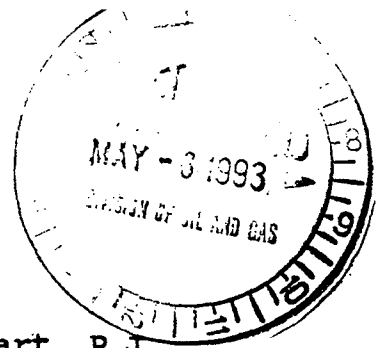


COURT OF APPEALS
MORGAN COUNTY, OHIO
FIFTH APPELLATE DISTRICT



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

Plaintiff-Appellee

-vs-

B & B ENTERPRISES, et al.

Defendants-Appellants

JUDGES:
Hon. Irene B. Smart, P.J.
Hon. William B. Hoffman, J.
Hon. Sheila G. Farmer, J.

Case No. CA-92-1

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the
Court of Common Pleas
Case No. CV-89-1

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

For Defendants-Appellants

LEE FISHER
ATTORNEY GENERAL OF OHIO

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FILED IN COURT OF APPEALS

Richard D. Welch 19 93
Clerk of Courts
Deputy

Time: 10:25 AM

CH-2, (P. 60)

FARMER, J.

This case is an appeal of a judgment from the Morgan County Court of Common Pleas finding that appellants, B & B Enterprises, Branham Well Management, Inc., and Raymond Branham, failed to comply with a consent order they entered into with appellee, State of Ohio, and finding appellants in contempt of that order. The consent order is a final judgment entry and permanent injunction wherein appellants agreed to bring fifteen oil and gas wells and well sites, which were in violation of R.C. Chapter 1509, into compliance with appellee's public health, safety and environmental laws. Appellants agreed to complete all work of each noncompliant well by October 15, 1990.

On October 18, 1991, one year after the completion date had come and gone, appellee filed its charges in contempt. Appellants were subsequently ordered to appear before the court and show cause why they should not be found in contempt in a hearing which was held on November 1, 1991. Appellee appeared by and through counsel, Ms. Laura J. Steffee. Appellant Raymond Branham appeared pro se and appeared on behalf of appellants B & B Enterprises and Branham Well Management, Inc.

On November 21, 1991, pursuant to R.C. 2705.02(A), 2705.05, and 2705.06, the court issued its judgment entry finding appellants in contempt for failing to fully comply with the consent order and complete the required compliance work with respect to eight

noncompliant wells. The court assessed a monetary sum on a per well, per day basis, and ordered work on each of the noncompliant wells to begin immediately. The court further ordered the monetary sum to begin to accrue on the date of filing of the court's judgment entry and to continue for each day each well remains in noncompliance.

Appellants timely filed their notice of appeal and this matter is now before this court for consideration.

Assignments of error are as follows:

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION BY DEPRIVING THE APPELLANT, RAYMOND BRANHAM, OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL AND TO APPOINTED COUNSEL AND THEREFORE, HIS CONVICTION MUST BE VACATED AND/OR REVERSED AND REMANDED FOR A NEW TRIAL.

ASSIGNMENT OF ERROR NO. II

DEFENDANTS-APPELLANTS' CONVICTION AND CONTEMPT OF COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND MUST BE VACATED AND/OR REVERSED AND REMANDED FOR A NEW TRIAL.

ASSIGNMENT OF ERROR NO. III

THE TRIAL COURT PREJUDICIALLY ERRED AND ABUSED ITS DISCRETION BY IMPOSING A FINE UPON DEFENDANTS-APPELLANTS WHICH EXCEEDED ITS STATUTORY AUTHORITY TO ACT AND WHICH VIOLATED THE "EXCESSIVE FINES" CLAUSES OF THE UNITED STATES AND OHIO CONSTITUTIONS.

I

Appellants claim that they were deprived of their right to a fair trial and to appointed counsel. We disagree.

Appellant Raymond Branham contends that the contempt hearing was criminal in nature because he could have been imprisoned. Appellant argues that he was entitled to a court-appointed attorney. In support of this position, appellant cites that the charges in the contempt's prayer filed sub judice asked the court to issue an order requiring appellants to appear to show cause why appellants "***should not be held in contempt of court, and be accordingly fined, imprisoned, or both." In addition, appellee's memoranda to the trial court cited R.C. 2705.02(A), 2705.05, and 2705.06.

In order to resolve this issue, it is necessary to determine whether the contempt prayed for is civil or criminal in nature. Both parties agree that the order sought to be enforced is civil in nature. Appellee asked the trial court to enforce the agreed journal entry and consent order of August 9, 1990, against appellants. That order established that certain items were to be completed by a date certain, along with a payment of a fine. The order, at page eight, further established the right of the trial court to make "any order or decree it may deem necessary to carry out this Journal Entry and Consent Order."

Using the standard for comparing the difference between criminal and civil contempt set forth in Brown v. Executive 200, Inc. (1980), 64 Ohio St.2d 250, we are to look at the "***character and purpose of the punishment." Id. at 253. In a civil contempt

the punishment is remedial or coercive and for the benefit of the complainant. Brown. Further, where the complainant is the State of Ohio, the penalty in contempt may "compensate the Attorney General and the people of Ohio *** for the necessity of bringing proceedings to enforce compliance with the consent judgment decree." Id.

A review of the proceedings and order of the court establish that appellee did seek the compliance with a consent judgment decree and the sanctions being imposed are only if appellants continue to violate the court's order, at page two:

2. Defendants shall pay a fine of One Hundred Dollars (\$100.00) per day, per well, for each day that each of the eight (8) non-compliant wells remains in non-compliance with this Court's Journal Entry of August 8, 1991. (Emphasis added).

We therefore conclude that the matter was a civil contempt proceeding and appellants were not entitled to appointed counsel. In re Calhoun (1976), 47 Ohio St.2d 15.

Assignment of Error I is overruled.

II

Appellants claim that the finding of contempt was against the manifest weight of the evidence. We disagree.

The standard of proof in a civil contempt proceeding is by clear and convincing evidence. Brown, at 253. A review of the record demonstrates the following: 1) appellants were aware of the requirements of the consent decree (T.58-59); 2) appellants did not fulfill the requirements of the consent decree (T.58-59); and 3)

appellants' noncompliance was a blatant disregard of the order. Appellant himself stated, "***I admit the wells are not plugged and at the time are not in production*** we just wasn't in any hurry about putting it back in because we don't lose anything when those wells sit for a while." T.43-44.

The determination of "clear and convincing evidence" is within the discretion of the trier of facts. We will not disturb the decision of the trial court absent a showing of an abuse of discretion. C.E. Morris Co. v. Foley Constr. Co. (1978), 54 Ohio St.2d 279.

Assignment of Error II is overruled.

III

Appellants claim that the fines levied by the trial court exceeded the statutory authority and are in violation of the United States and Ohio Constitutions. We disagree.

R.C. 2705.05 and 2727.12 set limits on the amount of fines that may be imposed for contempt. We concur with established case law that such fines are cumulative rather than exclusive. Sawbrook Steel Castings v. United Steel Workers of America (1947), 148 Ohio St. 73; State, ex rel. Bruns Coal Co. v. Compton (1953), 96 Ohio App. 541.

The \$100 per day, per well, fine did not commence until the filing of the trial court's order. Appellants could have purged themselves of contempt on day one of the entry. The imposition of a per-day fine cannot be termed an abuse of discretion by the trial court. It is within the inherent powers of any Ohio court to

punish for contempt and that power is not limited by legislative enactment. Cincinnati v. Cincinnati District Council 51 (1973), 35 Ohio St.2d 197.

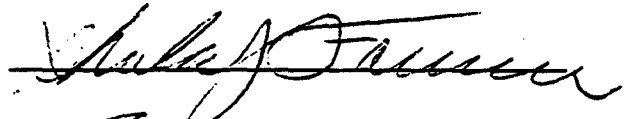
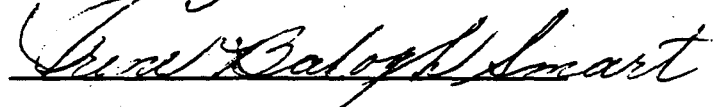
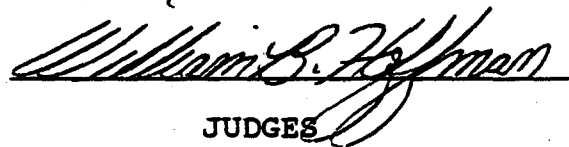
Assignment of Error III is overruled.

The judgment of the Court of Common Pleas, Morgan County, Ohio, is hereby affirmed.

By Farmer, J.

Smart, P.J. and

Hoffman, J. concur.




JUDGES

SGF/emc 0427 0428

IN THE COURT OF APPEALS FOR MORGAN COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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

Plaintiff-Appellee

-vs-

B & B ENTERPRISES, et al.

Defendants-Appellants

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JUDGMENT ENTRY

CASE NO. CA-92-1

For the reasons stated in the Memorandum-Opinion on file,
the judgment of the Court of Common Pleas, Morgan County, Ohio, is
affirmed.

Stacy Farmer

Carol Carolyn Smart

William R. Hoffman

JUDGES

FILED IN COURT OF APPEALS
Mary E. [unclear] 1993
Mary E. [unclear] Clerk of Courts
Deputy
Time: *10:25 AM*



Attorney General
Lee Fisher

M E M O R A N D U M

TO: Nancy Miller, Acting Chief Counsel
EES Attorneys

FROM: Joan Fishel, Assistant Attorney General
Environmental Enforcement Section JIF

DATE: May 6, 1993

RE: Favorable decision in State ex rel Fisher v.
B & B Enterprises, et. al Fifth District Court
of Appeals

Attached is a copy of the Fifth District's opinion upholding the Morgan County Common Pleas Court's decision finding several defendants in contempt of a consent order. The Court of Appeals rejected all of Appellants' arguments, holding that in this civil contempt proceeding there had been no right to appointed counsel; that the decision below was not against the manifest weight of the evidence; and that a fine of \$100 per unplugged well, per day of noncompliance was not excessive, did not violate statutory provisions, and was within the inherent power of the Court.

Credit for this decision must go to Laura Steffee who wrote the appellate brief and obtained the contempt finding.

JIF:df