

COURT OF APPEALS  
RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO EX REL.  
JIM PETRO,  
ATTORNEY GENERAL OF OHIO

Plaintiff-Appellant

-VS-

DOUGLAS EARL, ET AL

Defendant-Appellee

JUDGES:

: Hon: John F. Boggins, P.J.  
: Hon: W. Scott Gwin, J.  
: Hon: Julie A. Edwards, J.  
:  
:  
:

: Case No. 2004-CA-28  
:  
:  
:

: OPINION

CHARACTER OF PROCEEDING:

Civil appeal from the Richland County Court  
of Common Pleas, Case No. 02CV235

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

March 4, 2005

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

SHAUN K. PETERSEN  
30 E. Broad St., 25th Floor  
Columbus, OH 43215-3428

DALE M. MUSILLI  
105 Sturges Avenue  
Mansfield, OH 44903

*Gwin, J.*

{¶1} Plaintiff the State of Ohio on behalf of Jim Petro, Attorney General appeals a judgment of the Court of Common Pleas of Richland County, Ohio, entered on its motion for contempt brought against defendants Douglas Earl, and the Hoffman Family Revocable Living Trust. Appellant assigns three errors to the trial court:

{¶2} “I. THE TRIAL COURT ERRED BY FINDING THAT THE TIRES AT ROSELAND TIRE WERE NOT SCRAP TIRES SUBJECT TO OHIO’S SCRAP TIRE LAWS AND REGULATIONS.

{¶3} “II. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ASSESS STIPULATED PENALTIES FOR DEFENDANT TRUST’S CONTEMPT OF THE CONSENT ORDER.

{¶4} “III. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT FINDING DEFENDANT TRUST IN CONTEMPT FOR FAILING TO CONTROL MOSQUITOES.”

{¶5} The record indicates appellee Hoffman Trust owns the subject property in Mansfield, Richland County, Ohio, and for approximately 17 years, has leased it to appellee Douglas Earl. Douglas Earl operates a scrap tire retail business, known as Roseland Tire. At the time of the original complaint in 2000, Roseland Tire stored scrap tires in several semi-trailers and in a small building on the property. Appellee purchases some of its used tires from a scrap tire wholesaler, but also will remove tires from customers’ cars to re-sell.

{¶6} In 2000, appellee Earl was convicted of illegally operating a scrap tire facility without a license. He was sentenced to four years in prison and ordered to clean up the property as part of his probation. On March 1, 2002, the State filed a complaint

with the trial court alleging appellee Earl had not complied with the terms of his probation and was still violating Ohio's scrap tire laws and regulations at Roseland Tire.

{¶7} On November 4, 2002, the court journalized a consent order and permanent injunction, agreed to by all parties, which resolved all of the claims raised by the State. The consent order required appellee Earl to remove all scrap tires from the ground at Roseland Tire within 45 days of filing of the order. If he failed to comply, then appellee Hoffman Trust was required to remove all the scrap tires within 30 days of appellee Earl's non-compliance. Ohio EPA agents inspected Roseland Tire in 2002 and 2003, and observed scrap tires on the ground. Appellee Earl admitted he had not removed all the scrap tires from the surface of the ground at Roseland Tire within 45 days of the consent order, and admitted at the time of the contempt hearing, there were tires on the ground at Roseland Tire.

{¶8} Another paragraph of the consent order required appellee Earl to remove all semi-trailers and any other containers containing scrap tires from Roseland Tire within 45 days of the filing of the consent order. Appellee failed to comply with this portion of the consent order as well, and some semi trailers remained on the property.

{¶9} The consent order required both appellees to treat any scrap tires kept in an outdoor location for mosquitoes. In 2003, Ohio EPA agents observed standing water in scrap tires on the ground, with mosquito larvae in the water.

{¶10} Finally, the consent order required appellee Earl to pay a civil penalty of \$12,000 in three installments of \$4,000 over a period of eighteen months. If he paid \$10,000 of the penalty within one year, he was excused from paying the additional \$2,000. In the event appellee Earl failed to make any of the payments, then appellee

Hoffman Trust was responsible for paying the full amount. The Ohio EPA notified the Hoffman Trust appellee Earl had not made any payments, but the Trust did not pay the civil penalty.

{¶11} The trial court's decision on the contempt motion was filed February 13, 2004. The court found neither appellee Earl nor the Hoffman Trust removed the scrap tires from the ground outside Roseland Tire within the time frame required by the consent order, although the State had timely notified both defendants of their failure to comply. The court found around the time the consent order was signed, there were approximately 15,000 tires at Roseland Tire. By the last EPA inspection on September 8, 2003, there were 3,150 tires on the property. The court found there were mitigating factors which would excuse the delay. The court found it cost appellee Earl from \$1,150 to \$1,500 in disposal fees to get rid of a semi-trailer load containing approximately 1200 tires. Appellee's probation officer testified at the hearing appellee Earl has always been very compliant, and ships out loads of tires as he is financially able to do so. Appellee Hoffman Trust hired one Julio Tesca, to remove the tires for \$6,000. Appellee Hoffman Trust alleged Tesca absconded with the \$6,000, and did nothing with the tires. The Hoffman Trust also loaned appellee Earl \$3,300 to pay for some of the tire disposal costs and allowed appellee Earl to delay rent payments for the Roseland property.

{¶12} The court found there remained on the property fewer than 100 unusable junk tires and one set of wooden racks across the front of the building holding fewer than 200 useable used tires. The court found the outdoor rack of tires is part of appellee's advertising for his business. The court found there were approximately 3,000

used tires stored primarily inside the building or in the semi-trailers on the property. They are sorted by type and nearly all labeled.

{¶13} Regarding the provision of the consent order requiring appellees to treat scrap tires kept in outdoor locations for mosquitoes in accord with the Ohio Administrative Code, the court found appellee did treat the tires on at least one occasion. Appellee did not contend he applied mosquito pesticide every 30 days, nor did he maintain the log, as required by EPA regulations.

{¶14} The trial court concluded although appellee Earl had not removed all the junk tires from the premises as quickly as required by the consent order, he had removed substantially all the junk tires and the delay was caused by his limited financial means. The court found appellee Earl had made steady and conscientious progress towards complying and was not in contempt of that portion of the court's order.

{¶15} The trial court found the usable scrap tires constituted inventory of the Roseland Tire business, and thus, any usable scrap tires did not fall under purview of the consent order.

{¶16} The court found appellee Earl in contempt of court for failing to abide by the order regarding mosquito control and his failure to clean up "a couple hundred" outdoor tires. The court found appellee Hoffman Trust had not shown any inability to pay the \$12,000 penalty required by the consent order. The court sentenced appellee Earl to 30 days in jail for contempt, suspended on condition appellee complies with the mosquito control requirements and has no more than 200 junk tires on the premises not legally useable for re-installation on a vehicle. Appellee Earl is also directed to keep piles of tires out of the aisles between the tire racks in his building. The court fined

appellee Hoffman Trust \$1,750, suspended if the Hoffman Trust makes arrangements to pay the \$12,000 penalty.

I.

{¶17} In its first assignment of error, the State of Ohio argues the trial court erred in finding the Roseland Tires were not scrap tires subject to Ohio's scrap tire laws and regulation.

{¶18} Ohio Administrative Code 374-27-01 (S)(6) states: "Scrap tire" is a type of solid waste and means any unwanted or discarded tire, regardless of size, that has been removed from its original use. "Scrap tire" includes a whole scrap tire and pieces of scrap tires which are readily identifiable as scrap tires by visual inspection and which still contain wire. For purposes of this definition, "unwanted" means the original generator, original owner or manufacturer of the tire no longer wants to use, or is unable to use the tire for its original purpose, and "discarded" means the owner or manufacturer of the tire has otherwise managed the tire in such a manner that disposal has occurred.

{¶19} The trial court found appellant applied the definition of "scrap tire" too broadly. The court found a "scrap tire" is an unwanted or a discarded tire, regardless of size, which has been removed from its original use. The court found the legally reusable tires at Roseland Tire are neither unwanted nor discarded because even if the original owner does not want them, they may be resold to someone who does. The trial court concluded, any tire which Roseland Tire could legally sell was not unwanted or discarded, and thus was not a scrap tire, but inventory for the resale business.

{¶20} We agree with appellant the trial court has impermissibly limited the definition of scrap tire. We are bound by the definition in the Ohio Administrative Code,

and are forced to conclude the trial court was incorrect in finding some of the used tires on the property did not fall within the consent order.

{¶21} The first assignment of error is sustained.

## II.

{¶22} Appellant has formally withdrawn the second assignment of error, assuring this court at oral argument appellee Hoffman Trust has paid the penalty at issue in this assignment of error.

## III.

{¶23} In its third assignment of error, the State urges the trial court abused its discretion in not finding appellee Hoffman Trust in contempt for failing to control the mosquitoes as required by Ohio EPA regulations and the consent order.

{¶24} Paragraph 11 of the consent order states: “Any scrap tires stored in an unsecured, uncovered or outdoor location at the Spring Mill Street property pursuant to the terms and conditions set forth under paragraph nine of this consent order, shall be treated by the defendants for mosquitoes in accordance with Ohio Administrative Code 3745-27-60- (B)(8)-(10). The defendant shall keep detailed records of all mosquito control activities conducted at the Spring Mill Street property. These records shall be made available for inspection by the Ohio EPA.”

{¶25} Appellant argues the use of the plural “defendants” clearly encompasses both appellee Earl and appellee Hoffman Trust. Thus, it is inconsistent for the court to find appellee Earl in contempt of the order and not find appellee Hoffman Trust also in contempt.

{¶26} Appellee Hoffman Trust replies R.C. 2705.02 provides a trial court with broad discretion in contempt proceedings, and in the exercise of this discretion, the trial court may decline to make a finding of contempt even when a party has violated a court order.

{¶27} We find the plain language of the consent order must be construed to include both appellees, a point appellee Hoffman Trust does not contest. The trial court neither finds appellee Hoffman Trust has failed to comply, nor finds it is excused. While it is true the court may refuse to find appellee in contempt even though it failed to comply, this court cannot determine what the judgment is in regard to appellee Hoffman Trust. The trial court should have addressed this question in its findings of fact and conclusions of law.

{¶28} The third assignment of error is sustained.

{¶29} For the foregoing reasons, the judgment of the Court of Common Pleas of Richland County, Ohio, is reversed, and the cause is remanded to that court for further proceedings in accord with law and consistent with this opinion.

By Gwin, J.,

Boggins, P.J., and

Edwards, J., concur

---

---

---



## JUDGES