

DAYTON MUNICIPAL COURT
CRIMINAL DIVISION

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IN THE DAYTON MUNICIPAL COURT
CRIMINAL DIVISION

STATE OF OHIO : CASE NO: 07 CRB 12016
 Plaintiff, : (JUDGE GREANEY)
 Vs. :
 HARSHMAN II DEVELOPMENT : DECISION AND ENTRY
 COMPANY LLC :
 Defendant. :

This matter came before the Court for trial on November 3, 2008, through November 5, 2008, with Defendant represented by counsel. The Court took the matter under advisement and now issues its Decision.

Defendant Harshman II Development Company LLC was originally charged with recklessly Polluting State Waters [R.C. 6111.04(A)(1)] and recklessly Failing to Perform Any Duty Imposed by Revised Code Sections 6111.01 to 6111.08 [R.C. 6111.07(A)]. Before trial, the State amended the charges to: recklessly Polluting State Waters [R.C. 6111.04(A)(1)] and recklessly Placing Fill into a Wetland without a Permit in violation of R.C. 6111.021 [R.C. 6111.07(A)]. The State alleges that these offenses were committed by Defendant from January 9, 2006, through February 9, 2006, on the property at the 2700 block of Harshman Road, Montgomery County, Dayton, Ohio.

In order for Defendant to be found guilty of violating R.C. 6111.04(A)(1), the State must prove, beyond a reasonable doubt, that Defendant recklessly caused pollution or placed sewage, sludge, sludge materials, industrial waste or other wastes in a location where they caused pollution to the waters of the State. To be found guilty of violating R.C. 6111.07(A), the State must prove, beyond a reasonable doubt, that Defendant

recklessly violated or failed to perform a duty imposed under R.C. 6111.021 by filling or placing fill into an isolated wetland without a permit.

The State established at trial that Defendant Harshman II Development Co. LLC, a limited liability company, has owned the property at the 2700 block of Harshman Road, Montgomery County, Dayton, Ohio since December 30, 2005. (State's Exhibit 2). The State presented evidence that Defendant's property contained isolated wetlands and Defendant's development of the property disturbed the wetlands. Dr. James Amon, from Wright State University and an expert in this area, and OEPA Environmental Specialists II Joseph Bartoszek and Mick Micacchion testified that three low-lying areas on Defendant's property constituted isolated wetlands requiring a permit. OEPA Environmental Specialists II Mick Micacchion, Joseph Bartoszek, Dan Osterfeld, and Christopher Cotton testified that they visited the wetland sites around the end of January, 2006, and found that trees had been cleared, the ground disturbed, and there was fill material, such as wood debris, sawdust, and wood shavings, in the wetlands. Photographs corroborating their testimony were submitted as Exhibits by the State.

The above witnesses had visited the Harshman area through the years for the purpose of conducting salamander and other wetland-related studies. Their testimony indicated that they had regular contact with the previous owners of the Harshman property through their wetland studies. Unfortunately, there was a short time period when they had no contact and this was the time period that Defendant bought the property and began to develop it. Testimony at trial from the above witnesses established that Defendant was not contacted by anyone from the OEPA until late January, 2006, after most of the clearing of the wetlands was done.

Christopher Roof testified that his company TAWA Tree Service did a job for Defendant Harshman II Development Co. in January 2006 and the contract was submitted as State's Exhibit 15. The contract was for clearing an area of approximately

19 acres at the Harshman Commons job site. The State submitted photographs of the job site and Roof testified that the photographs were of the wet areas and showed TAWA equipment, equipment tracks, and ground up stump debris in these areas. Roof testified that the stump-grinder was used in and around the wet areas and the debris could have gotten into the wet areas. He stated that they were not told to stop working on the site until after 90% of the work was done.

Dan Godec of Civil & Environmental Consultants in Cincinnati testified that he is trained and experienced in wetlands delineation and is familiar with ORAM. He stated that Defendant hired his company to do a wetlands assessment and delineation around January 25, 2006, after Ed Kress was contacted by OEPA. Based on his ORAM scores, Godec found that the three low-lying areas were isolated wetlands. He stated that due diligence by developers requires two steps:

- (1) Have the site surveyed to assess if the site contains areas that have the potential to be wetlands or waters of the state.
- (2) If potential wetlands are found, then have a delineation done and possibly seek a permit.

Tammy Braden testified for the State that she used to work for ERAtech Environmental Inc. and did an assessment at the Harshman site. She issued the Phase I Environmental Site Assessment on December 9, 2005. (State's Exhibit 23). She confirmed that the Phase I Assessment stated that the site was characterized by tree growth with low lying wet areas, Brookston silty clay loam, and seasonal wetness. She stated that she never received a call back from Meijers about any environmental reports and did not have the 1992 Meijers Wetland Report when she did her Phase I Assessment. Braden testified that she was not an expert in wetlands and has never received any training regarding wetlands. She admitted that her Phase I Assessment did not bring up any wetland concerns for Defendant Harshman.

Doug Kohnen, President of ERAtech Environmental Inc., testified that he is familiar with Defendant's Harshman Road property and knows Ed Kress. A copy of ERAtech's Proposal for the Phase I Assessment was submitted as Exhibit 22, along with the fax from Mr. Kohnen. He testified that a Phase I Assessment is done to protect the buyer from buying a contaminated piece of property. He testified that his company does environmental assessments, not wetland assessments.

Lesley Sandler testified that he is a real estate investor and Defendant Harshman II Development Company is one of his business interests. He stated that Attorney Ed Kress has represented his interests for many years. The State submitted as Exhibit 25 a Fax Cover Sheet dated July 25, 2003, from Marvin Marcus to Sandler. The notes on the Fax Cover Sheet state that concept plans to divide the Harshman property owned by Meijers are attached and that Phase I and Phase II Reports were completed in November 1992 and a Wetland Report was completed in June 1992. Sandler testified that he stopped interest at that time and put the fax in his file. Later in 2005, he spoke with Ed Kress and a determination was made to buy the Harshman Road property. He testified that he ordered the Phase I Assessment in 2005, but did not read it and forwarded it to Ed Kress.

Marvin Marcus, who had worked for the Miller-Valentine Group, testified that he became aware of Mr. Sandler as an active developer over ten years ago. Marcus confirmed that the fax of July 25, 2003 (State's Exhibit 25) references a wetlands report completed in June 1992, but stated that he never had a copy of the wetlands report. He testified that he was asked to request all environmental reports from Meijers and Meijers was to send them directly to Ed Kress.

Ed Kress, a principal investor in Defendant Harshman II Development Co. along with Mr. Sandler, testified that he was usually the person responsible for due diligence. Defense Counsel submitted Defendant's Exhibit A, and Ed Kress testified that Exhibit A is a copy of the civil suit filed by Defendant on May 24, 2007, against Meijers and

ERAtch. He testified that Meijers was asked to provide all environmental reports before the Harshman property was purchased and that he did not become aware of the 1992 Wetland Report prepared for Meijers until February, 2006. He stated that he became involved in the Harshman project in October, 2005, and was never approached by Bartoszek, Micacchion, or anyone from the OEPA until January 24, 2006.

Ed Kress recalled discussing the Harshman site with Mr. Kohnen and asking him to see if the property would support development. Kress was specifically concerned with the woods and the wet areas in the southeast corner. Kohnen told him that he had a geologist, Tammy Braden, that was competent to do the assessment. ERAtch Environmental Inc. was contracted to do a Phase I Assessment on November 28, 2005, (State's Exhibit 23). Kress testified that he was expecting the Phase I Assessment to indicate if a wetlands assessment should be done. After he read the Phase I Assessment, he called Mr. Kohnen and asked him if there were any problems going forward and was told that there were none. Ed Kress stated that he is not a wetlands expert and, on behalf of Defendant Harshman II Development Company, he relied upon ERAtch Environmental to satisfy due diligence and to advise if a wetland delineation was needed.

Sandy Doyle-Aherm, an Environmental Consultant, testified that she has performed around thirty Phase I assessments and overseen about 300. She stated that she had done hundreds of wetland delineations, is a wetland expert, and her company always does wetland assessments as a standard practice during a Phase I. She further testified that she is familiar with the Harshman Road property and had been there twice. She stated that she has seen the Phase I Assessment by ERAtch and, in her opinion, ERAtch realized that something was out there but failed to recommend wetland delineation. She stated that Defendant Harshman II Development did the right thing in just getting the Phase I Assessment since there was no recommendation for anything else. She stated that wood waste could cause pollution in a wetland. After being shown State's

Exhibits 8 and 9 (photographs of the site showing decaying trees and wood debris in the wetlands), she testified that what she saw did not constitute pollution.

Defendant Harshman II Development is charged with criminal liability as an organization. In order to prove that Defendant committed the offenses as an organization, the State must prove, beyond a reasonable doubt, that Defendant's agent Ed Kress recklessly authorized, tolerated, or performed the acts of pollution and placing fill into a wetland without a permit. R.C. 2901.23; *State v. CECOS International Inc.* (1988), 38 Ohio St.3d 120; *State v. D.J. Master Clean Inc.* (Sept. 30, 1997), 123 Ohio App.3d 38.

A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. R.C. 2901.22(C). Proof of recklessness goes beyond proving failure to perceive a risk because of a substantial lapse from due care. There must be proof that the defendant perversely disregarded a known risk and proceeded with heedless indifference to the consequences. R.C. 2901.22(C); *State v. D.J. Master Clean Inc.* (Sept. 30, 1997), 123 Ohio App.3d 388; *State v. Schachner* (1999), 131 Ohio App.3d 808; *State v. Kelley* (2nd App. Dist.), 2008-Ohio-5167; *State v. Chemequip Sales Inc.* (1990), 69 Ohio App.3d 236; 26 Ohio Jur. 3d, Sec. 628 (2008 Westlaw Online Ed).

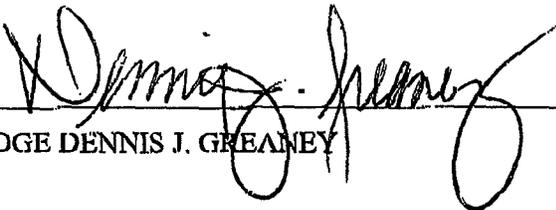
The State claims that Defendant knew about the low-lying wet areas, the Phase I Assessment, and only had to do a little bit of digging, but failed to look further or investigate. Instead of accessing the database, asking for an ORAM score, or calling Dr. Amon, Defendant relied upon ERAtech personnel who are not wetland experts. Even if Meijers failed to turn over the 1992 Wetlands Report, the State claims that Defendant still had information in its possession that should have lead it to do a wetlands assessment. The State asserts that Defendant, through its agent Ed Kress, had enough information and could have found out about the isolated wetlands through due diligence. The State concludes that it proved that Defendant Harshman II Development Company LLC knew

about the isolated wetland areas through its agent and recklessly committed violations of R.C. 6111.04 and R.C. 6111.07.

The Court finds that the State failed to prove, beyond a reasonable doubt, that Defendant's agent, with heedless indifference to the consequences, disregarded a known risk that the work at the Harshman site would result in the instant pollution and wetland offenses. The Court finds from the evidence that Defendant's agent Ed Kress exercised due diligence when he had ERAtech Environmental Inc. assess environmental liability at the Harshman site and then Kress followed the recommendations of the assessment.

The Court finds Defendant Harshman II Development Company LLC Not Guilty of the charges contained in the Amended Complaint.

4/7/09
DATE


JUDGE DENNIS J. GREANEY

Copies to: Counsel for the State
Counsel for the Defendant

