

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

G. SCOTT CO INVESTMENT CO., et al.,

Case No. 05CVH09-10023

Plaintiffs,

Judge: Sheward

v.

FRANKLIN COUNTY, et al.,

Defendants,

And,

STATE OF OHIO,

Third-Party Plaintiff

v.

Gayle Scott, Jr., et al.,

Third-party Defendants,
Third-Party Plaintiffs,

v.

WATER SPECIALISTS, INC., et al.,

Third-Party Defendants.

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
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CLERK OF COURTS

DECISION AND ENTRY
GRANTING THE MOTION OF THE STATE OF OHIO FOR SUMMARY
JUDGMENT ON LIABILITY AS TO STATE'S COUNTS ONE THROUGH FIVE
AGAINST PLAINTIFF OAK HILLS MHC, LLC.
AS FILED ON SEPTEMBER 15, 2008

AND
DECISION AND ENTRY
GRANTING THE MOTION OF THE STATE OF OHIO FOR SUMMARY
JUDGMENT ON LIABILITY AS TO STATE'S COUNTS ONE AND TWO
AGAINST PLAINTIFF G. SCOTT CO INVESTMENT CO., AND THIRD-PARTY
DEFENDANT GAYLE SCOTT, JR.

Rendered this 21ST day of NOVEMBER, 2008

Sheward, Judge

On September 15, 2008, the State of Ohio (hereinafter referred to as State) filed two independent motions for summary judgment. One addressed a number of claims against Oak Hills MHC, LLC (hereinafter referred to as Oak Hills) and the other addressed claims against G. Scottco Investment Co. (hereinafter referred to as Scottco) and the Third-Party Defendant Gayle Scott, Jr. (hereinafter referred to as Scott) On October 22, 2008 the non-moving parties filed their ‘Memorandum in Oppositions’.¹ The State filed two separate ‘Replies’ on November, 7, 2008. For the reasons that follow, this Court **GRANTS** both motions for summary judgment.

Given the independent claims, this Court will address the State’s two summary judgment motions one at a time, starting first with the State’s motion against Oak Hills.

FACTUAL HISTORY CLAIMS AGAINST OAK HILLS

The following is taken directly from the State’s ‘Factual History’ section of its motion for summary judgment filed against Oak Hills:

Plaintiff Oak Hills is an Ohio Limited Liability Company (“LLC”). See Second Amended Complaint, ¶ 2. Oak Hills owns the Oak Hills Mobile Home Community (“OHMHC”) located at 5965 Harrisburg-Georgesville Rd., Pleasant Township, Franklin County, Ohio. See Answer ¶ 3. This manufactured home community contains approximately 250 pads, of which approximately 190 are rented and occupied by manufactured homes². See DaGraca Depo. pp. 29:21-25, 30:1-2. These homes are connected to a private sanitary sewer within OHMHC which conveys wastewater to the WWTP at OHMHC. See Nelson Depo. p.14:2-9; DaGraca Depo. p.119:10-20. Oak Hills’ WWTP discharges effluent to the Big Darby Creek. See Answer ¶ 3. The discharge of wastewater from the WWTP has been occurring since at least before July 2, 2002 through the present time.

Oak Hills currently has or has had individual NPDES permits for its WWTP. See Exhibit A, Smith Aff. Exhibits A-1 and A-3; Answer ¶ 4. On February 23, 1998, NPDES Permit no. 4PV00008*DD was issued to

¹ The filing of the pleading was timely due to a stipulation filed with the Court.

² Manufactured homes are also commonly called mobile homes.

Holiday Parks, aka O.H. Community Ltd., became effective April 1, 1998. See Exhibit A, Smith Aff. ¶ 4, Exhibits A-1, p. 1; Answer ¶ 4. Oak Hills assumed responsibility for NPDES Permit no. 4PV00008*DD through a transfer agreement executed July 2, 2002. See Exhibit A, Smith Aff. ¶ 5, Exhibits A-2; Answer ¶ 4. Oak Hills formally submitted a "Permit Transfer Application Form" to Ohio EPA on August 21, 2002 concerning NPDES permit no. 4PV00008*DD. See Exhibit A, Smith Aff. ¶ 6, Exhibit A-3. The Director of Ohio EPA approved the transfer on September 6, 2002. See Exhibit A, Smith Aff. ¶ 7, Exhibit A-4. Oak Hills submitted a NPDES permit renewal application on April 1, 2003. See Nelson Depo. Exhibit 3. On June 4, 2003, Permit 4PV00008*ED was issued to Oak Hills effective July 1, 2003. See Smith Aff. ¶ 8 Exhibit A-5; Answer ¶ 4.

Oak Hills, through its contractor Water Specialist, has submitted MOR's to Ohio EPA for the time period starting in August 2002 through at least October 2007. See Eitel depo, pp. 29:11 through 38:2; Taylor depo. pp. 21:8 through 31:23; Answer ¶ 5; DaGraca Depo. pp. 26:8-11, 49:17-23.

The following are also undisputed facts:

- 1) Oak Hills held two National Pollutant Discharge Elimination System permits.
(hereinafter referred to as NPDES)
- 2) Oak Hills agent Waterworks submitted 'Monthly Operating Reports'
(hereinafter referred to as MORs).
- 3) The MORs that were submitted showed that the wastewater treatment plant
(hereinafter referred to as WWTP) operated by Oak Hills was not in compliance with the terms of Oak Hills' NPDES permits.

FACTUAL HISTORY FOR CLAIMS AGAINST SCOTTCO AND SCOTT

The following facts are taken from the State's 'Motion for Summary Judgment':

Pleasant Acres is a manufactured home community located at 6106 London-Groveport Road, Pleasant Township, Franklin County, Ohio, containing approximately 128 pads, of which 87 are rented and occupied by manufactured homes³. See Fox Depo. p.13:16-21. The homes are connected to a private sanitary sewer within Pleasant Acres which conveys wastewater to the WWTP at Pleasant Acres. See Fox Depo. p.14:11-14.

³ Manufactured homes are also commonly called mobile homes.

The WWTP discharges effluent to an unnamed tributary to the Big Darby Creek. See Scott Answer 4; Exhibit B, Sheree Gossett-Johnson Aff. ¶2. The discharge of wastewater from the WWTP has been occurring since at least January 1, 2000 through at least September 8, 2008. See Exhibit B, Gossett-Johnson Aff. ¶3-7, 10.

Gayle Scott Jr. is the owner of Pleasant Acres. See Scott Depo. pp.14:25, 15:1-18.⁴ Mr. Scott is also the owner and sole shareholder of G. Scottco. Id. p. 16:7-24. Mr. Scott is the only member of the G. Scottco board of directors and only officer. Id. G. Scottco has no minutes of any board meeting or shareholder meeting, nor have any such meetings taken place. Id. pp. 13:25, 14:1-6. Mr. Scott directs the activities of G. Scottco and Pleasant Acres through his employee Bonnie Fox. Id. pp. 16:16-25, 17:1-23. G. Scottco manages Pleasant Acres on behalf of Mr. Scott, along with a number of other properties either owned or controlled by Mr. Scott. Id. p.15:10-18. When asked during his deposition to explain his arrangement with G. Scottco to manage Pleasant Acres, Mr. Scott stated:

“Well, it’s a C Corporation, I’m the only stockholder. It would be no different if I was running it or G. Scottco was not and I was. So there is no difference.”

Id. p.15:15-18. Although incorporated, G. Scottco is merely an extension of Mr. Scott’s will through which Mr. Scott controls and manages Pleasant Acres.

As owner of Pleasant Acres, Mr. Scott has applied for or authorized applications to be made to the Ohio EPA for NPDES permits for the Pleasant Acres WWTP. Id. pp. 48:13-25 49:125 50:1-6. The Director has issued NPDES permits to Mr. Scott for the Pleasant Acres WWTP. See Exhibit A, Smith Aff. ¶¶ 4-6. None of these NPDES permits were ever appealed to the Ohio Environmental Review Appeal Commission by Mr. Scott, G. Scottco or any other person. See Exhibit C, Mary Oxley (“Oxley”)Aff. ¶ 3. Mr. Scott contracted with Winelco to provide the services of certified wastewater operators. See Scott Depo. p. 12:7-10. Through Winelco, Mr. Scott submits MORs to Ohio EPA for the Pleasant Acres WWTP. See Fox Depo. p.18:13-24.

By June 5, 2005, Franklin County completed the construction of a regional wastewater treatment plant and sewer system near Pleasant Acres. See Exhibit D, Thomas D. Shockley Aff. ¶ 5. The sewer at that time terminated less than fifty-six feet from the Pleasant Acres property line. Id. Through his counsel, Mr. Scott was notified by Franklin County through letter of March 11, 2005 that the County sewer would be available to the Pleasant Acres facility by July 2005. See Fox Depo. p. 50:12-22 Exhibit 9.

⁴ G. Scottco claimed to be the owner of Pleasant Acres in the Plaintiffs’ Second Amended Complaint, but based upon Mr. Scott’s testimony this was clearly a misrepresentation made to the Court.

Following are also undisputed facts:

- 1) Scottco holds National Pollutant Discharge Elimination System permits.
(hereinafter referred to as NPDES)
- 2) Scottco's agent Winelco was to submit 'Monthly Operating Reports'
(hereinafter referred to as MORs) and did submit MORs to the State.
- 3) The MORs that were submitted showed that the wastewater treatment plant
(hereinafter referred to as WWTP) operated by Scottco was not in compliance with the
terms of Scottco's NPDES permits.

STANDARD OF REVIEW

First this Court must enumerate the required standard concerning a motion for summary judgment. The Court shall grant a motion for summary judgment if the evidentiary materials in the case show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). The Ohio Supreme Court has ruled that "the moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292.

A motion for summary judgment must be backed by some type of evidence which shows that the nonmoving party has no evidence to support its claims. The moving party must point to Civ.R. 56(C) evidence in the record (i.e., pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, or stipulations of fact) that demonstrates the absence of any genuine issues of material fact. *Id.* at 293. If the moving party meets this test, the nonmoving party must rebut the motion with specific facts and/or affidavits showing a genuine issue of material fact that must be

preserved for trial. *Id.* The court must construe the evidence against the moving party and grant summary judgment only when it appears that reasonable minds can reach but one conclusion which is against the nonmoving party. *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

Having addressed the standard for review, this Court must now review the arguments of counsel.

LAW AND ARGUMENT

This Court has reviewed the evidentiary material filed by the parties concerning this motion. When this Court has specifically relied upon a document or testimony, the source is referenced.

First it is important to note that the State advanced case law to establish that violations of the applicable permits in this case are controlled by a 'strict liability' standard. Please note the following from the State's motions:

Environmental protection statutes have long been recognized as strict liability laws designed to prohibit public welfare offenses. In *United States v. United States Steel Corp.* (N.D. Ind., 1970), 328 F. Supp. 354, 356, that Court noted that "[t]he public is injured just as much by unintentional pollution as it is by deliberate pollution." In *U.S. v. Liviola* (N.D. Ohio, 1985), 605 F. Supp. 96, the District Court for Northern Ohio found that federal hazardous waste laws, like other environmental statutes dealing with water or air pollution, imposed strict liability, and that Congress had made intent irrelevant to the question of civil penalties. *Id.* at 100.

Under Ohio law, environmental liability is also strict. See, e.g., *Professional Rental, Inc. v. Shelby Insurance Co.* (1991), 75 Ohio App. 3d 365, 376. *State of Ohio v. Gastown* (1975), 49 Ohio Misc. 29, 34. *State ex rel Brown v Dayton Malleable, Inc.* Court of Common Pleas Montgomery County, Case No. 78-694 October 12, 1979, 13 ERC 2189, 2192. See Exhibit E. More specifically, when a statute requires that "no person shall" take some action, without any reference to degree of culpability, that statute indicates clearly the legislature's intent to impose strict liability. See *State v. Cheraso* (1988), 43 Ohio App. 3d 221, 223; *State v. Grimsley* (1982), 3 Ohio App. 3d 265.

The non-moving parties did not contest the State on this point. This Court has independently reviewed the law in this area and it agrees that strict liability is the correct standard.

A great deal of the State's argument in both motions concerns the application of R.C. §6111.07. Please note the following language from said statute:

6111.07 Prohibited acts - prosecutions and injunction by attorney general.

(A) No person shall violate or fail to perform any duty imposed by sections 6111.01 to 6111.08 of the Revised Code or violate any order, rule, or term or condition of a permit issued or adopted by the director of environmental protection pursuant to those sections. Each day of violation is a separate offense.

* * * * *

(C) No person knowingly shall submit false information or records or fail to submit information or records pertaining to discharges of sewage, industrial wastes, or other wastes or to sludge management required as a condition of a permit or knowingly render inaccurate any monitoring device or other method required to be maintained by the director.

This Court will first address the arguments raised in the State's 'Motion for Summary Judgment' as against Oak Hills.

I. Oak Hills:

The State first argued that Oak Hills was in violation of its NPDES. Specifically the State stated: "The State Is Entitled To Summary Judgment As To Oak Hills' Liability For Violations Of The NPDES Permits And R.C. Chapter 6111." (State's Motion at page 10.) The State's evidence established that two permits were held by Oak Hills. The evidence established that the permits were held by Oak Hills for years prior to the current litigation and that Oak Hills never attempted to have the permits changed prior to the timeframe relevant to this suit. Those facts were not in dispute.

Pursuant to the terms of the permits it was/is up to Oak Hills to make sure that the WWTP is monitored. Oak Hills was then required to report the findings of its monitoring to the government by way of the MORs. The State argued that the MORs are admissions by Oak Hills that establish the violation of the permits and therefore establish Oak Hills' liability. Specifically, the State claimed: "Count One – Oak Hills violated R.C. Chapter 6111 by failing to meet effluent limitations as required by the terms and conditions of the NPDES permits for the OHMHC WWTP." (State's Motion at page 12.)

In support of its argument the State cited to *Natural Resources Defense Counsel v. Outboard Marine Corp.* (1988) 692 F.Supp. 801. The State relied upon the following language from said opinion:

Normally a permit-holder's statements in its DMRs are conclusive and irrebuttable evidence that permit violations have occurred. Courts have almost uniformly rejected efforts by a claimed violator [**54] to impeach the data in its own DMRs in later enforcement proceedings (see, e.g., *Union Oil*, 813 F.2d at 1492). Clearly a court cannot accept a defense based simply on error or sloppiness in laboratory practices (*id.*), for the Act relies on accurate monitoring by dischargers and they will be held accountable for the data they collect and report (*id.*; *Bethlehem Steel*, 608 F. Supp. at 452-53). *Id.* at 819.

Said court was dealing with discharge monitoring reports (DMRs) that are equivalent to MORs.

Oak Hills did not address this case law within its 'Memorandum in Opposition'. Instead, Oak Hills tried to raise issues with the accuracy of the MORs as submitted by the Water Specialists. However Oak Hills never placed a fact in question that could overcome the 'irrebuttable nature' of the findings on its MORs. Frankly, if all it took was a suggestion of the possibility that the numbers were not correct, then the State could never enforce a system that relies on self reporting.

Though Oak Hills attacked the MORs by claiming that the Water Specialist made mistakes, Oak Hills never contested the factual allegations of the State as to the number and types of violations that are contained within the MORs. The State asserted that there were 929 days of violations.

Based on the self reporting and the admissions of Oak Hills, the State concluded that Oak Hills was in violation of its NPDES and therefore, in violation of R.C. §6111.07. This Court agrees. The State is entitled to summary judgment as to Count One of its claims against Oak Hills concerning liability. The State has proven that there existed '929' days of violations.⁵

Next the State argued: "Counts Four and Five – Oak Hills violated R.C. Chapter 6111 by failing to monitor and report information concerning the OHMHC WWTP as required by the terms and conditions of the NPDES permits for the OHMHC WWTP."⁶ The thrust of this argument is that not only is Oak Hills in trouble for reporting the times it violated its NPDES, it also failed to report testing that was required by its NPDES and that failure to report also is a violation of the permits.

Oak Hills does not contest this finding either. Oak Hills merely addresses this issue by claiming that Water Specialist was making the mistakes. The Affidavits of Smith and Gossett-Johnson filed by the State stand uncontested. Their statements are not conflicted by any prior inconsistent statement. As stated, Oak Hills does not claim that the table created to establish the number of violations is in error. Oak Hills just claimed that the underlying MORs were not correct. Therefore the State's position that there were 1099 days of violations of the Oak Hills permits was/is uncontested.

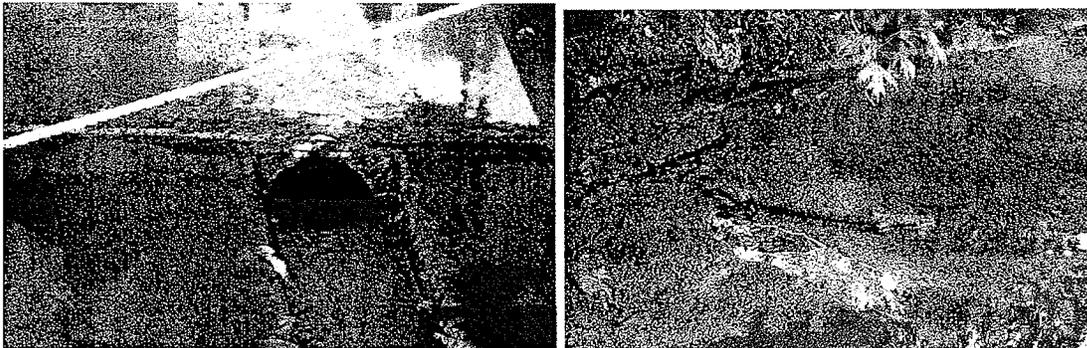
⁵ For each violation per category that equals 'one day' of permit violations. So if there are multiple violations during the same day there can be multiple 'days' of violations.

⁶ For some reason the State choose to go out of order concerning the claims against Oak Hills.

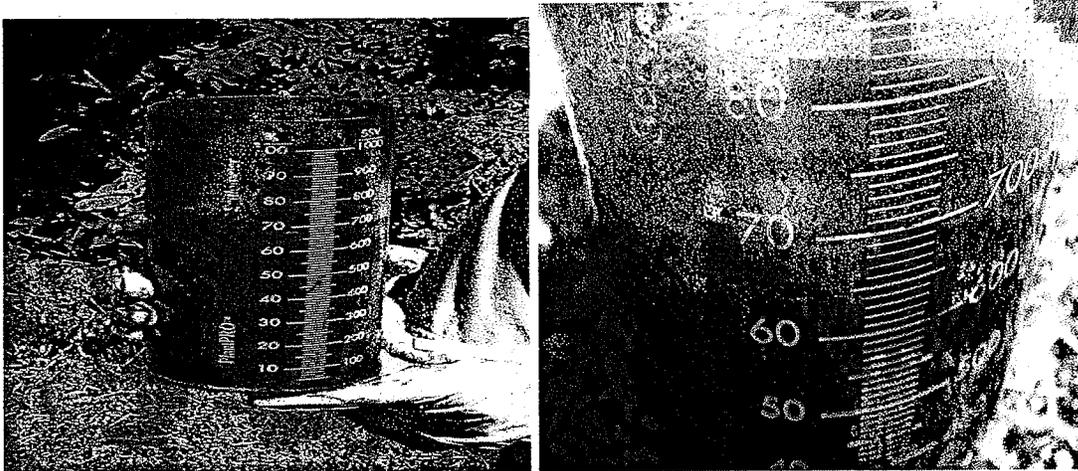
Hence, the State is entitled to summary judgment on Count Four and Count Five of its claim against Oak Hills. This Court **GRANTS** same as to liability only. The State has established '1099' days of violations for non-reporting have occurred.

The State then turned to its second count as plead against Oak Hills. It stated: "Count 2- Oak Hills violated R.C. Chapter 6111 by failing to meet general effluent requirements as required by the terms and conditions of the NPDES permits for the OHMHC WWTP." This claim deals with two specific times when evidence of pollution was directly observed by Ms. Gossett-Johnson.

Ms. Gossett-Johnson inspected Oak Hills' outfall pipe that went into the Big Darby Creek. (Gossett-Johnson Affidavit at ¶ 13.) Ms. Gossett-Johnson observed that the WWTP was in disrepair. She personally observed that sand filters were off-line and sludge was flowing over the WWTP clarifier. (Gossett-Johnson Affidavit at ¶ 13.) Ms. Gossett-Johnson took photographs that were attached to her affidavit. Please note the following:



Ms. Gossett-Johnson also noted in her affidavit that she witnesses an additional event on September 19, 2006. (Gossett-Johnson Affidavit at ¶14.) Ms. Gossett-Johnson took samples and personally observed the slow-settling substances. Again she document her findings with photographs:



Oak Hills did not contest these findings within its 'Memorandum Contra'. Oak Hills did address the potential bias of Ms. Gossett-Johnson by speculating on her motives but Oak Hills did not submit any evidence to contest her findings concerning the two days in September 2006 documented by her testimony and photographs.

Furthermore, Oak Hills did not produce any evidence that would show that the WWTP was being operated properly on the two dates in question. Oak Hills should have had access to such evidence if it did exist.

As to Count Two the State is entitled to summary judgment. It has proven that on September 1 and September 19 of 2006 the WWTP was in violation of the permits and Oak Hills was in violation of R.C. §6111.07. Therefore, liability is established as to two violations, one on September 1 and the second on September 19, 2006.

The last claim by the State against Oak Hills was: "Count Three – Oak Hills violated R.C. Chapter 6111 by failing to timely submit plans for disinfection facilities for its WWTP and to upgrade these facilities as required by the terms and conditions of the NPDES permits." (State's Motion at page 17) The State advanced evidence to show that Oak Hills violated its NPDES when it failed to submit a required "permit to install application". The NPDES permit No. 4PV00008*ED came with a requirement that Oak

Hills submit detailed plans to achieve compliance with the final effluent limitation for total residual chlorine within six months of the permits' effective date, or by January 1, 2004. Oak Hills did not contest the existence of that requirement.

The State then produced appropriate Civ.R. 54(C) evidence that indicated that Oak Hills never met that requirement. No plan was submitted and no new equipment has been installed at the WWTP in compliance with the permit requirements. Hence, Oak Hills is in violation of the permit. The State then calculated the time of the non-compliance to be 1169 days as of the day of the filing of its 'Motion for Summary Judgment'. (July 1, 2005 to September 11, 2008)

A review of Oak Hill's 'Memorandum in Opposition' failed to establish any effort by Oak Hill to address this deficiency. The Affidavits filed by Oak Hills do not contest the States' interpretation of the permit nor do they claim that the plans were submitted or that the work was conducted. Clearly, once the State met its burden of proof on this issue Oak Hills had the reciprocal burden of production to attempt to place the State's facts into conflict. Oak Hills failed to do so.

Summary judgment is appropriate at this time concerning the claims that Oak Hills has been in violation of its permit from July 1, 2005 to the present time. The State has established Oak Hills' liability on that issue.

This Court did review the issues raised by Oak Hills within its 'Memorandum Contra'. Oak Hills enumerated 6 reasons why this Court should not find in favor of the State. Those reasons were: "(1) The State has failed to meet its burden of proof; (2) The issues of liability and penalty are so interrelated that summary judgment would be inappropriate; (3) The State has failed to establish the accuracy of the data relied upon in

its Motion; (4) Summary Judgment is not yet ripe for adjudication due to on-going discovery and the recent addition of Third-Party Defendant Water Specialists, Inc. (“Water Specialists”) as a party to this litigation; (5) Summary Judgment would create irrefutable evidence against Water Specialists which would be inappropriate at this point in time; and (6) It was impossible for Oak Hills to comply with certain terms and conditions of its NPDES permit.” (Oak Hills’ ‘Memorandum in Opposition’ page 1.) This Court will address these issues in order to make clear that Oak Hills’ arguments were considered.

(1) The State has failed to meet its burden of proof: From this Court’s decision, it is obvious that the State has met its burden of proof. The affidavits of Smith and Gossett-Johnson and the State’s ability to rely upon the MORs were sufficient Civ.R. 54 (C) evidence of Oak Hills’ failure to comply with the terms of the NPDES. The affidavits relied upon by Oak Hill do not raise any issues that conflict with the State’s evidence.

Oak Hills asserted that Gary Bennett’s affidavit placed into questions the MORs that were submitted while the Water Specialists were working for Oak Hills. Please note the following from Mr. Bennett’s affidavit:

— 7. In my professional opinion, I checked the waste water plants of Pleasant Acres and Oak hills. Each plant had separate operators prior to the retention of TCCI [Mr. Bennett’s employer]. With respect to the initial inspection of Pleasant Acres, the facility was clean and in good order. Adjustments were made to the declorination unit and obtained accurate figures. All of the equipment was working properly.

With respect to the initial inspection of Oak Hills, I found sand filters were full of sludge, and the equalization tank was full. As a result, the readings may have produced results which were not in compliance with the EPA guidelines. Numerous variable maintenance, mechanical and weather factors could have contributed to the non compliant number of each facility.

The statements of Mr. Bennett do not contest the prior MORs, or any of the allegations contained within the State's 'Motion for Summary Judgment'. The last sentence of paragraph 7 is nothing more than speculation. It is not evidence that would refute the MORs or the facts alleged within the State's evidence in support of the violations.

Furthermore, the State pointed out that Mr. Bennett's affidavit and Ms. Nelson's affidavit, if actually evidence instead of speculation, would actually cut against Oak Hills. If this Court was to give the two affidavits the emphasis as requested by Oak Hills, all the affidavits would establish is that Oak Hills MORs were inaccurate. The submitting of inaccurate MORs is also a violation of the applicable permits and would lead to similar problems for Oak Hills.

Oak Hills also elide on the following from Ms. Nelson's affidavit at ¶¶ 6 – 7:

6. On occasion, I was told by employees of Water Specialists that the data submitted to the state related to Oak Hills' wastewater treatment plant could have possibly been outside the permit limits; however, I was told that if the data was outside the permit limits, it was only minimally so.

7. I was specifically told by Bill Eitel on at least one occasion that the data submitted to the State by Water Specialists related to Oak Hills' wastewater treatment plant was in error, either due to faulty equipment used in the wastewater treatment plant or due to errors in data collection methods.

This 'evidence' is not relevant Civ.R. 54(C) evidence that would in anyway contest the State's evidence that the MORs reported violations. The State met its burden and Oak Hills failed to meet its reciprocal burden.

(2) The issues of liability and penalty are so interrelated that summary judgment would be inappropriate:

Next Oak Hills advanced an apparent judicial economy argument to try and keep the State from receiving summary judgment. No cases were cited in support of this argument by Oak Hills. The point of the argument was that some of the same facts will

have to be advanced by the State to establish the evidence to support the penalty allowed by the permit violations. Therefore, because the State will have to cover some of the same ground at the trial, summary judgment is inappropriate at this time.

This Court's decision as to the pending summary judgment will not keep Oak Hills from producing what ever evidence it wants to produce to try and minimize the civil penalties. If it has evidence that the MORs show violations that are *de minimums* and/or violations that posed no real risk to the watershed then that evidence will be heard. Of course, the State will be free to produce evidence that supports the size and scope of the pollution that stemmed from Oak Hills violations of its permits. This Court will not be confused by the interrelationship between the liability and the penalties that may be assessed. There was/is no merit to this argument.

(3) The State has failed to establish the accuracy of the data relied upon in its Motion:

Oak Hills claimed that the data relied upon by the State is inaccurate. Oak Hills also claimed that it was 'unverified'. Concerning the 'inaccuracies' this Court has already addressed the two affidavits advanced by Oak Hills to make that claim. Both affidavits fail to create a material question of fact. Mr. Bennett's statements do not directly contest the MORs as submitted and merely speculates as to possible issues with their validity. Mr. Bennett does not indicate that he reviewed the MORs and compared them to the State's evidence and found conflicts.

The same is true concerning Ms. Nelson's affidavit. Ms. Nelson's affidavit states "could have possibly" as it relates to one of her claims. (Nelson's affidavit at ¶ 6) Then she reference one time when one individual told her that the MORs submitted to the State "was in error". (Nelson's affidavit at ¶ 7) However, Nelson's affidavit does not establish

that the 'error' was in Oak Hills favor or was in fact an underreporting of the permit violation. Ms. Nelson's and Mr. Bennett's affidavits do not, pursuant to Civ.R. 54(C) sufficiently question the evidence advanced by the State and therefore said argument lacks merit.

Concerning the Oak Hills claim that the data was 'unverified', this Court finds that said argument lacks merit. The Affidavit of Ms. Gossett-Johnson at ¶ 5 indicated that the MORs contained certifications that the information was "true, accurate and complete". That fact is uncontested by Oak Hills. In any event, the State relied upon the MORs as prepared by the authorized agent of Oak Hills; i.e., Water Specialists. The State's evidence does comply with Civ.R. 54(C) and said evidence stands uncontested. Oak Hills' position on this matter is unpersuasive.

(4) Summary Judgment is not yet ripe for adjudication due to on-going discovery and the recent addition of Third-Party Defendant Water Specialists, Inc. ("Water Specialists") as a party to this litigation:

If Oak Hills required more time to address the State's motion it should have filed the required Civ.R. 56 (F) motion for more time. No such request was made.

Furthermore, this case has been pending for years. The documents that Oak Hills needs to have in its possession to contest the State's claims were created by its own agent; i.e., Water Specialists. Oak Hills has known the nature of the State's claims and has had years to prepare a defense. Oak Hills only recently ended its business relationship with the Water Specialists. Prior to that time Oak Hills must have had easy access to all of Water Specialists business records. If it did not, Oak Hills had the ability to request the documents from the State to see what the State was using to establish the

permit violations. Furthermore, the State has shown conclusively that it produced the documents to Oak Hills as of October 19, 2007. Over one year ago.

Oak Hills' argument concerning this issue is not well taken.

(5) Summary Judgment would create irrefutable evidence against Water Specialists which would be inappropriate at this point in time:

Oak Hills has also argued that a summary judgment for the State would harm Water Specialists' ability to protect its interest. The State has argued that Oak Hills lacks standing to assert such a claim. This Court finds no merit in Oak Hills' argument.

Oak Hills argued that the Water Specialist might have evidence that would refute the State's claims leaving Oak Hills exposed to a judgment in the State's favor while Oak Hills will not be able to establish Water Specialists' negligence or breach of contract. Then Oak Hills asserted that to grant the State's motion would lead to the Water Specialists being precluded from denying wrongdoing.

Oak Hill is correct that the Water Specialists has not filed anything concerning the State's pending motion. However, the Water Specialists has been involved in this litigation for most if not all of the time that the State's motion has been pending. The State served the Water Specialists with its summary judgment motion. Had the Water Specialists had concerns with the motion it could have/should have raised those issues.

This argument lacks merit.

(6) It was impossible for Oak Hills to comply with certain terms and conditions of its NPDES permit:

Finally, Oak Hills advanced the theory of legal impossibility in regard to some of the conditions of the NPDES permits. Oak Hills claimed that the requirement of the permit to have Oak Hills hook into a regional sewer system was impossible. The State

responded by noting that its claims do not reflect that issue. The State is holding Oak Hills to the standards of the permits and the need to submit plans but it is not trying to enforce the 'hook in' part of the permit.

Oak Hills claims that said provision in the permit voids the permits other conditions. There is no law cited to support that result and this Court will not create it. Furthermore, the alleged 'impossibility' is not really an impossibility but a timing issue. Eventually, the required pumping station will be build and the other necessary improvements will allow Oak Hills to hook into the system.

There would be some merit to this argument if the State was pursuing a breach of the permit that was predicated on the lack of the hook up. However, that is not the case and therefore, said issue is a non-factor.

Next Oak Hills claimed that had the sewer system been created faster by the other non-party entities, then Oak Hills could have hooked into that system sooner thereby eliminating some of the days when Oak Hills was in breach of its permits. Clearly, the failure of others to meet the prospective deadline for the construction of a sewer system did not/does not excuse the permit holder from its obligations. Hence, this delay, though it might be advanced as mitigation, does not refute the need of Oak Hills to comply with the permit. This argument also fails to refute the State's arguments for summary judgment.

II. Scottco & Scott:

Now this Court will address the issues raised by the State within its 'Motion for Summary Judgment' as filed against Scottco and Scott. The State first claimed that "The State Is Entitled To Summary Judgment As To Mr. Scott's and his company G. Scottco's

Liability For Violations Of The NPDES Permits And R.C. Chapter 6111.” (State’s Scottco Motion at page 11) The State advanced the following argument:

Ohio Revised Code 6111.07(A) provides, inter alia, that no person who is the holder of a permit issued under R.C. 6111.01 to 6111.08 shall violate any of the permit’s terms and conditions. These NPDES Permits, nos. 4PV00101*AD, 4PV00101*BD and 4PV00101*CD, were issued to Mr. Scott making him clearly the holder of these permits. See Exhibit A, Smith Aff. Exhibits A-1, A-2 and A-3. These NPDES permits were not appealed by Mr. Scott pursuant to R.C. 3745.04, to the Environmental Review Appeals Commission (“ERAC”). See Exhibit C, Oxley Aff. ¶ 3. The Environmental Review Appeals Commission has exclusive and original jurisdiction to consider the validity of these permits under Ohio law. See State ex rel. Williams v. Bozarth (1978), 55 Ohio St. 2d 34; State ex rel. Maynard v. Whitfield (1984) 12 Ohio St. 3d 49, 50. In the current matter before the Court, the Court lacks jurisdiction to consider any argument of Mr. Scott or his company G. Scottco attacking the validity of these permits. Id. (State’s Scottco Motion at page 11)

This arguments, and the facts associated with Mr. Scott holding the permit are/were uncontested by Scott or Scottco within their “Memorandum in Opposition”.

The State then claimed: “Count One - Mr. Scott and his company G. Scottco violated R.C. Chapter 6111 by failing to timely submit plans for and to connect Pleasant Acres to the regional sewer, as required by the terms and conditions of NPDES permit no. 4PV00101*CD.” To support that claim the State offered Ms. Gossett-Johnson’s affidavit that established that Mr. Scott and/or Scottco failed to submit the required plain as outlined within the permit.

The State established the permit required such a plan by June 1, 2006. As of the date of the filing of the State’s ‘Motion for Summary Judgment’ there had not been any plan submitted. Hence, the State claimed there existed 834 days of violations.

Mr. Scott and Scottco do not deny that fact. They have not produced any evidence to the contrary. Mr. Scott and Scottco did not even contest the per-day nature of

the fine for their failure to produce the plain. Hence, they were and are violating the permit. Summary judgment as to the issue of liability for failure to submit a plain is warranted.

Next the State alleged: "Count Two – Gayle Scott and his company G. Scottco violated R.C. Chapter 6111 by failing to meet effluent limitations as required by the terms and conditions of the NPDES permits for the Pleasant Acres WWTP, as set forth in the State's Claim." In support of this claim the State submitted the affidavit of Ms. Smith and Ms. Gossett-Johnson. These affidavits established the existence of the permits, the terms of the permits and the fact that the MORs submitted by Scott and Scottco had testing results that exceeded the limits contained within the permits.

The State established that the MORs show 1,676 days of violations. As stated supra within this 'Decision and Entry', this Court finds that the MORs are admissions against Scott and/or Scottco. Scott and Scottco attempted to attack the credibility of the affidavits utilized by the State but their efforts fell short. Scott and Scottco submitted the same affidavit of Gary Bennett as used by Oak Hills. Mr. Bennett's affidavit does not support the proposition that there was something wrong with the State's numbers or the MORs that the State used to compile its charts. Frankly, Mr. Bennett does not address the issue at all.

Scott and Scottco then advanced the affidavit of Ms. Fox. Please note the following from her affidavit at ¶¶ 5 & 6:

5. I regularly received copies of the Monthly Operating Reports submitted to the State by Winelco related to Pleasant Acres' wastewater treatment plant, but most of the time I received the Monthly Operating Reports from Wineclo weeks and months after they were submitted to the State.
6. On occasion, I was told by employees of Wineclo that the data submitted to the State related to Pleasant Acres' wastewater treatment

plant could have possibly been outside the permit limits; however, I was told that if the data was outside the permit limits, it was only minimally so. Again, most of the time, I was given this information weeks or months after the fact when it would be too late to correct any issues.

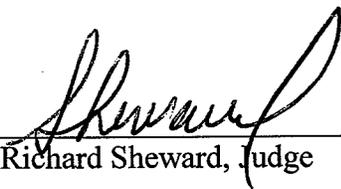
Said statement is void of any relevant fact that could contest the State's evidence. Ms. Fox does not directly contest the State's data. Her statement in paragraph 6 established that the MORs did show violations of the permit. The 'minimal' nature of the violation goes to mitigation and not to strict liability. Neither Ms. Fox nor Mr. Bennett state that the WWTP was operating within the permit limits during the time that the State asserts that there were violations. This evidence fails and the State is entitled to summary judgment as to the liability as plead within Count two of its claims against Scott and Scottco.

Within Scott and Scottco's 'Memorandum Contra' they argued the same issues as raised by Oak Hills in its 'Memorandum Contra'. The arguments are practically identical and therefore, are rejected by utilizing the same analysis *supra*.

DECISION AND ENTRY

This Court **GRANTS** the State of Ohio's 'Motion for Summary Judgment' as against Oak Kills MHC LLC on Counts One through Five of its complaint as to **LIABILITY ONLY**.

This Court **GRANTS** the State of Ohio's 'Motion for Summary Judgment' as against G. Scottco Investment Co, and Gayle Scott Jr. as to Counts One and Two of its complaint as to **LIABILITY ONLY**.


Richard Sheward, Judge

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