

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO  
CIVIL DIVISION

STATE OF OHIO EX REL., NANCY H. ROGERS,  
(NOW MIKE DEWINE) ATTORNEY GENERAL  
OF OHIO,

CASE NO.: 2008 CV 10301

JUDGE TIMOTHY N. O'CONNELL

Plaintiff(s),

-vs-

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

TITAN WRECKING & ENVIRONMENTAL, LLC,

Defendant(s).

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On April 12, 2011 Plaintiff filed a request pursuant to Civil Rule 52 for *Findings of Fact and Conclusions of Law*. This matter was tried without a jury on March 22, 23, 24 and 25, 2011 and April 05 and 06, 2011. After opening statements, presentation of evidence and closing arguments the court entered a general judgment in favor of the Defendant, dismissing Plaintiff's complaint with prejudice.

**STATEMENT OF THE CASE**

This action was commenced on November 14, 2008 with the filing of a complaint for injunctive relief and civil penalties. Plaintiff alleged that in the course of demolition activities at Cleveland Elementary School on Pursell Avenue in Dayton, Ohio, Titan Wrecking & Environmental failed to properly handle asbestos-containing material. The Plaintiff brought the action to enforce Ohio's Environmental Protection Control Laws.

Generally, the applicable statute prohibits the emission of asbestos-containing materials into the air. The situation is governed by the Ohio Administrative Code and the Federal EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP), which is contained in the federal regulations. The Plaintiff asserts that in the process of demolition the Defendant caused certain building materials to become

friable, and thus, Regulated Asbestos-Containing Materials (RACM). Since these items became RACM, Defendant was required to engage in certain activities to prevent release of asbestos particles during and after removal. Plaintiff asserts that Defendant was to wet and keep wet asbestos-containing materials after they had been removed or stripped until collected for disposal; to contain asbestos-containing materials from release by plastic sheeting and barriers, and negative air pressure; and to properly dispose of asbestos-containing waste materials. Plaintiff alleges that Defendant failed to use these methods and thus is subject to civil penalties.

Defendant asserts that the resilient floor tile in the Cleveland Elementary School did not become friable. Defendant asserts that the resilient floor tile was not extensively damaged. Defendant asserts that it was not crumbled, pulverized or reduced to powder. Because it was not crumbled, pulverized or reduced to powder the potential for significant asbestos fiber release was not great. Furthermore, because the floor tile was not extensively damaged it did not become RACM. Since the floor tile was not RACM, Defendant was not required to do such things as wet, contain by sheeting and barriers, use negative air pressure and otherwise properly dispose of the material. Defendant was not required to engage in containment methods due to the lack of RACM. Defendant also denies it engaged in any cutting, grinding, sanding or abrading, as those terms are defined in the regulations.

#### **FINDINGS OF FACT**

In 2003 the Cleveland Elementary School on Pursell Avenue in Dayton, Ohio was being demolished as a part of the Dayton Public Schools rebuilding program. In conjunction with a state program many, if not all, Dayton Public School buildings were being razed and replaced by new buildings. The Cleveland Elementary School, which had stood and been added to for decades, was being demolished to make way for the construction of a new Cleveland Elementary School.

Defendant, Titan Wrecking & Environmental, LLC, employed, directed, contracted with, or otherwise controlled persons to wreck, demolish, tear down, knock down, or otherwise destroy in part or completely the Pursell Avenue site.

In conjunction with the Cleveland Elementary School demolition, Dayton Public Schools contracted with other contractors. Dayton Public Schools contracted with an asbestos abatement contractor. The asbestos abatement contractor was to perform its work prior to Defendant completing the demolition. The

asbestos abatement contractor was Helix Environmental and its representative was Ralph Frochlich. Helix finished its work in late November or early December of 2003.

On December 03, 2003 Defendant filed its *Notification of Demolition and Renovation* on the prescribed EPA form. Defendant submitted the demolition notification to the Dayton Regional Air Pollution Control Agency ("RAPCA") indicating its plan to remove 12,000 feet of vinyl floor tile prior to demolition of the Cleveland Elementary School building. Defendant intended to remove the floor tile in order to recycle the concrete floors.

In its notification the Defendant indicated that asbestos was present in the building. The Defendant asserted that asbestos-containing flooring would be removed. The Defendant indicated that the building had non-friable asbestos material to be removed.

Defendant used a "bobcat" which had rubber tires. The bobcat is equipped with a shovel-type device on the front. Defendant used the bobcat to scrape the floor tile off the concrete floor. In the process of removing this floor tile from the concrete floor, the tile broke or cracked in pieces. Some of the floor tile broke into large pieces and other pieces of tile broke into small pieces. The floor tile was also mixed into piles with other debris that came from the ceiling and walls of the school building. Some of the walls were constructed out of plaster and some of concrete or ceramic, brick or block. There were also components of the structure made of wood. During the demolition all of this material was broken and damaged. The remnants were pushed into large piles. There were piles outside the building as well as piles in the building.

In early December of 2003 RAPCA received a complaint about Defendant's demolition. Sarah Gostomsky of RAPCA inspected the demolition site on December 15, 2003. She observed removal activity underway and saw the piles of debris. She observed there were no water trucks, hoses or sprayers. She saw damaged floor tiles of many different sizes.

Sarah Gostomsky looked at and later photographed the floor tile. She saw that it was cracked and in many pieces. She felt the edges of the tile. She concluded, simply by rubbing the edges, that there was a release of asbestos fragments into the air. She further concluded that the floor tile was extensively damaged and thus had become friable. Accordingly, in her view, the asbestos material was subject to regulation.

Sarah Gostomsky did not put the pieces into a plastic bag and apply hand pressure to them within the bag to determine if they would crumble, become pulverized, or be reduced to powder.

Titan Wrecking was not utilizing wetting during the removal of the floor tile. It was not using plastic sheeting on the window or negative air pressure. Titan was of the view that all asbestos-containing materials that were subject to regulation had been removed by Helix and it did not have to engage in containment activities unless the resilient floor tile became friable.

Sarah Gostomsky examined the samples from the site and sent them to a laboratory in Cincinnati. The laboratory was known as Data Chem Laboratories. RAPCA requested that the samples be analyzed and requested the Polarized Light Microscopy ("PLM") method.

On March 31, 2004 RAPCA issued a notice of violation to Defendant. Another contractor, Lepi, was brought in. Lepi conducted the clean-up of the site.

In her reports regarding the inspection, Sarah Gostomsky did not indicate that the floors had been subject to sanding, grinding, cutting or abrading. Sarah drew a conclusion, from visual observation, that the materials appeared to be grinded.

The Ohio Department of Health was also advised of the possible violation of the Ohio Administrative Code with regard to asbestos admission control standards and procedures. Pursuant to that notification, Shamus Estep, an ODH employee, inspected the Cleveland School demolition site on or about February 15, 2003. Mr. Estep observed non-intact floor tile. Mr. Estep did not observe wetting, containment by polycritical sheeting or negative air pressure machines. Mr. Estep took photographs of what he saw at the site. He did not acquire a dust sample. He did observe the pieces of floor tile. He did not place the pieces or a piece in a plastic bag and apply hand pressure to it to see if the tile would crumble, pulverize or be reduced to powder. He did not observe any mechanical sanding, grinding, cutting or abrading at the site. He was of the view that some cutting had occurred before he arrived. Mr. Estep collected samples of the floor tile and sent them to Data Chem Laboratories for analysis. Mr. Estep received a report from Data Chem. Mr. Estep had sent five samples to Data Chem. Data Chem analyzed the samples by Transmission Electron Microscopy (TEM) and found that asbestos was detected in some of the samples in percentages less than ten.

Data Chem Laboratories, now known as ALS Labs, performed analysis of the floor tile samples for RAPCA and ODH. Data Chem utilized PLM analysis on the RAPCA samples. Data Chem utilized TEM analysis on the ODH samples. TEM is more sensitive than PLM. PLM is not especially effective with respect to bulk building materials.

Data Chem found asbestos in four of the five samples submitted by ODH, two of the four contained asbestos in an amount greater than one percent. Data Chem determined that all three of the RAPCA samples contained asbestos. Data Chem did not engage in point counting as referred to in the regulation. Point counting is not feasible on floor tiles.

The samples submitted by the two agencies were held for about two months by Data Chem. The agencies did not request the samples be returned, so Data Chem disposed of the samples.

Floor tile is a category I item under the NESHAP regulations. Floor tile like roofing, packing and gaskets are considered less hazardous for the emission of asbestos fibers during demolition or renovation. If the floor tiles are in good condition and intact the danger of asbestos release is not great. Breaking a floor tile alone is not enough for fiber release.

Inspectors can use various types of tests to determine whether a category I non-friable asbestos-containing material becomes friable during the process of demolition. The determination is subject to some subjectivity. It is the custom in the regulatory arena to respect a decision about friability based on visual observation and a hand pressure test. It is not uncommon for an inspector to use an edge test. Some regulators are of the view that the more edges that are exposed the greater the likelihood asbestos fibers have been released.

The edge test is not provided for in the regulations. The edge test is a different method of hand pressure. It is not something that is described in the regulations.

Over the years there has been a great deal of discussion and consideration of treatment of building material such as floor tile with respect to the danger for asbestos fiber release. At one time the regulations indicated that if these materials become broken or extensively broken, the danger of asbestos fiber release was appreciably greater, materially enhanced. So, if the floor tile was extensively broken then it would be considered friable and containment activity would be appropriate. The EPA guidance letters have indicated that the EPA is moving away from the term "extensive breakage" as the criterion for judging whether the floor tile has become or will become regulated. The EPA has employed the term "extensively damaged" as a criterion as of about 1994. "Extensively damaged" appears to mean: crumbled, pulverized or reduced to powder.

Most non-friable material, such as resilient floor tile, if in good condition, can be broken without releasing significant quantities of airborne asbestos fibers. Category I material such as floor tile and including asphalt roofing, packing and gaskets are stable items and do not present as great a hazard as other material. So, if these items are not extensively damaged, they can be left in place during demolition and no containment activity need be performed.

### **CONCLUSIONS OF LAW**

Pursuant to R.C. 3074.05 (G) no person shall violate any order, rule, or determination of the director issued, adopted, or made under the chapter. Chapter 3704 is the air pollution control law of the State of Ohio. Under R.C. 3074 numerous regulations have been promulgated. These regulations are found in Ohio Administrative Code 3745-20 et seq. OAC 3745-20-04 (A) provides, “each owner or operator of a demolition or renovation operation to whom this rule applies should comply with the following procedures: (1) remove all regulated asbestos-containing material from a facility being demolished or renovated before any activity begins that would break up, dislodge, or similarly disturb the materials or preclude access to the materials for subsequent removal however, regulated asbestos-containing material need not be removed before demolition, except in accordance with paragraph (E) of this rule, if: (a) it is a category I non-friable asbestos-containing material that is not in poor condition and is not friable...”

In its notice of demolition and renovation Defendant disclosed that asbestos was present at the school. Defendant also disclosed, in effect, that the approximate amount of asbestos materials was 12,000 square feet of category I non-friable asbestos material to be removed. So under OAC 3745-20-04 Defendant did not have to remove the floor tile as it was category I non-friable asbestos-containing material if it was not in poor condition and was not friable. There is little evidence on whether the floor tile was in poor condition. The testimony disclosed that resilient floor tile can remain in good condition even if it is fifty years old. There were photographs of the floor tile after it was peeled off of the concrete floor and broken into pieces. From all of the evidence the court finds that the floor tile was not in poor condition. The major issue between the parties is the second component of this subsection regarding friability.

Category I non-friable asbestos-containing material is asbestos-containing packing, gaskets, resilient floor covering and asphalt roofing products containing more than one percent asbestos as determined using the method specified in appendix E subpart E, 40 CFR part 763, section 1, polarized light microscopy. The

material at issue here is resilient floor covering. The evidence indicated, based on the tests, that the floor tile contained more than one percent asbestos.<sup>1</sup> However, the PLM method did not occur as to all the samples.

If the floor tile were friable or became friable during removal the Defendant was required to wet it after it had been removed or stripped until collected for disposal under OAC 3745-20-04 (A)(6)(a), encapsulate or remove all regulated asbestos-containing materials before removing asbestos emission controls under OAC 3745-20-04 (C), properly dispose of asbestos-containing waste as soon as practical under OAC 3745-20-05 (A), use specified methods to ensure no visible emissions of asbestos-containing material under OAC 3745-20-05 (B), and to ensure that asbestos waste containers met the minimum standards as required by OAC 3745-20-05 (C). Defendant did not wet, repair, encapsulate or remove for disposal prior to removal of emission controls, deposit all asbestos-containing waste material as soon as practical in accordance with OAC 3745-20-06 or OAC 3745-20-13, use specified methods to ensure no visible emissions of any asbestos-containing waste material be discharged, or ensure that asbestos waste containers met the minimum standards in OAC 3745-20-05 (C)(1) - (5).

“Friable asbestos material” means any material containing more than one percent asbestos by area, as determined by the methods specified in appendix E subpart E, 40 CFR part 763, section 1, polarized light microscopy, that, when dry can be crumbled, pulverized or reduced to powder by hand pressure. If the asbestos content is less than ten percent as determined by a method other than point counting by Polarized Light Microscopy, the asbestos content may be verified by point counting using polarized light microscopy.<sup>2</sup>

The resilient floor tile was broken into many pieces when Defendant scraped it off of the concrete floors at the Cleveland Elementary School. The inspectors from RAPCA and ODH felt it was extensively damaged and thus was friable. The inspectors did not rely on hand pressure to determine if the floor tile would crumble, pulverize or be reduced to powder. The RAPCA inspector did rub the edges of the floor tile and found that particles or fibers came loose. She did not place the pieces or a piece in a plastic bag and apply hand pressure to it. There is no evidence of any person taking these broken pieces of floor tile and putting them in a bag and then using hand pressure upon them and finding them to crumble, pulverize, or be reduced to powder.

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<sup>1</sup> OAC 3745-20-01 (B)(9).

<sup>2</sup> OAC 3745-20-01 (B)(20).

If category I non-friable asbestos-containing materials (ACM) is subjected to demolition or renovation methods involving cutting, sawing, grinding or abrading category I materials are considered RACM and are subject to the various abatement regulations.<sup>3</sup>

“Cutting” means to penetrate with a sharp-edged instrument and includes sawing, but does not include shearing, slicing, or punching.<sup>4</sup> “Grinding” means to reduce to powder or small fragments and includes mechanical chipping or drilling.<sup>5</sup>

The inspectors did not see any penetration of the floor tile with a sharp-edged instrument. They did not see any sawing. The inspectors did not see the use of any mechanical device on the floor tile. What happened here is that the Defendant used a bobcat with a type of shovel implement on the front and peeled the floor tile off the concrete floor. Both the tile and the mastic came up.

The United States EPA document on demolition practices under asbestos NESHAP provides guidance on the effect of various razing operations on resilient floor tile and other category I non-friable ACM. The papers indicate that razing can be done by skid loaders, machines commonly used to load skids or pallets on to trucks. Skid loaders may be specially equipped with a type of ram commonly used during demolitions and are usually of the “bobcat” type. This is what occurred here. Defendant used a bobcat equipped with a type of ram /shovel device on the front to peel the tile. The EPA’s manual indicates that the razing of the building using this type of machinery causes category II non-friable ACM, but not category I ACM, to become regulated asbestos-containing material or RACM. So under the EPA pamphlet the bobcat use by Defendant would not generally cause the resilient floor tile to become friable. Thus, the material would not become RACM and Defendant was not required to employ the various containment procedures.

If non-friable asbestos-containing material is intentionally run over by rubber-tire vehicles as a means of segregation, it does not automatically become RACM but must be examined for damage. If it has become extensively damaged, i.e., it was sanded, ground, cut or abraded during segregation it becomes RACM and is subject to the NESHAP regulation. The bobcat used by Defendant was a rubber-tire vehicle. It undoubtedly ran over the floor tile. The question then becomes did it extensively damage the floor tile. If it did then the floor tile became subject to NESHAP regulations. As indicated above, Defendant did not

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<sup>3</sup> *National Emission Standards for Hazardous Air Pollutants (NESHAP)*, 40 CFR part 61, part M.

<sup>4</sup> *OAC 3745-20-01 (B)(12)*.

<sup>5</sup> *OAC 3745-20-01 (B)(24)*.

observe the NESHAP regulations regarding containment. The United States EPA has published asbestos/NESHAP regulated asbestos-containing materials guidance. In part four of that document inspection procedures are set forth. These inspection procedures are to assist in determining the potential for fiber release from non-friable asbestos-containing materials. The guidance provides that if the item is a category I non-friable asbestos-containing material the contractor, building owner, or operator can pursue a procedure to determine friability. The owner-operator would collect a piece of dry ACM and seal it in a transparent, reclosable sample bag. The builder/contractor would then apply hand pressure and observe if the ACM falls apart to the extent that it is crumbled, pulverized, or reduced to powder. The owner-operator would further observe whether this occurred suddenly. The guidance also provides that samples can be sent to an analytical laboratory to test.<sup>6</sup>

In this case the Plaintiff's inspectors did not employ this procedure. By the same token, the Defendants did not employ this procedure.

The central issue in this case is whether the floor tile was friable. To determine if the floor tile is friable one has to see if it can be crumbled, pulverized, or reduced to powder by hand pressure. It is the critical test that applies even to the alternative situation of examining whether there was cutting, sawing, grinding or abrading. It all comes down to the central question of whether these floor tiles were in such a condition that they can relatively easily be crumbled, pulverized, or reduced to powder. In that state they have a very high probability of releasing asbestos fibers into the air. In that state they present a risk to human health.

The Defendant argues that with regard to this critical issue the hand pressure test, as set forth in the EPA publication, is required. The Plaintiff agrees there needs to be a hand test but does not agree that the inspection procedures set forth in the EPA publication is the exclusive required method. Plaintiff asserts the "edge test", is equally valid.

Neither party has cited a statute, regulation, or case that mandates a particular method. The court is persuaded that on this important issue the procedure set forth in the EPA publication should be followed. Although the regulations appear to permit some subjectivity, the court feels that it is not unbridled

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<sup>6</sup> *United State Environmental Protection Agency Asbestos/NESHAP Regulated Asbestos-Containing Materials Guidance*, pg. 4

subjectivity that should prevail. Of the two alternatives to triggering the requirement of various containment procedures, all are best served by some observance of a standard. It should not be a situation of an inspector, even though well trained and very experienced, just saying there are too many edges and thus the pieces are friable. An inspector should be required to take a piece of dry tile and seal it in a transparent, reclosable sample bag, apply hand pressure and observe if the tile falls apart to the extent that it is crumbled, pulverized, or reduced to powder. The court realizes that this may be an attempt to draw a fine line in various gradations or degrees, but it provides some moderate reasonable objectivity.

Over the last ten to twenty years the U.S. Environmental Protection Agency has issued a number of abstracts on the issue of friability of asbestos-containing floor tile. These abstracts provide some guidance for determining this somewhat difficult factual issue of when floor tile becomes, or can be considered, friable based on demolition activities. The issue is obviously important because the asbestos NESHAP or containment procedures apply from the point where the tile becomes friable.

The U.S. EPA abstract at control number: A960019, dated July 28, 1994 provides the term broken in the rule can be interpreted as substantially increasing the scope of the standard and therefore, EPA removed it. The preamble further explained, "...most non-friable material can be broken without releasing significant quantities of airborne asbestos fibers. It is only when the material is extensively damaged, i.e., crumbled, pulverized, or reduced to powder that the potential for significant fiber release is greatly increased." Here the floor tile was not established to be extensively damaged. It was not shown that the floor tile was crumbled, pulverized, or reduced to powder. So it was not proven that there was a likelihood of the release of significant quantities of airborne asbestos fibers.

A 1990 abstract provides information and an indication of EPA policy on this issue. The letter provides:

This memorandum clarifies the requirements of the asbestos/NESHAP regarding non-friable asbestos-containing material (ACM), such as floor tile, roofing material, packing and gaskets.

The issue of friability and the intent of the original standards for demolition and renovation activities have been the source of many questions and comments. In recent months, we have spent considerable time discussing this issue and reviewing subsequent interpretations of the standards. The rulemaking proposed on January 10, 1989 only addresses administrative changes or clarifications to the original standards. Thus, the final rulemaking can not result in a change that would affect the stringency of the original standards.

In the original rule, published in 1973, a distinction was made between building materials that would release a significant amount of asbestos fibers and materials that would not. Floor tile, roofing material, packings and gaskets were identified as material that would not release significant amounts of fiber when disturbed. The term 'friable' was used to make this distinction.

In December 1985, we issued a determination which stated that if non-friable ACM could be damaged to the extent that it would be crumbled, pulverized, or reduced to powder, it should be removed prior to demolition. The 1985 determination was intended to affect only practices in ACM that could result in the release of significant quantities of asbestos. While it was unclear whether this determination was intended to affect ACM such as floor tile, roofing material, packings and gaskets that are not friable, some delegated enforcement agencies were inferring this material must be removed prior to demolition to ensure compliance with the NESHAP.

Although no research has been conducted on the conditions which will cause non-friable materials to become friable, it is considered probable that some conditions (e.g. severe weathering, prolonged exposure to harsh chemicals) will cause this effect. Furthermore, certain practices such as burning, sanding or grinding could crumble, pulverize or reduce to powder non-friable ACM.

#### POLICY

Therefore, we recommend the following approach:

Floor tile, roofing material, packing and gaskets (normally non-friable ACM) must be inspected before demolition to determine if the ACM is in poor condition, indicated by peeling, cracking, or crumbling of the material. If normally non-friable ACM is in poor condition then the material must be tested for friability. If the ACM is friable, it must be handled in accordance with the NESHAP. The above four non-friable ACM should be removed before demolition only if they are in poor condition and are non-friable.

If non-friable ACM is subjected to sanding, grinding or abrading as part of demolition or renovation then the non-friable ACM must be handled in accordance with the NESHAP. If the building is demolished by burning, all ACM must be removed prior to the demolition.<sup>7</sup>

The demolition of the Cleveland Elementary School did not involve floor tile that was in poor condition. There was no evidence that the floor tile was peeling, cracking or crumbling before demolition. The floor tile was not subjected to sanding, grinding or abrading as part of the demolition.

In most civil cases the jury decides the probabilities, so the burden of proof is normally carried by a preponderance of the evidence.<sup>8</sup> All reasonable doubts as to the truth of the facts do not have to be removed.<sup>9</sup> The requisite preponderance is the greater weight of the evidence.<sup>10</sup>

The burden of proof in any cause is upon the party asserting the affirmative of an issue,<sup>11</sup> which is determined by the pleadings or the nature of the case.<sup>12</sup> In the case at bar the Plaintiff asserted that

<sup>7</sup> *U.S. EPA Abstract Control No.: C67.*

<sup>8</sup> *In Re Walkers Estate* (1954), 161 Ohio St.564.

<sup>9</sup> *Jones, Stranathan and Co. v. Grieves* (1854), 26 Ohio St.2.

<sup>10</sup> *Stratler's Insurance Co. v. Gath* (1928), 118 Ohio St.257.

Defendant had violated the Ohio statute and its attendant regulations respecting air pollution. Plaintiff sought an injunctive remedy and a civil penalty. The Plaintiff has the burden of proof in this case. The Plaintiff has to establish these floor tiles became friable before or during demolition by Defendant of the Cleveland Elementary School. The Plaintiff has to establish friability by the greater weight of the evidence.

As indicated, the test for friability involves two determinations. First, had the asbestos-containing material when dry become crumbled, pulverized, or reduced to powder. One determines that when using hand pressure on the substance and seeing if it will crumble, pulverize, or be reduced to powder. The second question is whether the floor tile has been subject to cutting, grinding, sanding or abrading. Plaintiff failed to produce, in this case, evidence of cutting, grinding, sanding or abrading.

Plaintiff, with some credibility, points to the many pieces of floor tile in the photographs. The Plaintiff further had evidence that one of the inspectors had used her hand on the edges of the tile pieces and fragments came loose. Finally, Plaintiff points to the fact that there were so many pieces and that with that many edges exposed the likelihood of asbestos fiber release was great.

The Defendant stresses the lack of a test here. The Defendant emphasizes that the inspectors never engaged in the procedure suggested by the EPA to determine friability of floor tile. The Defendant stresses the general nature of resilient floor tile, that is, that if it is intact, not in poor condition, it is not likely to release a significant amount of asbestos fibers.

The court has employed the test for determining credibility of the witnesses. The court considers the appearance of each witness upon the stand; his or her manner of testifying; the reasonableness of the testimony; the opportunity he or she had to see, hear and know the things concerning which he or she testified; his or her accuracy of memory; frankness or lack of it; intelligence, interest and bias, if any; together with all of the facts and circumstances surrounding the testimony. Considering the credibility of the witnesses, the exhibits, testimony and all the facts and circumstances in evidence, it is reasonable to conclude that Plaintiff has not established by a preponderance of the evidence that the floor tile became friable. Therefore, the asbestos NESHAP was not triggered. Defendant did not have to comply with the NESHAP procedures under these circumstances.

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<sup>11</sup> *N.D. Graham and Co. v. W.H. Davis and Co.* (1854), 4 Ohio St.362.

<sup>12</sup> *Martin v. Columbus* (1920), 101 Ohio St.1.

Accordingly, the Plaintiff's, State of Ohio, ex rel. Nancy H. Rogers (now Mike Dewine), Attorney General of Ohio, complaint is DISMISSED.

SO ORDERED:

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JUDGE TIMOTHY N. O'CONNELL

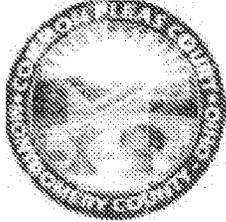
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WEDNESDAY M. SZOLLOSI  
CHRISTINA E. GRASSESCHI  
(419) 245-2550  
Attorney for Plaintiff, State Of Ohio Ex Rel Nancy H Rogers

KENNETH J. WALSH  
(216) 348-5736  
Attorney for Defendant, Titan Wrecking & Environment LLC

SHERRI PETERSON, Bailiff (937) 225-4416 [petersos@montcourt.org](mailto:petersos@montcourt.org)

FDL



General Division  
Montgomery County Common Pleas Court  
41 N. Perry Street, Dayton, Ohio 45422

**Case Title:** STATE OF OHIO EX REL NANCY H ROGERS vs TITAN  
WRECKING & ENVIRONMENT LLC  
**Case Number:** 2008 CV 10301  
**Type:** Entry Signed By Judge

So Ordered

*Timothy N. O'Connell*

Timothy N. O'Connell