**[Cite as *State ex rel. DeWine v. Marietta Indus. Ents., Inc.*, 2016-Ohio-7850.]**

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

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| STATE OF OHIO, EX REL. MICHAEL DeWINE, OHIO ATTORNEY GENERAL, | : | Case No. 15CA33 |
| Plaintiff-Appellant, | : | |
| vs. | : | DECISION AND JUDGMENT ENTRY |
| MARIETTA INDUSTRIAL ENTERPRISES, INC., ET AL., | : | |
| Defendants-Appellees. | : | **Released: 11/10/16** |

APPEARANCES:

Michael DeWine, Ohio Attorney General, and Sarah Bloom Anderson, Elizabeth Ewing, and Cameron Simmons, Assistant Attorneys General, Columbus, Ohio, for Appellant.

Whitnie P. Hackney, Marietta, Ohio, for Appellee W. Scott Elliott.[1]

McFarland, J.

**{¶1}** The State of Ohio ex rel. Michael DeWine ("Appellant") appeals the trial court's grant of summary judgment in favor of W. Scott Elliott, entered February 28, 2014, which became final and appealable on July 22, 2015. In 2010, Appellant filed a complaint for permanent injunctive relief and civil penalties against W. Scott Elliott ("Elliott") personally, and

[1] The State and Marietta Industrial Enterprises, Inc. entered into a consent order, settling all claims of the State against the corporation. Appellees Marietta Industrial Enterprises, Inc. have not participated in this appeal.

Marietta Industrial Enterprises, Inc. ("MIE"). Appellant alleged multiple violations of Ohio's air pollution control laws over a five-year period. In 2011, Elliott filed a motion for summary judgment, which was not granted until 2014 due to a stay of the proceedings. Appellant contends the trial court's decision was in error because there are genuine issues of material fact as to: (1) whether Elliott could be found liable for the corporation's violations under the participation theory; and (2) whether Elliott could be found liable under the "alter ego" theory, i.e. "piercing the corporate veil," which precluded summary judgment. For the reasons which follow, we find there is a genuine issue of material fact as to whether Elliott participated in the violations. Accordingly, we sustain Appellant's sole assignment of error and reverse the judgment of the trial court.

## FACTUAL AND PROCEDURAL BACKGROUND

**{¶2}** William H. Elliott, W. Scott Elliott's father, started Marietta Industrial Enterprises in the mid-1960s. MIE was primarily a trucking company. Elliott and his siblings worked there during their high school and college years. In 1976, Elliott returned from college to manage the company full-time. He became president of MIE in 1981. Under Elliott and his

brother Burt Elliott, the company expanded and experienced a growth in employees, services, customers, and property until its peak in 2000.[2]

**{¶3}** While MIE began as a trucking business, it evolved into a large materials' storage and handling facility along the Ohio River. MIE receives shipments of various materials from barges along the river and either stores the materials on site or ships them directly to customers by truck. MIE also processes raw materials, i.e. minerals, ores, ferro-alloys, and aggregate, by screening or crushing them into smaller sizes before transfer.

**{¶4}** MIE is operated by a board of directors. Elliott is president, Burt Elliott is vice-president, and David Downing is secretary/treasurer. The Board of directors also includes another brother, Grant Elliott.[3] From time to time, various people with relevant business expertise from outside the company have served on the board of directors. Elliott testified when he became president, his responsibilities were less "day-to-day," and he worked "pretty exclusively" on finance and marketing. Elliott also testified that MIE has always maintained the necessary corporate formalities, maintained sufficient capital, held board of directors/shareholders meetings, and filed corporate tax returns.

[2] MIE had approximately 40 employees in 1981 and grew to approximately 230 employees in 2000.
[3] Scott Elliott's son Trent Elliott also served on the board of directors for a short period of time.

**{¶5}** In 2000 when the national economy declined, MIE lost its biggest contracts, clients, and revenues. MIE was left with substantial debt. The corporation had to lay off most of its employees, and operations were stalled. In 2006, MIE completed Chapter 11 reorganization. Since emerging from bankruptcy in 2006, the company has maintained its business but has experienced flat revenue levels each year. Elliott and his brothers have struggled to keep the business afloat.

**{¶6}** On August 31, 2010, the State of Ohio filed a complaint for injunctive relief and civil penalties against MIE and Elliott. The complaint alleged 26 counts of violations of Ohio air pollution laws. Both defendants filed timely answers denying liability. The parties engaged in written discovery and Elliott was deposed on four separate occasions. On June 10, 2011, Elliott filed a motion for summary judgment. However, the case was stayed while MIE and Elliott resolved a federal Clean Air Act investigation.

**{¶7}** On February 28, 2014, the trial court granted Elliott's motion for summary judgment, holding that neither the "alter ego" theory nor the "participation" theory of liability alleged by the State were applicable. The State's claims against MIE remained pending. On July 22, 2015, the State and MIE entered into a partial consent order settling the remaining claims.

**{¶8}** On July 23, 2015, the trial court filed a notice of appealable order as of the July 22, 2015 entry. This timely appeal followed. Where relevant, additional facts will be set forth below.

ASSIGNMENT OF ERROR ONE

"I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT W. SCOTT ELLIOTT'S MOTION FOR SUMMARY JUDGMENT."

A. STANDARD OF REVIEW

**{¶9}** Appellate review of summary judgment decisions is de novo, governed by the standards of Civ.R. 56. *Laries v. Athens,* 2015-Ohio-2750, 39 N.E.3d 788 (4th Dist.), ¶ 12; *Today and Tomorrow Heating & Cooling,* 4th Dist. Highland No. 13CA14, 2014-Ohio-239, ¶ 10; *Vacha v. N. Ridgeville,* 136 Ohio St.3d 199, 2013-Ohio-3020, 992 N.E.2d 1126, ¶ 19. "Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate." *Laries, supra,* quoting *Matter v. Athens,* 4th Dist. Athens No. 13CA20, 2014-Ohio-4451, ¶ 11, quoting *Snyder v. Stevens,* 4th Dist. Scioto No. 12CA3465, 2012-Ohio-4120, ¶ 11.

**{¶10}** Summary judgment is proper if the party moving for summary judgment demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3)

reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion is made. *Laries, supra,* at ¶ 13; *Today, supra;* Civ.R. 56(C); *New Destiny Treatment Ctr., Inc. v. Wheeler,* 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 24; *Bender v. Portsmouth,* 4th Dist. Scioto No. 12CA3491, 2013-Ohio-2023, ¶ 8.

**{¶11}** "[A] party seeking summary judgment on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." *Laries, supra,* at ¶ 14, quoting *Dresher v. Burt,* 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). To meet this burden, the moving party must be able to specifically point to the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, which affirmatively demonstrate that the nonmoving party has no evidence to support its claims. *Id.;* Civ.R. 56(C).

**{¶12}** "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a

reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial * * *." *Laries, supra,* at ¶ 15, quoting *Dresher* at 293.

B. LEGAL ANALYSIS

**{¶13}** The intent of the Clean Air Act, 42 U.S.C. 7401 et seq., is "to protect and enhance the quality of the Nation's air resources" and to encourage pollution prevention through reasonable federal, state, and local governmental actions. 42 U.S.C. 7401(b)(1) and (c). *State ex rel. Ohio Attorney General v. Shelly Holding Co.,* 135 Ohio St.3d 65, 2012-Ohio-5700, 984 N.E.2d 996, ¶ 16. The administrator of the United States Environmental Protection Agency ("EPA") establishes national standards for air quality and certain types of air pollutants. 42 U.S.C. 7409(a)(2) and (b)(1); 40 C.F.R. 50.1 through 50.17. The act anticipates that states will achieve the air-quality standards through use permits, enforcement, and emission monitoring. 42 U.S.C. 7410(a).

**{¶14}** Similarly, the purposes of Ohio's Air Pollution Control Act, R.C. Chapter 3704, are "to protect and enhance the quality of the state's air resources" and "to enable the state, through the director of environmental protection, to adopt and maintain a program for the prevention, control, and abatement of air pollution that is consistent with the federal Clean Air Act."

R.C. 3704.02(A)(1) and (2); *Shelly, supra*, at 17. The director of the Ohio EPA is vested with the authority to administer R.C. Chapter 3704. *Shelly, supra*, at ¶ 18. The director is authorized to, among other things, require operators of pollution sources to monitor emissions or air quality and to provide such reports as the director prescribes, and to enter upon private or public property for the purpose of making inspections, taking samples, and examining records or reports to ascertain compliance with air-pollution statutes, regulations, or orders. R.C. 3704.03(D), (E), (F), (G), (H), (I), and (L). *Shelly*, ¶ 18.

**{¶15}** The Ohio EPA director has established administrative rules requiring air-contaminant sources to have either a permit to operate or a variance and has adopted rules that govern allowable emissions. Ohio Adm.Code 3745-31-02(A) and 3745-31-09 and Chapters 3745-15 through 3745-26. *Shelly*, ¶ 19. The Ohio Air Pollution Control Act prohibits certain acts. The most basic of the prohibitions is that "emissions of an air contaminant" shall not be "caused, permitted, or allowed" unless a permit or variance allowing the release of the contaminant has been issued. R.C. 3704.05(A) and (B). *See also* Ohio Adm. Code 3745-31-02(A). *Shelly*, ¶ 20. Additional prohibitions include that "[n]o person who is the holder of [an air-pollution-control] permit * * * shall violate any of its terms or

conditions," and that "[n]o person shall violate any order, rule, or determination of the director issued, adopted, or made under this chapter." R.C. 3704.05(C), (G), (J)(2). *Id.*

**{¶16}** Violations of R.C. 3704.05 may result in civil and criminal liability. *Shelly, supra,* at ¶ 21. R.C. 3704.06(C) provides that a "person who violates section 3704.05 * * * of the Revised Code shall pay a civil penalty of not more than twenty-five thousand dollars for each day of each violation." Injunctive relief and criminal penalties are also available. R.C. 3704.06(B) and 3704.99.

**{¶17}** Appellant argues there is a genuine issue of material fact as to Elliott's personal liability under the "alter ego" theory, i.e. "piercing the corporate veil." In *Belvedere Condominium Owners' Assoc., v. Roark,* 67 Ohio St.3d 274, 1993-Ohio-119, 617 N.E.2d 1075, the Supreme Court of Ohio held that in order to pierce the corporate veil and impose personal liability upon shareholders, the person seeking to pierce the corporate veil must show that: (1) those to be held liable hold such complete control over the corporation that the corporation has no separate mind, will, or existence of its own; (2) those to be held liable exercise control over the corporation in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity; and (3) injury or unjust loss resulted to the

plaintiff from such control and wrong. *Id.*, at paragraph three of the syllabus; *Washington Cty., Bd. of Dev. Disabilities v. United Re Ag*, 4th Dist. Washington No. 12CA47, 2013-Ohio-3419, at ¶ 16; *Stewart v. R.A. Eberts, Co. Inc.*, 4th Dist. Vinton No. 08CA10, 2009-Ohio-4418, ¶ 15.

**{¶18}** In *Dombroski v. Wellpoint, Inc.*, 119 Ohio St.3d 506, 895 N.E.2d 538 (2008), the Supreme Court of Ohio addressed the question of "what conduct must be demonstrated to fulfill the second prong of the test for piercing the corporate veil created in *Belvedere*?" The *Dombroski* court ultimately found a limited expansion of the *Belvedere* test necessary in order to allow the corporate veil to be pierced when a plaintiff demonstrates a defendant shareholder has exercised control over a corporation in such a manner "as to commit fraud, an illegal act, or a similarly unlawful act." (Emphasis added.) *Washington Cty., supra*, at ¶ 17, quoting *Dombroski*, syllabus (modifying *Belvedere*); *Eberts*, at ¶ 20.

**{¶19}** In the case sub judice, the trial court found Elliott was not liable under the "alter ego" theory, holding at paragraphs 3 and 4 of its decision:

> "Neither the 'alter ego' theory nor the 'participation' theory of liability alleged by the State are applicable, as the record supports that Marietta Industrial Enterprises, Inc. ("MIE") is a corporation with multiple officers, directors, shareholders and numerous employees, a number of whom have been responsible

> for addressing environmental compliance issues during the period at issue."
>
> * * *
>
> "Mr. Elliott's involvement in the corporate function of MIE does not rise to the level of a rare exception to the fundamental principle of limited liability for corporate shareholders, directors and officers for the obligations and liabilities of a corporation."

**{¶20}** The first prong of the *Belvedere* test, in essence, is the "alter ego doctrine." *DeCaprio v. Gas and Oil, Inc.,* 9th Dist. Summit No. 26140, 2012-Ohio-5866, ¶ 14. *See Willoway Nurseries v. Curdes,* 9th Dist. Lorain No. 98CA007109, 1999 WL 820784, *4 (Oct. 13, 1999). In order to satisfy the first prong, a plaintiff must prove that "the individual and the corporation are fundamentally indistinguishable." *Belvedere* at 288, 617 N.E.2d 1075. Some factors used to determine if this standard has been met include: (1) gross undercapitalization; (2) whether corporate formalities were observed; (3) whether corporate records were kept; (4) whether corporate funds were commingled with personal funds; and (5) whether corporate property was used for a personal purpose. *LeRoux's Billyle Supper Club v. Ma,* 77 Ohio App.3d 417, 422-423, 602 N.E.2d 685 (6th Dist.1991); *Pikewood Manor, Inc. v. Monterrey Concrete Constr.*, 9th Dist. Lorain No. 03CA008289, 2004-Ohio-440, ¶ 15.

**{¶21}** We have conducted a de novo review of the record. We cannot find evidence to satisfy the first prong of the *Belvedere* test. All three prongs of the test must be met for piercing to occur. *State ex rel. Petro v. Pure Tech Sys., Inc.*, 8th Dist. Cuyahoga No. 101447, 2015-Ohio-1638, ¶ 42. MIE is operated by a board of directors, which includes Elliott and his two brothers. Elliott is president and his brother Burt Elliott is vice-president. The secretary/treasurer is a non-family member, David Downing. Elliott testified the board of directors also includes another brother and, from time to time, various people with relevant business expertise from outside the company rotate on and off the board.

**{¶22}** The evidence introduced reveals that corporate formalities were observed and corporate records were kept. MIE held regular board of directors/shareholders meetings and regularly filed corporate tax returns. There is an absence of evidence suggesting that MIE was grossly undercapitalized, that Elliott commingled funds, or that Elliott used corporate property for his own personal purpose.

**{¶23}** While the evidence in this record does suggest that Elliott had a primary role in dealing with environmental compliance, as will be discussed in detail below, the evidence does not raise a genuine issue of material fact as to whether Elliott controlled MIE to the extent that it had no

separate mind, will, or existence of its own. Thus, because the first prong of the *Belvedere* test has not been satisfied, we need not discuss the second and third prongs. *See DiCaprio, supra,* at ¶ 22.

**{¶24}** For the foregoing reasons, we affirm the portion of the trial court's decision with regard to its finding that the "alter ego" doctrine does not apply in order to pierce the corporate veil. However, that does not end our analysis herein.

**{¶25}** Appellant also argues there is a genuine issue of material fact that Elliott could be found liable for the company's environmental violations under the "participation" theory. Ohio law has long held that corporate officers may be held personally liable for actions of the company if the officers take part in the commission of the act or if they specifically directed the particular act to be done, or participated or cooperated therein. *State ex rel. Fisher v. American Cts.*, 96 Ohio App.3d 297, 644 N.E.2d 1112 (8th Dist.1994), citing *Young v. Featherstone Motors, Inc.*, 97 Ohio App. 158, 171, 411, 124 N.E.2d 158, (2nd Dist.1954), 165-166. *See also State ex rel. Dann v. Coen*, 5th Dist. Stark No. 2008CA00050, 2009-Ohio-4000, ¶ 29. Appellant argues Elliott is liable under the participation theory for the following alleged reasons: (1) Elliott had knowledge of MIE's ongoing prior environmental violations; (2) Elliott was aware of the company's ongoing

compliance obligations; (3) Elliott was the only person at MIE with the ultimate authority to ensure that the company operated in compliance with Ohio's air pollution control laws; and (4) Elliott caused or allowed the violations in question to occur. An individual may be held to be personally liable for environmental violations, without regard to one's status as a corporate officer, through evidence of individual participation[4] in duties, acts, and omissions. *See State ex rel. DeWine v. Deer Lake Mobile Park*, 2015-Ohio-1060, 29 N.E.3d 35, (11th Dist.), ¶¶ 57-61. Elliott is a "person" who may be held liable for violations of air pollution control standards pursuant to R.C. 3704.01(O) and R.C. 3704.05.

**{¶26}** Elliott, however, begins by pointing out the allegations between 2005 and 2010 are largely based on the subjective findings of one Ohio EPA inspector, Christina Wieg.[5] Elliott maintains that as president and 1/3 shareholder, he is not personally liable for MIE's alleged violations.

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[4] In *State ex rel. DeWine v. Deer Lake Mobile Park*, the appellate court found a park employee personally liable for environmental violations where the state established the defendant not only supervised the park and managed the budget and records, but also oversaw the operation of the water and sewage facilities; served as the Ohio EPA administrative contact for the public drinking water system and had substantial phone contacts with the Ohio EPA; and did not correct waste water treatment plant violations, despite his knowledge of the violations and his authority to correct them.

[5] Elliott asserts that of the more than one hundred allegations listed in the complaint; only five involve an actual emissions event. The majority of the remaining allegations stem from the same alleged emissions events. Our review reveals that many of the environmental violations involve instances where the violations appear less "egregious" than emissions' events. For example, MIE was cited for failure to water roadways; failure to cover material piles; failure to post 10 mph signs on its parking area; failure to report in a timely manner; and other records-keeping violations. However, we also recognize that air pollution violations in Ohio are subject to strict liability. *State ex rel. DeWine v. Musleh*, 7th Dist. Mahoning No. 12MA121, 2013-Ohio-4323, ¶¶ 36-37.

Elliott argues the evidence shows that MIE operates strictly within its corporate structures and observes all corporate formalities. Elliott contends he is not the "alter ego" of MIE and he is not the sole person in control of environmental compliance issues. Specifically, Elliott argues there is no evidence that he personally participated in, cooperated in, or directed any violation to occur.

**{¶27}** Appellant urges reliance on *State ex rel. Celebreeze v. Scioto Sanitation Inc.* There, this court reversed the trial court's grant of summary judgment to defendants who were the sole shareholders, directors, and officers of the corporation. The defendants, Paul Soltis and Clyde Bradley, began operating a landfill, Scioto Sanitation, Inc., in Scioto County in 1969. After 1986, the Ohio EPA took over monitoring and licensing of the landfill. Upon periodic inspections, the EPA issued citations to Scioto Sanitation Inc. In April of 1989, the EPA, through the Ohio Attorney General, filed a complaint for civil and injunction relief against Scioto Sanitation and the defendants Soltis and Bradley individually. In December of 1989, Soltis and Bradley filed a motion for summary judgment asking the trial court to address their individual and personal liability for violations of Chapter 3734 of the Revised Code. The trial court entered summary judgment in favor of the individual defendants.

**{¶28}** When eventually the trial court's rulings became final and appealable, this Court reversed. The principal opinion held, in construing the evidence most strongly in favor of the State, that reasonable minds could come to different conclusions on whether the defendants were or were not individually liable for Scioto Sanitation's environmental violations. In Judge Abele's concurring opinion, he specifically observed that "Bradley and Soltis participated in the day to day operation of the landfill facility during the time the alleged statutory violations occurred." Similarly, Appellant contends that Elliott had direct personal participation in MIE's wrongdoing as he participated in the day-to-day operations at MIE.

**{¶29}** Appellee Elliott has directed our attention to the Second Appellate District's decision in *Eastbelle v. Nutter*, 2nd Dist. Greene No. 93CA19, 1994 WL 237500, (June 1, 1994). The Eastbelle company filed a complaint against Elano Corporation, Ervin J. Nutter, Elano's owner from 1950-1985, and General Electric Co., which subsequently purchased Elano. Eastbelle alleged its groundwater supply was contaminated by chemicals improperly disposed of by Elano, which was one mile away. Nutter was president, CEO, and owner of the property on which Elano was located until it was sold to General Electric. Eastbelle asserted that Nutter was personally

liable for the groundwater contamination under three theories, including the participation theory.

**{¶30}** In its decision holding that Eastbelle had failed to raise a question of fact as to any culpable conduct by Nutter in his personal capacity, the Second District Appellate Court noted the record was devoid of evidence showing that it was ever Nutter's personal duty to dispose of the chemical water, nor did he instruct anyone else on how to dispose of it. The duty to dispose was delegated to various employees. Eastbelle argued that Nutter, in his capacity as officer and director, knew or should have known that chemical waste was being improperly disposed of at the corporation. Since there was no evidence Nutter personally took part in the improper disposal, the court turned to consideration of whether he directed or cooperated in the commission of the act, or knew or should have known of the conduct and failed to correct it. The appellate court noted Eastbelle offered much evidence referring to the scope of Nutter's involvement in the operations of his plant. Under the summary judgment standard, the court accepted the testimony and other evidence offered by Eastbelle. The court observed:

> "Despite the large size of Elano, Nutter was a 'hands-on' leader who toured his plant as often as he could. * * * Numerous employees commented on how frequently Nutter visited the plant so that they never knew when to expect him. * * * Several

> Elano employees testified in their depositions that it was standard practice to dispose of the solvents by pouring them down the floor drains. * * * One employee stated that this method of disposal was so common that Nutter would have to [have been] blind not to have seen it during his tours at the plant. * * * Despite the plentitude of evidence that waste chemicals were improperly disposed of at Elano, none of that evidence raises a question of fact as to whether Nutter directed, co-operated in, or knew or should have known of the improper disposal methods. Even though Nutter would have to have "been blind" not to see waste being poured down floor drains, there is no testimony that he actually did see it happen, that he knew what was being poured down the drains if indeed he did see such waste disposal, nor that he knew that such waste disposal was improper."

**{¶31}** The appellate court also commented:

> "The only evidence that he possibly had such knowledge was the testimony of an employee that Nutter would have to have "been blind" not to have seen degreasers poured into drains. However, that is too speculative to create a genuine issue of material fact."

**{¶32}** Finally, the appellate court noted:

> "The depositions of several Elano employees documented the improper disposal practices, but that testimony is insufficient to impute knowledge to Nutter personally. The Elano employees were just that, employees of Elano, not Nutter's personal employees."

**{¶33}** Here, Elliott argues that Nutter's actions as president of Elano were similar to his actions as president of MIE. Elliott argues there is no evidence that he ever instructed employees to commit violations. Elliott argues the record shows that company operations and environmental

compliance duties that gave rise to the alleged violations were delegated to managers and other subordinates and never rested with Elliott. Furthermore, Elliott asserts, as the record supports, that when he was made aware of violations, he immediately moved to implement corrective action or improve company policies. Indeed the record reveals many emails or other correspondence which indicate Elliott provided timely responses to notices of violations to Christina Wieg after being made aware of those violations.

**{¶34}** In support of the argument regarding Elliott's personal participation in the environmental violations, Appellant points to the affidavit of Christina Wieg, Exhibit 1, attached to the State's motion for summary judgment, at paragraphs 11-15 and 20:

> 11. Since 2005, W. Scott Elliott ("Scott Elliott") has been my primary contact with Marietta Industrial for environmental compliance purposes. Scott Elliott has been the person upon whom I have consistently and primarily relied upon for information about the Facility, its operation, compliance issues, complaints, and solutions to environmental concerns going forward, although I have corresponded with other employees including Mike Davis, Carla Holland, and Mike Holland. I have also previously talked to environmental consultants regarding permitting issues but never in regard to environmental compliance.
>
> 12. Since 2005, Scott Elliott has consistently represented himself to me as the Marietta Industrial management person who is responsible for and has the ability to resolve environmental compliance issues at Marietta Industrial.

> 13. Through direct contact with Scott Elliott and my relationship with Marietta Industrial since 2005, I note Scott Elliott has demonstrated direct knowledge of the range of the environmental compliance issues -- visible emissions, control measures, recordkeeping; and malfunction reporting -- faced by Marietta Industrial since 2005 and those that still remain unresolved by Marietta Industrial.
>
> 14. When I have spoken to Mike Davis, Carla Holland, or Mike Holland, they have typically referred me to Scott Elliott for answers or they had to check with him first before providing answers.
>
> 15. At numerous times since 2005, I have had telephone conversations, email exchanges, and/or other correspondence with Scott Elliott multiple times per week.
>
> * * *
>
> 20. Throughout the period of current violations, Scott Elliott has consistently made assurances to me that the issues would be resolved, including explicit personal assurances made in writing on May 5, 2008 and May 23, 2008, See Attachment B. These assurances are characteristic of how Scott Elliott has consistently represented himself to me as the person capable of handling and resolving environmental compliance issues for Marietta Industrial since 2005.

**{¶35}** Appellant also supplied this Court with the Seventh Appellate District's recent decision in *State ex rel. DeWine v. Sugar*, 2016-Ohio-884, --N.E.3d-- (March 3, 2016). In *Sugar*, the State brought an action against several excavation companies and their sole shareholder, Dave Sugar, arising from a failure to correctly remove and dispose of asbestos at a steel

mill also owned by Sugar. The appellate court upheld a bench verdict that the shareholder, Sugar, was personally liable for a civil penalty.

**{¶36}** Sugar owned four excavating companies operated as separate entities. Sugar was the sole shareholder. Sugar and his consultant, Harry Manganaro, toured the Weirton Steel Mill in Steubenville Ohio, and learned that the mill contained friable asbestos which would have to have been removed by the purchaser. Sugar's company eventually obtained ownership of the mill in 2004. The evidence demonstrated that Sugar rarely visited the mill and placed Manganaro in charge of the demolition and asbestos remediation process. Anytime a problem arose, Sugar sent Manganaro to investigate.

**{¶37}** During both the preparation and remediation process, several environmental violations were reported to the Ohio EPA and the City of Steubenville Health Department. Over 50 violations were ultimately found by the health department alone. In March of 2005, an EPA and health department official investigated a white powdery substance reported to be in the air. On a return visit to the plant, it was discovered no corrective action had been taken and the EPA and city officials were asked to leave the premises.

**{¶38}** On appeal, Sugar argued that the record did not support the trial court's determination that he was subject to personal liability. In affirming the trial court's decision, the appellate court noted the trial court's comments that throughout the investigation:

> "Sugar himself was contacted by EPA officials on numerous occasions. While he tried to stay away from the facility in order to maintain plausible deniability of the violations occurring there, the fact is that he was informed of the violations over and over as the sole man in charge of all Sugar entities. Whatever was done was on his order, whatever was not done was on his failure to order. He alone had authority to control activity on the site. * * * He is liable not because he owned the company but because he made the decisions and gave the orders."

**{¶39}** In completing its own analysis, the appellate court further noted:

> "The record before us is replete with evidence to establish Sugar's personal liability. While Sugar rarely physically visited the site, there is evidence that he oversaw the operations. He organized the project. * * * He also served as the administrative contact person, as he received and responded to all notices of violations. He also gave all of the orders regarding the project. * * * Most importantly, Sugar made all decisions as to the project. He hired Manganaro. He also hired the remediation contractor. * * * He also made the decision not to fire [the remediation contractor], even though he testified that several violations were due to [the contractor's] poor work performance.* * * Despite receiving numerous notices of violations throughout [the contractor's employment] Sugar chose not to discharge or replace them. * * * [I]t was Appellant who chose to allow the company to continue working on the site despite repeated violations."

**{¶40}** The appellate court further observed:

> "Finally, the record clearly demonstrates that Sugar failed to correct known violations from the start of the project in 2005 until the end of the project in 2010, despite the fact that he was the sole person who had the authority to correct these violations. * * * Although Manganaro apparently supervised the site, this record reflects that all major decisions and orders came from Sugar. The record also reveals that Sugar unquestionable (sic) knew of the violations. He received and responded to notices of violation and frequently discussed violations with the EPA and health department on the phone. * * * [H]e failed to take action even though he continued to receive notices of violations."

**{¶41}** In the case sub judice, Appellee testified as follows at Vol. IV of his deposition, page 79, line 16:

> Q. Throughout our discussion we've seen that over time you have performed many environmental compliance functions at Marietta Industrial Enterprises. You have investigated compliance issues; is that correct?
>
> A. Yes.
>
> * * *
>
> Q. You have reported to Ohio EPA; is that correct?
>
> A. That is correct.
>
> Q. You have reviewed recordkeeping; is that correct?
>
> A. That is correct.
>
> Q. You have made visible emissions observations and records; is that correct?
>
> A. Yes.

Q. You have instituted environmental training; is that correct?

* * *

A. Could you ask that in another way, please?

Q. You have trained employees on environmental matters; is that correct?

A. That is correct.

Q. You've developed and implemented policies related to environmental compliance; is that correct?

A. That is correct.

Q. You have been involved in deciding what malfunctions to report; is that correct?

A. That is correct.

Q. You have corresponded with Ohio EPA; is that correct?

A. That is correct.

Q. You have responded to Notices of Violation from Ohio EPA; is that correct?

A. That is correct.

Q. And you have taken corrective actions in response to Notices of Violation from Ohio EPA; is that correct?

A. I personally have not.

Q. You haven't implemented training?

A. Training would be a corrective action. Yes, I have.

> Q. You have signed Consent Orders with Ohio EPA regarding environmental compliance issues; is that correct?
>
> A. That is correct.

**{¶42}** We agree, based on our de novo review of this case, that Elliott had knowledge of MIE's ongoing prior environmental violations and that Elliott was aware of the company's ongoing compliance obligations. What is not so clear is whether Elliott was the only person with the ultimate authority to ensure that the company operated in compliance with Ohio's air pollution control laws and whether Elliott caused or allowed the violations in question to occur by acts or omissions. Like Sugar, it appears Elliott was informed of violations "over and over." Like Sugar, Elliott oversaw the operations and served as the corporation's contact person who received and responded to notices of violation. Elliott's testimony in Vol. III of Elliott's deposition, at page 31, beginning at line 21, even from a cold record, strikes us as somewhat conflicting and evasive:

> Q. I believe that we talked about back, and I believe it was 2005 and 2006, the board decided that the President would be the one to take over corresponding with Ohio EPA; is that correct?
>
> A. That is correct.
>
> Q. So- -

> A. The President is responsible for answering the EPA's questions, and I don't interpret that as the point person for corresponding with the EPA.
>
> Q. But you would be the person to respond to Ohio EPA?
> A. To NOV's, correct.
>
> Q. Would you personally assume responsibility for correcting the compliance issue?
>
> A. No. The President of the corporation is responsible for correcting the compliance issues. I currently fill the job as President.

**{¶43}** And, despite Elliott's testimony that his involvement as president focused upon finance and marketing, we observe that Elliott's testimony in Vol. IV of Elliott's deposition, at page 55, beginning at line 1, indicates Elliott made "judgment calls" involving compliance issues. Elliott testified as follows:

> Q. Okay. Then it's an email chain that includes more emails; is that correct?
>
> A. Yes.
>
> Q. The first sentence states, "This letter shows that neither the EPA nor MIE knows whether or not the emission was greater than the allowables. Therefore, we should not have to report it, so there should be no fine." This email is sent from yourself to Carla Holland December 27th, 2010?
>
> A. That's correct.
>
> Q. What are you telling Carla in this sentence, in these two sentences?

> A. I'm simply making the statement that neither EPA nor MIE knows whether the emission was greater than allowables. Therefore, we should not have been fined for this because there's no way of telling if we exceeded the allowable.
>
> Q. Here you're making a judgment whether or not you should have to report a malfunction; is that correct?
>
> A. In my opinion, at that time, if there was no emission greater than allowables, it did not have to be reported.

**{¶44}** In *Sugar*, the defendant hired a consultant and an asbestos remediation company which he later blamed for several violations. Similarly, Elliott retained several employees responsible for environmental compliance over the years, despite the fact that violations kept occurring. A major difference between the two is that when Sugar received notices of violations, he failed to take action while Elliott responded with re-training and other corrective measures. However the violations at MIE kept occurring, which raises several questions: Were these measures enough? Were Elliott's responses to violations only providing the EPA with "lip service"? Did Elliott create or allow an ongoing atmosphere at MIE where he knew or should have known that violations would continue to occur?

**{¶45}** Summary judgment represents a shortcut through the normal litigation process by avoiding a trial. *Turner v. Turner*, 67 Ohio St.3d 337, 340, 1993-Ohio-176, 617 N.E.2d 1123; *Fyffe v. Jeno's, Inc.*, 59 Ohio St.3d 115, 120, 570 N.E.2d 1108, 1114 (1991). Because a trial court is making a

factual determination via summary judgment without the benefit of the usual tools available to a trial court necessary to make credibility determinations, Civ.R. 56 mandates that the facts must be viewed in a light most favorable to the non-moving party to compensate, before determining there is no genuine issue of material fact and judgment is warranted as a matter of law. Even the inferences to be drawn from the underlying facts contained in the affidavits and depositions must be construed in the nonmoving party's favor. *Turner, supra*, 617 N.E.2d 1123, 1127; *Hounshell v. Am. States Ins. Co*., 67 Ohio St.2d 427, 433, 424 N.E.2d 311, 315 (1981).

**{¶46}** Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Turner, supra*, quoting *Perez v. Scripps–Howard Broadcasting Co.*, 35 Ohio St.3d 215, 218-219, 520 N.E.2d 198, 202 (1988). Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that one party must prevail as a matter of law[?]" *Turner, supra*, quoting *Anderson v. Liberty Lobby*, 106 S.Ct. at 2512, 477 U.S. at 251-252.

**{¶47}** Furthermore, in a summary judgment setting, the trial court, like a court of appeals, is limited by the constraints of a cold record. *Starr v.*

*Wagner*. 7th Dist. Jefferson No. 12JE13, 2013-Ohio-4456, ¶ 17. Credibility issues typically arise in summary judgment proceedings when one litigant's statement conflicts with another litigant's statement over a fact to be proved. *Turner, supra.* Since resolution of the factual dispute will depend, at least in part, upon the credibility of the parties or their witnesses, summary judgment in such a case is inappropriate. *Turner, supra.*

**{¶48}** Based upon our de novo review, and construing the record in favor of the Appellee, we find that there are genuine issues of material fact which preclude summary judgment in this matter. We find reasonable minds could come to differing conclusions as to: (1) whether Elliott was the only person able to ultimately ensure whether MIE was in compliance; and, (2) whether Elliott caused or allowed the violations to occur by his own acts or omissions.

**{¶49}** To be sure, the record is devoid of any evidence that Elliott directed or ordered employees to commit acts which caused the violations. In our review, several material issues have surfaced: whether or not Elliott knew or should have known that he caused or allowed violations to occur by (1) his day-to-day participation in the corporation’s activities, specifically, environmental compliance; (2) his frequent corrective action of unsuccessfully retraining his subordinates; and (3) his failure to replace

subordinates with more knowledgeable and reliable employees when the violations kept occurring. For the foregoing reasons, we find merit to Appellant's argument that there are genuine issues of material fact with regard to Elliott's personal liability for the environmental violations which kept occurring during a five-year period at MIE.

**{¶50}** For the foregoing reasons, we find merit to Appellant's argument that the trial court erred in granting Elliott's motion for summary judgment. We find there are genuine issues of material fact as to whether Elliott is liable under the participation theory, precluding summary judgment to Elliott as a matter of law. As such, we hereby sustain the first assignment of error and reverse the judgment of the trial court.

**JUDGMENT REVERSED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE REVERSED and that the Appellant recover of Appellees any costs herein.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland, Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**