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IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PIKE COUNTY

STATE OF OHIO, EX REL RICHARD CORDRAY, ATTORNEY GENERAL OF OHIO,	:	
	:	
Plaintiff-Appellant,	:	Case No. 10CA804
	:	
vs.	:	
	:	
FRED T. MILLER, et al.,	:	DECISION AND JUDGMENT ENTRY
	:	
Defendants-Appellees.	:	

APPEARANCES:

COUNSEL FOR APPELLANT:	Richard Cordray, Ohio Attorney General, and John F. Cayton, Assistant Ohio Attorney General, One Government Center, Ste. 1340, Toledo, Ohio 43604, and Nicholas J. Bryan, Assistant Ohio Attorney General, 30 East Broad Street, 25 th Floor, Columbus, Ohio 43215
COUNSEL FOR APPELLEES FRED T. MILLER AND MILLER SALVAGE, INC.:	Christopher R. Schraff, Porter, Wright, Morris & Arthur, 41 South High Street, 30 th Floor, Columbus, Ohio 43215
COUNSEL FOR APPELLEE MILLER LAND COMPANY:	Thomas M. Spetnagel and Paige J. McMahon, Spetnagel & McMahon, 42 East Fifth Street, Chillicothe, Ohio 45601

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:

COURT OF APPEALS
FILED
APR 21 2011

ABELE, J.

This is an appeal from a judgment that found *Fred T. Miller*
and Miller Salvage, Inc., defendants below and appellees herein,
in contempt of court. The State of Ohio, ex rel Richard Cordray,
Attorney General of Ohio, plaintiff below and appellant herein,

PIKE CO. CLERK

assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT HELD THAT MILLER LAND COMPANY IS NOT IN CONTEMPT FOR FAILURE TO COMPLY WITH THE PROVISIONS OF THE AGREED JUDGMENT ENTRY."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO AFFIRM THE STIPULATED PENALTIES SET OUT IN THE AGREED JUDGMENT ENTRY."

In 1993, Appellee Fred Miller started a wood waste recycling business. In 1999, he sold the business to his brother, Douglas Miller, for three million dollars. No payment was made on the sale, however, and Douglas Miller, by and through his company W.D. Miller Enterprises, L.L.C., operated the business for only two weeks before abandoning it. Subsequently, Fred Miller again took over the business.

In November 2001 appellant commenced the instant action and alleged various violations of environmental laws and regulations promulgated under R.C. Chapter 3704. Appellant sought, inter alia, a permanent injunction to bar appellees from further violation as well as civil penalties.

On April 15, 2005, the parties entered into an "Agreed Judgment Entry Resolving the State's Motion for Preliminary Injunction" (hereinafter "the consent decree"). The decree required appellees to take certain actions regarding,

COURT OF APPEALS
F I L E D
APR 21 2011

John E. Williams
PIKE CO. CLERK

things, the construction and operation of a "new leachate pond"¹ and the removal of wood waste from an "old footprint."² The decree also set out "stipulated penalties" for the failure to complete various actions set forth in the consent decree. Furthermore, the consent decree was to be binding both "upon the partes to [the] action" as well as their "successors, and assigns[.]"

In March 2006, unbeknownst to the appellant, a portion of the contaminated property was conveyed to another entity, Miller Land Company. That company was subsequently joined as a party defendant to the action.

On November 7, 2006, appellant filed a motion to show cause why appellees should not be held in contempt for the failure to comply with the consent decree's terms. The matter then underwent a protracted process of discovery and hearing.

On January 27, 2010, the trial court issued its decision and (1) sustained the motion in part and overruled it in part; (2) found appellees Fred Miller and Miller Salvage, Inc. in contempt of court; (3) sentenced Fred Miller to thirty days in jail for

COURT OF APPEALS
 FILED
 APR 21 2011
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¹ "Leachate" is "a liquid that has percolated through soil, rock, or waste and has extracted dissolved or suspended materials." Ohio Adm. Code 1501:13-1-02(TTT). It logically follows that a "leachate collection pond" is a place to collect and hold the water that contains those contaminants.

² The agreed judgment defines the "old footprint" as "all areas containing wood waste as identified by" a topographic survey.

John E. Williams
 PIKE CO. CLERK

contempt, but suspended that sentence to give him "an opportunity to purge" the contempt by paying \$18,000 in stipulated penalties to the State of Ohio.³

With respect to Miller Land Company, the trial court found insufficient evidence to show that it was "an aider and abettor" to any violation or that it was in "active concert or participation with the other [d]efendants" in violating the terms of the consent decree. This appeal followed.

I

In its first assignment of error, appellant asserts that the trial court erred when it declined to hold Miller Land Company in contempt of court. Specifically, appellant contends that the court ignored the fact that Miller Land Company is a successor/assignee of the Miller brothers' family business and that Fred Miller, its principle, was aware of the proceedings against the property.

Our analysis begins with the principle that a trial court enjoys broad discretion when considering a contempt motion and its judgment should not be reversed absent an abuse of discretion. In re T.B., Athens App. No. 10CA04, 2010-Ohio-2047, at ¶37; Welch v. Muir, Washington App. No. 08CA32, 2009-Ohio-3575, at ¶10. Generally, an abuse of discretion is more than an

³ In its proposed findings of facts and conclusions of law, the appellant calculated \$1,700,000 as the stipulated penalties owed under the consent decree.

COURT OF APPEALS
FILED
APR 21 2011
John E. Williams
PIKE CO. CLERK

PIKE, 10CA804

error of law or judgment; rather, it implies that a trial court's attitude is unreasonable, arbitrary or unconscionable. Landis v. Grange Mut. Ins. Co. (1998), 82 Ohio St.3d 339, 342, 695 N.E.2d 1140; Malone v. Courtyard by Marriott L.P. (1996), 74 Ohio St.3d 440, 448, 659 N.E.2d 1242. Furthermore, when applying the abuse of discretion standard, reviewing courts may not substitute their judgment for that of the trial court. State ex rel. Duncan v. Chippewa Twp. Trustees (1995), 73 Ohio St.3d 728, 732, 654 N.E.2d 1254; In re Jane Doe 1 (1991), 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181.

In the case sub judice, we reject appellant's arguments for several reasons. First, as the trial court noted, Miller Land Company was not a party to the consent decree. Indeed, it was not a party to the action until March 19, 2007, approximately two years after the consent decree. Second, even if the trial court did err, we fail to see how appellant has suffered prejudice. Appellant recognizes that Fred Miller is the principle of Miller Land Company and Miller was found in contempt and will serve jail time unless he purges himself of that contempt. Third, the trial court's finding is based on its own evaluation of the evidence at the hearing. Here, the trial court sat as trier of fact and apparently determined that the evidence is insufficient to show that Miller Land Company is in contempt. We will not guess that determination.

COURT OF APPEALS
 FILED
 APR 21 2011

John E. Williams
 PIKE CO. CLERK

We further point out that if a court possesses the inherent power to punish contemptuous conduct, it also possesses the power to determine what type of conduct constitutes contempt. State, ex rel. Turner, v. Albin (1928), 118 Ohio St. 527, 535, 161 N.E. 792. This Court and others have held that trial courts may decline to hold a party in contempt, notwithstanding uncontroverted evidence that a court order has been violated. See e.g. McClead v. McClead, Washington App. No. 06CA67, 2007-Ohio-4624, at ¶32; In the Matter of Skinner (Mar. 23, 1994), Adams App. No. 93CA547; also see e.g., Kilcoyne Properties, LLC v. Fischbach, Licking App. No. No. 03CA072, 2004-Ohio-7272, at ¶97. Thus, even though appellant may have presented convincing evidence, it is within the trial court's discretion to refuse to find Miller Land Company in contempt.

Based upon the foregoing reasons, we find nothing arbitrary, unreasonable or unconscionable with the trial court's decision not to find Miller Land Company in contempt. Accordingly, we hereby overrule the first assignment of error.

II

Appellant's second assignment of error asserts that the trial court's decision regarding the sanction against Appellee Fred Miller constitutes reversible error. Specifically, appellant argues that in light of the fact that the \$18,000 penalty against Miller is less than two percent (2%) of the

COURT OF APPEALS
 FILED
 APR 21 2011
 J. E. Williams
 PIKE CO. CLERK

PIKE, 10CA804

stipulated penalties set out in the consent decree, the court's sanction effectively waives almost all of the penalties to which the parties stipulated.

The issue of whether a trial court must impose stipulated penalties set forth in a consent decree as a sanction for contempt appears to be one of first impression.⁴ One Ohio case that involved that issue saw the issue formally withdrawn during oral argument. See State ex rel. Petro v. Earl, Richland App. No. 2004-CA-28, 2005-Ohio-1049, at ¶22. We observe, however, that the Third Circuit Court of Appeals reviewed, and upheld, a lower court's imposition of "stipulated penalties" as not constituting an abuse of discretion. See Harris v. Philadelphia (C.A.3 1995), 47 F.3d 1311, 1325. This may suggest that the

⁴ We recognize that a consent decree is a settlement that is contained in a court order. In other words, a consent order is a contract based upon the parties' agreement. As such, courts are not generally free to modify the terms of the decree absent certain circumstances, including the parties' consent, changed factual conditions or unforeseen events.

In the case sub judice, we emphasize that our decision is guided by the procedural mechanism that the appellant chose to employ. Ohio case law is replete with examples of motions to "enforce" consent decrees. See e.g. Johnson v. Wilkinson (1992), 84 Ohio App.3d 509, 513, 617 N.E.2d 707; Baird v. SDG, Inc., Wayne App. No. 05CA30, 2005-Ohio-6605; Johnson v. Morris (Dec. 13, 1993), Ross App. No. 93CA1969; Morgan v. Tillotson (Feb. 4, 1983), Lake App. No. 0-119. Here, the State of Ohio chose to forego such a motion and, instead, sought to invoke the remedy of contempt. In our view, this action placed the proceedings squarely within the trial court's discretionary purview. Had the State of Ohio filed a motion to enforce the consent decree, the trial court's decision, as well as our decision, may very well have been different.

CLERK OF APPEALS
APR 21 2011

John E. Williams
PIKE CO. CLERK

PIKE, 10CA804

court believed that the trial court also possessed the discretion not to impose stipulated penalties.

Generally, a contempt sanction is reviewed under the abuse of discretion standard. See Mitchells Salon & Day Spa, Inc. v. Bustle, Hamilton App. No. No. C-0900349, 2010 -Ohio- 1880, at ¶23; DeMarco v. DeMarco, Franklin App. No. No. 09AP-405, 2010-Ohio-445, at ¶25; Myer v. Myer, Muskingum App. No. CT2009-0014, 2009-Ohio-6884, at ¶19. We again note that to establish an abuse of discretion, an appellant must show that a decision is unreasonable, unconscionable or arbitrary.

During the trial court proceedings, some evidence was adduced concerning Fred Miller's financial resources and, as the trial court characterized it, the "ability-to-pay analysis of the Defendants." Although the trial court did not make extensive findings on the matter, it did note that the "Defendants had the ability to contribute toward the stipulated penalties." That statement suggests that the court found the penalties that appellant sought to be onerous and beyond appellees' means. Further, although the consent decree is considered a contract between the parties, it is also an order of the court. Trial courts must be afforded considerable lee-way as to the manner in which they enforce their orders. The purpose of civil contempt is to coerce compliance with a previous court order. Slone v.

Slone (Feb. 11, 2002), Pike App. No. No. 01CA665; State v. Newman

COURT OF APPEALS
 APR 21 2011

John E. Williams
 PIKE CO. CLERK

(Apr. 3, 1998), Scioto App. Nos. 97CA2507 & 97CA2525. Here, the trial court may well have concluded that at this juncture the stipulated penalties were completely beyond the appellees' ability to pay. However, an \$18,000 penalty may have been viewed as feasible and within his ability to pay.

To the extent that appellant's arguments are centered on the amount of the sanction, and that the sanction is less than two percent (2%) of the stipulated penalty, we refuse to be drawn into setting a fixed percentage below which damages in the context of a contempt citation constitute an abuse of discretion. Trial courts are in a much better position than this court to adjudicate the facts and to determine what is best under the situation.

The appellant cites State ex rel. Rogers v. Republic Environmental Systems (Ohio), Inc., (Oct. 9, 2009), Montgomery C.P. No. 1998CV03449, which it claims contains facts similar to those at issue in the case sub judice. That court pondered whether to impose stipulated penalties in a similar consent decree in light of the fact that the "aggregate amounts are disproportionate to the nature and environmental impact of the violations." In the end, the Montgomery County Court of Common Pleas believed that it did not possess the authority to deviate from the stipulated penalties. In the case sub judice, appellant contends that the trial court should have imposed the stipulated

COURT OF APPEALS
FILED
APR 21 2011

John E. Williams

penalties and its refusal to do so constitutes reversible error. We disagree for several reasons.

First, this Court is not bound by trial court decisions from our district or any other. Chautauqua Park Apartments v. McMullen (Oct. 14, 1992), Highland App. No. 791; State v. Perotti (May 14, 1991), Scioto App. No. 1845. For that matter, neither is the trial court in the case at bar.

Second, the issue cited to us in the Republic Environmental Systems case is whether the penalties were disproportionate to environmental injury inflicted. By contrast, the issue here is the trial court's concern about the appellees' ability to pay those penalties.

Finally, and more important, we are not persuaded that Republic Environmental Systems necessarily conflicts with the trial court's actions in the case sub judice. The Montgomery County Court of Common Pleas exercised its discretion one way, while the Pike County Common Pleas Court exercised its discretion another way. Again, trial courts are afforded broad discretion in contempt cases and must be given broad flexibility to decide such cases in the manner they think best.

For these reasons, we find that the trial court sanction does not constitute abuse of discretion and we hereby overrule appellant's second assignment of error.

Having reviewed all of the errors assigned and argued, we

COURT OF APPEALS
PIKE
APR 21 2011

John E. Williams
PIKE CO. CLERK

PIKE, 10CA804

11

hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

COURT OF APPEALS
F I L E D
APR 21 2011
John E. Williams
PIKE CO. CLERK

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellees recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

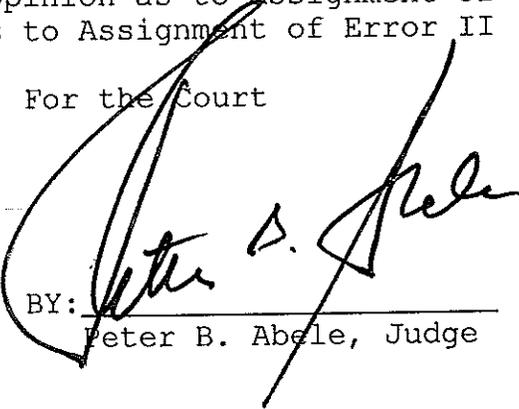
It is ordered that a special mandate issue out of this Court directing the Pike County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J.: Concurs in Judgment & Opinion

Kline, J.: Concurs in Judgment & Opinion as to Assignment of Error I and Concurs in Judgment Only as to Assignment of Error II

For the Court

BY: 

Peter B. Abele, Judge

COURT OF APPEALS

FILED
APR 21 2011

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes  final judgment entry and the time period for further appeal commences from the date of filing with the clerk. PIKE CO. CLERK