

FILED

2008 OCT -3 PM 2:13

IN THE COURT OF COMMON PLEAS

HOLMES COUNTY, OHIO

DORCAS L. MILLER, CLERK
COMMON PLEAS COURT
HOLMES COUNTY, OHIO

STATE OF OHIO, EX REL.
NANCY H. ROGERS,
ATTORNEY GENERAL,
Plaintiff

CASE NO. 97-CV-049

v.

JUDGMENT ENTRY

BOARD OF COMMISSIONERS OF
HOLMES COUNTY, OHIO,
Defendant.

Journalized: Journal 200, Page 665-667

On July 28, 2008 this Court handed down its Decision regarding Plaintiff's motion for contempt against Defendant for alleged violations of a December 15, 1998 consent order entered in this case.

On August 27, 2008 Plaintiff filed a motion for reconsideration of a portion of the July 28, 2008 decision. The motion was set for non-oral hearing. Defendant responded with Memorandum in Opposition.

Plaintiff seeks to revisit the Court's verdict that Defendant was not guilty of contempt of court for failure to pay stipulated penalties. (See IV. Stipulated Penalties, page 8, 9 of July 28, 2008 Decision.)

The Plaintiff argues that the Court improperly applied Ohio Law in rendering its not guilty verdict. Defendant argues that the Court properly applied Ohio Law to the facts as presented in hearing and correctly entered a verdict of acquittal.

Plaintiff has requested reconsideration of a verdict of not guilty in a contempt of court action. A verdict of not guilty is a final judgment of acquittal. A motion to reconsider a final judgment in a trial court is a nullity. *Pitts v. Department of Ohio Transportation* (1981), 67 Ohio St. 2d, 378, 379. A motion for reconsideration is thus not an appropriate procedure to collaterally attack a judgment of acquittal in a contempt of

court action. Many prosecuting authorities would like to appeal or revisit acquittals, but Ohio law does not provide for such a procedure.

However, in order to further elucidate the Court's reasons for finding Defendant not guilty of contempt for failure to pay stipulated penalties, the Court has considered carefully the Memorandum in Support of the Motion for Reconsideration and the Memorandum in Opposition.

The Court finds that Defendant's Memorandum in Opposition accurately states the law and the Court's position in rendering the verdict of not guilty. Wherefore, Defendant's Memorandum is adopted herein as if fully rewritten as the reasoning of the Court.

Plaintiff continues to treat this action as an original complaint made pursuant to Revised Code Chapter 6111. It is not. This action is in contempt for violation of a Consent Order. As counsel have extensively briefed, when there is disagreement with regards to a Consent Order a Court must apply fundamental principles of contract law. In interpreting a contract the Court is not bound by the "four corners" (i.e. the content) of the document. The Court must consider the content of the contract in light of the parties' conduct in carrying out the contract.

It is clear from the testimony of Ohio EPA witness Dean Stoll, that he considered some of the Wastewater Treatment Plant violations in this case to be substantial and subject to stipulated penalties and some not. It is therefore clear that Ohio EPA through its agent waived certain violations which were not in compliance with Holmes County's NPDES permits and thus not in compliance with the Consent Order.

Plaintiff has the burden of proving, pursuant to the parties' contract and conduct, which violations were substantial enough for the Court to find the Defendant in contempt for failure to pay stipulated penalties and which were not. This Plaintiff failed to do because the Plaintiff has taken the position that every NPDES permit violation should be subject of stipulated penalties. This is especially telling where Plaintiff wants the Court to look back over ten years and sanction Defendant for conduct that, if in violation of the Consent Order, could have and should have been brought to the Court's attention much earlier. While equitable defenses are not applicable to the State of Ohio, this Court as trier of the fact, may take such lack of action into account in weighing the evidence

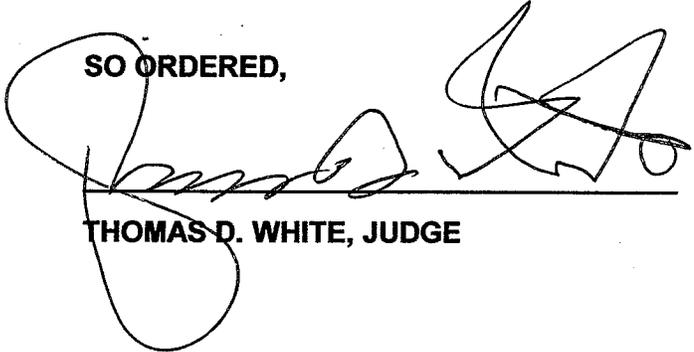
regarding a waiver of Defendant's non-conformance with the Consent Order. And that conclusion is that Ohio EPA, through its conduct, waived some if not most of the stipulated penalties provided for in the Consent Order.

The Court finds that Plaintiff failed to sustain its burden of proving pursuant to the Consent Order which violations were subject to stipulated penalties and which violations were not subject to stipulated penalties. Given this failure of proof, the Court was required to enter a verdict of not guilty on this branch of Plaintiff's motion in contempt.

For the foregoing reasons Plaintiff's motion for reconsideration is considered and denied.

SO ORDERED,

DATED: October 3, 2008



THOMAS D. WHITE, JUDGE

cc: All counsel

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