

THE FACTUAL ALLEGATIONS:

It is undisputed and the evidence submitted demonstrates that from 1997 to December 2010, the Defendant was the owner of two dry cleaning machines that utilized perchloroethylene at his business Society Dry Cleaners. *Deposition of Emmanual Hadgigeorgiou* (Exhibit C) at pp. 11-12; 17-20.

Pursuant to O.R.C. Chapter 3704, the State of Ohio has the ability to regulate sources of air pollution. Under that authority, Defendant was required with respect to his perchloroethylene dry cleaning machines, to obtain permits, keep and maintain records, and submit reports to the Ohio EPA.

Defendant was notified on March 13, 2008, that he was required to have a permit for the two machines. Subsequently, on March 18, 2008, a "Notice of Violation" was issued against the Defendant for operating without a permit and failing to maintain records. *Affidavit of Valerie Shaffer* (Exhibit F) at ¶¶ 2-3. The Defendant failed to respond and it resulted in another "Notice of Violation" on April 17, 2008. Defendant finally obtained the required permits on December 16, 2008 (Exhibit G). Nonetheless, upon and subsequent to obtaining the permit, Defendant failed to submit permit evaluation reports and keep the required records on site. *Deposition of Emmanual Hadgigeorgiou* (Exhibit C) at pp. 34-36.

However, it is undisputed that Defendant is no longer operating the machines. *Deposition of Emmanual Hadgigeorgiou* (Exhibit C) at p. 22.

LAW AND ARGUMENT:

The Court does not agree with Plaintiff's assertion set forth in its Motion for Summary Judgment, that any violation of R.C. 3704.05 is a strict liability offense. A

review of R.C. 3704.99 lists the penalties for R.C. 3704.05 and reads as in pertinent part as follows:

(A) Whoever **recklessly** violates division (A), (B), (C), (D), (E), (F), (G), or (I) of section 3704.05... shall be fined not more than twenty-five thousand dollars or imprisoned not more than one year, or both, for each violation. Each day the violation continues after a conviction for a violation is a separate offense.

(Emphasis added.)

Thus, pursuant to the Ohio Revised Code, the *mens rea* that applies to this case is "recklessly":

The Restatement of Torts 2d defines "recklessness" as follows: "The actor's conduct is in reckless disregard of the safety of others if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent." 2 Restatement of the Law 2d, Torts (1965), at 587, Section 500. Comment f to Section 500 contrasts recklessness and intentional misconduct: "While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it." Id. at 590. Comment a to Section 500 adds that " * * * the risk must itself be an unreasonable one under the circumstances." (Emphasis added.) Id. at 588.

Thompson v. McNeill (1990), 53 Ohio St.3d 102, 104-105.

Generally, Counts One, Two and Three allege that Defendant failed to obtain the permits for installation/operation of the dry cleaning machines, violating R.C. 3704.05(G). Counts Four through Nine allege violations of terms of the specific permits, violating R.C. 3704.05(C). Thus, when examining Defendant's actions for purpose of this Motion, the proper standard to use is whether he acted "recklessly"

in failing to comply with the above provisions. On March 13, 2008, Defendant was notified as to his deficiencies with respect to the operation of these machines. (Exhibit F) at ¶¶ 2-3. Defendant failed to act until December 16, 2008, to obtain said permits. (Exhibit G). Defendant also never properly submitted the correct reports or kept the correct records on hand for these machines. (Exhibit C at pp. 34-36).

Essentially, Defendant failed to calculate and record the yearly perchloroethylene consumed and the running total annually of fabric dry-cleaned with perchloroethylene. (Exhibit C at pp. 55-73). Based on the entirety of the Defendant's conduct, even after notification, it is clear he acted recklessly. Defendant disregarded the safety of others when he intentionally failed to obtain the permits, intentionally failed to prepare reports and intentionally failed to maintain the requisite records associated with his operation of the machines.

Given the evidence provided with Plaintiff's Motion for Summary Judgment, this Court finds that there is no genuine issue of material fact that Defendant failed to comply with or violated R.C. 3704.05(G) and R.C. 3704.05(C).

COURT'S ORDER:

IT IS HEREBY ORDERED that Plaintiff State of Ohio's Motion for Summary Judgment is **GRANTED**.

The Court orders the Defendant to:

- 1) pay a civil penalty to the State of Ohio in an amount to be determined at a hearing, pursuant to R.C. 3704.06(C).
- 2) pay costs of this action.

The Court shall retain jurisdiction for purposes of enforcing this Order.

DATED THIS _____ day of _____, 2011.

JUDGE PAMELA A. BARKER