

[Cite as *Patriot Water Treatment, L.L.C. v. Ohio Dept. of Natural Resources*, 2015-Ohio-5638.]

PATRIOT WATER TREATMENT, LLC

Plaintiff

v.

OHIO DEPARTMENT OF NATURAL  
RESOURCES

Defendant

Case No. 2012-07951

Judge Patrick M. McGrath

DECISION

{¶1} Defendant Ohio Department of Natural Resources (ODNR) filed a motion for summary judgment and plaintiff Patriot Water Treatment, LLC (Patriot) filed a response. ODNR then filed a reply.<sup>1</sup> ODNR's motion for summary judgment is now before the court for a decision.

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." See also *Gilbert v. Summit Cty.*,

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<sup>1</sup>ODNR's related motion for leave to file a reply is GRANTED, instanter.

104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶4} In interpreting the United States Supreme Court decision in *Celotex v. Catrett*, 477 U.S. 317 (1986), the Supreme Court of Ohio found no express or implied requirement in Civ.R. 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 291-292 (1996). Furthermore, the *Dresher* Court stated that it is not necessary that the nonmoving party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Id.* at 289, quoting *Celotex*. In sum, the *Dresher* Court held that the burden on the moving party may be discharged by "showing"—that is, pointing out to the Court—that there is an absence of evidence to support the nonmoving party's case. *Id.*

{¶5} "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Id.* at 293. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden as outlined in Civ.R. 56(E):

{¶6} "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of his pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶7} This matter arises out of Patriot's claims against ODNR for spoliation of evidence and public records removal in violation of R.C. 149.351, which it filed with this court on November 2, 2012. Its complaint states that on August 10, 2010, the Ohio Environmental Protection Agency (OEPA) issued Patriot a permit to install and operate a water treatment facility designed to treat solid-containing waters (brine wastewater) emanating from the oil and gas industry. Patriot's permit, in

conjunction with another OEPA permit issued to the city of Warren (Warren), allowed Patriot to send treated water to Warren's water treatment facility for further processing. The complaint alleges that ODNR and OEPA had corresponded prior to OEPA's issuance of the permit about whether the proposed facility was in compliance with Ohio statutes, specifically R.C. 1509.22. Patriot further alleged that, after receiving the 2010 permit, it invested millions of dollars to build its treatment facility, which began operating in 2011.

{¶8} According to the complaint, in December 2010, new directors at ODNR and OEPA agreed that in the future, ODNR would not support similar OEPA permits. On March 19, 2012, OEPA issued modified permits (2012 permits) to Patriot and Warren that precluded Warren from accepting brine wastewater from Patriot. The relevant portion, Section BB, of Warren's 2012 permit states:

{¶1} BB. Beginning on the effective date of this permit, the permittee shall stop accepting brine wastewater from oil or gas drilling, exploration or production. **Disposal of brine wastewater \* \* \* is not an authorized method of disposal under R.C. 1509.22(C)(1) unless and until it is approved by the Chief of the Division of Oil and Gas Resources Management for testing or implementing a new technology or method of disposal.** If such an approval is granted under R.C. 1509.22(C)(1) by the Chief of the Division of Oil and Gas Resources Management, the permittee must submit an NPDES Permit Modification application to Ohio EPA for approval prior to acceptance of brine wastewater. The permittee may not accept brine wastewater from oil or gas drilling, exploration or production until after an NPDES Permit Modification authorizing acceptance of the material is approved. *Patriot Water Treatment, LLC & City of Warren v. Chris Korleski, Director of Environmental Protection, et al.*, ERAC Nos. 156477, 156588, 786501, and 786589, 2012 Ohio ENV LEXIS 6, at ¶ 135 (July 3, 2012) (emphasis added).

{¶9} Patriot alleges the 2012 permits prompted it to discontinue its operations and initiate litigation against both ODNR and OEPA. The litigation resulted in Patriot

making several public records requests, the first commencing on May 17, 2011. According to Patriot, ODNR provided records in response, but the production was incomplete. It states that during the deposition of John Husted, a retired ODNR official, it became aware of at least one additional responsive record, an e-mail dated July 21, 2009, which ODNR had not previously provided. Patriot alleges that ODNR's willful concealment of this email coupled with the concealment and destruction of other public records, resulted in the disruption of its declaratory judgment action filed in the Trumbull County Court of Common Pleas (Trumbull County Court) and appeals of the 2012 permits (ERAC cases) to the Ohio Environmental Review Appeals Commission (ERAC).

{¶10} On April 12, 2013, this court dismissed Patriot's case. On appeal, the Tenth District Court of Appeals affirmed the court's dismissal with regard to the public records removal claim, but reversed with regard to spoliation claim. The main issue now before the court is whether ODNR's motion for summary judgment should be granted as to the remaining spoliation claim.

{¶11} The five-part test in Ohio for spoliation of evidence requires: (1) pending or probable litigation involving plaintiff, (2) knowledge on the part of the defendant that litigation exists or is probable, (3) willful destruction of the evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts. *Smith v. Howard Johnson Co.*, 67 Ohio St.3d 28, 29 (1993).

{¶12} ODNR states that assuming, *arguendo*, Patriot can prove the first three elements of a tortious spoliation claim, as a matter of law Patriot cannot prove the fourth element—that its Trumbull County Court or ERAC cases were disrupted because it did not have documents from ODNR. Specifically, it states that Patriot lost the Trumbull County Court case because the court concluded that ERAC had exclusive, original jurisdiction to consider matters regarding OEPA permits.

Patriot did not appeal that judgment. Furthermore, with regard to the ERAC cases, ERAC found, as a matter of law, that OEPA had no authority to enforce R.C. 1509.22, the provision on which Patriot's ERAC appeal hinged. In sum, ODNR states that Patriot's cases were an effort to appeal OEPA permits and because there is no document Patriot will ever find that would have conferred jurisdiction on the Trumbull County Court or have caused ERAC to hold that OEPA can enforce R.C. 1509.22, ODNR's motion for summary judgment should be granted.

{¶13} Patriot, in its response, states that ODNR's motion for summary judgment should not be granted for two reasons. First, according to Patriot, ODNR has failed to demonstrate that it is entitled to summary judgment as a matter of law, because pursuant to R.C. 2721, Ohio's declaratory judgment statute, Patriot had a legal right and the Trumbull County Court had the jurisdiction to hear a declaratory judgment action involving R.C. 1509.22. However, Patriot claims that ODNR destroyed various documents and misled the Trumbull County Court into believing that ERAC had jurisdiction over the R.C. 1509.22 challenges presented by Patriot. As a result, Patriot states that ODNR's motion fails because its own concealment of documents disrupted Patriot's litigation.

{¶14} Second, Patriot states that ODNR has failed to demonstrate that no genuine issue of material fact exists because ODNR's motion, though sounding in law, actually involves questions of fact. Namely, it concerns the existence of the requested documents. Because, ODNR has not filed any affidavits supporting its motion, Patriot states that it has failed its burden under Civ.R. 56.

#### **RELEVANT ODNR AND OEPA STATUTES**

{¶15} R.C. 1509.02 vests ODNR's division of oil and gas resources management with the "sole and exclusive authority to regulate the permitting, location, and spacing

of oil and gas wells \* \* \* excepting only those activities regulated under federal laws for which oversight has been delegated to the environmental protection agency \* \* \* under sections 6111.02 to 6111.028 of the Revised Code.” R.C. 1509.22(C)(1), the specific provision at issue in this case, allows the chief of the division of oil and gas resources management to “adopt rules regarding storage, recycling, treatment, processing, and disposal of brine and other waste substances.” Additionally, brine wastewater can be disposed only in the following ways “[b]y injection into an underground formation \* \* \* [b]y surface application \* \* \* [or] any other manner \* \* \* that is approved by a permit or order issued by the chief.” R.C. 1509.22(C)(1)(a)-(d).

{¶16} Next, OEPA issues permits to ensure water quality under the authority of R.C.6111.02-6111.08, which is Ohio’s Clean Water Act. It authorizes the OEPA director to develop plans and programs “for the prevention, control, and abatement of new or existing pollution of the waters of the state.” R.C. 6111.03(A).

### **THE TRUMBULL COUNTY COURT LITIGATION**

{¶17} Initially turning to the Trumbull County Court litigation, in that case the court stated: “[a]lthough couched in terms of interpretation of R.C. 1509.22, the crux of the requests made by Patriot and Warren before this court concern the validity of the renewal permit issued by OEPA prohibiting the ‘Patriot method’ of brine wastewater disposal.” *Patriot Water Treatment LLC v. Ohio Environmental Protection Agency*, Trumbull C.P. No. 2011-CV-02454 (March 30, 2012). Because there was no controversy regarding the statutory interpretation of R.C. 1509.22, the court held that ERAC was required to resolve the matter as it was the only forum with exclusive jurisdiction regarding OEPA permit appeals. *Id.*

{¶18} At the outset, this court notes that during the pendency of the entire litigation, Patriot has been unable to specifically describe a single document that ODNR purportedly did not produce through the public record requests and which would have changed the outcome of the Trumbull County Court case. Instead, its records request spans a vast range, including “ODNR’s regulation of Light Water under R.C. 1509,” ODNR’s “approval process for Patriot and others under R.C. 1509.22,” ODNR’s “approval process for disposal methods under R.C. 1509,” ODNR’s “treatment of low-salinity brine water disposal under R.C. 1509,” and “Patriot’s method of disposal pursuant to R.C. 1509.22.” Plaintiff’s Response Memorandum, p. 4.

{¶19} Moreover, the range of documents Patriot seeks would not have bestowed jurisdiction on the Trumbull County Court because during that litigation Patriot never possessed a permit from ODNR, which regulates the disposal of brine wastewater in Ohio. See R.C. 1509.22(C)(1). Patriot was only in possession of an OEPA permit, issued under R.C. 6111. The Trumbull County Court did not have jurisdiction to hear OEPA permit appeals; the only forum with exclusive jurisdiction to hear such appeals is ERAC. R.C. 3745.04(B). While the Trumbull County Court could have decided Patriot’s matter if it had appealed an ODNR permit there instead of appealing to the Oil and Gas Commission, Patriot was never in possession of such a permit. See *State ex rel. Fisher v. Nacelle Land & Mgmt. Corp.*, 90 Ohio App.3d 93, 97 (11th Dist.1993) (holding that appeals to the Oil and Gas Commission do not constitute the exclusive procedure for redress and a party may appeal to the courts to protect and preserve rights). Consequently, as a matter of law, the Trumbull County Court could never have subject matter jurisdiction over Patriot’s case because it involved an OEPA permit appeal.

### THE ERAC LITIGATION

{¶20} Turning to the ERAC cases, the court notes that in its reply, Patriot appears to have abandoned the argument that the requested documents would have changed the outcome of those cases. The main focus of its reply brief is the Trumbull County Court litigation. However, the court will address Patriot's argument in order to fully discuss ODNR's motion for summary judgment.

{¶21} The relevant issue in the ERAC litigation was whether the OEPA director had the legal authority to include Section BB in Warren's 2012 permit. As noted above, Section BB required Warren to obtain approval from ODNR pursuant to R.C. 1509.22 before treating brine wastewater. *Patriot Water Treatment*, 2012 Ohio ENV LEXIS 6, at ¶ 135. Patriot and Warren argued that including Section BB in the permit exceeded the scope of the director's authority because it prohibited Warren from accepting Patriot's brine wastewater. The director argued that the section merely informed Warren of its other obligations under Ohio law. The director also argued that even if the section was an affirmative prohibition, it was permissible under Ohio law to ensure compliance with R.C. 1509.22 for the protection of water quality. *Id.* at ¶ 136-137.

{¶22} Finding that Section BB constituted a prohibition, ERAC then analyzed the two administrative codes which the director relied on as the legal basis for Section BB. Ohio Admin. Code 3745-33-04(A)(3) states that an OEPA permit holder must comply with other provisions of applicable law. Ohio Admin. Code 3745-33-07(A) states that "[t]he director may impose additional terms and conditions \* \* \* as are appropriate or necessary to ensure compliance with the applicable laws and to ensure adequate protection of water quality." ERAC noted that neither code section authorized the director to enforce R.C. 1509.22 or to impose permit restrictions beyond the scope of Chapter 6111, Ohio's Clean Water Act. The latter constituted the authority under which OEPA issues permits for the



prevention, control, and reduction of water pollution. The director also did not present any testimony establishing R.C. 1509.22 as an integral component of that purpose, i.e. preventing, controlling, and reducing water pollution. *Id.* at ¶ 144-163. As a result, because “the evidence established that Section BB was included for the primary purpose of ensuring compliance with R.C. 1509.22, a statute outside of Chapter 6111 and over which the [d]irector has no jurisdiction,” ERAC found that the director had “acted unlawfully and unreasonably by including Section BB” in the permit. *Id.* at ¶ 163. Notably, ERAC made “no determination as to whether ODNR ‘approved’ of the Warren/Patriot method of disposal” and “simply [held] that the [d]irector exceeded his authority by including Section BB” in the permit. *Id.* at ¶ 165.

{¶23} Here, the only permit in Patriot possession was one from OEPA. ERAC is the only forum with exclusive jurisdiction to hear appeals of final actions regarding OEPA permits made by the OEPA director. See R.C. 3745.04(B). The 2012 permit required ODNR to approve the Patriot method of brine wastewater disposal. ERAC’s decision was that OEPA could not, under its authority derived from Chapter 6111, include this particular stipulation requiring compliance with R.C. 1509.22. Even if Patriot was in possession of documents establishing ODNR’s approval of the Patriot method, ERAC would have still only determined that Section BB exceeded the OEPA director’s authority. ERAC’s opinion was clear: It had no jurisdiction to determine issues related to R.C. 1509.22. It expressly stated that its decision made no findings with regard to ODNR’s approval of the Patriot method. As such, even if Patriot was in possession of the documents it seeks, the focus of ERAC’s analysis, the OEPA director’s authority to include Section BB, would remain unchanged.

{¶24} Lastly, the court notes that Patriot’s ERAC appeal was, in fact, instrumental for its business. Though ERAC could not resolve the R.C. 1509.22 issues, as a result

of its decision issued on July 3, 2012,<sup>2</sup> Patriot was able to resume its operations the day following and currently continues to treat brine wastewater. Consequently, any disruption to its business caused by the inclusion of Section BB was promptly rectified by ERAC within three months of Patriot's original shutdown.

### AFFIDAVITS OF SUPPORT

{¶25} In its response, Patriot also states that ODNR's argument involves questions of fact because it is grounded in whether the requested documents exist. It states that ODNR's motion should be denied because it has not filed any affidavits in support of its motion and consequently failed to meet its Civ.R. 56 burden of establishing that there is no genuine issue of material fact.

{¶26} The Supreme Court of Ohio has found that there is no express or implied requirement in Civ.R. 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. *Dresher*, 75 Ohio St.3d at 291-292. Furthermore, the *Dresher* Court held that the burden on the moving party may be discharged by "showing"—that is, pointing out to the Court—that there is an absence of evidence to support the nonmoving party's case. *Id.*

{¶27} Here, ODNR's motion and its reply both indicate that ODNR's argument involves a question of law: whether any document ODNR purportedly destroyed could have disrupted Patriot's cases. And the answer is no; the Trumbull County Court had no jurisdiction to hear an OEPA permit appeal and ERAC had no jurisdiction to decide if ODNR approved the Patriot method. Patriot did not have an ODNR permit during either litigation. ODNR has fulfilled its burden by demonstrating

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<sup>2</sup>The Vindicator, *Patriot gets OK to resume operations*, <http://www.vindy.com/news/2012/jul/04/patriot-gets-ok-to-resume-its-operations/> (accessed Oct. 13, 2015) ("A ruling by the Ohio Environmental Review Appeals Commission will allow Patriot Water Treatment, shut down since April 1, to reopen for business.")

that no document, as a matter of law, could have changed the outcome of either litigation. As a result, Patriot's argument with regard to affidavits of support is without merit.

{¶28} Accordingly, ODNr's motion for summary judgment shall be granted and judgment shall be rendered in its favor because Patriot could not have, as a matter of law, obtained a different outcome in either the Trumbull County Court or ERAC cases with the requested documents.

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PATRICK M. MCGRATH  
Judge

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Judge Patrick M. McGrath

JUDGMENT ENTRY

{¶29} A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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PATRICK M. MCGRATH  
Judge

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