

STATE OF INDIANA)
) SS:
COUNTY OF JAY)

IN THE JAY SUPERIOR COURT
CAUSE NO. 38D01-0712-MI-4

JOHN and AMANDA WITT and)
HYDROTECH CORP.)
Plaintiffs,)

vs.)

CHEVRON, USA, INC.,)
JAY PETROLEUM, INC., JACK R. JAMES)
and JACK E. HOUCK)
Defendants.)

JAY PETROLEUM, INC.)
Third-Party Plaintiff,)

vs.)

CREEK RUN, LLC and)
CHRIS M. GRIESHOP)
Third-Party Defendants.)

ORDER ON JAY PETROLEUM, INC.'S MOTION FOR CONTEMPT

The Defendant, Jay Petroleum, Inc. ("Jay Petroleum"), filed its Motion for Contempt. The Motion was joined by Defendant Jack R. James. After the issues were fully briefed, the parties attended a hearing thereon on November 9, 2009, after which the Court took the matter under advisement. The Court now enters the following order.

I.

Facts and Procedural History

The Court finds the following facts to be relevant to the determination of the issue in question.¹ This is an environmental dispute involving certain property located in

¹ The parties referred extensively in both written and oral argument to the transcripts of proceedings in this case for the June 11, 2008 Discovery Scheduling Conference, the June 27, 2008 Temporary Restraining Order hearing, and the July 2, 3, 9 and 10th 2008 Preliminary Injunction Hearing, and the exhibits admitted in the July hearing. In finding facts relating to this motion, the Court relied upon those transcripts and

Portland, Jay County, Indiana. The primary issue in the case is the apportionment of the responsibility among the various parties for environmental contamination to the premises. The property had a long history as a gasoline filling station with automotive repair bays, and the various owners of the property have been named as defendants or third-party defendants to answer for their role in the alleged environmental leaks and spills over the years.

The first judge in this proceeding held a hearing on June 11, 2008 for purposes of scheduling discovery in the lawsuit. At that hearing, the parties discussed, among other things, a discovery plan and the impending work to be performed. At the hearing, the following exchange occurred between Court and counsel:

MR. BRAUN: But just so we are clear, there has been no (inaudible) to date to their investigation of the site and they have spent a considerable amount of money investigating the site. Mr. Shere has now represented that the underground storage tanks can be removed in two (2) weeks. So again, while we've been spending time bringing the right parties in, the right counsel in, the right carriers, etc., this site has continued to march on. So it's not like we asked Mark to completely stop on everything. Don't do anything. That hasn't happened. He's continued to move forward. We have also engaged in discovery. There hasn't been any depositions, but there's been a considerable amount of written discovery that's gone on absent any kind of discovery plan or anything else. So the parties are gathering the information they need to go forward and try to get this thing resolved.

MR. SHERE: Your Honor we are gathering information. The Defendants are not. I'm quite concerned about the stone wall. When it comes to all this talk about we want to, we have complex issues, we are going to need to talk through them, we need to mediate it, I've heard this from Mr. Braun before. I heard it in February when it was in writing, it told me we are going to get you a settlement proposal in two (2) weeks. I'm still waiting. We had a discussion last week. But it wasn't so much a discussion of

exhibits, in addition to attachments to briefs of counsel.

settlement, as a discussion of how we are going to discuss settlement when we get around to discussing settlement. And again, I have a statement that a real written proposal will be coming in two (2) weeks. Great if it comes and it's real and reasonable, we can get this thing done. The Witts who have an unmarketable property. The Witts who are suffering ongoing financial damage every day that this case drags on.

THE COURT: Let me ask you though isn't there going to be a considerable expense, I think your client apparently has already undergone some expense, but isn't there going to be a considerable expense to the defendants, third-party plaintiffs and so forth and third-party defendants? Isn't there going to be a considerable expense to begin to do all of this site analysis that they might wish to perform in this case?

MR. SHERE: Yes your Honor.

THE COURT: Would it not be beneficial, I mean talking a sixty (60) day delay or something like that to give the opportunity for the parties to mediate with a skilled mediator and maybe alleviate the need to incur those costs, maybe those costs could even end up being utilized more appropriately in trying to aid in a resolution of the issue?

MR. SHERE: I respectfully suggest no and here is why. *The Defendants have the right to incur these additional costs to do their own sampling*, but it's already adherent. The data is the data. I've already provided to Mr. Braun the preliminary data from Hydro Tech.

(Emphasis added). Thus, the parties discussed with the Court the upcoming work and the Plaintiff acknowledged the right of the Defendants to take sampling from the site. Therefore, while it seems evident that the parties had been discussing the discovery issues before the hearing, at the very latest, the Plaintiffs were on notice at the June 11th hearing that (not surprisingly) the Defendants were interested in conducting environmental sampling on the property when the tanks were pulled.

The next week, counsel for Jay Petroleum, Inc. sent a letter to counsel for the Plaintiffs indicating just that. The three-sentence letter, sent on June 18 via e-mail and

regular mail, stated:

As a follow-up to the June 11, 2008 hearing in the above-referenced litigation and your representation that the Plaintiffs John and Amanda Witt, via their environmental consultant Hydrotech, intended to remove the underground storage tanks (“UST’s”) from the Witts site in Portland, Indiana (“Site”), defendants Chevron USA, Jay Petroleum, Inc., Jack James, Creek Run, LLC, Chris Grieshop and Jack Houck (collectively the “Defendants”) hereby request that you provide each counsel of record with written notice at least seven (7) business days in advance of the date the USTs will be removed so that the Defendants can coordinate having their own environmental consultants present at the Site while this UST removal and related testing work is being performed and our consultants can observe the work being performed and perform their own testing. If you have any questions about this letter do not hesitate to contact me. Otherwise, we look forward to your cooperation with this request.

No direct response was apparently made by Plaintiffs.

On June 25, 2008, the Plaintiffs mailed to the Clerk their Memorandum on Discovery Conference, which discusses at length scheduling regarding environmental sampling, again acknowledging the desire of the Defendants to conduct sampling and access the site in question. The proposed Discovery Plan appended thereto indicated that Hydrotech had “installed groundwater monitoring wells collected subsurface soil samples as part of [the Initial Site Characterization]”. The next day, counsel for Plaintiff told counsel for Jay Petroleum that the tank removal had begun.² Apparently believing from the telephone conversation (which was somewhat heated) that there was an agreement for the Defendants’ expert, QEPI, to view the work and conduct sampling, Travis Erny, a representative of QEPI, was dispatched to the site.

² Counsel for the Plaintiff, Mark Shere, learned this crucial fact by at least June 24. While it appears Shere attempted to call Jay Petroleum’s counsel on that date, in his voice mail message he did not advise tank removal had begun, and did not notify counsel for Jay Petroleum by correspondence or e-mail of that fact. Counsel for Jay Petroleum learned of that fact on June 26, 2008 via a telephone conference with Shere.

When Erny arrived at the site, he noted that work had already begun. Initially, he was permitted to observe the work on the property, but shortly thereafter, was told to get in his car. Erny was later told by the plaintiff John Witt to leave the property. He did so and parked on the street, attempting to view the happenings at the property. He was later approached by the police, was told that Witt had called them, and was told that if he again went on the property, he would be arrested for trespassing.

That evening, the attorneys had conversations about the situation, which were unproductive. Following the exchange, counsel for Jay Petroleum notified Plaintiffs' counsel in writing that he intended to ask the Court for "injunctive relief to stop any UST removal work at the Witts site until the Defendants are granted the necessary and reasonable access they are entitled to". He also noted that the Witts' counsel was "invited to participate in the hearing, in person or via telephone. . . ."

The next morning, Jay Petroleum sought a temporary restraining order requiring that the work be stopped. The Plaintiffs received actual notice of the request for temporary restraining order and their attorney, Mark Shere, participated in the telephonic hearing. At the hearing, Shere did not deny that work was progressing on the property and that the Defendants had been barred from the property.

The transcript of the hearing provides a clear picture of the Court's intent in issuing its restraining order. The Court stated at the beginning:

Do you understand Mr. Shere as I read the defendant's request, they're just merely seeking that the status quo be maintained until we can have a hearing to really address maybe in more detail, the procedure that would be followed with regard to the preservation of the conditions of the site and also the opportunity, meaningful opportunity for all parties to be able to participate in any changes in the site and monitor those changes and so forth? So really today's

motion as I understand it, is merely to ask that the plaintiffs cease any work at the site which would in any way disturb the conditions until such time as the defendants would have an opportunity to participate. That's what is being asked of the Court to do today.

After hearing arguments of counsel, the Court indicated an intent to issue its Order and discussed the implementation of the Order:

THE COURT: . . . We can't undue [sic] what's already been done, but we, at least, can attempt to *preserve the status quo* until we give all parties a more fair opportunity to explain to the court why it is or is not going to be a problem if certain testing is conducted and the manner in which that is conducted. So Mr. Shere, do you have any comment that you would like to make about the amount of bond that the court should require in this case? I realize that if you have people on site, that *there could be some substantial cost to your client in shutting their completion of that work down for a few days* and I certainly want to take that into consideration in setting the amount of bond in this particular case.

MR. SHERE: Thank you your Honor. I respectfully propose \$50,000.00. We will have business costs, some to the Witts. We will have demobilization and mobilization costs. Some for Hydro Tech. We will have costs for bringing Hydro Tech personnel into the hearing. Without prejudging whether any of those are recoverable or not, we wish to have a reasonable provision, if we are able to persuade you, that this was an unnecessary exercise borne by Jay Petroleum. There should be a reasonable amount there to cover it.

THE COURT: Mr. Braun do you have any comment on the amount of bond that you believe would be appropriate from the defendants' prospective?

MR. BRAUN: I think something in the range of \$20,000.00 to \$25,000.00. *You're talking about work that simply be suspended. Their equipment will be sitting there for few days.* So to the extent there's a loss opportunity, that's reasonable. *But they are not going to be incurring any personnel cost* (inaudible). But I do think, I mean, \$20,000.00 to \$25,000.00 bond would certainly be appropriate for a three (3) business day delay.

THE COURT: Mr. Shere, could you hear what Mr. Braun said?

MR. SHERE: I did your Honor.

(Emphasis added). Thus, the parties clearly contemplated the order to be preserving the status quo, by, in the words of Judge Roberts “shutting the completion of the work down for a few days”.

As to the service of the Order, the following exchange occurred:

THE COURT: . . . I will be giving a copy of the order to the Sheriff, of course, to serve on the plaintiffs and also a copy to the contractor on the site. But I think it would probably work better if you were willing to do that and also that might speed up the process of terminating this work pursuant to this order. Would you be willing to do that?

MR. SHERE: Yes I would your Honor.

The order was signed on June 27, 2008 at 9:50 a.m.

The Court’s Order provides in relevant part:

The Court further finds that the Witts have excavated underground storage tanks and related piping (“USTs”) and soil from the Witts property located at 611 South Meridian Street, Portland, Indiana (the “Property”) and that the Witts refused to allow Jay Petroleum’s consultant from Quality Environmental Professionals, Inc. (“QEPI”) on the Property to collect split samples of the soil and groundwater during UST removal activities. The Court finds the Witts are likely to continue to remove critical evidence from the Property unless restrained.

* * *

The Court hereby orders, adjudges and decrees that John and Amanda Witts [sic] and all persons acting in concert and participation with them, including the Witts’ [sic] environmental consultant, HydroTech, Inc., are now enjoined and restrained until further order of this Court as follows, from:

1. from [sic] conducting UST removal, soil excavation, or other environmental investigation and remediation activities on the Property until the Court can schedule a preliminary injunction hearing to [sic] at which all parties will be provided notice of Jay Petroleum’s request that its consultant, QEPI, shall be allowed to observe the UST removal activities and be allowed to

collect split samples;

* * *

The Plaintiff's Opposition to Motion to Contempt confirms that Shere contacted John Witt and Cory Smith of HydroTech "right away" and conducted "lengthy phone conversations" about Judge Roberts' instructions. The Court finds that the Witts and HydroTech had actual notice of the Order at the latest by 10:30 a.m. on June 27. Inexplicably, despite the clear language of the preceding discussion and Order, Shere, Witt and Smith concluded that "preserving the status quo" included sampling from the tank pits and then backfilling the pits. Confirming those conversations, Shere sent an e-mail with those instructions to Witt and Smith. Shere neither sought nor received any clarifying instructions from Judge Roberts or modification of the order pursuant to Trial Rule 65(a)(4).³

Following the hearing, Travis Erny went to observe the site at about 10:30 to determine if the work had stopped. Plaintiff John Witt was at the site. Recognizing Mr. Erny from their prior interactions, Witt turned and dropped his pants. He then turned back, raised his arms and made a pejorative gesture to Erny involving his middle finger.

Notwithstanding the slight, Erny continued to observe the premises and noticed that work on the premises had not stopped. Erny took photographs of the work and notes as it progressed throughout the day. It appears from the photos that Plaintiff John Witt was present at the site throughout the day. Sheriff's deputies arrived at the property at approximately 1:45 p.m. to physically serve the order at the premises. Work stopped for about 15 minutes, and then continued until Sheriff's deputies again arrived at the property

³ The Courthouse was open on June 27 and the premises are located a few blocks from the Courthouse. The parties later apparently had a telephone conference with Judge Roberts after Jay Petroleum learned that work continued despite the issuance of the restraining order, which led to a visit from the sheriff's deputies and direction from the deputies to cease work on the premises.

at around 3:42 p.m.

Work performed in the nearly six hours after issuance of the restraining order included sampling from the excavation pits, removal of soil from the premises, backfilling of the excavation pits, and compaction of the fill into the excavation pits. Testimony at the preliminary injunction hearing indicated that due to the actions taken by Hydrotech on the premises after the restraining order, that the activities resulted in contamination or alteration of the conditions of the pits and the soil which would render re-excavation and retesting useless, or at least less useful. Further, sampling from re-excavated pits would be less reliable than sampling from the original pits due to the contamination with fill and the compaction. The opportunity to observe and document the soil quality surrounding the tanks was lost or impaired. The opportunity to test any fluid in the pits was also lost. While Hydrotech removed samples and tested them, the opportunity for independent sampling was lost or frustrated.

II.

Legal Analysis

In general, contempt of court involves disobedience of a court which undermines the court's authority, justice, and dignity. *City of Gary v. Major*, 822 N.E.2d 165, 169 (Ind. 2009). But the authority of a court to sanction a party for contempt is not a matter of legislative grace. Rather, among the inherent powers of a court is that of maintaining its dignity, securing obedience to its process and rules, rebuking interference with the conduct of business, and punishing unseemly behavior. *Id.* In order to be held in contempt for failure to follow a court's order, a party must have willfully disobeyed the order. *Id.* at 170. The order must have been so clear and certain that there could be no

question as to what the party must do, or not do, and so there could be no question regarding whether the order is violated. *Id.* A party may not be held in contempt for failing to comply with an ambiguous or indefinite order. *Id.* In assessing the whether an order is ambiguous or definite, our Supreme Court has found a direct, declarative order without conflicting terms or provisions to be unambiguous. *Id.* at 171.

Plaintiffs' proposed escape hatch is to parse the language in Judge Roberts' Order. The Plaintiffs' primary argument is that by backfilling the holes, it was not conducting "UST removal, soil excavation, or other environmental investigation and remediation activities" on the property (although they do not argue that taking the soil samples was not environmental investigation, for which they have no explanation). However, Cory Smith of HydroTech acknowledged in his testimony at the Preliminary Injunction hearing that when he contracts to do environmental investigation and remediation activities, he intends and understands that such activities include backfilling of UST sites.⁴ Further, and more importantly, a thorough reading of the Order, and the discussion at the hearing which preceded the Order, leave no doubt that the intent of the Order was, in the explicit words of Judge Roberts, to "preserve the status quo," in order that representatives of all parties could be present when the environmental work was completed. The actions of the Witts, Shere, and Hydrotech seem rather to be clearly calculated to compete the work on the premises without the interference of Defendants' expert.

Plaintiffs' backup rationale is that they were justified in backfilling all of the pits

⁴ This is consistent with several cases which describe remediation to include backfilling. *See, e.g., Cross Petroleum, Inc. v. U.S.*, 57 Fed.Cl. 34, 38 (Fed.Cl. 2003); *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Auth.*, 678 N.E.2d 519, 521 (Ohio 1997); *Muralo Co. v. Employers Ins. Of Wausau*, 759 A.2d 348, 350 (N.J. Super. Ct. App. Div. 2000); *U.S. v. Sensient Colors, Inc.*, 580 F.Supp.2d 369, 373-74 (D.N.J. 2008).

due to safety concerns. They then speculate on a parade of horrors which could have happened if the pits remained unfilled. This *post hoc* justification is not persuasive. The pits had been open on the site since they had been dug, and the precautions of barrels and snow fencing had been deemed adequate safety measures when the workers left the site in the evening up to the point of the entry of the temporary restraining order. HydroTech's Project Manager, Cory Smith, testified that it was an industry standard to use barrels and snow fencing as a safety precaution around open holes and that HydroTech had regularly used this precaution on hundreds of other sites. The Court finds no adequate explanation why the concern for safety on the site became so urgent on July 27th that the Plaintiffs could ignore the industry standards and Judge Roberts' Order and unilaterally impose new safety standards on this site. Further, had the parties had an actual safety concern, they could have sought a modification of the order pursuant to Trial Rule 65. Finally, this excuse fails to justify why HydroTech continued to sample and remove contaminated dirt from the site after the explicit order not to do so.

The Plaintiffs' final refuge is that they were acting on advice of counsel in violating the Court's Order. Notwithstanding that the Order clearly set out the prohibited activity, and a reasonable person could and should have heeded it regardless of counsel's advice to the contrary, advice of counsel is not a defense to contempt. *In re Snider*, 125 B.R. 993, 998 (Bankr. N.D. Ind. 1991); *SEC v. McNamee*, 481 F.3d 451, 455-56 (7th Cir. 2007); *see also, Worthington v. State*, 391 N.E.2d 1164 (Ind.Ct.App. 1979). Certainly, John Witt's actions toward Travis Erny after the Order was entered demonstrate that he was not acting in good faith in the situation, regardless of any advice he received from his attorney.

This situation is similar to that in *Harlan Bakeries, Inc. v. Muncy*, 835 N.E.2d 1018 (Ind.Ct.App. 2005). *Harlan* was a dispute between adjoining property owners regarding boundary lines and surface water drainage. In *Harlan*, one of the parties had constructed a concrete wall on the disputed boundary. The trial court entered a restraining order prohibiting the party from “any further work on this matter until a full hearing can be held”. The party nonetheless installed curbing and blacktop. The trial court found the restrained party in contempt of court. The Court of Appeals affirmed, noting:

Here, Harlan was ordered to halt "any further work on this matter until a full hearing can be held." Appellant's App. at 42; Tr. at 8, 10. While in a vacuum this might have been vague and/or indefinite, this particular order came on the heels of the court's granting and dissolving of Harlan's September 26, 2000 restraining order which had required Muncy to remove property from Harlan's side, refrain from interfering with the freezer project, and permit removal of the West Storm Sewer pipe. The orders related to the same matter, i.e., the boundary dispute. As such, we view Harlan's contention, that it was unclear on the meaning of the order, to be rather disingenuous. Further, had Harlan truly been uncertain, clarification should have been sought before Harlan installed curbing and blacktop over the disputed property line, thereby changing the elevation of Harlan's property and reversing the historical water flow. See Tr. at 233, 533-60, 634-37. We cannot say that the court's contempt finding was against the logic and effect of the facts and circumstances before it. Hence, we will not reverse the contempt finding or the accompanying fine and award of attorney fees.

Id. at 1040.

The language of the Order in this case is much more explicit than in *Harlan*, and unlike in *Harlan*, the Witts had an opportunity to be heard *before* the Order was issued. Further, the Witts had notice the day before the hearing that Jay Petroleum intended to

seek a preliminary injunction to stop work at the premises. The Court finds that the language of the Order was direct, declarative, and without ambiguous terms or conditions. The Order was issued with notice, after hearing at which the Plaintiffs were represented by competent counsel, with an opportunity to request clarification of the Order if counsel so desired. The Plaintiffs' decision to continue with the environmental work on the premises was willful disobedience of Judge Roberts' Order. Literally adding insult to injury, Plaintiff John Witt exposed his bare buttocks to the employee of Defendant's consultant and "flipped him off" as HydroTech was in the process of defying the Court's Order. The Court therefore finds that Plaintiffs John and Amanda Witt⁵, HydroTech, Inc., and their attorney Mark Shere, are in contempt of the Court's June 27, 2008 Order Granting Defendant Jay Petroleum's Verified Motion for Temporary Restraining Order. The Court further finds that as a result of such contempt, Jay Petroleum, Inc. incurred damages including attorneys and consultant fees to establish the factual basis for such contempt at the temporary restraining order hearing and in briefing and arguing the contempt motion. The Court further finds that such contempt resulted in the spoliation of evidence or potential evidence relevant to these proceedings, and prohibited the Defendants from conducting their own independent observation and sampling of the tank removal process.⁶

⁵ The Plaintiffs argue that any contempt order should not apply to Amanda Witt, since she was not directly involved in the transaction. However, HydroTech, Inc. and Shere were employed by both John and Amanda Witt, and therefore were, in the terms of the Order, "person[s] acting in concert and participation with" her. Amanda Witt is an owner of the property in question, and was present with John Witt and Cory Smith when the Order was served at the premises.

⁶ The parties do not suggest, and the Court does not attempt, to fashion a remedy for Travis Erny for the ignominy of being subjected to the view of John Witt's bare buttocks or his "one finger salute". To this end, Plaintiffs state in their Brief: "John Witt has stated his firm intent to express himself in a thoroughly professional manner going forward." One can only hope.

III.

Conclusion

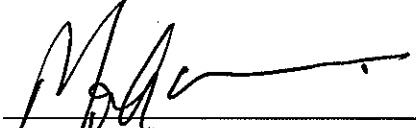
As a result of the Court's finding of contempt, the Court hereby orders that:

1. the Witts, HydroTech, and Shere are jointly and severally liable to pay Jay Petroleum, Inc. and Jack R. James for all of their costs and reasonable attorneys' fees relating to and/or arising from the Preliminary Injunction hearing, the contempt of court argument, and all related briefing and preparation;
2. the Witts, HydroTech and Shere are jointly and severally liable to pay Jay Petroleum's environmental consultant's fees incurred by Quality Environmental Professionals, Inc. ("QEPI") on June 27, 2008, and during the Preliminary Injunction hearing;
3. the Witts, HydroTech and Shere shall not be permitted to introduce to a judge, jury, or any other finder of fact any evidence regarding any environmental or expert reports and data relating to the subject property collected or resulting from activities on the property between June 27, 2008 at 10:30 a.m. and 5:00 p.m. July 2, 2008 ("the Restraining Order Period"), or evidence relating to any legal, business and environmental expenses and damages incurred during the Restraining Order Period, except as might have been previously agreed by the parties;
4. the Witts, Shere, and HydroTech are solely responsible for all costs associated with the environmental investigation and/or remediation at the Witts Gas Station during the Restraining Order Period and all legal

expenses incurred by the Witts, HydroTech and/or Shere during the Restraining Order Period;

5. Jay Petroleum and James shall submit their petition for fees within fourteen (14) days of this Order; and,
6. the Plaintiffs' motions that the TRO and preliminary injunction be vacated *ab initio*, both on the merits and as a sanction, are denied.
7. The Court finds that there is no just reason for delay and hereby enters final judgment as to the matters decided herein pursuant to Trial Rule 54(B) of the Indiana Rules of Trial Procedure.

SO ORDERED this 9th day of December, 2009.



Mark E. Spitzer
Special Judge, Jay Superior Court

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MARK E. SPITZER
Judge

JOHN B. MILFORD
*Commissioner
Domestic Relations*

Rachelle Hunt
Stacy Dorothy
Court Reporters
Teresa Baker
Bailiff

March 18, 2009

Clerk, Jay Superior Court 1
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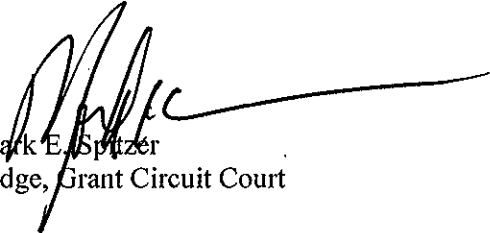
RE: John Witt and Amanda Witt v. Chevron, USA, Inc., Jay Petroleum, Inc., Creek Run, LLC, and
Jack R. James
Jay Petroleum, Inc. v. Jack E. Houch and Chris M. Grieshop
Cause No. 38D01-0712-MI-4

Dear Angie:

As you will recall, I am Special Judge in the above-captioned case. Enclosed for filing, please find an Order on Fee Petitions. Please show the Order filed and entered, and please make copies and forward to all counsel of record.

Please contact me if you have any questions. Thank you again for your assistance in this matter.

Very truly yours,



Mark E. Spitzer
Judge, Grant Circuit Court

MES/rh
Enclosures

STATE OF INDIANA)	IN THE JAY SUPERIOR COURT
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JAY PETROLEUM, INC.)	
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vs.)	
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CREEK RUN, LLC and)	
CHRIS M. GRIESHOP)	
Third-Party Defendants.)	

ORDER ON FEE PETITIONS

The Court, having conducted a hearing on the Fee Petitions of Jay Petroleum, Inc. (“Jay Petroleum”) and Jack James (“James”) on February 4, 2010, and having taken the matter under advisement, and having reviewed the written submissions of the parties, now enters the following order.

I.

Facts and Procedural History

The Defendant, Jay Petroleum, Inc. (“Jay Petroleum”), filed its Motion for Contempt. The Motion was joined by Defendant Jack R. James. After the issues were fully briefed, the parties attended a hearing thereon on November 9, 2009, after which the Court took the matter under advisement. The Court entered an Order on December 9,

2009 (“the Contempt Order”) finding the Plaintiffs and their attorney in contempt and granting the following relief:

As a result of the Court’s finding of contempt, the Court hereby orders that:

1. the Witts, HydroTech, and Shere are jointly and severally liable to pay Jay Petroleum, Inc. and Jack R. James for all of their costs and reasonable attorneys’ fees relating to and/or arising from the Preliminary Injunction hearing, the contempt of court argument, and all related briefing and preparation;
2. the Witts, HydroTech and Shere are jointly and severally liable to pay Jay Petroleum’s environmental consultant’s fees incurred by Quality Environmental Professionals, Inc. (“QEPI”) on June 27, 2008, and during the Preliminary Injunction hearing;
3. the Witts, HydroTech and Shere shall not be permitted to introduce to a judge, jury, or any other finder of fact any evidence regarding any environmental or expert reports and data relating to the subject property collected or resulting from activities on the property between June 27, 2008 at 10:30 a.m. and 5:00 p.m. July 2, 2008 (“the Restraining Order Period”), or evidence relating to any legal, business and environmental expenses and damages incurred during the Restraining Order Period, except as might have been previously agreed by the parties;
4. the Witts, Shere, and HydroTech are solely responsible for all costs associated with the environmental investigation and/or remediation at the Witts Gas Station during the Restraining Order Period and all legal expenses incurred by the Witts, HydroTech and/or Shere during the Restraining Order Period;
5. Jay Petroleum and James shall submit their petition for fees within fourteen (14) days of this Order; and,
6. the Plaintiffs’ motions that the TRO and preliminary injunction be vacated *ab initio*, both on the merits and as a sanction, are denied.

Opinion at pp. 14-15. As a result of points 1, 2, and 5 above, the Court entertained Fee Petitions from James and Jay Petroleum and set the matter for hearing on the sole issue of the appropriate amount of fees and related expenses to be assessed as a result of the

Contempt Order.

II.

Legal Standard

Courts are vested with inherent authority to enforce their own orders. *Allied Property and Casualty Ins. Co. v. Good*, 919 N.E.2d 144, 152 (Ind.Ct.App. 2009). Such authority is “as old as the judiciary itself,” and permits courts to “protect their institutional integrity and to guard against abuses of the judicial process with contempt citations, fines, awards of attorneys’ fees, and such other orders and sanctions as they find necessary, including even dismissals and default judgments.” *Id.* at 153. Appropriate sanctions for “intentional, reckless, or negligent conduct by the party or attorney may include compensating the innocent parties for attorney’s fees and other expenses incurred” as a result of such conduct. *Id.* at 155.

When an award of attorneys’ fees is awarded, the award of such fees is left to the discretion of the trial court. *City of Hammond v. Marina Entertainment Complex*, 681 N.E.2d 1139, 1144 (Ind.Ct.App. 1997). Factors to be considered in such a determination were set out by the Court of Appeals in *McGehee v. Elliot*, 849 N.E.2d 1180, 1191 (Ind.Ct.App. 2006) at n. 4:

Although a trial court may take judicial notice of what constitutes a reasonable amount of attorney fees, “[s]uch practice should be limited to routine cases involving relatively small amounts.” *Zebrowski and Associates, Inc. v. City of Indianapolis*, 457 N.E.2d 259, 264 (Ind.Ct.App. 1983). “When the amount of the fee is not inconsequential, there must be objective evidence of the nature of the legal services and the reasonableness of the fee.” *Stepp v. Duffy*, 654 N.E.2d 767, 775 (Ind.Ct.App. 1995), *trans. denied*. “In determining what a reasonable amount of attorney fees would be in a particular case, consideration should be given to the nature and difficulty of the litigation; the time, skill

and effort involved; the fee customarily charged for similar legal service; the amount involved; and the time limitations imposed by the circumstances.” *Zebrowski*, 457 N.E.2d at 264.

In addition, the factors identified in Rule of Professional Conduct 1.5 provide useful guidelines to courts in fashioning fee awards, although evidence need not be presented on every factor identified in Rule 1.5 in order for a fee award to be supported. *City of Hammond, supra*, 681 N.E.2d at 1144.

III.

Decision

Plaintiffs spent a significant amount of their brief and argument attempting to minimize the relief granted in the Contempt Order and arguing that, since the relief was insignificant, a similarly insignificant flat fee order should be imposed as a sanction. The Plaintiffs repeatedly argued that the Contempt Order related only to “six soil samples” and therefore any significant fee order would be tantamount to killing a gnat with an elephant gun. It is worthy of note that the appropriateness of a contempt order in this case is underscored by the Plaintiffs’ apparent abiding disregard for the significance of their actions. If there remains any doubt following a reading of the Contempt Order that the Court considered this a serious matter, the Court takes this opportunity to emphasize that the actions of the Plaintiffs and Mr. Shere were a serious breach of Judge Roberts’ prior order and the Contempt Order was intended to impose meaningful and significant sanctions for such misbehavior, whether viewed as such by Plaintiffs or not. The fact that the Court did not impose a more significant sanction, such as dismissal of the lawsuit, was a matter of grace. It was not intended as an indication that the actions of the Plaintiffs or Mr. Shere were in any way justified.

The Plaintiffs further suggest that the Court could merely impose a \$10,000 flat fee in lieu of awarding the fees actually incurred as a result of the contempt. Even if the Court were inclined to do so (it is not), such a practice would appear to violate the guidelines set forth in *McGehee, supra* and the cases cited therein. Further, the actions taken by Plaintiffs did not have an insignificant impact. They resulted in two lengthy hearings,¹ hundreds of pages of briefing, evidentiary consequences for trial, and a sixteen page Contempt Order. An award of \$10,000 would bear little relation to the actual costs engendered by the actions. Therefore, the Court finds that a reasonable award should be determined by a review of the actual fees and costs incurred by the Defendants. *Allied Property, supra*.

In connection with the Court's review of reasonable fees to be awarded as a result of its contempt finding, the following considerations became relevant to the Court's inquiry. James and Jay Petroleum's Fee Petitions included fees in connection with the original temporary restraining order hearing, the preliminary injunction hearing, and the contempt hearing. The Contempt Order did not award fees for the temporary restraining order hearing, which predated the Plaintiffs' contemptuous behavior. Accordingly, the Court has not included those fees or expenses in its judgments, and in some circumstances has allowed only a portion of certain time entries which related to both the contempt behavior and the temporary restraining order hearing. In addition, Judge Roberts ordered security to be provided by the Defendants at the site. As Judge Roberts expressly ordered the Defendants to provide the security, the Court has not included

¹ The Plaintiffs argued that the Defendants should not have been compensated for the Preliminary Injunction hearing. However, the transcript of that hearing was copiously cited by all parties in their briefing on the contempt issue, including the Plaintiffs. Had the hearing not occurred, the Court would have been required to conduct an evidentiary hearing on the Motion for Contempt constituting virtually the same evidence.

expenses or fees in connection with the provision of security in its award. Further, the Court has not included Westlaw charges in the award, as the Court considers such charges to be attorney overhead, rather than expenses, given the Court's judicial knowledge of the availability and use of flat rate research plans. In addition, James requested fees at their normal hourly rate of between \$165 to \$195 per hour. This rate is unquestionably reasonable in light of fees charged by the other attorneys in this litigation.² However, the rate billed was \$150 per hour, and the award to James was based upon that rate. The Court finds that such award is more in keeping with the theory of compensation of innocent parties victimized by the contempt which is reflected in Indiana caselaw. *Allied Property, supra*, 919 N.E.2d at 155.

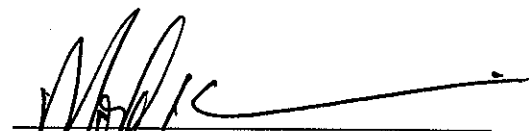
There is a significant disparity in the hourly rates requested by James' attorneys and those requested by Jay Petroleum's attorneys. Jay Petroleum's attorneys are requesting that the Court approve hourly rates as high as \$450. While Jay Petroleum's attorneys have undeniably taken the lead in this suit, and did so on the contempt issue, and attorney Braun is certainly a knowledgeable and prominent attorney in the area of law with which this suit is concerned, for purposes of the Court's determination the Court, considering the factors in Rule 1.5, finds that a lesser hourly rate is appropriate. Accordingly, the Court determines that \$300 per hour is an appropriate ceiling to apply to billing by Jay Petroleum's attorneys as a result of this contempt issue. *Cf. Greenfield Mills, Inc. v. Carter*, 569 F.Supp.2d 737, 758 (N.D.Ind. 2008) (\$285 per hour); *Wickens*,

² There is authority for an award of regular hourly rates as opposed to negotiated preferred rates. *See Jardien v. Winston Network, Inc.* 888 F.2d 1151, 1160 (7th Cir. 1989). Mr. Shere's arguments against such an award ring a bit hollow, as he apparently received the benefit of a similar argument less than a year ago. *Wickens v. Shell Oil*, 2009 U.S. Dist. LEXIS 47516 at p. 24 (N.D. Ind. 2009). Nonetheless, the Court deems that an award of rates actually paid is more in keeping with most Indiana authorities on the subject, and therefore the Court exercises its discretion to award fees in that fashion.

supra, at p. 24 (\$300 per hour). Finally, the Court did not include in the award a number of time entries relating to apparently duplicative effort and lengthy review by multiple attorneys of briefs prepared on the contempt issues. *See Greenfield Mills, supra*, 569 F.Supp.2d at 751-752.

With the above considerations in mind, and following the review of the various time records and billings submitted by the Defendants, the Court awards Jay Petroleum the sum of \$74,414 in attorneys' fees and \$5,958.46 in expenses, and the sum of \$15,158 for costs incurred for the services of QEPI, for a total judgment of \$95,530.46. The Court awards James the sum of \$12,375 in attorneys' fees and \$581.86 in expenses for a total judgment of \$12,956.86. Pursuant to the Contempt Order, these judgments are imposed jointly and severally against John and Amanda Witt, Hydrotech Corp., and Mark E. Shere. The Court finds that there is no just reason for delay and hereby enters final judgment as to the matters decided herein pursuant to Trial Rule 54(B) of the Indiana Rules of Trial Procedure.

SO ORDERED this 18th day of March, 2009.



Mark E. Spitzer
Special Judge, Jay Superior Court

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