[Cite as *State ex rel. Dewine v. Valley View Ent.s, Inc.*, 2015-Ohio-1222.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO ex rel. MICHAEL DEWINE, OHIO ATTORNEY GENERAL,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2014-T-0051**
- vs -	:	
VALLEY VIEW ENTERPRISES, INC., et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 09 CV 3251.

Judgment: Reversed and remanded.

Mike DeWine, Ohio Attorney General, *David E. Emerman*, *Casey L. Chapman*, and *Alana R. Shockey*, Assistant Attorneys General, State Office Tower, 30 East Broad Street, 25th Floor, Columbus, OH 43215 (For Plaintiff-Appellant).

Thomas J. Wilson, Comstock, Springer & Wilson Co., L.P.A., 100 Federal Plaza East, Suite 926, Youngstown, OH 44503-1811 (For Defendants-Appellees).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, the state of Ohio, on relation of its Attorney General and at the written request of the Director of the Ohio Environmental Protection Agency ("Ohio EPA"), filed a complaint against appellees, Valley View Enterprises, Inc., Valley View Properties, Ltd., and Joseph V. Ferrara, individually. The complaint alleged violations of Ohio's water pollution control laws at a facility located at Phase I and Phase II of a 233-

acre parcel of property located in Hubbard Township, Trumbull County, currently known as "Pine Lakes Golf Club and Estates." After a bench trial, the trial court found appellees not liable for an environmental violation. The state now appeals.

{¶2} Valley View Enterprises, Inc. is a commercial and residential real estate development company incorporated under the laws of the state of Ohio since February 29, 1960. Valley View Properties, Ltd. (d.b.a. Pine Lakes Estates, a.k.a. Estates at Pine Lakes, a.k.a. Pine Lakes Golf Club and Estates) is a limited partnership registered with the state of Ohio since February 4, 1999. Mr. Joseph V. Ferrara is the owner and president of Valley View Enterprises, Inc., and the general partner of Valley View Properties, Ltd.; the limited partners of Valley View Properties, Ltd., are Mr. Ferrara's four children.

{¶3} In 2003, appellees began developing a 233-acre piece of property in Hubbard Township, Trumbull County, known as "Pine Lakes Golf Club and Estates," a residential development beside a golf course. Construction of this project was divided into two phases: Phase I, a 52-acre portion of the property known as "Estates at Pine Lakes," and Phase II, a 25-acre portion of the property. Storm water leaving the property flows into an unnamed tributary to Little Yankee Run.

{¶4} On April 21, 2003, Valley View Enterprises, Inc. received authorization under the General National Pollutant Discharge Elimination System ("2003 Permit") to begin Phase I construction. This Permit, which was attached to the state's complaint and admitted as an exhibit at trial, required: (1) development and implementation of a Storm Water Pollution Prevention Plan ("SWP3") prior to commencing construction on Phase I and (2) authorization to discharge storm water associated with construction

activity. The 2003 Permit informed Valley View Enterprises, Inc. of the following: "[n]o condition of this permit shall release the permittee from any responsibility or requirements under other environmental statutes or regulations."

{¶5} The 2003 Permit requires each permit holder to develop a complete SWP3 prior to the timely submission of a Notice of Intent ("NOI") application form. The 2003 Permit remains in effect for a covered construction area until a signed Notice of Termination form is submitted to the Ohio EPA.

{¶6} Mr. Ferrara testified that from April 2003 to April 2005, Valley View Properties, Ltd. cut out roadways and constructed sewer lines, water lines, and storm water lines with water inlets.

{¶7} Mr. Ed Wilk, the "401 coordinator" with the Ohio EPA, testified that the Trumbull County Soil and Water Conservation District was the original complainant. A site visit by the Ohio EPA was conducted based upon the complaint; this site visit was done by the prior coordinator, Mr. Pete Clingan. Mr. Clingan informed Mr. Ferrara of a violation that occurred, based on his review and inspection, regarding the impact to waters of the state: a violation of R.C. 6111.04. The letter further informed Mr. Ferrara that a permit was required (Section 401 and 404 permits) for any fill activity going into waters of the state. Testimony was adduced regarding the impact to the wetlands that was observed during this visit.

{¶8} On April 29, 2005, the Army Corp of Engineers issued a cease and desist letter to Mr. Ferrara, as no permit was authorized for the location. Mr. Ferrara then began working with Mr. Jeffrey Mihalic of Western Reserve Land Consultants to obtain the permits from the Army Corp of Engineers and the Ohio EPA. Appellees submitted

an incomplete 401 application on October 3, 2005, and September 19, 2006, but a complete 401 application was not submitted until November 7, 2006.

{¶9} The Ohio EPA issued to Valley View Properties, Ltd. a 401 water quality certification and Ohio isolated wetlands permit on December 19, 2007. The 404 permit was issued to Valley View Properties, Ltd. by the Army Corp of Engineers on January 22, 2008. The 404 permit removed the cease and desist order. At the time of trial, however, appellees had not submitted a SWP3 for Phase I.

{¶10} Appellees then initiated construction activities for Phase II without applying for coverage under the 2003 Permit. On July 13, 2007, Ohio EPA discovered that appellees were engaged in construction activities on Phase II without first applying for, and receiving, coverage under the 2003 Permit. On July 17, 2007, Valley View Properties, Ltd. submitted a NOI for coverage under the 2003 Permit for Phase II. A SWP3 for Phase II was not submitted to Trumbull County until August 7, 2008.

{¶11} On December 7, 2009, the state filed a complaint for injunctive relief and civil penalty. The nine-count complaint alleged the following:

{¶12} Count One alleged that appellees initiated construction activities for Phase I without having first completed an approvable storm water prevention plan, in violation of R.C. 6111.04, R.C. 6111.07(A), Ohio Adm.Code 3745-48 and the 2003 Permit. Count Two alleged appellees failed to complete an approvable SWP3 for Phase I of the Site, in violation of R.C. 6111.04, R.C. 6111.07(A), and Ohio Adm.Code 3745-38. Count Three alleged appellees initiated construction activities for Phase II without having applied for the 2003 Permit and without having completed an approvable SWP3, in violation of R.C. 6111.04, R.C. 6111.07, Ohio Adm.Code 3745-38-06 and the 2003

Permit, Part III(B). Count Four alleged appellees failed to comply with the terms and conditions of the 2003 Permit regarding sediment controls by failing to implement the deficient SWP3, failing to minimize off-site sediment tracking, failing to properly install silt fence, and failing to perform temporary stabilization, in violation of R.C. 6111.04, R.C. 6111.07, and Ohio Adm.Code 3745-38. Counts Five and Six alleged appellees illegally discharged sediment-laden storm water to waters of the state, in violation of R.C. 6111.04, R.C. 6111.07, Ohio Adm.Code 3745-38, Ohio Adm.Code 3745-1-04(A) and (D), and 2003 Permit Part V.A. Count Seven alleged appellees illegally discharged, dredged, or filled materials into waters of the state in violation in of R.C. 6111.04, R.C. 6111.07, 33 USC 1344, and Ohio Adm.Code 3745-32-02. Count Eight alleged appellees' illegal discharge, dredge, or fill material violated Ohio Water Quality Standards in violation of R.C. 6111.04, R.C. 6111.07, Ohio Adm.Code 3745-1-50 through 3745-1-54. Count Nine alleged that appellees failed to obtain a Permit to Install prior to installation of a new disposal system in violation of R.C. 6111.04, R.C. 6111.07, R.C. 6111.44 through 6111.46, and Ohio Adm.Code Chapter 3745-42.

{¶13} During trial, the state attempted to admit Exhibit 37, which was denied by the trial court. This proposed exhibit was prepared by witness Chris Moody, a storm water and sewage sledge coordinator with Ohio EPA. It described (1) the violation, (2) the site where the violation occurred, (3) the initial date of violation, (4) the date the violation was resolved, and (5) the total number of days of each violation.

{¶14} The parties submitted findings of fact and conclusions of law. The trial court adopted, verbatim, appellees' factual findings and conclusions of law. In its entry, the trial court found, inter alia, the following: "the State failed to present evidence to

establish the number of days for which civil penalties can be assessed. * * * The State failed to conclusively establish the number of days of violation. Thus, the defendants are entitled to judgment in their favor." The trial court found that under the *Dayton Malleable* factors, the state is not entitled to civil penalties.

{¶15} The judgment entry also found that "Valley View Properties is the only party against whom civil penalties can be assessed. * * * Valley View Enterprises, Inc. has no relationship to Pine Lake Estates. * * * The State failed to present evidence that Mr. Ferrara ordered activities that caused pollution."

{¶16} The trial court denied the state's request for a civil penalty and ordered judgment in favor of appellees.

{¶17} The state filed a timely notice of appeal.

{¶18} We address the state's first and second assignments of error in a consolidated fashion:

> [1.] The trial court erred as a matter of law and ruled against the manifest weight of the evidence by holding that the State was required to establish the number of days of violation for every violation to find liability for any violation.
>
> [2.] The trial court ruled against the manifest weight of the evidence by failing to hold Appellees liable for violations of Ohio's Water Pollution Control laws.

{¶19} We first address the state's contention that the trial court erred in finding that appellee could not be held liable for any violation because the state failed to "conclusively" prove the number of days of violation for each violation.. Appellant challenges the trial court's interpretation of what is required to prove liability for environmental violations; the state maintains that it need only establish the elements of each violation in order to prove liability for that violation alone.

{¶20} Conversely, appellees argue that the trial court did not misapply the applicable statute but that the state failed to meet its burden of proof, namely that it did not present competent, credible evidence to support its claim that appellees were liable for 4,742 days of violations.

{¶21} R.C. 6111.07(A) states:

> No person shall violate or fail to perform any duty imposed by sections 6111.01 to 6111.08 of the Revised Code or violate any order, rule, or term or condition of a permit issued or adopted by the director of environmental protection pursuant to those sections. *Each day of violation is a separate offense*. (Emphasis added.)

R.C. 6111.09(A), which sets the ceiling for a civil penalty of $10,000 per day of violation, states, in part: "[a]ny person who violates section 6111.07 of the Revised Code *shall* pay a civil penalty * * *."

{¶22} "R.C. Chapter 6111 embodies the response of the General Assembly to the Federal Water Pollution Control Act Amendments of 1972. See R.C. 6111.01(L); Section 1342(b), Title 33, U.S. Code. The goal of the federal Act is 'eliminating "the discharge of pollutants into the navigable waters," 33 U.S.C., Section 1251(a)(1) * * *.'" *State ex rel. Brown v. Dayton Malleable, Inc.*, 1 Ohio St.3d 151, 154 (1982), quoting *EPA v. Natl. Crushed Stone Assn.*, 449 U.S. 64, 69 (1980).

{¶23} In its judgment entry, the trial court made the following relevant findings:

> Mr. Moody did not testify to the number of days the Ohio EPA claims Valley View Properties was in violation.
>
> The State failed to conclusively establish the number of days of violation. Thus, the defendants are entitled to judgment in their favor.

{¶24} Initially, this court recognizes that in a civil action, such as this case, the state is not required to "conclusively" prove its claims, but is required to prove its claims

by a preponderance of the evidence. *See State ex rel. Brown v. East Liverpool*, 7th Dist. Columbiana No. 80-C-19, 1981 Ohio App. LEXIS 11978, *5 (May 6, 1981). "Preponderance of the evidence simply means 'evidence which is of a greater weight or more convincing than the evidence which is offered in opposition to it.'" *In re Starks*, 2d Dist. Darke No. 1646, 2005-Ohio-1912, ¶15, quoting *Black's Law Dictionary* 1182 (6th Ed.1998).

{¶25} Furthermore, with respect to the foregoing findings, the trial court appears to have construed an unambiguous statute. The statute states that the failure to perform specific legal duties is a violation of law and that each day a violation occurs is a separate offense. In its entry, the trial court essentially ruled that the state had to conclusively prove with specificity each day any of the violations occurred in order for liability to attach to any day. In doing so, the trial court interpreted the statute to require more than is necessary to establish liability for a violation of R.C. Chapter 6111. "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312 (1994), paragraph five of the syllabus. The plain language of R.C. 6117.07(A) contradicts the trial court's finding that the state is required to prove a sum certain of violations.

{¶26} First, the failure to prove a sum certain of violations is not dispositive of the liability issue. The quantity of violations goes to the remedy sought, not the liability for which the defendant should be held accountable. Second, the fact that the state did not establish how many violations the defendant committed does not imply the state

failed to prove *any* violation at all. In fact, a review of the transcript and exhibits demonstrates that appellees did, in fact, commit violations of R.C. Chapter 6111. Mr. Ferrara even admitted to some of the alleged violations during his testimony: inter alia, authorizing construction activities without applying for the required section 401 certification and section 404 permit, and the installation of sanitary sewers for Phase II without the required permit. The trial court's finding that Valley View Properties, Ltd. "has not completed [a storm water pollution plan] for Phase I," when it is undisputed such plan is required, establishes, at a minimum, a violation of the statute. Appellees have not cited to any authority to support their position that the state was required to offer testimony establishing the duration of any of the alleged violations.

{¶27} In its entry, the trial court proceeded to engage in a penalty analysis even though it found no liability. After analyzing various factors, it found a penalty to be inapposite. If no liability attached, it necessarily follows that a defendant would not be subject to penalties. Given our analysis above, however, the trial court's application of the law was erroneous, and as a result, the trial court's legal conclusion was against the manifest weight of the evidence.

{¶28} This matter must therefore be reversed and remanded for the trial court to determine the number of violations established by the state by a preponderance of the evidence. Once it has done so, the trial court must then proceed to the civil penalty phase. Upon remand, we note that "[b]ecause of the mandatory language of R.C. 6119.09(A), a trial court has no discretion regarding about whether to impose a civil penalty. Nevertheless, the language of the statute gives it broad discretion to determine

the amount of that penalty." *State ex rel. v. Tri-State Group, Inc.*, 7th Dist. Belmont No. 03 BE 61, 2004-Ohio-4441, ¶103, citing *Dayton Malleable*, *supra*, at 157 (1982).

{¶29} The state's first and second assignments of error have merit.

{¶30} The state's third assignment of error alleges:

{¶31} "The trial court erred as a matter of law and ruled against the manifest weight of the evidence by holding that Valley View Enterprises, Inc., and Mr. Ferrara could not be liable for environmental violations."

{¶32} Here, the state sought civil penalties from three entities: the property owner and Phase II permit holder, Valley View Properties, Ltd.; the Phase I permit holder, Valley View Enterprises, Inc.; and the sole general partner of the property owner, Mr. Ferrara.

{¶33} Under the third assignment of error, the state alleges the trial court erred in its finding that "Valley View Properties is the only party against whom civil penalties can be assessed." The trial court also found Mr. Ferrara was not liable based on his "good faith" actions and Valley View Enterprises, Inc. was not liable because it had no relationship to Pine Lakes Estates; the state failed to present evidence that Mr. Ferrara ordered activities that caused pollution; and the testimony was "clear" that the Ohio EPA knew that Valley View Properties, Ltd. was the proper entity with respect to environmental compliance at Pine Lakes Estates.

{¶34} The aforementioned findings, however, are against the manifest weight of the evidence. As previously indicated, the trial court adopted, verbatim, the findings of fact submitted by appellees. These findings of fact and conclusions of law are, however, inconsistent with the evidence presented at trial. For example, although the

trial court found that Valley View Enterprises, Inc. had no relationship to Pine Lake Estates, the evidence establishes that Valley View Enterprises, Inc. applied for and was granted the 2003 Permit and, as the permittee, was required to ensure compliance with the permit. The 2003 Permit explicitly states, "[t]he permittee must comply with all conditions of this permit, any permit noncompliance constitutes a violation of ORC Chapter 6111[.]" Additionally, notwithstanding the trial court's findings that the state failed to present evidence that Mr. Ferrara ordered activities that caused pollution and that he acted in good faith to obtain all necessary certifications, the evidence demonstrates that Mr. Ferrara personally was in charge of the activities performed at the sites; authorized the construction activities at the sites; and failed to obtain necessary certifications and permits.

{¶35} Moreover, the trial court's finding that "a corporate officer cannot be held liable merely by virtue of his status as a corporate officer" is erroneous and not supported by the evidence. Admittedly, Mr. Ferrara is the sole general partner of Valley View Properties, Ltd., an Ohio limited partnership. He is not, in relation to Valley View Properties, Ltd., a "corporate officer." Therefore, he is not, in the course of his conduct as the general partner of that limited partnership, entitled to the insulation from liability of a corporate officer. *See* R.C. 1782.24.

{¶36} The state's third assignment of error is with merit.

{¶37} Based on the opinion of this court, the judgment of the Trumbull County Court of Common Pleas is hereby reversed and remanded for proceedings consistent with this opinion. Upon remand, the trial court is to determine the number of violations established by the state by a preponderance of the evidence and then proceed to a civil

penalty phase. The trial court should then, in its discretion, issue and apportion penalties among the liable parties.

THOMAS R. WRIGHT, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

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{¶38} I respectfully dissent. Although it appears necessary to remand this case for the trial court to determine a penalty, albeit nominal, I disagree with the majority's conclusion that the trial court did not find any violation of R.C. Chapter 6111 and that its findings are against the manifest weight of the evidence.

{¶39} The majority focuses on the following finding of the trial court: "The State failed to conclusively establish the number of days of violation. Thus the defendants are entitled to judgment in their favor." Based on this finding, the majority draws several conclusions which, however, do not follow from the finding itself.

{¶40} First, the majority concludes that the trial court applied the wrong standard of proof, noting that "the state is not required to 'conclusively' prove its claims, but is required to prove its claims by a preponderance of the evidence." *Supra* at ¶ 24. The use of the word "conclusively" by the trial court does not suggest that the court has applied the wrong standard, but merely that the State failed to meet the appropriate standard.

{¶41} That the majority misinterpreted the trial court's finding is suggested by the fact that "conclusively" is not a recognized standard of proof at law. The court's use of the word "conclusively" cannot be stating the legal standard applied by the court because no such standard exists. Even more persuasive is the fact that the court, in the same entry, sets forth the correct burden of proof: "the State is required to prove its claims by a preponderance of the evidence," defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it." Judgment Entry at 9.

{¶42} The majority also concludes from the above-quoted finding that the trial court found that there was no evidence of any violation of R.C. Chapter 6111. The majority writes that although "the state did not establish how many violations the defendant committed [this] does not imply the state failed to prove *any* violation at all." *Supra* at ¶ 28. Again, the majority mistakenly interprets the lower court's finding that the defendants were entitled to judgment to mean that the court found no violation of the statute. This conclusion is inconsistent with the plain meaning of the court's finding.

{¶43} The trial court found that the defendants were entitled to judgment because the State had failed to "establish the number of days of violation." This statement presupposes the existence of violations in the first place. As the majority acknowledges, the court's entry states a violation of the statute by finding that Valley View Properties has not completed a storm water pollution plan for Phase I of the development. The majority overlooks a further statement in the entry that "Valley View Properties' failure to comply with the Ohio EPA's permit requirements * * * does constitute a violation of the EPA's regulations * * *." Judgment Entry at 12. If the court's

judgment entry expressly states a statutory violation, the court is likely aware that the statute was violated. A fairer interpretation of the trial court's meaning is that the defendants were entitled to judgment because the State failed to introduce evidence from which a penalty could be determined, not because there was no violation.

{¶44} That the trial court found statutory violations is also implicit in the fact that the court conducts a lengthy analysis of *Dayton Malleable* factors to determine what an appropriate penalty would be for the violations. Yet the majority expresses perplexity that "the trial court proceeded to engage in a penalty analysis even though it found no liability." *Supra* at ¶ 27. It would be far more reasonable to conclude that the court engaged in a penalty analysis precisely because it found liability (statutory violations).

{¶45} Accordingly, with respect to the standard of proof and the existence of statutory violations, I find no error in the trial court's judgment.

{¶46} I agree that a remand of this case is necessary as the trial court was required to determine a penalty, although, in the exercise of the court's discretion, such penalty may be nominal. "Any person who violates section 6111.07 of the Revised Code shall pay a civil penalty * * *." R.C. 6111.09(A). Consistent with federal law, this provision has been interpreted to mean that "a trial court has no discretion regarding about whether to impose a civil penalty," although "the language of the statute gives it broad discretion to determine the amount of that penalty." *State v. Tri-State Group, Inc.*, 7th Dist. Belmont No. 03 BE 61, 2004-Ohio-4441, ¶ 103; *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1397 (9th Cir.1995) ("[w]e agree with the other circuits that have held that civil penalties are mandatory under section 309(d) [of the Clean Water Act]"); *State ex rel. Brown v. Dayton Malleable*, 1 Ohio St.3d 151, 157, 438 N.E.2d 120 (1982)

("USEPA policy should be the standard for determining the amount of penalty [under R.C. Chapter 6111]").

{¶47} "When determining the appropriate amount of a civil penalty, the trial court should consider the following factors: 1) the harm or threat of harm posed to the environment by the person violating R.C. 6111.07; 2) the level of recalcitrance, defiance, or indifference demonstrated by the violator of the law (also referred to in case law as the defendant's good or bad faith); 3) the economic benefit gained by the violation; and, 4) the extraordinary costs incurred in enforcement of R.C. 6111.07." *Tri-State* at ¶ 104. Despite "the fact that civil penalties are mandatory under [the Clean Water Act] * * * [d]istrict courts retain the broad discretion to set a penalty commensurate with the defendant's culpability," and "in its consideration of the seriousness of a defendant's violations and 'such other matters as justice may require,' the district court could assess a civil penalty of only a nominal amount." *Leslie Salt* at 1397.

{¶48} Here, the trial court determined that no penalty should be imposed, which is contrary to statute. Accordingly, remand is necessary for the lower court to assess a penalty.

{¶49} Finally, the trial court's determination that Mr. Ferrara is a corporate officer of Valley View Enterprises, Ltd. is in error, as conceded by the defendants-appellees. On remand, the trial court should consider Mr. Ferrara and Valley View Enterprises as parties against whom a penalty may be assessed. I do not concur that the trial court's findings in assessing Mr. Ferrara's and Valley View Enterprises's involvement in the violations are against the manifest weight of the evidence. The court may consider

these parties' actual involvement in the statutory violations when determining an appropriate penalty.