plaintiff-Appellee,

- vs -

ALBERT NOZIK, et al.,

JUDGMENT ENTRY

CASE NO. 92-L-090

Defendants-Appellants,

ANTHONY J. CELEBREZE, JR.,
ATTORNEY GENERAL, STATE OF OHIO,
et al.,

Defendants-Appellees.

For the reasons stated in the Opinion of this court, the assignments of error are without merit, and it is the judgment and order of this court that the judgment of the trial court is affirmed.

Robert A. Nader

JUDGE ROBERT A. NADER

FOR THE COURT

COURT OF APPEALS

ELEVENTH DISTRICT

LAKE COUNTY, OHIO

JUDGES

CITY OF MENTOR,

Plaintiff-Appellee,

- vs -

ALBERT NOZIK, et al.,

Defendants-Appellants,

ANTHONY J. CELEBREZZE, JR., ATTORNEY GENERAL, STATE OF OHIO, et al.,

Defendants-Appellees.

HON. DONALD R. FORD, P. J.,
HON. JUDITH A. CHRISTLEY, J.,
HON. ROBERT A. NADER, J.

CASE NO. 92-L-090

OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas, Case No. 87 CIV 0191

JUDGMENT: Affirmed.

ATTY. DANIEL F. RICHARDS
3500 Kaiser Court, #202
Willoughby, Ohio 44094

(For Plaintiff-Appellee)

ATTY. ALBERT C. NOZIK
7833 Lake Shore Boulevard
Mentor-on-the-Lake, Ohio 44060

(For Defendants-Appellants)

LEE FISHER, ATTORNEY GENERAL
ATTY. ATHAN A. VINOLUS,
ASSISTANT ATTORNEY GENERAL
Environmental Enforcement Section
30 East Broad Street
Columbus, Ohio 43266-0410

(For Defendants-Appellees)

NADER, J.

This appeal is from a decision of the Lake County Court of Common Pleas, finding appellants, Albert Nozik and Mentor Lagoons Marina, to be in contempt and imposing a fine of $4,000, denying the motion to enhance pre-judgment penalties, and assessing post-judgment penalties in the amount of $71,980. The trial court also granted Civ.R. 11 sanctions in the sum of $2,250, and ordered appellants to reimburse the Mentor Health District in the amount of $3,861.66.

The underlying action from which these sanctions arose was previously before this court in *City of Mentor v. Nozik* (Nov. 30, 1990), Lake App. No. 89-L-14-080, unreported. The action was brought to enjoin appellants from depositing solid waste behind the bulkheads supporting the docks at the marina. Appellants were basically using anything that would not decompose as fill. The specifics of the underlying action may be found in our previous opinion.

Appellants have appealed the imposition of the above penalties and sanctions, setting forth the following assignments of error:

> "1. The trial court committed prejudicial error and a gross abuse of discretion in imposing sanctions for violation of Civ.R. 11, the finding being clearly against the manifest weight of the evidence.
>
> "2. The trial court committed prejudicial error in finding the defendants guilty of charges of contempt beyond a reasonable doubt and in exercising a gross abuse of discretion.
>
> "3. The trial court erred in finding, penalizing and punishing the defendants for performing clean-up work that was not included within or required by the court order."

In appellants' first assignment of error, they contend that the trial court erred in imposing attorney's fees as a Civ.R. 11 sanction. The imposition of attorney fees as a Civ.R. 11 sanction, while not expressly authorized by the rule, has been upheld in a number of appellate decisions. See, *e.g.*, *Stevens v. Kiraly* (1985), 24 Ohio App.3d 211; *Newman v. Al Castrucci Ford Sales, Inc.* (1988), 54 Ohio App.3d 166; *Gordon Food Service, Inc. v. Hot Dog John's, Inc.* (1991), 76 Ohio App.3d 105; and *Sweeney v. Hunter* (1991), 76 Ohio App.3d 159.

At the hearing on the motion for Civ.R. 11 sanctions, emphasis was placed upon the lack of supporting authority for appellants' position. Appellants contend that, in areas such as environmental law, case law is sparse, and that new arguments unsupported by case law, even if found to be incorrect, should not by themselves subject an attorney to sanctions. We agree; however, there was sufficient basis for the court to impose Civ.R. 11 sanctions in this matter.

Appellants argue that no evidence was presented that counsel willfully violated Civ.R. 11. Appellants filed answers to interrogatories stating the only items placed behind the bulkheads were dirt and driftwood; however, in the city of Mentor's motion for the imposition of Civ.R. 11 sanctions, excerpts from Mr. Nozik's trial testimony demonstrate that he knew that these statements were incorrect. At the hearing on the Motion for Civ.R. 11 sanctions, appellant Nozik does not refute this knowledge, but, instead, continues to argue that these deposits, such as refrigerators and hot water tanks, do not constitute solid waste. Knowing that more than dirt and

driftwood were deposited behind the bulkheads, appellant Nozik violated Civ.R. 11 when he signed contradictory answers to the interrogatories. This, together with other factors enumerated in the trial court's judgment entry on this issue more than amply support its conclusion. Accordingly, appellants' first assignment of error is without merit.

In their second assignment of error, appellants maintain that the trial court erred in finding them in contempt upon evidence which failed to establish appellants' guilt beyond a reasonable doubt. Contempt citations to punish completed acts of disobedience constitute criminal contempt, and the accused must be proven guilty beyond a reasonable doubt. *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250.

The temporary and preliminary restraining order of May 13, 1987, mandated that:

> "[appellants], together with their successors in office and their agents, officers, servants, employees, associates and members and each of them are hereby restrained from any further dumping, disposing, or placing of or permitting others to dump, dispose, or place solid or other waste materials or products or matter on the premises ***."

The trial court found appellants in contempt of the above order, stating:

> "Evidence at the hearing verified that the area on or about no less than eight docks exhibited conduct which violates the May 13, 1987 restraining order. Bundled newspapers dated post-May 13, 1987 were found at Docks 11 and 35; new fill was deposited over existing solid waste at Docks 29 and 32; Docks 39, 44, and 60 were supported by newly deposited solid waste; and new platforms were installed over pre-existing solid waste at Docks 45 and 54."

At the hearing, there was direct testimony establishing those charges relating to the bundles of newspaper. The post-trial briefing, in support of the charges of contempt, directs the court's attention to the videotape prepared in August of 1987, played at the original trial, and discussed during the contempt proceedings. The post-trial briefing also refers to the affidavit of John Brice, counsel for the City of Mentor, attached to the charges in contempt filed by Lake County General Health District, filed on August 29, 1988. These averments were not objected to by appellants' post-trial briefing and remain unrefuted. In fact, appellants' post-trial briefing argued that the construction of 3, 4 or 5 platforms did not violate the restraining order. Based upon the foregoing, appellants' guilt was established beyond a reasonable doubt and the second assignment of error is without merit.

In their third assignment of error, appellants contest the trial court's imposition of civil penalties. Appellants assert that the clean-up work was completed by the time of the hearing and, therefore, no additional penalties should have been imposed. This assertion is in direct conflict with evidence presented at the hearing that 15% of the ordered clean-up remains to be done.

Appellants also maintain that their clean-up efforts were hampered by the court's designee requiring more than the ordered clean-up to be done. The trial court accounted for such delay by reducing the per diem penalty from $100 to $10 for the period from May 24, 1991 to November 18, 1991.

Appellants also posit arguments relying upon the four factors of the civil penalty policy of the USEPA, which were utilized in *State ex rel. Brown v. Dayton Malleable, Inc.* (1982), 1 Ohio St.3d 151. It should be noted, however, that in *Dayton Maleable* the parties had agreed to the application of the USEPA guidelines. Here, the trial court set forth those factors as follows:

> "(1)the economic benefit gained by noncompliance; (2) the degree of recalcitrance, defiance or indifference of the violator to the law, (3) the harm or threat to the environment; and (4) the extraordinary costs incurred in enforcement."

Neither R.C. 3734.13, which authorizes a civil penalty up to $10,000 per day, nor R.C. 6111.99, with a limit of $25,000, requires the trial court to commence such an endeavor. Further, the evidence presented supports the trial court's findings with regard to the above factors. Facing the possibility of much harsher penalties, appellants should not be heard to complain about the minimal amounts imposed. As such, appellants' third assignment of error is without merit.

Based on the foregoing, the judgment of the trial court is affirmed.

Robert A. Nader

JUDGE ROBERT A. NADER

FORD, P.J.,

CHRISTLEY, J.,

Concur.

Attorney General
Lee Fisher

Civ Rule 11
Civil Pen (Dayton-M)

M E M O R A N D U M

TO: NANCY MILLER, Acting Chief Counsel

THRU: JACK VAN KLEY, Chief, EES JVK

FROM: ATHAN A. VINOLUS, AAG
Environmental Enforcement Section

DATE: April 2, 1993

RE: Recent Court of Appeals Decision in City of Mentor v. Nozik, et al.

Attached please find a recent Court of Appeals decision in the above-referenced action to which we were a party. The trial court held: Nozik was liable for Civil Rule 11 sanctions; Nozik was in contempt of a 1987 TRO; and Nozik and Mentor Lagoons were liable for post-judgment civil penalties in the amount of seventy-one thousand nine hundred eighty dollars ($71,980.00). Nozik and Mentor Lagoons Marina appealed the trial court holding. The Court of Appeals totally affirmed the trial court holding.

In upholding the trial court's Civil Rule 11 sanctions, the Court of Appeals held that Nozik's answers to interrogatories were contradictory to his trial testimony and, therefore, supported the trial court's finding that Nozik willfully violated Civil Rule 11.

In upholding the trial court's criminal contempt findings, the Court of Appeals held that Nozik's guilt was established beyond a reasonable doubt.

In upholding the trial court's assessment of post-judgment civil penalties, the Court of Appeals held that Nozik could have faced much harsher penalties and it was not error for the trial court to assess the smaller amount actually imposed. You should note that on page seven of the decision, the Court of Appeals points out that the trial court was not required by either R.C. 3734.13 or R.C. 6111.99 to follow the US EPA civil penalty policy earlier identified in the Dayton Malleable decision. Further, the Court of Appeals decision states that R.C. Chapters 3734 and 6111 set forth maximum daily amounts of civil penalties, and the decision implies that trial courts are not required to consider the extra endeavors of the penalty policy or to reduce penalties.

I have discussed this decision with Margaret A. Malone, AAG, and neither of us recommend appealing any of the civil penalty language. If you have any questions, please contact me.

/lac

cc: Margaret Malone, AAG
Heidi Sorin, OEPA, CO, DWPC
Jim Mehl, OEPA, CO, DWPC
Bill Skowronski, OEPA, NEDO
EES Attorneys

2592E(50-51)