

In The Court of Common Pleas
Holmes County, Ohio
FILED

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STATE OF OHIO, ex. rel.
LEE FISHER,
ATTORNEY GENERAL OF OHIO, **CASE NO. 83-CV-129**
DORRIS L. MILLER, CLERK
PLEAS COURT
HOLMES COUNTY, OHIO

Plaintiff,

vs

UNION CHEESE COMPANY,
et. al.

JOURNAL ENTRY

Defendants.

**DOCKET: FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING
STATE'S MOTION FOR CONTEMPT; DEFENDANTS' FOUND IN CONTEMPT;
DEFENDANTS ORDERED TO SUBMIT REMEDIAL PLANS AND APPEAR TO
SHOW CAUSE WHY THEY SHOULD NOT BE PUNISHED AT 8:30 A.M. ON
3/28/95.**

I. Introduction.

This is a contempt action brought by the State of Ohio against Union Cheese Company and its principle owner and operator, Dominic Gangale, for their violations of the 1985 Consent Judgment and a 1988 Modification of that Judgment. The 1985 Consent Judgment sought to remedy Defendants' violations of Ohio's water pollution and control laws and nuisance laws, R.C. 6111 and 3767 respectively. As a result of Defendants continued and repeated noncompliance with this Court's orders, I find that both

THOMAS D. WHITE, Judge
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WILLOUGHBY, OHIO 44654

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Defendants are in contempt of court for the reasons set forth in the Statement of Facts and Conclusions of Law which follow.

II. Findings of Facts.

A. Background. Defendants are Dominic Gangale and Union Cheese Company, who operate a cheese processing plant located in Holmes County, Ohio. Defendants generate whey as a by-product of their cheese-processing. Whey is the thin, watery part of milk that separates from the curds, the thicker part, during the processing of cheese. Defendants also produce sludge as a by-product of their cheese processing and sewage treatment process.

As early as 1981, the Defendants began violating Ohio's environmental pollution control laws, by discharging pollutants into waters of the State without a permit and disposing of their whey in a manner causing a nuisance and polluting waters of the State. As a result, the Director of Environmental Protection (hereafter "Director") issued Final Findings and Orders to Defendants in February, 1982.

The 1982 Orders required Defendants to submit an application for a National Pollution Discharge Elimination System (hereafter "NPDES") permit and an approvable plan of action for the disposal of whey in a manner that the waters of the State would not be polluted. The Order also required installation of a wastewater treatment facility.

Subsequently, Defendants obtained an NPDES Permit and installed a wastewater treatment facility. They proceeded, however, to violate their NPDES permit by discharging inadequately treated wastewater into a nearby creek. Also, the whey disposal

plan, which was submitted two years late, was not approved. Even more disturbing, Defendants continued to illegally dispose of whey and other waste products to the detriment of the waters of the State. Thus, in 1985, the State filed a Complaint against Defendants for violations of Ohio's water pollution control and nuisance laws, R.C. Chapters 6111 and 3767. This Court resolved this litigation in a Consent Judgment Entry in 1985.

The Consent Judgment required Defendants to do the following:

- 1.) Withdraw their application for land application as the method of disposal of whey;
- 2.) Refrain from disposing of the whey on the land without prior approval of the Director;
- 3.) Refrigerate their whey, ship it to a facility that uses whey as raw material, and obtain a receipt for each truckload of whey delivered to such facility;
- 4.) Pay a civil penalty;
- 5.) Reclaim all ponds and surface impoundments into which Defendants previously disposed of whey; and,
- 6.) Comply with Ohio's water pollution laws, including Defendants' NPDES permits.

In 1988, the State filed charges in contempt with this Court as a result of Defendant's failure to comply with the civil penalty requirements of the 1985 Consent Judgment. In April 1988, this Court, at the request of the parties, entered a modification

of Consent Judgment which provided Defendants with a new more lenient civil penalty payment schedule. It is important to note that the 1988 Modification only modified the civil penalty provisions of the 1985 Consent Judgment, and specifically required Defendant to continue to comply with remaining provisions.

Subsequent to the entry of the 1988 Modification, Defendants continue to violate provisions of the 1985 Consent Judgment and 1988 Modification. These violations threaten to degrade the quality of waters of the State and pose health risks if Defendants are not required to abate the violations and further require penalties for disobedience of this Court's Orders.

B. State's Current Charges.

1. Illegal Disposal of Whey. Defendant's have been repeatedly disposing of their whey in a manner which pollutes the waters of the State and causes a public nuisance as early as 1981. Thus, the 1985 Judgment prohibited such actions. Despite the express language of the 1985 Judgment prohibiting land application of whey, Defendants have illegally disposed of their whey at a location in Bucks Township, Tuscarawas County, Ohio on several occasions since the entry of the 1985 Consent Order. The State proved that these violations occurred in at least 1990, 1992, 1993, and as late as August, 1994. Further, the State's evidence proved that this illegal disposal has contaminated a nearby tributary of the waters of the State.

2. Illegal Disposal of Sludge. In addition to the whey, Defendants have taken the sludge generated by their waste-water treatment plant to the same location in Bucks

Township, Tuscarawas County. This action is in violation of the State's water pollution laws, and thus a violation of the general injunctive provision of Sec. X of the 1985 Consent Judgment.

3. Failure to Meet Effluent Limits. Defendants have failed to comply with the effluent's limits contained within Defendants' NPDES permit on numerous occasions. These violations based on reports to the Director by the Defendants were identified and admitted into evidence at hearing.

4. Failure to Pay Civil Penalty. Defendants have failed to comply with either the 1985 Consent Judgment or the more lenient Modification in 1988 and are delinquent in unpaid civil penalties and interest.

5. Failure to Reclaim Former Disposal Site. While Defendants largely did not contest the other four contempt citations, Defendants stringently contest that their depositing large quantities of whey into an abandoned strip pit, improper reclamation of the pit and sale of the land resulted in very high levels of carbon dioxide in the basement of the home built on the site.

It is this dispute between the parties that has taken most of the Court's time in determining this matter. As late as 1984 Defendants had dumped "hundreds of thousands of gallons" of whey in a strip mine pit described in State's Exhibit 4 (See Testimony of Martin Polaski, Senior Environmental Engineer, Scientific Applications. Former Ohio Environmental Protection Agency Investigator responsible for this Case).

The Court finds by clear and convincing evidence that this repository of whey was:

not reclaimed at the time the 1985 Consent Judgment was entered into by Defendants. Thus, Defendants had the obligation pursuant to Section XII of the 1985 Consent Judgment to reclaim the area in a manner approved by Ohio EPA.

Defendants never submitted the required reclamation plan to Ohio EPA for approval and never properly reclaimed the area.

By clear and convincing evidence I find that when EPA Agent Polaski and Defendants' consulting engineer, Thomas J. Weber, went to the site, Defendants had already covered over the site with some dirt thus negating the express mandate of the 1985 Consent Judgment.

Jennifer Troyer testified that she and her husband built their house on the subject land in September 1992. She did not know Defendant Dominic Gangale and purchased the land through Kauffman Realty. Kauffman Realty was acting as Defendant's agent and after the purchase agreement was signed, the Troyers were told that there was a holdup in the proceedings mentioning that there might have been a problem with whey being disposed of on the property but that it was "cleared up".

The representation to the Troyers by Defendant's real estate agent was patently false.

After building their home on the site, the Troyers had difficulties keeping their gas hot water heater in their basement lighted, having to replace the gas water heater with an electric water heater.

The Troyers subsequently noticed a shortness of breath in family members when

they went into the basement and problems with their family pets who were in the basement.

The Troyers were referred upon inquiry to the government to Perry Ramsay of the Division of Mines of the Department of Industrial Relations, Laboratory Division. Mr. Ramsay testified that the Troyer basement contained unhealthy levels of carbon dioxide.

The bone of contention between the parties is the cause of the excessive carbon dioxide in the Troyer residence. Defendants contend that the carbon dioxide is generated by natural conditions and/or is a byproduct of the strip mining.

Defendants' contention is contradicted by Defendants' expert witness, David Bennett. Mr. Bennett opined that when low-grade coal oxidizes it emits carbon dioxide. However, in response to the Court's questions, Mr. Bennett indicated that he had never heard of a carbon dioxide problem like the Troyers have when building on a reclaimed strip mine. Furthermore, the length of time between last mining operations (sometime in the 1960's) and the time when Defendants covered over the pit (post 1985) would most certainly have allowed for oxidation of most if not all of the low-grade coal left as a result of the strip mining operation.

I am thus left with a pit within hundreds of feet of the Troyer residence which contained hundreds of thousands of gallons of whey improperly covered over with one to two feet of topsoil. All experts agree that decomposing whey generates gas.

In my opinion, the thing speaks for itself and the doctrine of *res ipsa loquitur* must apply.

By clear and convincing evidence, I find that the high levels of carbon dioxide in the Troyer residence are not natural byproducts of reclaimed strip mines nor is it a naturally occurring phenomenon in the area. (No neighbors of the Troyers have experienced similar problems.)

Therefore, by the elimination of all other possible causes of high levels of carbon dioxide I find that the Troyers' unhealthful home has been caused by the hundreds of thousands of gallons of whey dumped and improperly covered over on what is now the Troyer property.

The Defendants, as a direct result of their violation of the Court's 1985 Consent Order, have created the Troyers' unhealthful living situation.

III. CONCLUSIONS OF LAW.

Based upon the above Findings of Fact, I find the Defendants, Union Cheese Company and Dominic Gangale, jointly and severally, in contempt of this court for failure to abide by prior Orders of this Court.

Specifically, I find that Defendants are in contempt of this Court for violating the 1985 Consent Order and the 1988 Modification Order in that Defendants have:

- 1.) Illegally disposed of whey from their operation in Bucks Township, Tuscarawas County, Ohio.
- 2.) Illegally disposed of sludge generated by their wastewater treatment plant in Bucks Township, Tuscarawas County, Ohio.
- 3.) Defendants have failed to comply with effluent limits contained within.

Defendants' NPDES Permit on numerous occasions.

4.) Defendants have failed to pay the civil penalty and interest agreed to in the 1985 Consent Judgment and the 1988 Modification Order; and,

5.) The Defendants violated Section XII of the 1985 Consent Judgment which required that the area under the Troyer property be reclaimed in the manner approved by Ohio EPA.

IV. ORDER.

Defendants having been found in contempt, they are Ordered to immediately submit to the Attorney General plans acceptable by the state to remedy these citations and to purge themselves of Contempt of Court.

Defendants shall appear before a Judge of this Court at 8:30 a.m. on March 28, 1995, and thereat show cause why they should not be punished for Contempt of Court.

SO ORDERED,



JUDGE, COURT OF COMMON PLEAS

cc: AAG Finn, Atty. Gordon, Union Cheese Co., Dominic Gangale

[] Copies distributed on _____, by _____.



Attorney General
Betty D. Montgomery

MEMORANDUM

TO: ALL EES ATTORNEYS *T.S.F.*
FROM: TERRENCE S. FINN AND JOAN R. KOOISTRA
DATE: January 18, 1995
RE: STATE V. UNION CHEESE COMPANY CASE NO. 83-C-V-129

Enclosed for your research files on contempt, please find a copy of Judge White's recent decision in the above-captioned case in which he determined that the Defendants were in contempt for five different violations alleged by the State. The enclosed entry is very factual in nature and you may find that it is actually case specific. However, Joan prepared an excellent pre-trial brief which is on the server in the Union Cheese Company case file. You may also want to make a copy of this brief for your research files.

Finally, you will note that Judge White has delayed his ruling on the punishment until March 28, 1995, in order to provide the Defendants with an opportunity to purge themselves of their contempt. In any event, at some point he will more than likely rule on the issue of whether or not the State has the authority to collect additional civil penalties under the environmental statutes in a contempt proceeding--so stay tuned.

TSF:vh