

FILED
COURT OF COMMON PLEAS
TUSCARAWAS COUNTY, OHIO

IN THE COURT OF COMMON PLEAS

2012 JUL 10 PM 2 59

TUSCARAWAS COUNTY, OHIO

JEANNE M. STEPHEN
CLERK OF COURTS

GENERAL TRIAL DIVISION

STATE OF OHIO, ex rel., OHIO
ATTORNEY GENERAL,

PLAINTIFF

vs.

SHIRLEY A. MASSARELLI,

DEFENDANT

CASE NO. 2010 CV 04 0541

JUDGE

EDWARD EMMETT O'FARRELL

JUDGMENT ENTRY - FURTHER NON-ORAL CONSIDERATION CONDUCTED ON 7/9/2012 PERTAINING TO THE ISSUE OF AN AWARD OF A CIVIL PENALTY AGAINST DEFENDANT - CIVIL PENALTY OF \$144,450.00 AWARDED AGAINST DEFENDANT AND IN FAVOR OF PLAINTIFF - PLAINTIFF'S REQUEST FOR ATTORNEY FEES OVERRULED - ORDERS ENTERED

This matter was further considered by Edward Emmett O'Farrell, Judge, Court of Common Pleas, Tuscarawas County, Ohio, General Trial Division, on 7/9/2012 on a **Non-Oral** basis relative to the following:

- ◆ 4/6/2011 **Judgment Entry** granting partial summary judgment in favor of Plaintiff as to liability only
- ◆ **Plaintiff's Pre-Hearing Civil Penalty Brief** filed on 4/2/2012
- ◆ **Plaintiff's Amended Pre-Hearing Civil Penalty Brief** filed on 4/3/2012
- ◆ 4/5/2012 **Oral/Evidentiary** hearing for the purpose of considering amount of **Civil Penalty**, if any, to be awarded Plaintiff and against Defendant

- ◆ **Plaintiff's Civil Penalty Post-Hearing Brief** filed on 4/13/2012
- ◆ **Defendant's Post-Trial Memorandum** filed on 5/4/2012
- ◆ **Plaintiff State of Ohio's Reply to Defendant's Response to Plaintiff's Civil Penalty Post-Hearing Brief** filed on 5/14/2012
- ◆ **5/22/2012 Judgment Entry** deferring a decision relative to the award of a civil penalty against Defendant and in behalf of Plaintiff

The Court

FINDS that Plaintiff requests a civil penalty in the amount of \$722,250.00 (\$50.00 per day of violation for the 14,445 days in which Defendant was found to have been in violation of Ohio safe drinking water law) plus reasonable attorney's fees. Plaintiff argues that it is too late for Defendant to raise its proper referral argument because judgment on liability has already been established.

FINDS that Defendant argues that the Ohio Attorney General is only permitted to take action on behalf of the Director of the Ohio Environmental Protection Agency (hereafter "OEPA") if the Director of OEPA makes a written request of the Ohio Attorney General to do so. Defendant argues that absent the necessary request, the Attorney General has no jurisdiction to take any action on behalf of the Director of the OEPA. Defendant argues that the Ohio Attorney General did not have the authority to bring suit against Defendant without a written request from the director of the OEPA. Defendant further argues that the OEPA delayed its enforcement causing additional days of violations. Defendant also argues that the requested penalty is excessive because of her limited

resources and low income, and that the requested penalty exceeds the penalties given to large corporations in Ohio.

FINDS that R.C. 6109.32 provides, in relevant part, that “[t]he attorney general, upon written request by the director [of environmental protection], shall bring an action for injunction or other appropriate action against any person violating or threatening to violate such section.”

FINDS that the Ninth District Court of Appeals found that the attorney general had authorization to file an action regarding alleged drinking-water violations where the attorney general presented a referral letter at a hearing over a year after the suit was filed. *See State ex rel. Cordray v. Helms*, 192 Ohio App.3d 426, 2011-Ohio-569, 949 N.E.2d 522, ¶10-13.

FINDS that Plaintiff has presented the Court with evidence to show that a proper referral was made to the Ohio Attorney General by the Director of the OEPA.

FINDS that neither of the parties has presented the Court with any case authority to suggest that documentation regarding the referral from the Director of the OEPA is a filing requirement or that the Ohio Attorney General must prove that a written referral was properly made before judgment can be issued.

FINDS that Defendant’s argument regarding lack of jurisdiction is unpersuasive.

FINDS that R.C. 6109.31 provides that:

“No person shall violate this chapter, any rule adopted under it, or any order or term or condition of a license, license renewal, variance, or exemption granted by the director of environmental protection under it. Each day of noncompliance is a separate violation.”

FINDS that R.C. 6109.33 provides that a person who violates R.C. 6109.31 shall pay a civil penalty of not more than \$25,000.00 for each violation, to be paid into the state treasury to the credit of the drinking water protection fund.

FINDS that the Fifth District Court of Appeals has found that a trial court has no discretion regarding whether or not to impose a civil penalty because R.C. 6109.33 makes a penalty mandatory. *State ex rel. Dann v. Meadowlake Corp.*, 5th Dist. No. 2006 CA 00252, 2007-Ohio-6798, ¶50, citing *State v. Tri-State Group, Inc.*, 7th Dist. No. 03 BE 611, 2004-Ohio-4441.

FINDS, however, that the trial court does have discretion in determining the amount of the penalty imposed, based upon the evidence in the case. *Meadowlake Corp.*, at ¶50.

FINDS that “in determining the appropriate amount of a civil penalty, the trial court should consider the following factors: 1) the harm or threat of harm posed to the environment by the violations; 2) the level of recalcitrance, defiance, or indifference demonstrated by the violator of the law (the defendant’s good or bad faith); 3) the economic benefit gained by the violation; and, 4) the extraordinary costs incurred in enforcement.” *Meadowlake Corp.*, ¶51, citing *Tri-State Group, Inc.*, at ¶104. Furthermore, “in determining a penalty, the trial court must remember that because a civil

penalty is an economic sanction designed to deter violations, the penalty must be large enough to hurt the offender.” *Meadowlake Corp.*, at ¶51, citing *Tri-State Group, Inc.*, at ¶104.

FINDS that the financial status of the defendant is relevant to determine whether the civil penalty is appropriate to deter future conduct. *State ex rel. Ohio Atty. Gen. v. LG Dev. Corp.*, 187 Ohio App.3d 211, 2010-Ohio-1676, 931 N.E.2d 642, ¶36, citing *State ex rel. Celebrezze v. Thermal-Tron, Inc.*, 71 Ohio App.3d 11, 19, 592 N.E.2d 912 (1992).

FINDS that the party that has violated R.C. Chapter 6109 bears the burden of showing that the impact of a proposed penalty would be ruinous or otherwise disabling. *Meadowlake Corp.*, at ¶66, citing *United States v. Golf Water Park Co., Inc.* (S.D. Miss. 1998), 14 F.Supp.2d 854, 868.

FINDS that the Ninth District Court of Appeals found that the trial court’s imposition of a fine that was less than one percent of the maximum allowable fine was not large enough to financially hurt the defendants and deter future violations where the court failed to mention that it had considered all four factors. *State ex rel. Rogers v. Elbert*, 180 Ohio App.3d 284, 2008-Ohio-6746, 905 N.E.2d 235, ¶62.

FINDS that since Defendant Massarelli violated R.C. 6109.31, she must pay a civil penalty for each violation into the state treasury to the credit of the drinking water protection fund.

FINDS that there were 14,445 separate violations of the safe drinking water laws because Defendant Massarelli was in violation of the laws for 14,445 days.

FINDS that a civil penalty in the amount of \$144,450.00 should be assessed to Defendant Massarelli, which represents a penalty of \$10.00 for each violation.

FINDS, upon review of the factors found in *State ex rel. Dann v. Meadowlake Corp*, that, 1) the harm or threat of harm posed to the environment by Defendant's violations was virtually non-existent; however, the harm or threat of harm resulting from Defendant Massarelli's violations of the applicable water statutes posed a moderate threat to the consuming public at her places of business; 2) Defendant Massarelli's level of indifference to the potential threat caused by her violations was significant; 3) Defendant Massarelli gained an economic benefit from her violation of the safe drinking water laws, which was not in excess of \$144,450.00; and 4) the costs incurred in enforcement were relatively minimal.

FINDS, based on the economic and financial circumstances of the Defendant, that the civil penalty of \$144,450.00 will cause significant financial and economic impact to the Defendant.

FINDS, in determining the civil penalty assessed to Defendant, that the economic sanction represented by the civil penalty, in this case, serves as a significant deterrent to future violations by others in the community.

FINDS that Plaintiff's request for attorney fees is not well taken and should be Overruled.

It is therefore

ORDERED that a **civil penalty** in the amount of **\$144,450.00** is assessed to **Defendant Massarelli**.

ORDERED that Defendant Massarelli shall pay \$144,450.00 into the state treasury to the credit of the drinking water protection fund within 180 days of the file-stamped date of this Judgment Entry.


ORDERED that Plaintiff's **request for attorney fees** is **Overruled**.

ORDERED that Court costs shall be assessed to Defendant.

ORDERED that the Clerk of Courts shall close this case file and remove it from the pending docket of the undersigned.



Edward Emmett O'Farrell, Judge



Date

cc: Court Administrator's Office
Court
Asst. Attys. General Casey L. Chapman and Alana R. Shockey
Atty. Eugene H. Nemitz Jr.
Clerk of Courts

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ATTORNEY GENERAL OFFICE
ENVIRONMENTAL ENFORCEMENT

proposed penalty exceeds the penalty given to