[Cite as *State ex rel. Dann v. Coen*, 2009-Ohio-4000.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO, ex rel. MARC DANN	:	William B. Hoffman, P.J.
	:	Julie A. Edwards, J.
	:	Patricia A. Delaney, J.
Plaintiff-Appellee	:	
	:	
-vs-	:	Case No. 2008 CA 00050
	:	
DONALD C. COEN, et al.	:	
	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Civil Appeal From Stark County Court of Common Pleas Case No. 2007 CV 02973
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 3, 2009
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
NICHOLAS J. BRYAN JESSICA B. ATLESON GEORGE HORVATH Assistants Attorney General Environmental Enforecement Section 30 East Braod Street, 25th Floor Columbus, Ohio 43215-3428	DONALD C. COEN, Pro Se 414 - 49th Street, N.W. Canton, Ohio 44709

Edwards, J.

{¶1} Appellant, Donald C. Coen, appeals a judgment of the Stark County Common Pleas Court finding him liable for civil penalties and subject to injunctive relief for violations of the State of Ohio Fire Marshal's Bureau of Underground Storage Tank Regulations (BUSTR) codified in R.C. Chapter 3737 and the rules promulgated thereunder.[1] Appellee is the State of Ohio ex rel. Marc Dann.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant began employment with Coen Oil Company in 1963 as a salesman at the request of his father, eventually becoming vice president of the company. In 1989, Coen Oil split into a separate company known as The Coen Company. Appellant became Chairman of the Board of Coen Company. The company was liquidated by Key Bank in 1995, and later cancelled by the Ohio Secretary of State.

{¶3} Appellant was president of Rocket Oil Company (Rocket) until he promoted his son to the position. He demoted his son in 2002, and replaced his son as president until the Ohio Secretary of State cancelled the corporation in 2002. Rocket continues to operate in spite of its formal cancellation, collecting rent from various pieces of property owned by the company. Appellant has authority to sell property, borrow money and obligate the company.

{¶4} Carlton B. Coen Land Company (Carlton) is a company started by appellant's father for the purpose of purchasing property to lease to Coen Company and Rocket. The company continues in operation, and appellant is president. Appellant

[1] The notice of appeal in this case was filed solely by Donald C. Coen individually, and not by the corporate defendants The Coen Company, Rocket Oil Company and Carlton B. Coen Company. A motion to strike appellant's brief as it related to the corporate defendants Rocket Oil and Carlton B. Coen Company was granted by this court on May 9, 2008.

has authority to sign checks in any amount. The only employee of the company is appellant's wife, who receives a salary as bookkeeper.

{¶5} The three companies and appellant personally own numerous properties where service stations selling gasoline using underground storage tank (UST) systems have been operated.

{¶6} Appellee filed the instant action in the Stark County Common Pleas Court alleging violations of BUSTR regulations by appellant and the corporations regarding failing to register UST systems, failing to maintain UST systems and failing to comply with corrective action plans set in place by BUSTR where problems had been detected. The complaint involved numerous pieces of property throughout Stark County. Appellee sought civil penalties and injunctive relief.

{¶7} Appellant attempted to personally file an answer on behalf of himself and the corporate defendants. The court granted appellee's motion to strike the answer filed on behalf of the corporate defendants on the grounds that the answer was not filed by an attorney licensed to practice law. See *Union Savings Assn. v. Home Owners Aid, Inc.* (1970), 23 Ohio St. 2d 60, 262 N.E.2d 558. Default judgment was entered against the corporate defendants on December 6, 2007, and the court entered judgment granting injunctive relief to appellee. The court enjoined the corporate defendants to comply with registration requirements and to permanently remove, close-in-place, perform a change in service or immediately place back into service UST systems at several sites and to handle any corrective action required to be taken on sites where contamination was found. The court did not determine the amount of civil penalties to be assessed at that time and reserved the issue for a later date following hearing.

{¶8} The case proceeded to bench trial against appellant before a magistrate. Following the trial, the magistrate issued a report assessing civil penalties and granting injunctive relief against the corporate defendants and finding appellant personally responsible for civil penalties and injunctive relief.

{¶9} As to Coen Company, the magistrate found that the company had ceased to exist and that assessing civil penalties would punish the defendant rather than deter future conduct. As deterrence is the purpose of civil penalties for violation of R.C. Chapter 3737, the magistrate assessed no penalties against Coen Company.

{¶10} The magistrate assessed civil penalties against Carlton for violations at several sites. For the 19th Street Canton site, Carlton was penalized $49,080.00 for failure to register the UST system and $26,460.00 for failing to maintain an out of service UST system. For the Ray & Sons site in Alliance, Carlton was penalized $47,230.00 for failure to register and $87,720.00 for failure to maintain. Carlton was penalized $601,700.00 for failing to comply with a corrective action plan in association with the Crescent Amoco in Massillon, and $376,110.00 for failing to comply with a corrective action plan associated with the Beach City Dairy Mart.

{¶11} Rocket was assessed penalties of $34,470.00 for failure to register and $36,020.00 for failure to maintain the UST system at the Navarre Amoco site, and $23,510.00 for failure to register and $38,540.00 for failure to maintain the UST system at the Clearview Amoco. Rocket was further penalized $221,500.00 for failing to comply with a corrective action plan as to the Louisville Dairy Mart.

{¶12} The magistrate found that appellant was the owner of the property on which the Clearview Amoco was located, as well as the Louisville Dairy Mart property.

As to Clearview, the magistrate found appellant was an "owner" for purposes of OAC 1301:7-9-04(B)(1) and 1301:7-9-12, and was liable for violations on the property. The court found that the tanks at Clearview had not been properly registered since 2001 and had been out of service since August of 2002. The court further found the tanks on the site were not properly maintained. The court granted injunctive relief ordering appellant to comply with registration regulations and to remove, close-in-place, perform a change in service or immediately place back in service the tanks on the site. The court held appellant jointly and severally liable for the civil penalties assessed to Rocket on this site.

{¶13} As to the Louisville site, the court found that on July 9, 1998, an employee of the Dairy Mart reported a suspected petroleum release from the UST system. BUSTR ordered a site assessment done, and appellant failed to comply with BUSTR's directives. The court found appellant liable as the owner of the property for violation of OAC 1301:7-9-13 and granted injunctive relief ordering appellant to conduct a Tier 1 Source Investigation and submit an evaluation report to BUSTR. The court required appellant to take any required action if free product was found on the site, and held appellant jointly and severally liable for the civil penalties assessed to Rocket for the site.

{¶14} The court did not pierce the corporate veil as to Rocket and Carlton, but found appellant individually liable for violations by these two companies on a participation theory. The court found that appellant was responsible for environmental compliance, and he chose not to comply with regulations despite attempts by BUSTR and the Fire Marshal. The court found that appellant did not have a defense to the

violations, despite his claims that he thought the tanks were "orphans of the state," that no harm could come to the environment from the release of petroleum, and that future legislation would not require him to comply. The court found that appellant personally brought about noncompliance issues by his refusal to work with BUSTR and the Fire Marshal.[2] The court held appellant personally liable for the violations by Rocket and Carlton and the accompanying civil penalties and injunctive relief.

{¶15} Appellant filed objections to the magistrate's report. No transcript was filed for the court's review of the magistrate's decision because appellant failed to pay for the transcript. The court found that because appellant had waived his right to a transcript and had not submitted an affidavit in support of his objections, the court lacked an evidentiary basis upon which to review the findings of fact. The court did review the decision to determine whether there was an error of law or other defect, and finding none, adopted the decision of the magistrate.

{¶16} Appellant assigns four errors:

{¶17} "I. THE COURT'S DECISION FINDS ENVIRONMENTAL HARM WHERE THE EVIDENCE DOES NOT SUPPORT SUCH A FINDING.

{¶18} "II. THE COURT'S DECISION INCORRECTLY HOLDS DONALD C. COEN PERSONALLY LIABLE FOR ACTIONS OF ROCKET AND CARLTON.

{¶19} "III. THE COURT'S DECISION INCORRECTLY FINDS THAT THE FINES IMPOSED ON ROCKET, CARLTON, AND DONALD C. COEN WERE APPROPRIATE.

{¶20} "IV. THE COURT'S ORDER OF INJUNCTIVE RELIEF IS INAPPROPRIATE.

[2] The court found that the participation theory did not apply to appellant as to Coen Company, as he hired a manager to deal with environmental compliance issues connected to the company. As noted earlier, the court did not assess any penalties against Coen Company because it ceased to exist.

I

{¶21} In his first assignment of error, appellant argues the evidence did not support the court's finding of environmental harm.

{¶22} Appellant failed to provide a transcript for the court's consideration of objections to the magistrate's report. Civ. R. 53(D)(3)(b)(iii) provides in pertinent part:

{¶23} "An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ. R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available."

{¶24} While appellant has submitted a transcript with the appellate record, this court is precluded from considering the transcript as it pertains to establishing or refuting the magistrate's or trial court's factual findings because the trial court was not provided the transcript, and therefore did not have an opportunity to review the testimony from which the magistrate drew her factual findings. *Mattix v. Mattix* (1998), Morrow App. No. CA-860, unreported, page 3. Our review of the court's findings is limited to a review of whether the trial court's adoption of the findings constituted an abuse of discretion. Id.

{¶25} Appellant argues that appellee presented no scientific evidence of environmental harm, while he presented evidence through his own testimony that soil microbes digest hydrocarbon spills over time. Appellant is therefore challenging the magistrate's factual findings. As the trial court did not have a transcript before it in ruling on the objections, we cannot review the testimony from which the magistrate's conclusions were drawn. Based on the state of the record before us, we cannot

conclude that the court abused its discretion in adopting the findings of the magistrate concerning environmental harm.

{¶26} The first assignment of error is overruled.

II

{¶27} In his second assignment of error, appellant argues that the court erred in finding him personally liable for the acts of Rocket and Carlton. Appellant argues that his noncompliance was based on the economic realities associated with running a family-owned business and was not defiant or willful non-compliance.

{¶28} Again, in the absence of a transcript provided to the trial court, we cannot review the testimony from which the magistrate drew her factual findings.

{¶29} The court found appellant liable on a participation theory, citing *Young v. Featherstone Motors* (1954), 97 Ohio App. 58, 124 N.E.2d 158, which provides:

{¶30} "Officers of a corporation are not held liable for the negligence of the corporation merely because of their official relation to it, but because of some wrongful or negligent act by such officer amounting to a breach of a duty which resulted in injury. To make an officer of a corporation liable for the negligence of the corporation there must have been upon his part such a breach of duty as contributed to, or helped to bring about, the injury; that is to say, he must be a participant in the wrongful act."

{¶31} Appellant cannot now challenge the factual findings of the magistrate that he personally refused to work with BUSTR and the Fire Marshal to address the issues of noncompliance because he failed to provide a transcript to the court for review of his objections. We cannot find that the court abused its discretion in adopting the decision of the magistrate finding appellant personally liable on the theory that he participated

personally in the noncompliance issues that led to the violations that are the subject of this action.

{¶32} The second assignment of error is overruled.

III

{¶33} Appellant argues that the fines imposed on Rocket, Carlton and himself were not appropriate because the fines would render them bankrupt.

{¶34} In order to deter future violations, a civil penalty must be large enough to hurt the offender, but not so large as to result in the violator's bankruptcy. *State ex rel. Petro v. Maurer Mobile Home Court, Inc.,* Wood App. No. WD-06-053, 2007-Ohio-2262, ¶62.

{¶35} The burden is on appellant to show that the impact of a penalty would be ruinous or otherwise disabling. *State ex rel. Dann v. Meadowlake Corporation*, Stark App. No. 2006CA00252, 2007-Ohio-6798, ¶66.

{¶36} Appellant's argument that the civil penalties will render Rocket and Carlton bankrupt is not properly before this court, as Rocket and Carlton are not parties to this appeal.

{¶37} In support of his argument that the penalties will render him personally bankrupt, appellant directs this court to Exhibit G, attached to his objections to the magistrate's report. This exhibit purports to be appellant's "personal financial statement" showing a net worth of negative $63,000.00, as well as bank statements and tax returns.

{¶38} We first note that the exhibits attached to the objections to the magistrate's report are not evidence presented at trial. Civ. R. 53(D)(4)(d) governs the court's consideration of additional evidence upon objections to the magistrate's report:

{¶39} "If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate."

{¶40} The use of the word "may" indicates the court has discretion to decide whether to hear additional evidence after the parties submit objections to the report. *Normandy Place Assoc. v. Beyer* (1982), 2 Ohio St. 3d 102, 105, 443 N.E.2d 161.

{¶41} Appellant did not move the court to consider additional evidence, nor are the financial documents attached to his objections authenticated in any way so as to render them of evidentiary quality. We find that the court did not abuse its discretion in failing to consider additional evidence, especially because appellant had not provided a transcript for the court's consideration of the evidence before the magistrate.

{¶42} Again, in the absence of a transcript presented to the trial court, we cannot find that the court erred in overruling appellant's objection to the amount of the civil penalties assessed against him. The trial court had no basis from which to find that appellant would be rendered bankrupt by the penalties based on the state of the record before it when it reviewed the report of the magistrate.

{¶43} The third assignment of error is overruled.

IV

{¶44} In his fourth assignment of error, appellant argues that the court erred in granting injunctive relief because given his financial status, he is unable to undertake responsibility for complying with the injunctive relief ordered by the court.

{¶45} As discussed in III above, the record does not reflect that appellant demonstrated that his financial situation was such that the civil penalties would render him bankrupt. For the same reasons, the record does not demonstrate that appellant is financially unable to comply with the orders for injunctive relief.

{¶46} The fourth assignment of error is overruled.

{¶47} The judgment of the Stark County Common Pleas Court is affirmed.

By: Edwards, J.

Hoffman, P.J. and

Delaney, J. concur

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JUDGES

JAE/r0213

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FIFTH APPELLATE DISTRICT

STATE OF OHIO, ex rel. MARC DANN	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DONALD C. COEN, ET AL.	:	
Defendant-Appellant	:	CASE NO. 2008 CA 00050

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES