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IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

STATE OF OHIO MICHAEL DEWINE	:	CASE NO: 11M000168
Plaintiff	:	JUDGE DAVID L. FUHRY
-vs-	:	
DEER LAKE MOBILE PARK INC et al	:	**JUDGMENT ENTRY**
Defendants	:	A-Le

This matter came on for trial on May 16 and 17, 2013. At the onset of trial Plaintiff, State of Ohio ("State") indicated it was not seeking a civil penalty against Eugene Malliski and Alice Malliski as individuals. Those defendants moved for dismissal of any claims against them in regard to such personal liability. The State did not oppose such motion and the Court granted the Motion.

The State seeks injunctive relief and a $500,000.00 civil penalty against Deer Lake Mobile Home Park, Inc., ("Deer Lake"), Mark Malliski, the Malliski Family Trust and Eugene and Alice Malliski, as Trustees (collectively "Defendants"). This relief is sought for violations of R.C. Chapter 6109 ("Safe Drinking Water Act") and R.C. Chapter 6111 ("Water Pollution Control Act"). Prior to trial Attorney Robert F. DiCello represented all Defendants. At trial Mark Malliski was *pro se.*

Earlier in the case the State had prevailed on a Motion for Partial Summary Judgment. That Judgment was entered on October 22, 2012 and it determined that Defendants committed numerous violations of the Safe Drinking Water Act and the Water Pollution Control Act. In large part the trial of the instant case is premised upon the violations and related issues decided by the granting of the Motion for Partial Summary Judgment.

FACTUAL FINDINGS

At all relevant times prior to transfer to the Eugene Malliski Family Trust ("Trust") in 2003, Defendants Eugene and Alice Malliski owned approximately 40 contiguous acres of land on Kinsman Road in Burton, Ohio. Eugene and Alice Malliski used the land as a 43 unit manufactured home park with central water and sewage facilities ("Deer Lake Park").

In June, 2003 settlor Eugene Malliski created the Trust to benefit himself and Alice Malliski and their son, Mark Malliski. Alice Malliski was designated a co-trustee. At about the same time Deer Lake was incorporated with Alice Malliski as President and Eugene Malliski as Vice President. Since June, 2003 the Trust has owned Deer Lake.

As Trustees Eugene and Alice Malliski had "absolute, discretionary power to deal with any property, real or personal, held in such trust". A litany of authority is given to the trustees by the trust instrument to deal with the trust property.

At all times relevant Eugene and Alice Malliski were the Trust's Trustees and Deer Lake's corporate officers. Mark Malliski was employed by the Trust, Deer Lake, or Eugene and Alice Malliski to manage Deer Lake Park. That included the overall supervision of the park and managing its budgets and records. He also oversaw operation of the water and sewage facilities.

By February 21, 2012, Defendants had severed lateral water lines to a significant number of units such that the public water system on the property was converted to a private water system. As a private water system the Park was no longer subject to regulation as a public water supply. At all times pertinent to February 21, 2012 each defendant owned or operated the Park's public water system.

The State established that Defendants operated in violation of the Safe Drinking Water Act and Water Pollution Control Act over a long period of time. The Partial Summary Judgment established over 20,000 violation days. Over 19,000 of those days are attributable to private water system *per diem* violations which carry a maximum potential civil penalty of $25,000 each. An additional over 1,100 violation days are for violations of the Water Pollution Control Act. On a *per diem* basis each of those violations carry a maximum potential fine of $10,000. The maximum civil penalty for all violations exceeds $500,000,000.00.

The State repeatedly demanded that the Defendants comply with R.C. Chapters 6109 and 6111. The Defendants repeatedly ignored the State demands or simply refused to comply. That refusal risked human and environmental health which led the State to its filing of this action on February 9, 2011.

PROCEDURAL HISTORY

Prior to filing the complaint the State gave Defendants numerous detailed notices and descriptions of violations. The State offered assistance and suggested remedies. The State provided Defendants ample time to comply with Ohio's Water and

Pollution Laws.

Incident to its filing of suit the State obtained a Temporary Restraining Order. On March 11, 2011 a Consent Order for Preliminary Injunction was entered. On May 24, 2011 the State found certain Defendants in contempt of the injunction for failing to comply with the Consent Order for Preliminary Injunction. That Preliminary Injunction ordered the Defendants to take steps to provide safe drinking water. It also ordered Defendants to stop violating water pollution control laws.

At trial, the State introduced ample, credible evidence of Defendants' conduct with respect to environmental violations. The State failed to introduce evidence of its enforcement costs. After the Court granted the State's Motion for Partial Summary Judgment, the Defendants appealed to the 11th District Court of Appeals. The case was stayed. Thereafter, the Court of Appeals dismissed the appeal because the Court's order was not a final appealable order. The case was re-opened and then scheduled for bench trial.

LAW AND ANALYSIS

No person may violate safe drinking water or water pollution statutes. "Person" includes individuals, corporations, and trusts. See R.C. 1.59 (C). Owners and operators of public water and sewage disposal systems are responsible for water supply and pollution violations regardless of intent. Threatening environmental health is an actionable offense; actual injury need not be shown. See *State Ex rel. Petro v. Mercomp, Inc.,* 167 Ohio App. 3d 64, 73, 2006 Ohio 2729 (8th Dist.).

The case was brought by the Ohio Attorney General acting on the request of the Director of the Ohio EPA. It is notable that this is a relatively unusual circumstance. This is because it is seldom that public water suppliers or those who operate under the Water Pollution Control Act commit persistent violations resulting in referral of a case to the Ohio Attorney General. State's Exhibit 7 produced at trial recites that of the over 4,800 public water systems in Ohio, less than 1% reach a level of seriousness such that they are referred to the Ohio Attorney General for enforcement. For waste water treatment plants, less than 3% of the State's over 2,200 systems are referred.

When a statute allows a governmental agency to enforce public policy by seeking an injunction, the agency need not prove absence of inadequate remedy at law and the Court need not balance the equities. See *Ackerman v. Tri-City Geriatric & Health Care, Inc.* 55 Ohio St. 2d 51, 57, 378 NE 2d 51 145, 149 (July 12, 1978).

As the Defendants no longer operate a public water system no injunction lies for violations of R.C. Chapter 6109. Defendants however, continue to discharge sewage without a National Pollutant Discharge Elimination System ("NPDES") permit. Defendants are hereby enjoined from violating any applicable provisions of R.C. Chapter 6111.

CIVIL PENATLY

A civil penalty may be imposed against any person who has violated any provision of R.C. Chapters 6109 or certain provisions of R.C. Chapter 6111. Civil penalties are designed to deter violations. The penalty must be significant enough to operate as a deterrent to the commission of present violations as well as future violations. See *State ex rel. Brown v. Dayton Malleable, Inc.*, 1 Ohio St 3d 151, 157, 438 NE 2d 120 (1982). An effective deterrent is designed to hurt but not bankrupt the offender. See *State ex rel. Cordray v. Marrow Sanitary Co.*, 5th Dist. No. 10 CA 10, 2011 Ohio 2690 ¶26. Ohio's regulatory scheme explicitly enlists the use of economics to deter violations of environmental statues. A small penalty would only be treated by the offender as a cost of doing business rather than acting as a deterrent. The fear implicitly expressed in the scheme is that a failure to penalize a violator for past violations is likely to encourage others to also violate the law.

It is noteworthy that the imposition of a civil penalty of less than 1% of the statutory maximum has been found to be an abuse of discretion where the trial court does not address mitigating factors. Factors the court must consider are those set forth in the *Dayton Malleable* case sited above.

At trial the State established; 1) the trust owned Deer Lake and Deer Lake Park; 2) there were liquid assets in the trust exceeding $454,000; and, 3) the Defendants refused to comply and attempted to evade responsibility for violations of the Safe Drinking Water Act and Water Pollution Control Act.

Penalties are measured to the October 22, 2012 date when Partial Summary Judgment was granted. The Court has discretion to reduce the penalty to below the statutory maximum as long as it fulfills it deterrent purpose. See *Dayton Malleable* at page 157. The burden of proving that the penalty would be ruinous or disabling is on the Defendant. See *State ex rel. Dann v. Meadowlake Corp.*, 5th Dist. No. 2006 CA 00252, 2007 Ohio 6798, ¶66.

The Court may but is not required to employ the *Dayton Malleable* itemization of damages. See *City of Mentor v Nozik*, 85 Ohio App 3d 490, 494, (11th Dist. 1993).

Under *Dayton Malleable,* the Court assigns a damage penalty to each of four factors: the harm or risk of harm to public health or the environment; the economic benefits gained or to be gained from failure to, or delay in, compliance; the violator's level of recalcitrance, defiance, or indifference to the law; and unusual or extraordinary enforcement costs. Separate amounts are assigned each of the factors and are then added together. The offender may be entitled to a decrease by establishing mitigating factors. *State Ex rel. Brown v. Dayton Malleable Inc.*, 2nd Dist. No. 2722, 1981 WL 2776, *3(Apr. 21, 1981), *rev'd on other grounds)* 1 Ohio St. 3d 151, 439 NE 2d 120 (1982). Mitigating factors can include such things as a failure to comply due to weather conditions, governmental action, strikes, or other factors outside the control of the offender.

The Court notes that in this case the Defendants failed to monitor the levels of various chemicals in the public water supply; to post public notice; to file required periodic reports; to deliver consumer confidence reports and contingency plans; to obtain a license to operate before providing water to the public; and, other violations set forth in the record. All of these create a risk of harm to the public health. Actual damage does not have to be precisely ascertained nor capable of measurement before imposition of a civil penalty.

The violations in this case exposed the public to drinking water that possibly was not safe for human consumption. With respect to waste water violations, even up to the present the waters of the state are subject to sewage discharges from the Defendants plant which are unlawful. The Defendants treatment plant discharges into an unnamed tributary of the Cuyahoga River.

THE COURT FURTHER FINDS THAT the Defendants exhibited open recalcitrance as well as pronounced indifference to their duties. The Defendants knew the requirements to monitor; to hire a certified operator; and, to obtain an NPDPS permit. They failed to do so. Their attitude was one of disregard for the public health and at times, open hostility to those who sought to protect the health of the public and the enforcement.

The Defendants benefited economically to an extent by virtue of their violations. They didn't pay fees associated with properly operating the waste water treatment plant, they didn't do the sampling, pay for the license, or otherwise do those things that were required of them when operating a public water supply and waste water treatment plant. The State provided evidence at trial that established a quantifiable

savings to the Defendants of at least $12,000.

The Court is also entitled to infer that the State of Ohio incurred significant enforcement costs in bringing suit against these Defendants. As stated previously the statutory scheme governing enforcement of Ohio's environmental laws is one designed to be self regulating. It depends upon cooperation of the regulated industry through its self monitoring, self reporting, and self correction. It is designed to avoid reaching litigation stage, let alone the stage of litigation that this case attained. The Ohio Environmental Protection Agency made every reasonable effort to avoid referring this case to the Ohio Attorney General for litigation.

The Court further notes that it is not the duty of the State to establish that the Defendants have an ability to pay for violations. The burden is upon the Defendants to establish inability to pay as a mitigating factor.

Despite having no duty to establish an ability to pay the State of Ohio did establish that the Defendants had over $400,000 in liquid assets in the trust. Further, the State established that the Defendants owned the Park property (over 40 acres) as set forth in State's Exhibit 19.

The Court cannot presume that the Defendants have any extraordinary debt. The Defendants presented no credible evidence of an inability to pay. The Defendants did not show what their financial condition amounted to.

In addition to a civil penalty the State also seeks the issuance of an injunction as previously mentioned.

The Court imposes a penalty calculated under *Dayton Malleable* as follows:

1. Redress the harm or risk of harm to the public health or environment $50,000;

2. Removal of economic benefit gained from non-compliance or delayed compliance - $12,000;

3. Recalcitrance, defiance, or indifference to the law - $100,000;

4. Recovery of unusual enforcement costs - $50,000.00.

Total **$212,000.00**

THE COURT FINDS such penalty reasonable even without specific itemizations pursuant to *Dayton Malleable.*

A civil penalty total of $212,000 is sufficient to deter violations and within Defendants' ability to pay.

THE ORDER

WHEREFORE, the Court Orders, Adjudges, and Decrees, both in its informed discretion and after considering the *Dayton Malleable* factors, that a civil penalty of $212,000 be and is hereby awarded in favor of the State of Ohio, ex rel. Michael DeWine, Ohio Attorney General and against Deer Lake, Mark Malliski, the Malliski Family Trust and Trustees Eugene and Alice Malliski. The Judgment is joint and several as to all. The Judgment does not operate against Eugene and Alice Malliski personally. Further, the costs of this action are also awarded in favor of the State and against the foregoing Defendants. The Judgment shall bear interest at the Judgment rate of 3% from the date of this entry.

Deer Lake, Mark Malliski, the Malliski Family Trust and Trustees Eugene and Alice Malliski shall apply for, obtain, and comply with the terms of an EPDPS permit within **thirty (30) days** of this judgment, shall complete a waste water treatment capacity analysis for the waste water treatment system within **forty-five (45) days** of this judgment, and shall comply with all applicable laws and rules including those set forth in Title 61 of the Ohio Revised Code within **forty-five (45) days** of this judgment.

IT IS SO ORDERED.

DAVID L. FUHRY, JUDGE

cc: Robert DiCello, Esq. ✓
Aaron Farmer, Esq. ✓
Mark Malliski ✓

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TO THE CLERK:
Serve upon all parties, not in default for failure to appear (per Civil Rule 5-(B), notice of this judgment and its date of journalization.

Per Sup.R.26(F), exhibits, if any, may be retrieved after 40 days from the conclusion of litigation, including times for direct appeal. Contact the Court Reporter or said exhibits shall be destroyed 180 days from the date of this entry.