

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 17, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2005AP1507

Cir. Ct. No. 2003CV504

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

**WILLIAM F. SCHWEDA, JEFFREY G. SCHWEDA, AND ECI SPECIAL
WASTE SERVICES, INC.,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 SNYDER, J. William F. Schweda, Jeffrey G. Schweda, and ECI Special Waste Services, Inc., (collectively, ECI) appeal from a judgment awarding forfeitures, surcharges, fees and costs in the amount of \$365,373.54 for violating

state laws and regulations relating to the pretreatment of industrial wastewater and the handling of hazardous waste. ECI contends that the evidence is insufficient to support the judgment and penalties, and that the trial court erroneously exercised its discretion in assessing statutory forfeitures.¹ We disagree and affirm the judgment.

BACKGROUND

¶2 ECI is a “centralized waste treater” within the meaning of WIS. ADMIN. CODE § NR 211.03(2e) (Oct. 2002),² with a permit to collect waste from client industries, transport the waste to its treatment facility, treat the waste to comply with specific discharge limitations, and then discharge the waste via sanitary sewer into the City of Fond du Lac’s (City) municipal wastewater treatment plant. ECI’s discharges into the City’s treatment system are governed by a pretreatment permit issued by the City. This permit authorizes ECI to discharge wastewater into the City’s system only in accordance with effluent limitations, monitoring requirements and other conditions set forth in the permit and in compliance with WIS. ADMIN. CODE ch. NR 211.

¶3 On September 11, 2003, the State filed a complaint³ against ECI and its owners alleging several violations of the terms of the permit and of the

¹ ECI also appealed from a circuit court order denying a jury trial. We certified that issue to the supreme court which held “that the claims asserted in the State’s complaint do not give rise to a constitutional right to a jury trial.” *State v. Schweda*, 2007 WI 100, ¶14, ___ Wis. 2d ___, 736 N.W.2d 49. The supreme court then remanded the remaining issues to the court of appeals. *Id.*, ¶45.

² All references to the Wisconsin Administrative Code are to the October 2002 version.

³ The State filed an amended complaint dated November 30, 2004, upon which the issues were tried in the circuit court.

requirements imposed by the state administrative code and state statutes. The State made fifteen claims for relief, including causing the City to exceed its discharge standards by releasing surfactant-laden wastewater into the City's treatment system, illegally discharging sludge into a drain in ECI's truck wash bay, accepting a category of waste other than what was covered by the permit, expanding its facility and its capacity without approval from the Department of Natural Resources, and failing to take samples of its wastewater discharge to assess compliance with the permit. Other claims involved improper characterization, handling, and disposal of hazardous waste.

¶4 The State sought forfeitures pursuant to WIS. STAT. §§ 281.98(1), 283.91(2), 289.96(3)(a) and 291.97(1) (2005-06),⁴ plus penalties pursuant to WIS. STAT. § 757.05(1)(a), and the environmental assessment available under WIS. STAT. § 299.93. The State also sought an injunction against ECI, along with costs and fees associated with the action. Following a trial to the court, judgment was granted in favor of the State in the total amount of \$365,373.54.⁵ ECI appeals from that judgment.

SUFFICIENCY OF EVIDENCE

¶5 We first address ECI's contention that the evidence is insufficient to support the judgment and penalties. In a trial to the court, findings of ultimate fact shall not be set aside unless clearly erroneous. WIS. STAT. § 805.17(2). Clearly erroneous has been equated with being against the great weight and clear

⁴ All references to the Wisconsin Statutes are to the 2005-06 version.

⁵ The judgment consisted of \$219,120.00 in forfeitures, \$76,776.00 in surcharges, \$29,477.54 costs and \$40,000.00 in attorney fees.

preponderance of the evidence. *Peterson v. Natural Res. Bd.*, 94 Wis. 2d 587, 598, 288 N.W.2d 845 (1980). The trial judge is the ultimate arbiter of the credibility of the witnesses. Sec. 805.17(2); *Onderdonk v. Keepman*, 81 Wis. 2d 687, 697, 260 N.W.2d 803 (1978). When more than one reasonable inference can be drawn from the credible evidence, the appellate court must accept the inference drawn by the trial judge. *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

¶6 ECI complains that the trial evidence fails in six respects, specifically: (1) the evidence does not support the court’s findings that ECI caused upsets at the City’s treatment plant which, in turn, caused the City to violate its own permit; (2) the evidence does not support a finding that ECI failed to notify the City of waste accepted from McIntyre in violation of WIS. ADMIN. CODE § NR 211.15(6); (3) the evidence fails to support that ECI was operating without a flow meter in violation of WIS. STAT. § 281.41; (4) the evidence is insufficient to show that ECI committed violations of § NR 211.16(3); (5) the evidence does not support that ECI violated § NR. 211.16(4) in the manner in which it conducted samplings; and (6) that the evidence is insufficient to support a finding that ECI submitted incomplete semi-annual reports in violation of § NR 211.16(5). We address each in turn.

Municipal Treatment System Upsets

¶7 The trial court found ECI jointly and severally liable for eight violations that caused the City to exceed its discharge standards in violation of WIS. ADMIN. CODE § NR 211.10(1). Section NR 211.10(1) prohibits industrial users from discharging pollutants into a municipal treatment system that would “pass through or interfere with the operation or performance” of the treatment

plant “and thereby cause or significantly contribute to a violation of the [municipality’s] WPDES permit.”

¶8 A waste treatment plant “upset” occurs when something kills or otherwise interferes with the bacteria used to break down incoming waste. The trial court found that the upsets were caused by surfactants. The court further found that ECI took waste from a commercial customer, McIntyre Group Ltd. (McIntyre), which produced cleaning-type products for industry and the consumer market, and that the McIntyre waste loads were a “surfactant-laden waste.”

¶9 The trial court cited to the testimony of Mark Stanek,⁶ a civil engineer with an emphasis on environmental aspects, and to a letter from ECI to City of Fond du Lac chemist James Kaiser in finding that the upsets occurred due to the McIntyre surfactants that ECI introduced into the City treatment system. The ECI letter, dated April 30, 2002, conceded that ECI had accepted McIntyre waste that “was mostly surfactants and water” of approximately 10,000 gallons per week and had increased the amount of McIntyre waste to approximately 45,000 gallons on March 23, 2002. ECI acknowledged that the City had advised it of a plant foaming problem, that ECI had stopped accepting waste from McIntyre on April 4, 2002, and that McIntyre’s other source for disposal “believed there was some compound in the surfactants that may be causing the problems.”

¶10 Stanek testified that treatment plant upsets would result in the plant losing its efficiency with the result of untreated effluent being discharged into

⁶ The trial court acknowledged DNR wastewater engineer, Mark Stanek, as qualified to render expert opinions based upon his education, training and experience on the subject of wastewater treatment.

Lake Winnebago. Stanek testified that the upsets in January and March, 2002, resulted in the treatment plant losing all of its treatment capabilities and that surfactant waste going into the treatment system had caused the upsets. Stanek concluded that the upsets were caused by ECI introducing the McIntyre wastewater containing a high level of surfactants.

¶11 ECI presents an array of reasons that the trial court erred in finding that ECI caused the treatment plant upsets. The first is that WIS. ADMIN. CODE § NR 211.18(1)(a) allows ECI an affirmative defense. The trial court acknowledged that § NR 211.18(1) provides ECI an affirmative defense if ECI

did not know or have reason to know that its discharge, alone or in conjunction with the discharge or discharges from other sources, would cause pass through or interference” and the “discharge immediately prior to and during the pass through ... did not substantially change in nature or constituents from [its] prior discharge activity.

¶12 In addressing ECI’s affirmative defense, the trial court, citing to the testimony of Stanek, found that ECI, as a licensed industrial permit user, would have “had reason to know that the discharge of surfactants could and would cause a pass through to the City” treatment plant. The trial court found that ECI, in accepting a new waste stream from McIntyre containing a high concentrate of surfactants, had the responsibility to know that the presence and complexities of surfactants and the volume of the McIntyre surfactant waste could cause a pass through of untreated effluent to the City causing a permit violation. The trial court concluded that ECI was not entitled to relief on its proffered affirmative defense. We agree.

¶13 Second, ECI contends that the evidence fails to show that the upset violations were severe enough to interfere with the operations of the City plant.

The trial court found that the upset violations did significantly interfere with the City treatment system:

So I find that the wastewater ECI discharged to the City sewer system from March 23 to April 4, 2002, was laden with surfactants due to the sudden and substantial increase in loads from McIntyre, destroyed the microbes required to properly treat the City's wastewater, caused or significantly contributed to the City's violations of BOD₅ limits in April and March of 2002.

I further find that this wastewater ECI discharged into the City sewer system in January 2002 interfered with the operation of the City's wastewater treatment plant, resulted in the January 19th, '02, upset, and did cause or significantly contributed to the violations of the City's discharge limits.

¶14 The trial court's findings are supported by the testimony of Stanek and the concessions made in ECI's letter to Kaiser. ECI also concedes that, as a result of the upsets, on September 30, 2003, the DNR sued the City for violating its DNR permit by discharging harmful wastes into Lake Winnebago, that the State had filed suit against ECI earlier that month, and that the City's settlement stipulation with the State provided that the City would cooperate with the State in the enforcement action against ECI. The trial court's findings that the upsets were sufficient to adversely affect the operations of the City treatment plant are supported by the record and not erroneous.

¶15 ECI complains that newspaper articles hurt its reputation by printing accounts of the upsets and pollution claims, that evidence that the City could not prove the cause of the pass through of contaminants was not considered, and that ECI had cooperated with the City and was wrongly singled out for prosecution. Interestingly, while ECI complains about news coverage in its brief it cites to one article in support of its failure of proof claim:

An article in the Oshkosh *Northwestern* concluded: “Neither the DNR or the City is able to prove who or what caused the problem.”

¶16 Newspaper article contents are not evidence, and there is no trial record or ECI argument that the trial court considered the news coverage as trial evidence for any reason. In addition to citing the news article, ECI points out that Kaiser and State expert witness Kari Fleming both indicated on the trial record that the cause of the treatment upsets was unknown. Other than pointing out that Kaiser and Fleming may disagree with the trial court’s ultimate findings and conclusions, based primarily on the testimony of Stanek and ECI’s concessions, ECI fails to present any controlling argument or basis to conclude that the trial court erred in its ultimate factfinding.

¶17 ECI next contends that it was singled out as a wastewater violator because it responded to, and cooperated with, the City as indicated in its letter to the City dated April 30, 2002. In that letter, ECI stated that it had stopped accepting waste from McIntyre on April 4, 2002, after the City informed it of foaming problems, that ECI requested McIntyre to provide product information on the waste involved, and that ECI had voluntarily hauled 20,000 gallons of micro-organism to the City treatment plant to reverse the system upset results. We would expect no less from a wastewater treatment permit holder. All of this information was presented to and known by the trial court, and we have no basis to disrupt its findings or conclusions because of ECI’s responsible remedial actions.

¶18 ECI further contends that the upsets could have been caused by other industrial users, that other upsets had occurred at other times, and that even heavy rainfall can contribute to upsets and pass through problems. Assuming that ECI is correct in its contentions, the trial court’s finding that the system upsets here were

caused by ECI introducing the McIntyre surfactants into the City treatment system is not erroneous for the reasons stated above. We conclude that the evidence supports the trial court's findings that ECI introduced surfactants to the City treatment system which, in turn, caused system upsets in violation of the City permit.

ECI Notification to City Regarding McIntyre Waste

¶19 WISCONSIN ADMIN. CODE § NR 211.15(6) requires ECI to notify the City "in advance of any substantial change in the volume or character of the pollutants." The trial court found that ECI's acceptance of waste from McIntyre and another customer, Westfalia Surge, substantially increased phosphorus discharge into the City system resulting in twenty-eight code violations and assessed a forfeiture of \$280.00. ECI argues that the evidence does not support the twenty-one Westfalia Surge notice violations.

¶20 The State points to evidence cited by the trial court that ECI accepted wastewater from Westfalia on twenty-one occasions in 2002, that the phosphorus concentration resulted in a fifty- to one hundred-percent increase in phosphorus loading into the City system, and that the phosphorus was not removed by ECI prior to releasing into the City system. The City contends that the phosphorus releases caused a substantial change in the character of the discharge pollutants and ECI failed to notify the City of that change as required. We conclude that the trial court's findings were not erroneous.

¶21 ECI also contends that the seven McIntyre code violations involving its failure to notify the City are not supported by the evidence. The State responds that the charge was based upon unrefuted testimony and evidence. While the trial court noted ECI's arguments concerning the proof of ECI's violating the notice

section, it noted its prior finding that ECI had caused the plant upsets, which killed all of the system bacteria due to a substantial change in pollutant character. The trial court pointed to the ECI letter to the City indicating that McIntyre would be unable to indicate exactly what wastes, surfactants or otherwise, were disposed of by ECI in the City system. The trial court cited to evidence which indicated the dates and volumes of waste loads received by ECI, and to the testimony of witness Stanek in regard to the volume and character of the McIntyre waste.

¶22 Trial Exhibit 249 identifies sixty-two waste loads that ECI processed from McIntyre from July 7, 2001, to April 4, 2002, that were in violation of the notice requirement. The trial court limited the alleged violations to those that occurred during the month of March 2004, which coincided with an increase in surfactant waste.⁷ The trial court's findings that ECI violated the notice requirements of WIS. ADMIN. CODE § NR 211.15(6) are not erroneous.

Operating Without a Flow Meter

¶23 ECI next contends that the evidence was insufficient to show that ECI violated WIS. STAT. § 281.41 by operating without a flow meter. The trial court found that between July 2001 and October 2001 ECI operated without a flow meter for eighty working days resulting in eighty violations. The State contends that § 281.41(1)(c) requires ECI use a flow meter and sampler as a matter of law based upon the plan approved for the ECI operation prior to July 2001. ECI concedes that it was not in compliance with the plan until October 2001. ECI's primary contention is that the prior owner of ECI failed to comply with the plan

⁷ The trial court found notice violations relating to waste loads on March 23, 24, 27, 29, 30 and 31, 2004.

and that ECI should not be faulted. While the trial court did not disagree with ECI on that contention, it found that ECI was at fault for the period of operation subsequent to that of the prior owner. Because ECI does not contest the flow meter allegations on the merits, but seeks relief based upon faulting a prior owner, we cannot disagree that the violations of the statute were properly found by the trial court as to the time ECI was operating without the required equipment.

Violations of WIS. ADMIN. CODE § NR 211.16(3)

¶24 The trial court found fifty-four violations of WIS. ADMIN. CODE § NR 211.16(3), which provides:

Each centralized waste treater shall implement waste acceptance procedures sufficient to ensure that wastes accepted for treatment are within the centralized waste treater's treatment capabilities and have no characteristics that could reasonably be expected to prevent compliance with the applicable pretreatment standards and requirements. These acceptance procedures shall include sampling and analysis, treatability studies and any other procedures necessary to identify the source and character of the waste.

¶25 The trial court found one violation for each customer whose waste ECI accepted between July 2001 and August 2002 and imposed a \$10.00 forfeiture for each violation, a total of \$540. ECI contends that the State lacked customer profiles and failed to specify what customers were involved and that ECI had introduced the missing profiles into evidence. That, according to ECI, should have ended the issue.

¶26 Stanek testified that ECI's waste acceptance procedures were inadequate to comply with WIS. ADMIN. CODE § NR 211.16(3), and the trial court found that the global opinion of Stanek was supported by the evidence. The trial court pointed to testimony of William Schweda that the subject customer profiles

were kept in Schweda's home where they could not be consulted before testing or treating and that ECI relied on customers' tests and analyticals rather than independent analysis. Those deficiencies, supported by the testimony of Stanek, support the findings of the trial court. ECI's contention that it had provided profiles during litigation may be mitigating (as indicated by the fines imposed) but does not negate violations that are charged and proven.

Violations of WIS. ADMIN. CODE § NR 211.16(4)

¶27 ECI complains that the evidence is insufficient to support sixty violations of WIS. ADMIN. CODE § NR 211.16(4) for which the trial court imposed forfeitures of \$60,000. That Code provision addresses effluent monitoring methodology and provides:

Sampling and analysis of effluent shall be sufficient to assess consistent compliance with the applicable pretreatment standards and requirements.

¶28 The State contends that the applicable sampling standards were the daily limits for certain pollutants as set forth in ECI's permit. ECI contends that its permit did not require ECI to submit a twenty-four-hour flow proportional composite sample every day, nor does any specific code provision so require.⁸

⁸ The State points in its brief to WIS. ADMIN. CODE § NR 211.15(1)(e)1, requiring a twenty-four-hour flow proportional composite sample for most of the pollutants listed in ECI's permit. The State does not cite to any place in the record where this code provision was raised or argued during the trial. ECI responds that the code provision relates to a new categorical pretreatment standard published in the federal register and does not apply to its permit as an industrial user. We agree with ECI that the State takes unwarranted license in raising and arguing an administrative code provision which has no cited support in the trial record or in the trial court's findings. We note, however, that ECI raises the issue as one of insufficient evidence rather than a specific administrative code provision applying to its waste permit. We decide the issue on that basis.

¶29 The trial court cited to Stanek’s testimony and to Exhibits 1 and 2⁹ in finding that ECI’s waste limits were daily limits, and that WIS. ADMIN. CODE § NR 211.16(4) required ECI to take twenty-four-hour flow proportional composite samples. Exhibit 1 is the City of Fond du Lac permit issued to ECI stating that “[a]ll discharges from this facility and actions and reports relating [to the permit] shall be in accordance with the terms and conditions of this permit.” Further, the exhibit states that ECI is “authorized to discharge industrial wastewater from [its] facility into the City sewerage system in accordance with the effluent limitations, monitoring requirements, and other conditions set forth in this permit.” The permit monitoring and reporting requirements include a note that “24-hour composite samples must be obtained through flow-proportional composite sampling techniques.”

¶30 Stanek, during an unannounced inspection visit to ECI, advised ECI that “the samples that [ECI] needs to take to show compliance with [its permit] limits have to be 24-hour flow proportional composite [samples].” Stanek testified as a wastewater treatment expert, and we agree with the State and trial court that Stanek’s interpretation of the sampling requirements is due great weight deference. *See Clean Wis., Inc. v. PSC*, 2005 WI 93, ¶45, 282 Wis. 2d 250, 700 N.W.2d 768 (great weight should be given to the administrative agency’s interpretation and application of its own rules in an area calling for special expertise). We conclude that the trial court’s findings concerning the violations of WIS. ADMIN. CODE § NR 211.16(4) were not erroneous.

⁹ Exhibit 2 is the DNR approval of ECI as a wastewater pretreatment system.

Violation of Semi-Annual Report Requirement

¶31 The trial court found two violations of WIS. ADMIN. CODE § NR 211.16(5), which provides in part:

SEMIANNUAL REPORT. Every June and December or as otherwise specified by the control authority, each centralized waste treater shall provide to the control authority the following information for all wastes treated since the previous report:

- (a) The name and address of each waste's generator;
- (b) The volume and date of arrival of each wastewater and the name and address of the transporter if received by truck or rail.

¶32 The trial court found that ECI's required reports did not include a "listing of all wastewater accepted during the previous six months, including the name of the generator, volumes and dates received, and the category of each waste." ECI concedes that finding, but contends that the trial court erred by interpreting the law without consideration of the circumstances and that the forfeiture, in the amount of \$5000 was excessive. ECI specifically states that the trial court misconstrued WIS. ADMIN. CODE § NR 211.16(5) as a matter of law when it determined that the historical practice of compliance by ECI was not a defense to a violation of the provision. ECI stated the appellate issue as one of insufficient evidence and we conclude that the evidence was sufficient to support a finding that ECI violated the § NR 211.16(5) reporting requirements.

¶33 In the alterative, ECI asks that we hold that the penalty of \$2500 for each violation of WIS. ADMIN. CODE § NR 211.16(5), a total of \$5000, is excessive because the conduct was unintentional and condoned by the City and the DNR. The trial court described the violations as a failure to identify and submit reports on customer waste streams to the City which are then forwarded to the

DNR. According to the trial court, the failures went to the heart of ECI's responsibility to monitor its wastewater disposal and the penalties should act to deter such failures on the part of industrial users. We have no basis to disturb the trial court's decision.

¶34 ECI's final argument challenging the justification of the trial court's rulings is that the court erroneously found that ECI accepted septage loads in 2002 and that each day they accepted such loads was a violation of WIS. ADMIN. CODE § NR 211.16(2). ECI challenges the determination that the septic waste introduced by ECI into the City treatment system was a categorical waste subject to notice requirements under § NR 211.16(2). The trial court found that ECI accepted septage from a trailer park based upon William Schweda's testimony and the testimony of Scott Coda, an ECI truck driver. The court observed that § NR 211.16(2) required ECI to notify the City at least sixty days prior to accepting a new waste stream that was not identified in its permit. It further noted that ECI was permitted to accept only metal finishing and non regulated wastewaters for treatment in the City system. Therefore, the court concluded, ECI was not licensed to accept or haul septage.

¶35 While ECI argues that septic waste is not a categorical waste, the record supports the trial court's findings that it was a waste product not included in their permit for treatment in the City system. The trial court found that the separate violations were based upon a failure of ECI to notify the City that it was releasing a substance into the system not covered by its permit, contrary to the notice requirement in WIS. ADMIN. CODE § NR 211.16(2). We therefore reject ECI's argument as to the categorical nature of the unlicensed wastewater product.

EXCESSIVE FORFEITURES

¶36 ECI requests that we review the penalties imposed for the 529 separate violations found by the trial court after trial. Judgment was entered in the amount of \$365,373.54, and ECI points out that the minimum amount would have been \$23,410 including statutory surcharges.

¶37 When assessing a forfeiture, a trial court is afforded discretion within the statutory range. *See State v. Schmitt*, 145 Wis. 2d 724, 734, 429 N.W.2d 518 (Ct. App. 1988). We review discretionary decisions to ascertain whether or not the court erroneously exercised its discretion. *Gaugert v. Duve*, 2001 WI 83, ¶44, 244 Wis. 2d 691, 628 N.W.2d 861. A trial court is permitted to use the limits provided to fashion an appropriate forfeiture based on the facts of the individual case. *See State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130, 174, 580 N.W.2d 203 (1998). In determining civil penalties, the trial court can consider, among other matters, cooperation in remediation, voluntary remedial efforts, environmental harm caused, and the degree of culpability. *Id.* at 174-75.

¶38 ECI contends that the total penalty imposed here is so unreasonable that it amounts to an abuse of discretion. Indicators of unreasonableness, ECI asserts, are as follows: (1) the penalty imposed is nearly seven times the individual income the owners received in 2002; (2) ECI suffered injury to its reputation by the adverse publicity; (3) the trial court had an “obvious dislike” of William Schweda; (4) the trial court “barely touched” on the *Chrysler Outboard Corp.* factors; (5) ECI cooperated with the City and DNR; (6) the violations did not really cause any significant environmental harm; and (7) the Schwedas are honest, hardworking citizens that made only a modest income from the ECI operation.

¶39 We agree with ECI that the penalties imposed are substantial. However, industrial waste treatment is a highly regulated business and the legislature has required licensing and authorized a range of penalties for violations of the relevant laws and regulations addressing such treatment operations. Where the trial court examined the relevant facts, applied an appropriate legal standard, and reached a reasonable result, we will not disturb its discretionary ruling. *Schmitt*, 145 Wis. 2d at 734. Here, the trial court had the benefit of trial evidence and testimony, made extensive findings and entered appropriate conclusions based upon those findings, and provided its reasoning for imposing the penalties included in the final judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

