

IN THE IOWA DISTRICT COURT FOR WOODBURY COUNTY

<p>STATE OF IOWA, ex rel., IOWA DEPARTMENT OF NATURAL RESOURCES,</p> <p>Plaintiff,</p> <p>vs.</p> <p>JOHN GOLDSMITH,</p> <p>Defendant.</p>	<p>NO. EQCV191254</p> <p>FINDINGS OF FACT, CONCLUSIONS OF LAW and JUDGMENT</p>
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Trial was held on March 31, 2021. The State of Iowa, ex rel., Iowa Department of Natural Resources appeared by Assistant Attorney Generals Eric Dirth and Jacob Larson; John Edward Goldsmith appeared in person and with his attorney, Anthony Osborn. Amy Lutgen reported the entire proceeding.

On March 30, 2021, the court entered a Ruling on Plaintiff's Motion for Summary Judgment finding:

1. Goldsmith deposited and permitted the depositing of solid waste on the Goldsmith property in violation of Iowa Code §455B.307(1) and 567 Iowa Admin. Code 100.4 from August 11, 2018, through August 14, 2018;
2. Goldsmith caused and allowed the open burning of combustible materials on the Goldsmith property in violation of 567 Iowa Admin. Code 23.2 (1) on August 11, 2018, through August 14, 2018; and
3. Goldsmith caused and allowed the open burning of a fire exceeding 40% opacity in violation of 567 Iowa Admin. Code 23.3(2)(d) on August 11, 2018, and August 12, 2018. The court found a factual dispute existed on the August 13, 2018, alleged violation.

The State of Iowa informed the court it would not be pursuing the August 13, 2018, opacity violation.

Witnesses testified on behalf of both parties. Exhibits were offered and admitted on behalf of both parties.

At the conclusion of the plaintiff's case, the court granted the defendant's motion for directed verdict on the August 13, 2018, opacity violation.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant John Goldsmith ("Goldsmith") owns real property located at 1470 210th Street in Sergeant Bluff, Iowa. This property is bordered to the north and south by other residential properties.

On August 7, 2018, Goldsmith had at least 5,000 railroad ties located on this property (Exhibit 1). The railroad ties had been on the property for at least one month prior to August 11, 2018, and as early as June 6, 2011 (Exhibit 4). The ties were approximately 10 inches wide, 8 inches deep, and between 8 to 9 feet long.

Tom Roos, a DNR Environmental Specialist Senior, and Amber Wolff, DNR Environmental Specialist Senior, had contacted Goldsmith after receiving an open-burning complaint from the City of Sergeant Bluff which they were investigating.

Goldsmith was informed that burning the railroad ties was illegal in an August 7, 2018, telephone conversation with Tom Roos,

On August 11, 2018, at least some of the railroad ties on Goldsmith's property began to burn. Goldsmith's neighbor, Josh Lee ("Lee"), took videos of Goldsmith's property on August 11, 2018, documenting the burning (Exhibits 16-18). DNR took video on August 11, 2018 (Exhibits 24-27). The fire on Goldsmith's property continued to burn into August 12, 13, and 14 of 2018. Lee, once again, took videos of the burning each of these days (Exhibits 19-23). After the fire on August 14, 2018, no railroad ties remained on Goldsmith's property (Exhibit 10).

The State, on August 22, 2018, issued a Notice of Violation/Notice of Referral to Goldsmith (Exhibit 15). Defendant responded to the Notice of Violation (Exhibit 2) mentioning, in part, he obtained monetary estimates of the cost to dispose of the railroad ties in a landfill, but found the cost to be "horrendous" (Exhibit 2). Goldsmith mentioned the removal cost being \$400,000 and his real estate is worth only \$300,000.

The State filed the present action against Goldsmith on March 4, 2020, seeking the assessment of civil penalties for each day of these violations, as well as a permanent injunction enjoining Goldsmith from any further violations of these provisions.

RELAVANT IOWA CODE AND IOWA ADMINISTRATIVE CODE PROVISIONS**Solid Waste Disposal Violations****455B.307. Dumping--where prohibited--penalty**

1. A private agency or public agency shall not dump or deposit or permit the dumping or depositing of any solid waste at any place other than a sanitary disposal project approved by the director unless the agency has been granted a permit by the department which allows the dumping or depositing of solid waste on land owned or leased by the agency.

...

3. Any person who violates any provision of part 1 of this division or any rule or any order adopted or the conditions of any permit or order issued pursuant to part 1 of this division shall be subject to a civil penalty, not to exceed five thousand dollars for each day of such violation.

Open Burning Violations**455B.146. Civil action for compliance--local program actions**

If any order, permit, or rule of the department is being violated, the attorney general shall, at the request of the department or the director, institute a civil action in any district court for injunctive relief to prevent any further violation of the order, permit, or rule, or for the assessment of a civil penalty as determined by the court, **not to exceed ten thousand dollars per day for each day such violation continues, or both such injunctive relief and civil penalty.** Notwithstanding sections 331.302 and 331.307, a city or county which maintains air pollution control programs authorized by certificate of acceptance under this division may provide civil penalties consistent with the amount established for such penalties under this division.

567-23.2(455B). Open burning.

23.2(1) Prohibition. No person shall allow, cause or permit open burning of combustible materials, except as provided in 23.2(2) and 23.2(3).

Open Burning Opacity Violations**567-23.3(455B). Specific contaminants.**

23.3(1) General. The emission standards contained in this rule shall apply to each source operation unless a performance standard for the process is specified in subrule 23.1(2), in which case the performance standard shall apply.

23.3(2) Particulate matter. **No person shall cause or allow the emission of particulate matter from any source in excess of the emission standards specified in this chapter, except as provided in 567--Chapter 24.**

d. Visible emissions.

No person shall allow, cause or permit the emission of visible air contaminants into the atmosphere from any equipment, internal combustion engine, premise fire, open fire or stack, equal to or in excess of 40 percent opacity or that level specified in a construction permit, except as provided below and in 567--Chapter 24.

Penalty Considerations

455B.109. Schedule of civil penalties--violations

1. The commission shall establish, by rule, a schedule or range of civil penalties which may be administratively assessed. The schedule shall provide procedures and criteria for the administrative assessment of penalties of not more than ten thousand dollars for violations of this chapter¹ or rules, permits or orders adopted or issued under this chapter. **In adopting a schedule or range of penalties and in proposing or assessing a penalty, the commission and director shall consider among other relevant factors the following:**

a. The costs saved or likely to be saved by noncompliance by the violator.

b. The gravity of the violation.

c. The degree of culpability of the violator.

d. The maximum penalty authorized for that violation under this chapter.

2. Penalties may be administratively assessed only after an opportunity for a contested case hearing which may be combined with a hearing on the merits of the alleged violation. Violations not fitting within the schedule, or violations which the commission determines should be referred to the attorney general for legal action shall not be governed by the schedule established under subsection 1.

3. When the commission establishes a schedule for violations, the commission shall provide, by rule, a procedure for the screening of alleged violations to determine which cases may be appropriate for the administrative assessment of penalties. However, the screening procedure shall not limit the discretion of the department to refer any case to the attorney general for legal action.

4. A penalty shall be paid within thirty days of the date the order assessing the penalty becomes final. When a person against whom a civil penalty is assessed under this section seeks timely judicial review of an order imposing the penalty as provided under chapter 17A, the order is not final for the purposes of this section until all judicial review processes are completed. Additional judicial review may not be sought after the order becomes final. A person who fails to timely pay a civil penalty assessed by a final order of the department shall pay, in addition, interest at the rate of one and one-half percent of the unpaid balance of the assessed penalty for each month or part of a month that the penalty remains unpaid. The attorney general shall institute, at the request of the department, summary proceedings to recover the penalty and any accrued interest.

5. a. Except as provided in paragraph "b", all civil penalties assessed by the department and interest on the civil penalties shall be deposited in the general fund of the state.

b. Civil penalties assessed and collected by or on behalf of the department and interest on the civil penalties as provided in sections 459.602, 459.603, 459.604, 459A.502, and 459B.402 shall be credited to the Iowa nutrient research fund created in section 466B.46.

6. This section does not require the commission or the director to pursue an administrative remedy before seeking a remedy in the courts of this state.

Analysis

This case was tried to show aggravating or mitigating circumstances in determining the amount of civil penalty. The court heard evidence of contact between the parties prior to the August 11-14 burning event, the August 11-14 burning event, and contact occurring after August 14, 2018. The testimony and exhibits cause the court to reaffirm its summary judgment ruling.

Goldsmith objected to the expert testimony of Mark Fields (See October 21, 2021, Plaintiff's Designation of Expert Witness) and Jennifer Christian (See October 30, 2021, Plaintiff's Designation of Expert Witness) for failing to file an expert report as required by I.R.Civ. P. 1.500. Goldsmith later withdrew the objection to the Field testimony. Ms. Chastain's testimony was related to disclosure of the risks associated with improper solid waste disposal and environmental impact. At best this testimony goes to costs saved by Goldsmith, a fact Goldsmith admitted and acknowledged in his email sent to Amber Wolf on September 5, 2018 (Exhibit 2). The State did file a summary of the facts and opinions of Ms. Chastain, albeit, the day before trial contrary to I.R.Civ.P. 1.500(2)(d). Ms. Chastain was not a retained expert. An expert report is not required under I.R.Civ. P. 1.500(2)(c)(2). This may be applicable to the facts of this case. See *McGrew v. Otoadese*, 2021 WL 815875, an unpublished Iowa Court of Appeals decision filed March 3, 2021. Better practice may dictate timely disclosure (at least 90 days prior to trial) or resolving by stipulation the dual role witness testimony. See *United States v Overton*, 970 F.3d 756 (2020), a Southern District of Iowa case allowing dual role witness testimony, concluding error, if any, was harmless. The court grants Goldsmith's objection to Chastain testimony as untimely disclosure of expected testimony and no expert report previously provided.

Goldsmith's I.R.E. 5.402 and 5.403 objection to Exhibits 12-14 (pre-burn event DNR contact with Goldsmith) is overruled. The probative value is substantially greater than a danger of unfair prejudice or confusing the issues. The court finds this information is material, relevant, and admissible on Goldsmith's culpability, a factor the court must consider in determining the amount of any civil penalty.

Maximum Civil Penalty

I. Solid Waste Violation

August 11-14, 2018 \$5,000 per day x 4 days = \$20, 000

II. Open Burning

August 11-14, 2018 \$10,000 per day x 4 days = \$40,000

III. Open Burning Opacity Violation

August 11 & 12, 2018 \$10,000 per day x 2 days = \$20,000

Note: State did not pursue August 13, 2018, opacity claim and defendant's motion for directed verdict on that specific claim was granted.

\$80,000 Maximum

The cost saved by Goldsmith as a result of his noncompliance are significant. Goldsmith stated, "My only hope for that was to generate enough revenue to pay the contractor for the work he had done. Your tipping fees of \$160,000 was incorrect, it was \$160,000 for the tipping fees plus \$240,000 for the side dumps to transport to the landfill for a total of \$400,000. Now my real estate is only worth \$300,000, and you want me to pay 400,000 to dispose of the railroad ties. Now to me that sounds like a Democrat" (Exhibit 2). Goldsmith's email admission of the cleanup costs involved means he has saved \$320,000 by his noncompliance. The DNR witness testimony implied the cost of disposing of the railroad ties by utilizing the Iowa Waste Exchange or a landfill in their region able to handle creosote (wood preservative) and pesticides (for insects) would exceed the maximum civil penalty of \$80,000.

This was a major violation of the depositing of solid waste on his property. Goldsmith stated he had 20,000 railroad ties on his property (Exhibit 2). These railroad ties were not in one pile or one area. The railroad ties were in several areas of his property and had been for some time (See Exhibit 4 Google Earth photographs from 2011 through 2017). From 2011 through 2017 Goldsmith offered no evidence of a sale of any railroad ties. Goldsmith testified to an online auction, but offers no documentation to support his listing of items for sale. Elliott Saunders testified on behalf of defendant, Goldsmith,

stating simply he would have purchased some of the longer railroad ties. Mr. Saunders was not disclosed during discovery and his testimony was objected to by the State for failing to disclose. The objection is valid. As a discovery sanction, the court will not consider the testimony of Witness Saunders. It is noted Mr. Saunders was only contacted the Friday before trial (March 26, 2021) to request his testimony. There was no testimony or evidence Mr. Saunders ever purchased railroad ties from Goldsmith in the past. The numerous photographs and video clips show the volume of the fire and smoke. This was a large burn event that continued for days.

How culpable is Goldsmith? Sergeant Bluff Fire Chief Gaul testified he did not receive any calls for assistance from Goldsmith. Gaul's testimony lacked any specificity and came across as if he had not reviewed any records prior to his testimony. There is no love lost between Goldsmith and Fire Chief Gaul who was referred to as a "clown of a Fire Chief" (see Exhibit 2). Goldsmith admits he did not call the fire department, but instead personally drove up and requested help that was refused. No Sergeant Bluff firefighter corroborated Goldsmith's testimony. Fire Chief Gaul did not corroborate Goldsmith's testimony. Assuming for the sake of argument that Goldsmith did travel to the Sergeant Bluff Fire Department, his September 5, 2018, email is the best evidence to show that the trip occurred after the suggestion of Tom Roos and occurred on August 14, 2018, the last day of the fire as opposed to when it began (See Exhibit 2, page 2).

Goldsmith was being investigated by the State for a December 7, 2017, open burning violation that had been reported by the Sergeant Bluff Fire Department (Exhibit 14). Witness Roos testified on August 7, 2018, he told Goldsmith the burning was illegal. Roos testified he also spoke with Goldsmith on August 13, 2021, where Goldsmith reaffirmed the disposal cost of \$400,000. Roos told Goldsmith of the illegality during that call and again on December 14, 2021. According to the Goldsmith email (Exhibit 2), he only called the fire department on August 14, 2018, which was the last day of the burn event.

Goldsmith had interactions with the DNR for burning and other violations as early as 2002 (Exhibit 12), 2012 (Exhibit 13), and a November 16, 2017, burn event depicted in photographs (Exhibit 14). Goldsmith's desire for his open burning to not be interrupted by the fire department is shown by some of his earlier behavior blocking access (Exhibit

8). Goldsmith's actions imply he felt he could do whatever he wanted on his property. This viewpoint caused him to be at odds with the Sergeant Bluff Fire Department chief and to have several interactions with the DNR, which were increasing in frequency. Goldsmith acknowledged he started the fire of railroad ties, but testified the fire got away from him, and his civil penalty liability should be limited to a day. This testimony is inconsistent with the backhoe moving material on August 11, 2018 (Exhibit 17 at 7:04), a pickup observed driving around the fire in the August 12, 2018, video, and a skid loader being operated on August 13, 2021. Goldsmith testified he may have been using the skid loader and pushing some material into the fire. Then, according to the Goldsmith email, he took no action to contact the fire department until August 14, 2018. The court finds the Goldsmith testimony of the fire getting away from him to not be credible. Goldsmith, at trial, discussed his medical issues and their impact upon his memory and ability to recall. Goldsmith was unwilling and, at times, qualified his answers that he was unwilling to make some statements under oath because of these medical and memory issues. The parties stipulated no medical information was provided to support Goldsmith's testimony. Goldsmith acknowledged the statements he made closer to the event in August 2018 are likely more accurate and reliable than his trial testimony if conflicts exist. The court finds the DNR employees' testimony regarding their conversations with Goldsmith to be credible. The court finds Defendant Goldsmith made admissions in his conversations, his email (Exhibit 2), the actions observed on his property over the days involving a backhoe, skid loader, and individuals (believed to be Goldsmith) driving his pickup around the perimeter of the fire. Goldsmith took no action to stop or put out the fire until told to do so by Tom Roos and then took no action until August 14, 2018. The photos taken after the burn event show that the railroad ties that had been scattered throughout his property are gone. The court believes this is evidence the railroad ties were being fed to the fire as opposed to the railroad ties catching on fire from a nearby fire. The Google Earth photos show the area taken up by the railroad ties.

Despite his dealings with the DNR and phone calls with their staff, within a few weeks he was again the subject of a burn complaint on September 30, 2018 (Exhibit 3, 6, and 7).

The court has considered Goldsmith's tax returns (Exhibit 5) in determining his reasonable ability to pay. Goldsmith's property has a value at or around \$300,000 (Exhibit 2) according to his September 2018 email. Goldsmith had income exceeding \$50,000 in each of the last 2 years of tax returns provided (see Exhibit 5, pages 76 and 63).

The court finds, under the evidence submitted, Goldsmith should be ordered to pay the maximum civil penalty of \$80,000 for all of the reasons mentioned above. The court acknowledges he may not have the ability to pay the total within 30 days, but, based upon the most recent tax returns and income shown on the 2016 and 2017 tax returns, he should be able to make payments on the outstanding balance. Goldsmith financially benefited greatly by this fire taking place. Goldsmith took little action to have it put out. Goldsmith has violated DNR guidelines in the past, did so in August 2018, and yet a burn event still took place on September 30, 2018. This behavior is a violation of the law and Goldsmith needs to be ordered to pay the maximum civil penalty and an injunction entered to protect the community, serve as deterrence for future illegal violations, and to punish financially a seemingly indifferent, confrontational behavior. Goldsmith has failed to present any affirmative mitigating circumstances. The court finds his trial testimony and explanation is not credible. The court finds Goldsmith's self-diagnosed memory issues and reluctance or qualification of his answers given under oath at trial to be a means of avoiding other civil penalties and/or criminal liability for his behavior and actions and is not credible.

Further, for the reasons stated above, the court finds the plaintiff has met its burden of proof for the entry of an injunction against Goldsmith. With an injunction ordered, future violations by Goldsmith can be punished through the court's contempt of court statute.

In general, Iowa Code Chapter 665 governs the punishment of contempt. Iowa Code § 665.2 identifies acts which constitute contempt, as follows:

The following acts or omissions are contempts, and are punishable as such by any of the courts of this state, or by any judicial officer, including judicial magistrates, acting in the discharge of an official duty, as hereinafter provided:

...

3. Illegal resistance to any order or process made or issued by it.
6. Any other act or omission specially declared a contempt by law.

Id.

Contempt proceedings in Iowa are treated as quasi-criminal in nature, including contempt proceedings that arise in civil cases. *McNabb v. Osmundson*, 315 N.W.2d 9, 11 (Iowa 1982). In order for a court to find that a party is guilty of contempt, the court must find beyond a reasonable doubt that the party willfully violated a court order or decree. *Ary v. Iowa District Court for Benton County*, 735 N.W.2d 621, 624 (Iowa 2007); *Opat v. Ludeking*, 666 N.W.2d 597, 607 (Iowa 2003); *Christensen v. Iowa District Court for Polk County*, 578 N.W.2d 675, 678 (Iowa 1998); *Phillips v. Iowa District Court for Johnson County*, 380 N.W.2d 706, 709 (Iowa 1986). *In Re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995). The party who alleges that another party should be held in contempt has the burden of proving that the other party: (1) had a duty to obey a court order; and (2) willfully failed to perform that duty. *Ary*, 735 N.W.2d at 624.

An order of this Court must be obeyed unless that order is modified by subsequent court action or changed on direct appeal from the entry of the order. If the Court has jurisdiction of the parties and the legal authority to make an order, the order must be obeyed, no matter however erroneous or improvident the order may be. An erroneous, irregular, or improvident order furnishes no grounds for a person to disobey its terms. Thus, a person's failure to obey a court order may be punished as contempt despite any legal error or irregularity which inheres in the order giving rise to the contempt proceeding. *Allen v. Iowa District Court for Polk County*, 582 N.W.2d 506, 508-09 (Iowa 1998). In *Iowa Supreme Court v. Hughes*, 557 N.W.2d 890 (Iowa 1996) the Supreme Court stated:

We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. *If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but absent a stay, to comply promptly with the order pending appeal.* Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately

ruled incorrect. The orderly and expeditious administration of justice by the courts requires that 'an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties *until it is reversed by orderly and proper proceedings*. Nor should the attorney advise a client not to comply.

Id. at 892-93 (emphasis in original) (internal quotations and alterations omitted).

A court has the authority to punish a party found to be in contempt by ordering that party to serve time in jail. In general, Iowa Code § 665.4 provides for the punishment of contempts, as follows:

The punishment for contempt, where not otherwise specifically provided, shall be:

1. In the supreme court or the court of appeals, by a fine not exceeding one thousand dollars or by imprisonment in a county jail not exceeding six months, or by both such fine and imprisonment.
2. Before district judges, district associate judges, and associate juvenile judges by a fine not exceeding five hundred dollars or imprisonment in a county jail not exceeding six months or by both such fine and imprisonment.
3. Before judicial magistrates, by a fine not exceeding one hundred dollars or imprisonment in a county jail not exceeding thirty days.

Id.

Order

1. Defendant is assessed a civil penalty of \$80,000 for the reasons set forth above. If defendant fails to timely pay a civil penalty assessed by a final order of the department, shall pay, in addition, interest at the rate of one and one-half percent of the unpaid balance of the assessed penalty for each month or part of a month that the penalty remains unpaid.
2. Defendant is enjoined from any further solid waste disposal violation of Iowa Code 455B.307(1) and/or 567 Iowa Admin. Code 100.4.
3. Defendant is enjoined from any further open burning violation of Iowa Code 455B and/or 567 Iowa Admin. Code 23.2(1).

4. Defendant is enjoined from any further open burning opacity violation of Iowa Code 455B and/or 567 Iowa Admin. Code 23.3(2)(d).
5. The court will retain jurisdiction of this matter to ensure compliance with the terms of this order.
6. Costs are taxed to the defendant.



State of Iowa Courts

Case Number
EQCV191254

Case Title
STATE OF IOWA EX REL & IOWA DNR VS. GOLDSMITH,
JOHN
Type: ORDER FOR JUDGMENT

So Ordered

Duane E. Hoffmeyer, Chief Judge,
Third Judicial District of Iowa

Electronically signed on 2021-06-10 15:06:32