COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 65889

STATE OF OHIO, EX REL. LEE FISHER, ATTORNEY GENERAL Plaintiff-Appellant/ Cross-Appellee -vs- CLEVELAND TRINIDAD PAVING CO. ET AL. Defendants-Appellees/ Cross-Appellants	JOURNAL ENTRY and OPINION

DATE OF ANNOUNCEMENT OF DECISION: AUGUST 25, 1994

CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court Case No. 236290

JUDGMENT: Affirmed in part, Reversed in part.

DATE OF JOURNALIZATION: _____

APPEARANCES:

FOR PLAINTIFF-APPELLANT:

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PATRICIA A. BLACKMON, J:

This is an appeal from a judgment of the Court of Common Pleas of Cuyahoga County in which civil penalties were imposed against Cleveland Trinidad Paving Company and Gary Helf, defendants-appellees/cross-appellants, for violating the (State) Environmental Protection Agency environmental guidelines as set forth in the Ohio Administrative Code. The State of Ohio, ex rel. Lee Fisher, Attorney General, plaintiff-appellant/cross-appellee, Cleveland Trinidad, and Helf challenge the decision of the trial court and assign several errors for review.[1]

Having reviewed the record and the legal arguments presented by the parties, we find that the State's assignments of error are not well taken; however, we find that Trinidad's claim in its fifth cross-assignment of error, is well taken, which error states that the trial court erred in requiring it to install various instruments not required by its PTO or PTI. Trinidad's remaining cross-errors are not well taken. The apposite facts follow.

Cleveland Trinidad Paving Company was an Ohio Corporation and Gary Helf was its Chief Executive Officer. Cleveland Trinidad operated a drum mix asphalt plant as Air Contaminant and Pollution Source No. P902. On June 1, 1989, October 21, 1990, August 22, 1990, and October 26, 1990, P902 had emissions of pollutants that exceeded over 20% opacity under "Test Method Nine" as established

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[1]See Appendix for the parties' respective assignments of error.

by the Federal Environmental Protection Agency. At the end of the asphalt paving season, Cleveland Trinidad shut down P902.

In January of 1991, Cleveland Trinidad submitted plans and sought the appropriate permits for an air contaminant and pollution source, P904. In March 1991, Cleveland Trinidad cleaned the work site and prepared a concrete base for P904. On April 10, 1991, Cleveland Trinidad was issued a permit for P904. Thereafter, they proceeded to fully install and operate P904.

The State filed a complaint against Cleveland Trinidad and Helf under R.C. 3704.06 for injunctive relief and civil penalties. Count One of the complaint alleged emissions of a density of greater than 20% opacity in violation of Ohio Adm. Code 3745-17-07(A). Count Two alleged the same emissions were in violation of their permit issued by the State as a violation of R.C. 3704.05. Count Three alleged failure to report equipment malfunctions under Ohio Adm. Code 3745-15-06(B). Count Four alleged unlawful installation of P904.

The case proceeded to a bench trial and the court found in favor of the State on Count One of the complaint. The court found that the emissions were in excess of 20% opacity in violation of R.C. 3704.06 on the four dates in question and imposed fines of $2,500 for each day for a total of $10,000. The court also ordered Cleveland Trinidad to install a flow meter and recorder and a pressure drop gauge to maintain records of emissions for a period of three years. This appeal followed.

In its first assignment of error, the State argues that the trial court erred in dismissing Count Two of its complaint. The State reasons that Count Two was an alternative theory of liability under Civ.R. 18(A), and therefore, the case should be remanded for imposition of a penalty for Cleveland Trinidad's violation of Count Two. We disagree.

The issue in this assignment is whether, as a matter of law, the trial court erred in dismissing Count Two of the complaint. Civ.R. 18(A) provides as follows:

> A party asserting a claim to relief as an original claim, counter-claim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party.

The error in this case is predicated on the rationale that Counts One and Two of the complaint list separate causes of action. In *Henderson v. Ryan* (1968), 13 Ohio St.2d 31 at 35, the Supreme Court of Ohio provided that:

> "Where a plaintiff suffers [under two legal theories] as a result of the same wrongful act, only a single cause of action arises, the different injuries occasioned thereby being separate items of damage from such act." *Rush v. Maple Heights* 167 Ohio St. 221. The rationale is that "as the defendant's wrongful act is single, the cause of action must be single." (Emphasis supplied.) *Rush v. Maple Heights, supra*, 230.

In this case, the State properly pleaded alternate claims of relief in Counts One and Two of the complaint. Count One sought a civil penalty and injunctive relief for "Unlawful Emission of Excessive Pollutants and Contaminants" under Ohio Adm. Code 3745-

17-07(A), but Count Two sought a civil penalty and injunctive relief for "Unlawful Violation of Air Pollution Permit Terms and Conditions. Thus, Count Two was an alternate claim within the meaning of Civ.R. 18(A), and not, as the trial court found, "frivolous."

Nonetheless, the single act of Cleveland Trinidad represents a single cause of action with alternate theories of liability. Both Counts One and Two provided a remedy for the same excessive pollutants in the emissions from Cleveland Trinidad's facility. Accordingly, the trial court properly held that "Count Two in practical effect duplicates Count One, and therefore, the civil penalty imposed herein will apply to Count One only." Accordingly, this assignment of error is not well taken.

In its second assignment of error, the State argues that the trial court erred in dismissing Count Four of its complaint. They reasoned that Source P904 was installed before a permit was obtained. We disagree.

Ohio Adm. Code 3745-31-02 requires that a permit must be obtained before installing a new source of pollution or modifying an existing source. Ohio Adm. Code 3745-31-01(I) provides that "'install' or 'installation' means to construct, erect, locate, or affix any air contaminant source or any treatment works." Ohio Adm. Code 3745-31-01(J)(1)(a) defines "modify" or "modification" as "any physical change in, or change in the method of operation of any air contaminant source***."

> Based on the plain language of Ohio Adm. Code 3745-31-01, 3745-31-02, Sections 52.21(b)(2) and 51.18, Appendix S(II)(A)(6), Title 40, C.F.R., any change in air polluting control devices attached to the "source" of the pollution is not a physical change in, or change in the method of operation of, the source of air pollutants. Not only must a "physical change" occur in the operation of the source, but a "modification" must occur before state and federal regulations require a preconstruction review.

North Sanitary Landfill, Inc. v. Nichols (1984), 14 Ohio App.3d 331. If modification depends on a change in the method of operations of an existing air contaminant source, then it stands to reason that a permit is not required until installation of the actual "air contaminant source" takes place.

In this case, Cleveland Trinidad merely cleaned a work site for the air contaminant source, "P904" prior to installing it or receiving a permit. This preparation included scraping, leveling, and placing concrete. The concrete pad they prepared for the air contaminant source was not a part of the actual apparatus and, therefore, it was not a part of the method of operation. Therefore, as a matter of law, preparing a concrete slab for a new air contaminant source is not a violation of Ohio Adm. Code 3745-31-02. Accordingly, this assignment of error is not well taken.

In its third assignment of error, the State argues that the trial court erred in sanctioning the State for filing expert reports late. The State reasons that they are immune from costs, the court abused its discretion, and any prejudice to Cleveland Trinidad was the result of its own neglect. We disagree.

The first issue in this assignment is whether, as a matter of law, the State is immune from the assessment of costs for its failure to comply with discovery orders. Thus, our standard of review is plenary.

> The administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers.
>
> Courts of general jurisdiction, whether named in the Constitution or established pursuant to the provisions thereof, possess all powers necessary to secure and safeguard the free and untrammeled exercise of their judicial functions and cannot be directed, controlled or impeded therein by other branches of the government.

State, ex rel. Johnston, v. Taulbee (1981), 66 Ohio St.2d 417 at paragraphs one and two of the syllabus. Consequently, the other branches of government may not encroach upon the inherent power of the judiciary. *Id.* at 422. Courts have the inherent power to maintain and enforce the judicial process; "these inherent powers include the power to prevent abuse committed by counsel upon the court's processes." *Slabinski v. Servisteel Holding Co.* (1986), 33 Ohio App.3d 345.

To the extent that the Court of Common Pleas of Cuyahoga County established their local rules to maintain and enforce the judicial process, the State's [Attorney General's] assertion of immunity cannot impede the court's inherent power. The Court of Common Pleas clearly established its Loc.R. 21.1 to enforce and maintain the judicial process. Such enforcement is clearly within their inherent power. Accordingly, when the State is a litigant,

it is subject to, not immune from, the court's enforcement of the discovery rules.

We now turn to the question of whether the trial court properly exercised its inherent power. A trial court has discretion to determine whether a party has complied with its obligation to provide expert reports under Loc.R. 21 and determine the appropriate sanctions. *David v. Schwarzwald, Robiner, Wolf & Rock Co., L.P.A.* (1992), 79 Ohio App.3d 786, 795. The court's determination of sanctions shall not be reversed absent an abuse of discretion. *Id.*

Loc.R. 21.1(C) mandates that "All experts must submit reports." Consequently, the State had a duty to submit reports of the experts it intended to call at trial, notwithstanding the trial court's failure to impose a deadline for the submission of the expert's reports.

Loc.R. 21.1(B) provides that "It is counsel's responsibility to take reasonable measures, including the procurement of supplemental reports, to insure that each report adequately sets forth the expert's opinion." The rule further provides that "The report of an expert must reflect his opinions as to each issue on which the expert will testify." In this case, the document that the State submitted as an expert's report indicated the names of four experts, the facts provided to those experts, and the subjects about which they would testify, but did not indicate the experts' actual opinion on those subjects. Thus, the State's report fell

short of being an expert's report. See *Krantz v. Schwartz* (1992), 78 Ohio App.3d 759.

Because the State failed to provide an expert's report within the meaning of Loc.R. 21.1(B), the trial court was faced with the option of excluding the expert's testimony at trial, or permitting Cleveland Trinidad to depose the experts at the State's cost. See Loc.R. 21.1(C), (D), and (F). With approximately one month left before trial, we find that the trial court was well within its discretion to allow Cleveland Trinidad to depose the State's experts at the State's cost.

Finally, the State argues that there was no prejudice and, therefore, depositions at the State's expense should not have been permitted. In *David*, this court held that whether a motion *in limine* is granted after a party fails to provide an expert report rests upon whether the complaining party was prejudiced. *Id.* at 795. We are in agreement with the reasoning in *David,* but we recognize that the trial court does not have to wait until trial to address this issue. The question of prejudice does not preclude depositions of experts under Loc.R. 21.1(D) and (F). In fact, the deposition of experts prior to trial may eliminate the potential for prejudice. Accordingly, this assignment of error is without merit.

In their cross assignment of error, Cleveland Trinidad and Helf argue that the trial court erred in admitting the expert opinions of James M. Krause and Roy J. Jaskowski, Jr. They reason that Krause and Jaskowski failed to produce any documentary

evidence that they were qualified as experts and, therefore, their testimony should have been excluded. We disagree.

A trial court's ruling on the qualifications of a witness to provide expert testimony under Evid.R. 702 shall not be reversed absent a clear abuse of discretion. *Vinci v. Ceraola* (1992), 79 Ohio App.3d 640, 646. In this case, Krause and Jaskowski did not produce documentation of their expert training, but they testified that they were trained and certified to use "Test Method Nine" as "Visible Emissions Readers." Accordingly, we find no abuse of discretion in admitting the expert testimony presented at trial.

In their second assignment of error, Cleveland Trinidad and Helf argue that the trial court lacked competent and credible evidence of a prohibited amount of air pollutants. They reasoned that Test Method Nine's reliability was not proven and, therefore, the State's experts did not conduct the test with a reasonable degree of scientific accuracy. We disagree.

Test Method Nine was established by the Federal Environmental Protection Agency, and where Test Method Nine was introduced into evidence and experts testify that they used Test Method Nine, there is competent and credible evidence of compliance with Test Method Nine. See *Cleveland Elec. Illum. Co.* (1983), 4 Ohio St.3d 184.

In this case, the trial court found the testimony of Krause and Jaskowski to be "weak," but concluded that the experts properly used Test Method Nine. We find the experts' testimony that they used Test Method Nine provided competent and credible evidence of

Cleveland Trinidad's violations on June 1, 1989, August 22, 1990, October 21, 1990, and October 26, 1990.

In their third assignment of error, Cleveland Trinidad and Helf argue that certain emissions violations were barred by the doctrine of Double Jeopardy Protection of the United States and Ohio Constitutions. We disagree.

In *United States v. Halper* (1989), 490 U.S. 435 at 450, the Supreme Court of the United States held that:

> "***[The government may seek] the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction is punitive. In such a case, the Double Jeopardy Clause simply is not implicated.

In such a case, the Double Jeopardy Clause is only implicated if a criminal prosecution results in a conviction and a criminal penalty is imposed. See *Id.* at 450-451. In this case, there was a previous criminal prosecution by the city of Cleveland, but that case resulted in acquittal and no penalties were imposed. Therefore, the Double Jeopardy Clause does not apply. Accordingly, this assignment of error is not well taken.

In their fourth assignment of error, Cleveland Trinidad and Helf argue that the trial court erred in holding Helf personally liable for the violations of Cleveland Trinidad. They reason that Helf was not liable for a corporate act by reason of his official relationship to the corporation. We disagree.

The issue in this assignment of error is whether there was sufficient evidence that Helf was individually liable for the

wrongful acts of Cleveland Trinidad. The standard of review provides that judgments supported by competent and credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. See, *e.g., Seasons Coal Co. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80.

This court has held a corporate officer liable for environmental violations when he was involved with the day-to-day operations in general, and also involved with the corporation's environmental problems in specific. *State of Ohio, ex rel. Celebrezze, v. Dearing* (Nov. 13, 1986), Cuyahoga App. Nos. 51209, 51220, 51221.

In this case, there is competent and credible evidence that Helf was involved with the day-to-day operations where environmental problems were concerned. He was aware of the problems with Cleveland Trinidad's P902 facility, but testified that the facility could not be shut down because it was the middle of the season. He further admitted that he was involved in the decision to keep it running until the city of Cleveland ordered it shut down. Accordingly, the trial court properly found him individually liable, and this assignment of error is not well taken.

In their fifth assignment of error, Cleveland Trinidad and Helf argue that the trial court erred in ordering Cleveland Trinidad to install various instruments in its new plant. They reason that such instruments were not requested or required in the permit process. We agree.

On April 10, Trinidad was issued a permit to install its new facility. The trial court found as fact that there were no air contaminants and pollution violations in the new asphalt manufacturing plant. Yet, the court ordered additional controls not required by the permit. During the trial, it was established that Trinidad had a new state of the art facility. Based on this record, it is our finding that the trial court incorrectly ordered these additional instruments and as such abused its discretion. Trinidad's assignment of error five is well taken.

Judgment affirmed in part and reversed in part.

It is ordered that Appellant and Appellee share the 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 Common Pleas Court to carry this judgment into execution.

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

Exceptions.

KRUPANSKY, J., and

DYKE, J., CONCUR.

PATRICIA ANN BLACKMON
PRESIDING JUDGE

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

APPENDIX

APPELLANT'S ASSIGNMENTS OF ERROR

I. *THE TRIAL COURT ERRED IN DISMISSING COUNT TWO OF THE COMPLAINT FOR FAILURE OF PROOF AND CLAIMING IT WAS FRIVOLOUS WHEN THE TRIAL COURT ITSELF FOUND THAT THE STATE HAD PROVED THE VIOLATIONS OF LAW ALLEGED IN COUNT TWO, AND WHEN THE TRIAL COURT ITSELF CONCLUDED THAT, IN ADJUDICATING COUNT 1, CLEVELAND TRINIDAD VIOLATED THE REGULATORY PROHIBITION UPON WHICH COUNT 2 WAS BASED.*

II. *THE TRIAL COURT ERRED IN DISMISSING COUNT FOUR FOR FAILURE OF PROOF AND CLAIMING IT WAS FRIVOLOUS WHEN THE TRIAL COURT FOUND NOT ONLY THAT SOURCE P904 WAS A NEW SOURCE OF AIR POLLUTION, BUT ALSO THAT IT HAD ALREADY BEEN INSTALLED BEFORE THE PERMIT TO INSTALL WAS ISSUED.*

III. *THE TRIAL COURT ERRED WHEN IT SANCTIONED THE STATE FOR ITS ALLEGEDLY LATE FILING OF EXPERT REPORTS BY ORDERING THE STATE TO PAY TRINIDAD'S COSTS OF DEPOSITIONS BECAUSE THE STATE IS IMMUNE FROM COSTS ABSENT A STATUTE WAIVING THAT IMMUNITY, THE TRIAL COURT NEVER ORDERED THE EXCHANGE OF EXPERT WITNESS REPORTS, AND TRINIDAD WAS NOT PREJUDICED.*

CROSS-APPELLANT'S ASSIGNMENTS OF ERROR

I. *THE TRIAL COURT ERRED IN ADMITTING, OVER OBJECTION, THE PURPORTED EXPERT OPINIONS OF JAMES M. KRAUSE AND ROY J. JASKOWSKI, JR.*

II. *THE TRIAL COURT ERRED IN ITS JUDGMENT FINDING THE CLEVELAND TRINIDAD PAVING COMPANY LIABLE FOR FOUR (4) VISIBLE EMISSION VIOLATIONS OF STATE AIR POLLUTION LAWS AND FOR VIOLATIONS OF ITS PERMIT TO OPERATE UNDER COUNTS ONE AND TWO OF THE COMPLAINT.*

III. *THE TRIAL COURT'S JUDGMENT FINDING THE CLEVELAND TRINIDAD PAVING COMPANY LIABLE FOR FOUR (4) VISIBLE EMISSION VIOLATIONS OF STATE AIR POLLUTION LAWS UNDER OF THE COMPLAINT IS ERRONEOUS AND BARRED BY THE DUE PROCESS PROTECTION* OR DOUBLE JEOPARDY PROTECTION, OR THE EQUAL PROTECTION PROVISIONS AFFORDED BY THE UNITED STATES AND OHIO CONSTITUTIONS.

IV. *THE TRIAL COURT ERRED IN FINDING GARY HELF, PRESIDENT OF THE CLEVELAND TRINIDAD PAVING COMPANY, IN HIS INDIVIDUAL CAPACITY TO BE JOINTLY AND SEVERALLY LIABLE FOR THE VIOLATIONS FOUND BY THE TRIAL COURT AGAINST THE CLEVELAND TRINIDAD PAVING COMPANY UNDER OF THE COMPLAINT.*

V. *THE TRIAL COURT ERRED IN ORDERING CLEVELAND TRINIDAD TO INSTALL VARIOUS INSTRUMENTS IN ITS NEW PLANT WHEN THESE INSTRUMENTS WERE NOT REQUESTED OR REQUIRED BY THE STATE IN THE PERMITTING PROCESS.*

Attorney General
Lee Fisher

TO: JUDI TRAIL, DEPUTY CHIEF COUNSEL

FROM: GARY COX, AAG D.G.C.

DATE: AUGUST 30, 1994

RE: STATE V. CLEVELAND TRINIDAD APPEAL

Please find attached a copy of the decision rendered by the Cuyahoga County Court of Appeals which decided this appeal against us. The Court ruled against us on all of our assignments of error, and ruled in favor of Cleveland Trinidad on their assignment of error related to injunctive relief. The Court ruled (1) we could recover on either a 20% opacity limit imposed by a PTO term and condition or a 20% opacity limit imposed by Rule 17-07, but not both, (2) we could not recover on a PTI count when installation was commenced by the construction of a concrete foundation for the source, (3) we were liable for costs for allegedly failing to provide expert witness reports allegedly required by a local rule, and (4) we were not entitled to the installation of pressure and temperature gauges and recorders on a source which was not found to be violating the law. We are discussing with Ohio EPA whether they wish to appeal this decision.

copy: All EES Attorneys