

Agency.

Kirby's Tire Recycling, Inc., had accepted, for a fee, used and discarded tires. The other Defendants, Doris Kirby, Rebecca Williams, who is Doris Kirby's daughter, and Donald Williams, who is Rebecca Williams' husband, are officers of the corporation. These individuals earned their living from the scrap tire business. Aside from acquiring millions of tires, the corporation also acquired expensive equipment and vehicles with which to manage and operate the business.

While some of the tires at Defendants' site were probably accumulated prior to the enactment of certain environmental regulations, federal, state and local regulations have been in effect for a significant period of time relevant to the Defendants' business operations. Regulations involving scrap tires and solid waste are particularly applicable to Defendants' tire site.

On June 13, 1997, the Attorney General, at the request of the Director of the E.P.A., filed a Complaint for "Preliminary and Permanent Injunction Relief, Civil Penalties, Nuisance Abatement, Damages and Other Relief" with this Court. The State, in its Complaint, specifically referenced that the Kirby's "tire dump" in

addition to violating regulations, constituted "an imminent threat to public health and safety and to the environment."

Defendants filed their answer and set forth their defenses, through their Attorney, Christopher Schraff on July 2, 1997. Shortly thereafter, on July 17, 1997, the parties filed a Preliminary Injunction and Consent Order, hereinafter referred to as "PICO" which the Court adopted as its Order. This entry, in summary, required Defendants, effective July 9, 1997 to:

1. Shred and bale all incoming scrap tires and remove an equivalent weight within seventy-two (72) hours to a lawful disposal facility.
2. In addition to the above, remove 100,000 pounds (approximately 5,000 whole passenger tires) per day to a lawful disposal facility. This removal was to be from certain specified and numbered tire piles at Defendants' facility.
3. Keep monthly incoming tire logs which would track the weight of the tires, and the generator and transporter of the tires.

4. Keep monthly outgoing tire logs containing the same information as contained in #3 above and designate the pile from which the tires were removed.
5. Comply with the law regarding mosquito infestation control.
6. Comply with the law regarding shipping papers.
7. Cease expanding the area covered by scrap tires.
8. Comply with the Ohio Administrative Code 3745-27-(60)(B) which has as a requirement the maintenance of fifty foot (50') fire lanes.
9. Provide 'round-the-clock human security at the Defendants' scrap tire facility.
10. Limit access for incoming vehicles loaded with tires.
11. Within forty-two (42) days, establish and maintain fifty foot (50') fire lanes between working piles associated with recovery equipment and scrap tire pile 1015.

This Order was amended by the Court on October 10, 1997, with an Entry hereinafter referred to as "APICO" with the consent of the parties and was essentially the same as the Order previously issued with the following exceptions: Order #2 was amended to add a scrap tire pile to the designated list of piles for removal and Order #10 was amended to extend the limit for incoming trucks traveling on Defendants' property.

On July 15, 1998, the Plaintiff filed charges in contempt, alleging several significant violations of the Court's Orders. The Plaintiff requested that the Court require Defendants to come into full compliance with the terms of the APICO, impose a penalty and grant such other relief as the Court deemed necessary and appropriate.

The parties thereafter, entered into written stipulations for the Court's consideration and pertinent to the Plaintiff's contempt charge. Again, the parties entered into an "Agreed Judgment Entry Finding Violations and Order" which was adopted by the Court and filed on September 18, 1998. The Court found that the Defendants had violated Order #1 of the PICO and APICO in that they failed for seven (7) months from the time the PICO went into effect and the

time of this September, 18, 1998 Entry to remove incoming tires within seventy-two (72) hours of receipt.

The Court also found Defendants had violated Order #2 by failing to remove 100,000 pounds of scrap tires (approximately 5,000 whole passenger tires equivalents) per business day as agreed from the time the Order was issued to the date of the Judgment.

Finally the Court determined that Defendants violated Order #8 of the PICO and APICO by failing to create and maintain fifty foot (50') fire lanes free from combustibles and obstructions between the tire piles. Notably, the Court found that Defendants filled in fire lanes, which existed at the time the PICO was entered, with additional scrap tires. Nor had Defendants, according to the Court, made progress in reducing the size of the scrap tire piles.

Because of these foregoing findings, the Court made several additional Orders. The Defendants were directed to immediately cease accepting tires until they had complied with all the requirements of the PICO and APICO. Several of the Orders related to the Defendants making financial reports/disclosures to the Court and Plaintiff, curtailing transfer or expenditures of Kirby's Tire Recycling, Inc.'s assets and specifically addressing how funds were

to be spent, i.e., security, maintenance of buildings and equipment at the site and to maintain utilities at the site.

Notably, the Court also required at Letter I of the Entry dated September 18, 1998 that:

"That Defendants shall make written status reports to the Court every sixty (60) days setting out their efforts to comply with the terms of this Order and the PICO and APICO. "

Defendants, in compliance with a provision in the foregoing order filed two status reports within the first approximate 120 days of the order. Thereafter no status reports were received by the Court from the Defendants as Ordered until April 27, 2001 and after the second charge of contempt was filed.

Shortly after this September 18, 1998 Entry, the Ohio EPA sent a letter regarding violations of the APICO to Defendant, Doris Kirby, on December 1, 1998. (See Plaintiff's Exhibit 3). More such letters, giving notice of violations, followed the first.

On August 21, 1999, a fire occurred at Defendants' business site. It is estimated five million tires burned during the four days it took to bring the fire under control. Millions of public

dollars were spent in fire response and fire related costs. For instance almost \$2.7 million dollars alone were spent treating water from the site due to the oil, which was a byproduct of the burning tires, contaminating a local creek, which would continue to be contaminated without water treatment intervention. (See Exhibit 25).

On February 15, 2001, Plaintiff filed its second written charges of contempt, which will be more fully analyzed later herein. Defendants, on March 19, 2001, filed their Motion for Stay of, or Relief from Preliminary Injunction. A hearing was conducted and each side presented its evidence. From the evidence adduced the Court HEREBY makes additional and specific findings of fact.

FINDINGS OF FACT

1. Defendants are owners/operators of a scrap tire dump ("Kirby Tire facility") comprised of approximately 100 acres of real property at 3137 State Route 231 in Sycamore, Wyandot County, Ohio.

2. Order #2 of the PICO and APICO issued by this Court states that Defendants shall remove at least 100,000 pounds of scrap tires paper business day from the Kirby's tire site. (Plaintiff's Exhibits

1 and 3.)

3. Defendants were specifically ordered by this Court in the APICO to draw down scrap tire piles in the following order: Pile 1022, 1021, 1018, 1013, and 1007 (as designated in Plaintiff's Exhibit #2, a Geo One survey map submitted to the State by the Defendants.) (Plaintiff's Exhibit 3.)

4. As noted in Beth Brown's Notice of Violation ("NOV") letter of April 20, 1999, the outgoing scrap tire logs submitted by Defendants to the Ohio EPA for September 1998, through March 1999, indicate that Defendants did not remove 100,000 pounds of scrap tires per business day from their scrap tire facility for those months. (Plaintiff's Exhibit 7; Testimony of Beth Brown.)

5. Subsequent to July of 1999, Defendants did not remove any tires from their facility. (Testimony of Rebecca Williams; Testimony of Beth Brown, Exhibit 10.)

6. To date, scrap tire piles 1021, 1018, 1013 and 1007 remain at the Kirby scrap tire site; pile 1022 was removed by Central Ohio Contractors ("COC"). (Plaintiff's Exhibits 2 and 14; Testimony of Beth Brown.)

7. Order #4 of the PICO and APICO issued by this Court states that Defendants shall maintain and submit monthly outgoing tire logs to the Ohio EPA and the Wyandot County Board of Health that record the weight of the scrap tires removed from the facility, the name and address of the transporter, the name and address of the destination of the scrap tires and the designated piles from which the tires were removed. (Plaintiff's Exhibits 1 and 3.)

8. Order #5 of the PICO and APICO issued by this Court states that Defendants shall comply with mosquito infestation control requirements of Ohio Administrative Code ("OAC") Rule 3745-27-60(B)(8) at the Kirby's tire site. OAC Rule 3745-27-60 (B)(8) requires Defendants to control mosquito infestation either by applying pesticide or larvicide to the scrap tires at the site every thirty days between April 1 through November 1 or by removing liquids from the scrap tires, storing them in such a manner that water does not accumulate and keeping the scrap tires free from water at all times. (Plaintiff's Exhibits 1 and 3; Testimony of Beth Brown.)

9. Since August 26, 1998, Defendants have not controlled mosquito infestation at their facility either by applying pesticide

or larvicide to the scrap tires at the site every thirty days between April 1 and November 1 or by removing liquids from the scrap tires, storing them in such a manner that water does not accumulate and keeping the scrap tires free from water. (Plaintiff's Exhibits 10 and 13; Testimony of Beth Brown.)

10. Order #8 of the PICO and APICO issued by this Court states that Defendants shall comply with the scrap tire storage and handling requirements in OAC Rule 3745-27-60 (B) by maintaining individual scrap tire piles in sizes no greater than 2,500 square feet in basal area and 14 feet in height, and by maintaining 50 feet wide fire lanes free of combustible material between each scrap tire pile. (Plaintiff's Exhibits 1 and 3.)

11. At the time of Ohio EPA inspector Beth Brown's inspections of the Kirby Tire facility on November 24, 1998, April 16, 1999, August 2, 2000, and April 17, 2001, the scrap tire piles in Sections A, B, C, and D of the Defendants' facility exceeded the 2,500 square foot basal area limit and the 14 feet limit for a scrap tire storage pile as set forth in OAC Rule 3745-27-60 (B). Also on the above inspection dates, the fire lanes between Defendants' scrap tire piles were less than the 50 feet minimum as

required. (Plaintiff's Exhibits 5, 7, 10, and 13; Testimony of Beth Brown.)

12. Effective February 17, 1999, through June 30, 2001, the State of Ohio and COC entered into a contract under which COC was hired by the State to remove and dispose of scrap tires from Defendants' facility. (Defendants' Exhibit A; Testimony of Brian Hatfield.)

13. COC used San Lan Landfill to dispose of tires from the Kirby site. This location was the most convenient tire disposal site available to COC and Defendants. COC use of San Lan interfered with Defendants using this location for purposes of tire disposal. (Testimony of Rebecca Williams.)

14. Order B of the Agreed Judgment Entry states that Defendants are prohibited from transferring or expending any assets of Kirby's Tire Recycling, Inc., unless such transfer or expenditure is specifically required to comply with the terms of the Agreed Judgment Entry or to maintain the buildings or equipment at the Kirby Tire facility.

15. On June 3, 1999, Defendants sold a car wash owned by Kirby's Tire Recycling, Inc., to Herbert Songer for \$158,000.00.

The proceeds of this sale went into the Kirby's Tire Recycling, Inc., checking account number #####, maintained at First National Bank in Sycamore, Ohio. (Stipulations 8 and 9 of the parties.)

16. Between January 20, 1999 and December 14, 2000 Defendants sold numerous corporate assets of Kirby's Tire and Recycling, Inc.

17. Defendants sold personal assets. Former Attorneys for both sides agreed proceeds from the sale of personal assets were to be deposited into specific accounts so that the expenditures made from these accounts could be traced. (Testimony Attorney Christopher Schraff.)

18. Conversations between the former Assistant Attorney General assigned to this case and Defendants' former Attorney, Christopher Schraff, did occur. During such conversations the Assistant Attorney General had objected to certain conveyances of assets, from the Defendants to family members as inappropriate and arrangements were discussed regarding the procedure of depositing proceeds, again, so that they could be tracked. (Testimony of Christopher Schraff.)

19. A letter dated November 5, 1998, to former defense counsel from the former Assistant Attorney General reiterated that proceeds from the sale of personal assets were to be used only for expenses necessary to comply with the PICO and APICO. (Plaintiff's Exhibit 26.)

20. In 1999, Defendants transferred the ownership of platform scales from Kirby's Tire Recycling, Inc., to the company, James E. Morrow and Sons, in exchange for the discharge of a \$24,650.00 debt Kirby's Tire Recycling, Inc., owed to Morrow and Sons. (Plaintiff's Exhibit 20; Testimony of James Morrow.)

21. Proceeds from the sale of other assets were deposited into the Kirby's Tire Recycling Inc., checking account number #####, maintained at First National Bank in Sycamore, Ohio. A total of \$35,000.00 of the proceeds; from Defendants' sale of assets as set forth in Findings of Fact 14 and 15 above, was not deposited in the aforementioned account. (Defendants' Third Status Report; Testimony of Rebecca Williams.)

22. Defendants did not use any of the \$158,000.00 in proceeds from the June 3, 1999 sale of the car wash as set forth in Finding of Fact to remove any scrap tires from their facility. (Testimony

of Rebecca Williams.)

23. Defendants did not remove any tires from their facility after July of 1999 and thus did not use any proceeds from Kirby's Tire Recycling, Inc., assets sold after July of 1999 to remove any tires from their facility. (Defendants' Third Status Report; Testimony of Rebecca Williams.)

24. Defendants did not use the proceeds from the sale of their corporate assets, as set forth in Findings of Fact 14 and 15, above, to maintain buildings or equipment at the Kirby Tire facility. (Testimony of Brian Hatfield; Testimony of Beth Brown.)

25. Defendants did not use the proceeds to resume providing security at their facility. (Testimony of Rebecca Williams.)

26. Defendants stopped providing telephone, electric, and water utilities at the Kirby Tire facility before the fire in 1999 and never resumed providing these utilities. (Testimony of Brian Hatfield; Testimony of Rebecca Williams.)

27. On October 11, 2000, and April 18, 2001, Defendants were given notice that they were in violation of Order B of the Agreed Judgment Entry. Defendants did not respond to those notices. (Plaintiff's Exhibits 10 and 13; Testimony of Beth Brown.)

28. From June 4, 1999 until January 7, 2000, Kirby's Tire Recycling, Inc., records indicate that Defendants Kirby's Tire Recycling, Inc. paid more than \$42,000.00 in salaries to employees even though the Defendants' scrap tire facility was not accepting additional scrap tires, shredding existing scrap tires, or removing scrap tires during this period. Employees regularly receiving checks during this period included Defendants Doris Kirby, Rebecca Williams and Donald Williams, as well as the Williams' daughters. (Defendants' Third Status Report; Testimony of Rebecca Williams.)

29. During an eight-day period between September 24, 1999, and October 1, 1999, Defendants Doris Kirby, Rebecca Williams and Donald Williams each received three paychecks from Defendant corporation Kirby's Tire Recycling, Inc. (Defendants' Third Status Report; Testimony of Rebecca Williams.)

30. Defendants Doris Kirby and Donald Williams regularly received paychecks from Defendant Kirby's Tire Recycling, Inc., until October 22, 1999, and that Defendant Rebecca Williams regularly received paychecks from the corporation until January 7, 2000. (Defendants' Third Status Report; Testimony of Rebecca Williams.)

31. The only recent financial record Defendants have provided this Court consist of the following:

- a. Individual tax returns of Donald and Rebecca Williams for the years 1996 through 2000.
- b. A list of certain corporate assets sold by Defendants in 1999 and 2000 and
- c. Photocopies of deposit slips and checks pertaining to the Kirby's Tire Recycling, Inc., checking account number ##### maintained at First National Bank in Sycamore, Ohio, for the period of November 23, 1998, through September 9, 2000.

32. This Court has not received any recent financial information in the form of tax returns, a balance sheet, an income statement or any other standard financial statements regarding Defendant Kirby's Tire Recycling, Inc., or any recent tax returns of Defendant Doris Kirby. (Defendants' Third Status Report; Defendants' Exhibit E.)

33. Agreed Judgment Entry Order C states that Defendants shall submit to the Court and Plaintiff State of Ohio monthly reports disclosing Defendants credit card and bank account statements as well as monthly reports rendering an accounting of all cash or other transactions in excess of \$200.00.

34 . Between October 19, 1998, and April 27, 2001, Defendants failed to file a monthly report to the Court disclosing all credit card and bank account statements. (Stipulation of Defendants during contempt hearing; Plaintiff's Exhibit 10 and 1.3; Testimony of Beth Brown.)

35 . Between October 30, 1998, and April 27, 2001, Defendants failed to file a monthly report to the Court rendering an accounting of all cash or other transactions in excess of \$200.00. (Stipulation of Defendants during the contempt hearing; Plaintiff's Exhibits 10 and 13; Testimony of Beth Brown.)

36. On October 11, 2000 and April 18, 2001, Defendants were given notice that they were in violation of Order C of the Agreed Judgment Entry. Defendants did not respond to those notices. (Plaintiff's Exhibits 10 and 13; Testimony of Beth Brown.)

37. Agreed Judgment Entry Order D states that Defendants shall maintain continuous security protection at the facility "until further order of the Court." (Plaintiff's Exhibit 4.)

38 . Agreed Judgment Entry Order I states that Defendant shall submit written status reports to the Court every sixty days outlining their efforts to comply with the terms of the Agreed

Judgment Entry PICO and APICO. (Plaintiff's Exhibit 4.)

39. On October 11, 2000, and April 18, 2001, Defendants were given notice by the State of Ohio that they were in violation of Order I of the Agreed Judgment Entry. (Plaintiff's Exhibits 10 and 13; Testimony of Beth Brown.)

40. Defendants filed their Third Status Report to the Court on April 27, 2001. Prior to Defendants' April 27, 2001 Status Report, Defendants had not filed a written status report to the Court since March 19, 1999. (Stipulation of Defendants during the contempt hearing; Plaintiff's Exhibits 10 and 13.)

41. Since initiating its tire abatement project at the Defendants facility in 1999, the State of Ohio has incurred costs of \$2,201,434.21 to shred, remove and dispose of approximately 1.9 million of Defendants' scrap tires, spray for mosquitoes and provide utilities and site security. (Stipulations 3 and 5 of the parties; Plaintiff's Exhibit 25; Testimony of Jim Laipply.)

42. Because of the enormous scrap tire abatement costs being incurred by the State at Defendants' facility, approximately 70 other scrap tire sites in Ohio are presently being allocated little or no funds for scrap tire abatement. (Testimony of Jim Laipply.)

SUMMARY OF PLAINTIFF'S CONTEMPT CHARGES

Plaintiff has asserted seven charges of contempt against the Defendants. The Court finds from the evidence adduced, by clear and convincing evidence, that the Defendants did violate the Court's orders. Not only did the Defendants fail to do that which they were ordered to do, they failed to make any appreciable effort at complying with the orders. These charges in contempt may be summarized as follows:

COUNT ONE IN CONTEMPT

The Judgment Entry of September 18, 1998 Ordered at "Paragraph B" in pertinent part:

"To the extent that funds are available, the Defendants shall not transfer or expend any assets of Kirby's Tire Recycling, Inc., except for those specifically required to comply with the terms of this Order or to maintain the buildings and equipment at the facility..."

Plaintiff's allege and Defendants agree, that after this order was issued, Defendant sold and transferred assets of Kirby's Tire Recycling, Inc. and the transfers were in violation of the afore cited order and the proceeds were not used to comply with the Court order. Among the transfers was the June 3, 1999 sale of the Kirby Tire Recycling Inc. asset, namely Kirby Car Wash, to Herbert Songer

for the sum of \$158,000.00. The proceeds were deposited into a corporate operating account, but the funds received were not used to comply with the Court's specific order.

COUNT TWO, THREE AND FOUR IN CONTEMPT

The allegations contained in count 2, 3 and 4 in contempt are related in that all require ministerial functions on the part of the Defendants. Plaintiff alleges that Defendants failed to disclose assets and failed to file status reports as required by the Judgment Entry of September 18, 1998. Plaintiff also alleges Defendants failed to submit monthly tire logs as required by the PIC0 and APICO.

The evidence disclosed that, but for initial filings occurring in October of 1998, Defendants have failed to submit monthly reports to the Court and Plaintiff disclosing assets and debts. Defendants have failed to account for their cash and other transactions impacting on their finances. Bank and credit card statements have not been produced.

The evidence also disclosed, and it was confirmed by Defendant Rebecca Williams, that no monthly status reports since May 19, 1999 have been filed, save and except, the Status Report filed April 27,

2001, just days prior to this hearing.

Finally the Court finds Defendants have failed to submit tire logs to Plaintiff detailing the piles from which tires have been removed, the names and addresses of the transporter, the names and addresses of the destination of the tires and such other particulars as required.

This inaction on the part of the Defendants likewise constitutes violations of this Court's prior orders.

COUNT FIVE

The Defendants admit that they have failed to remove 100,000 pounds of scrap tires per business day as required by the PICO and APICO. Again, the Defendants have failed to perform as directed by the orders of this Court.

COUNT SIX

Plaintiff maintains that Defendants failed to take steps to comply with mosquito control procedures thereby creating a danger to the health and safety of the citizens of Wyandot County. Plaintiff proved that Defendants ignored this Court's order regarding their responsibility to provide insect control by spraying pesticides at necessary times to control the mosquito

population.

COUNT SEVEN

Plaintiff alleged that Defendants failed to store the scrap tires at the Kirby facility in piles of specified heights and basal area and further that Defendants failed to maintain the 50 foot (50') fire lanes as required. The evidence presented supported Plaintiff's assertion.

ANALYSIS

Defendants have cited a number of reasons to justify or excuse the numerous violations just detailed. Among these reasons are alleged misunderstandings regarding Defendants obligations, impossibility of compliance and arguments regarding the legal efficacy of the very orders issued. It is important to recognize that if these violations are justified or otherwise excusable Defendants would avoid a contempt finding. However, if the defenses interposed are not accepted, Defendants conduct would then be found contemptuous and warrant concomitant punishment.

Contempt of court is, by statute, a disobedience of, or resistance to a lawful order of court. (See Revised Code Section 2705.02 (A)). Therefore the establishment of a valid court order is

the foundation of any contempt action.

At the outset it should be noted that the PICO, APICO, and Judgment Entry of September 18, 1998 were all agreed entries signed by the attorney(s) for the Defendants, Kirby's Tire Recycling, Inc., Doris Kirby and Rebecca and Donald Williams. And the PICO and APICO were also signed by Rebecca Williams and Donald Williams "individually and as agent for Kirby's Tire Recycling, Inc." These consent entries, which bound the parties, were adopted as Orders of this Court.

In one of the more all encompassing defenses that Defendants interject is the notion that any contempt finding based on violations of the PICO and APICO would be erroneous. Defendants argue that the "law of the case" doctrine requires that this Court determine that the Entry of September 18, 1998 addressed the prior contempt charges involving the orders contained in the PICO and APICO. The Defendants maintain that the Court should not revisit anything prior to the Entry of September 18, 1998 and accept the Entry as "addressing all matters prior to...it."

Defendants' reliance on the law of the case doctrine is misplaced. Briefly stated this (doctrine is a rule of practice

"...that the decision of a reviewing Court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." Nolan v. Nolan (1984), 11 Ohio St. 3d, 1,3 citing Gohman v. St. Bernard (1924), 111 Ohio St. 726, 730, reversed on other grounds New York Life Ins. Co. v. Hosbrook (1935), 130 Ohio St. 101 [30.0.138; Gottfried v. Yocum (App. 1953), 72 Ohio Law Abs. 343,345. The doctrine functions so as to require trial Courts to follow the dictates of higher courts. The doctrine was designed to avoid endless litigation.

In the instant case no higher court has reviewed the case so there is no mandate that the trial court was compelled to follow. If the Defendants are using the doctrine to argue that "the law of the case" is such that Plaintiff is essentially relitigating the same issues, the Court would note, that while Defendants have previously been found to have committed violations of the Court Orders there has been no finding of contempt. Plaintiff is seeking a finding and a remedy that heretofore have not occurred. Accordingly there is no circuitous, endless cycle of litigation where the law of the case doctrine may reasonably be interposed to

prevent it.

Also related to the generalized defenses Defendants assert is the theory that the Judgment Entry of September 18, 1998 superceded and/or replaced the orders contained in the PICO and APICO. As some of Plaintiff's charges are relevant to Defendants' violations of provisions of the PICO and APICO, this stance requires that this theory be explored.

Defendants argue that the Court did not specifically retain jurisdiction in the PICO and APICO as it did in the September 18, 1998 Entry. The defense interprets this omission to mean that the Court relinquished jurisdiction and concomitantly the right to enforce the orders contained in the PICO and APICO documents. But Courts do retain jurisdiction over collateral issues such as contempt. See Vavrind v. Greczanik (1974), 40 Ohio App. 2d 129. If a Court could not enforce its orders what would be the point in issuing them in the first place?

"The power of contempt is the sole means by which judges can enforce their orders and affirm the rule of law for the benefit of the public..." In re Contemnor Caron v. State (2000), 110 Ohio Misc. 58, @ Syllabus no. 13.

The Court therefore finds that it has jurisdiction to enforce the PICO and APICO provisions. Finally as a generalized defense to violations of the PICO and APICO orders, Defendants suggest that they were somehow led to believe the September 18, 1998 Entry relieved them from complying with the PICO and APICO. A study of the September 18, 1998 Entry however shows that it was meant to complement the PICO and APICO, reinforce their objectives, and that all three documents were issued to achieve specific results pertaining to Defendants' business site. Specifically supporting this finding is Letter I of the September 18, 1998 Entry which provides:

" The Defendants shall make written status reports to the Court every sixty days setting out their efforts to comply with the terms of this Order and the PICO and APICO... (emphasis added)

As defense counsel and/or the parties themselves consented to the terms contained in all three court orders as evidence by their signatures on the documents, Defendants claim of ignorance regarding their continued responsibilities under the PICO and APICO are self-serving statements which have no factual support.

The foregoing addressed the general issues of whether valid court orders were in place, whether the Defendants had notice of them, and whether certain generalized defenses were applicable. The Court having found valid and enforceable orders were in place and the general defenses used by the Defendants inapplicable, the Court now turns to the specific infractions committed by the Defendants.

Defendants argue that the violations occurred because it was impossible for them to comply with the Court's Orders, or that in equity, compliance with the Orders should not be required and/or that the violations are "de minimis" or of no real consequence.

The bedrock of most of the orders sought and issued was to address the public safety and welfare issues that the Kirby facility posed. Collateral issues involving reports and Defendants' financial status were to keep the parties apprised of Defendants' abilities to meet the orders and the resources the Defendants could devote to such an enterprise. At the heart of this process was the management of and reduction in size of the existing tire piles. Toward this end Defendants were to remove 100,000 pounds of scrap tires or 5,000 whole tire equivalents per

business day from specific piles and store tires in piles no greater than 2,500 square feet in basal area and no pile higher than 14 feet. Defendants were also to maintain fifty foot (50') wide fire lanes free of combustible materials between each pile; all as required by Order #2, #5, and #11 of the PICO and APICO.

Defendants argue compliance with these orders was impossible particularly when the subsequent September 18, 1998 Judgment Entry forbade them from accepting tires thereby precluding them from earning monies to assist with the foregoing requirements. To further buttress their claim, Defendants point out that Central Ohio Contractors, a business employed by the EPA, was only able to "remove approximately 1.9 million tire equivalents from the Kirby site from July 1999 to September 2000 and at substantial cost.

The Court notes that to some, compliance with the foregoing orders would appear to require a Herculean effort on the part of the Defendants. However the Court considers the fact that what was ordered to be performed was part of Defendants' ordinary business, and that Defendants had the equipment and knowledge which would allow them to abide by the Court Order. More importantly, the Defendants, with their expertise, experience and knowledge agreed,

not once but three times to the orders being put into place.

For a lengthy period of time after the orders were issued not only did Defendants fail to remove tires as specified in the Order, Defendants failed to remove any tires whatsoever.

This apathy toward compliance on the part of the Defendants is made more egregious when one considers that Defendants were content to enter into an agreement, which by their lack of action, demonstrates they had no intention of even attempting to fulfill. The evidence disclosed that Defendants had access to the site, time, and funds, particularly given the \$158,000.00 sale of the Kirby Car Wash asset, but Defendants put their efforts toward their own personal goals instead. Plaintiff is to be scolded for allowing its contractor to haul the removed tires and tire equivalents to the most convenient location, thereby giving Defendants reason to complain, however since Defendants failed to even attempt to fulfill the order, by finding other disposal sites or moving tires within the facility to meet height requirements and fire lane widths, the Defendants complaint lacks credibility.

Keeping the tire piles to a size not to be exceeded and maintaining fire lanes as required in the Court Orders are of

specific interest. Despite numerous notices of violations of these requirements, Defendants again did nothing, despite their agreement to the contrary as contained in the PICO, APICO and September 18, 1998 Judgment Entry. To comply with these requirements would have required primarily the Defendants' labor. While all of the Defendants and some of their relatives received paychecks during the time the orders were in effect, these individuals were apparently being paid to do "tasks" completely unrelated to complying with the Court orders which were put into place for public safety and environmental reasons.

Of particular concern was the requirement that Defendants maintain 50' fire lanes between the tire piles. Witness Brown explained that 50' between piles was necessary to allow access for emergency vehicles and as a physical barrier to keep a fire from jumping from one pile to another. Not only did Defendants ignore these provisions of the orders, but the unrefuted testimony was that the fire lanes had gotten smaller since the State had commenced inspecting the site. This last finding is particularly troublesome not so much because it flaunts the authority of the Court, but because it jeopardizes the safety of anyone called upon

to fight a fire at the site and also jeopardizes the safety of the community where the site is located given the sheer number of tires amassed at the site. Defendants offered no credible reason as to why they could not take any appreciable efforts to attempt compliance in regards to these orders or any rational reason as to why the situation involving fire lanes worsened with time given the potential danger.

Also presenting a danger to the community is the fact that if the tire piles are stored so liquid may accumulate, the piles are likely to become infested with mosquitoes; a known disease carrying vector. Given the millions of tires at that the Kirby facility, Defendants cannot be faulted for failing to tarp the tire piles to comply with this requirement. An acceptable mosquito control alternative, is the spraying of pesticide at stated intervals during the mosquito breeding season. Defendants apparently recognized the importance of controlling this pest as they had, in the past, sprayed pesticides to control the mosquito population.

However once the Court issued its orders requiring the Defendants to be responsible for this process, Defendants ceased this spraying and relied on others, using public funds, to

accomplish this task. Defendants' failure to address this problem again violated the Court's Orders and required the use of public funds to abate the potential danger posed by this private facility. Defendants suggested, through testimony and argument, that since the State was responsible for having the spraying accomplished, it was of no real consequence that the Defendants were not performing as ordered. Alternatively Defendants argue they had no funds with which to comply.

The evidence revealed that spraying the site for mosquitoes was a necessity and not a choice. The fact is that those actually working at the Kirby facility needed to have the site sprayed for their safety and protection, not to alleviate the Defendants obligation in this regard. The Defendants complaints, that they had no funds with which to perform, lacked credibility and as this particular defense was raised regarding other compliance issues, the Court finds it appropriate to address them with more particularity.

The Court is convinced that the Defendants could not have from the time the PICO was issued to current date, fulfilled each and every order issued by this Court with the known funds available to

the Defendants. However the Defendants could have utilized some of the funds at their disposal to attempt initial compliance or to comply with at least some of the orders of this Court.

For instance, the parties agreed that on June 3, 1999 Kirby's Tire Recycling Inc. sold its asset, Kirby Car Wash, to Herbert Songer for the sum of \$158,000.00. The proceeds of this sale, again according to the agreement of the parties, were deposited into a corporate operating account.

The facts revealed, despite the receipt of these funds, Defendants failed to use the funds to remove tires, comply with mosquito control regulations or for the security of the Defendants' business location. The Defendants did not maintain utilities or use the funds in any respect, to comply with the PICO, APICO or Judgment Entry. Indeed other Kirby's Tire Recycling Inc. assets were likewise sold and the proceeds disbursed, per the testimony of Rebecca Williams, to serve Defendants private interest, pay Defendants' salaries, as well as salaries to Defendants' children/grandchildren, to pay loans, attorney fees and otherwise to keep Defendants' "status." There was not one occasion where the funds of the car wash sale were directly utilized to

comply with any order of the Court.

Defendants also employed a peculiar banking method which, to the critical mind, was employed to defeat any attempt to make the Defendants financially responsible for any of the Court Orders which would require funds to comply. Defendants would deposit funds, selected bills and expenses would be paid, and the remaining funds withdrawn and kept in the form of a cashier's check until the next deposit was required. The process would then be repeated when the Defendants circumstances so dictated.

As the foregoing is not a prudent practice, lacking security and risks the easy loss of any amounts returned via cashiers check, one must question the practice and determine that it confirms that the practice was utilized to facilitate avoidance of Defendants' obligations.

Defendants acknowledge that no tires or tire equivalents left the Kirby facility, pursuant to Defendants efforts, after July of 1999. However Plaintiff complains that Defendants failed to submit a monthly outgoing tire log beginning August 15, 1999 to present. The Court would agree that, given the circumstances, absent a showing that Defendants removed or were responsible for having

tires removed from their facility such a complaint seems trivial. The law does not require such a useless exercise particularly when Defendants' labors could have been more productively expended. As Defendants had nothing to "log," while there was a technical violation, the Court does not find that it rises to the level of contempt and accordingly would dismiss Plaintiff's request for a finding on this particular point.

As to the Defendants' administrative duties required by the Court, a perusal of the file shows that since the Judgment Entry of September 18, 1998 Defendants have filed only three status reports with the last one being filed on April 27, 2001, a few days before this hearing commenced. Such reports were to be filed monthly. A perusal of the file also discloses that Defendants failed to provide monthly financial reports, despite the fact that orders were in place that Defendants do so.

For years Defendants were in the scrap tire business and presumably profited from it. The Court Orders which focused on Defendants' finances and assets were designed to monitor them and insure that Defendants used some of those very profits to assist in correcting a problem Defendants created and perpetuated.

One might sympathize with Defendants if they were the hard working, ignorant people they attempt to portray themselves to be. Defendant Rebecca Williams went so far as to testify that she could not read, retreating from that statement when confronted with documents that she must have read. Defendants are not ignorant about their business and were apparently very good at it when one considers the sheer volume of business that they did conduct as attested by the number of tires collected. But when the time came for cleaning up some of the mess Defendants created, Defendants maneuvered and manipulated so as to avoid any negative impact on them. Defendants' bizarre banking practice has already been discussed. Other significant practices also play into the notion that Defendants were avoiding responsibility.

Despite having paid, according to Defendant Rebecca Williams, thousands of dollars to accountants, lawyers, and other professionals, Defendants' "reports" consist of handwritten scrawls and notations. Thousands of dollars appear to be unaccounted for and other monies spent were not spent for clean up for the site, security, mosquito infestation prevention, etc. as required for the public good, but for salaries for people who did not work to

comply with the Court Orders, but rather, to find ways to continue a business that heretofore had and continued to threaten public safety. Three times Defendants entered into agreements, but not in good faith, given their failure to act on the agreements. What was the purpose of Defendants entering into these agreements? One plausible explanation is that Defendants used them to buy time in which to dispose of assets and cloud the procedure for tracing them.

Defendants allude to some "side agreement" with their former attorney and the State's Assistant Attorney General which, according to them, relieved them of the responsibility of abiding by the Court's specific orders. Defendants failed to provide any concrete evidence of such a "deal" nor was the Court informed or asked to sanction an agreement whereby it lost its authority to insist upon compliance. Defendants' former counsel, in his testimony, reiterated several times that the Plaintiff expressed concern over the transfer of assets and the practices of the Defendants in relation thereto. Plaintiff produced a letter from the former Assistant Attorney General, assigned to this case, to Defendants' former attorney which demonstrates that Plaintiff was

concerned and requested a procedure for tracking transfers, sales, and the proceeds therefrom. In light of this letter and former counsel's testimony it is not credible that a "deal" was struck relieving the Defendants of many of the burdens the Orders imposed. Logically one must question if a deal of such import to the Defendants was struck, why was it never memorialized by the defense for the Defendants' protection?

Even when the Defendants were called upon to perform tasks which cost them nothing, i.e., monthly financial reports, they failed to perform without a valid excuse. Defendants seemed determined to walk away with the profits feeling none of the adverse consequences their business had produced and which will cost millions of dollars of taxpayer money to remedy. That is why Court Orders were sought and given and why the Court must now punish the contemnors.

Based on the foregoing it is the decision of the Court that Plaintiff has proved, by clear and convincing evidence, that each of the Defendants is guilty of contempt of this Court's orders and are HEREBY FOUND GUILTY.

Pursuant to Ohio Revised Codes Section 2705.05 (A)(1), as no previous finding of contempt has been made, the Court HEREBY Orders that each of the Defendants, Doris Kirby, Rebecca Williams, and Donald Williams serve a thirty (30) day Wyandot County Jail sentence and each pay a fine of \$250.00

It is further Ordered that Kirby's Tire Recycling, Inc. likewise pay a fine of \$250.00.

Fine and jail sentence to be suspended on the condition that:

- A. Defendants place the proceeds of the sale of Kirby's Tire Recycling, Inc. assets into a constructive trust to be used by Plaintiff for remediation of the Kirby Tire facility.
- B. Defendants provide Plaintiff complete, accurate and reliable financial statements pertaining to each Defendant, a complete accounting of all Kirby's Tire Recycling, Inc. assets sold by Defendants and a record of any and all assets with a value in excess of \$200.00 that were acquired, transferred or otherwise encumbered by Defendants since the

issuance of the Entry of September 18, 1998.

This Order is to be accomplished within thirty (30) days of this Judgment Entry.

C. Defendants to comply with the provisions of the PICO, APICO, and Agreed Judgment Entry of September 18, 1998 to the extent each Defendant has the ability to comply given the foregoing orders and the institution of the foregoing trust, even if each is only able to contribute some labor or other skill to assist in the clean-up of this site and lessen the threat it poses to public safety and monies Plaintiff must pay.

The Court, at this time and given the foregoing findings, determines that while it may not be able to expect full compliance by Defendants with the terms of the PICO, APICO and Judgment Entry of September 18, 1998, the Court also recognizes Defendants seem to misconstrue actions to their benefit. Accordingly the Court will not, at this time, disturb the injunction issued as requested by Defendants and therefore overrules the "Motion to Stay of or Relief

from Preliminary Injunction."

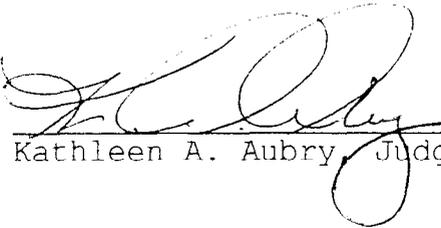
Finally the Court has been presented with a "Motion to Withdraw as Counsel for Defendants" filed by defense attorneys, Mark Segreti and David Bacon. The Court finds counsel has represented the Defendants during much of the course of these proceedings. In their memorandum counsel states they agreed to represent Defendants without compensation with respect to the contempt charge. But then counsel states Defendants have failed to comply with the fee agreement (relating to counsel) as justification for their withdrawal from this case. As the Motion in Contempt is not, even with this Entry concluded, [given time for appeals, implementation of court Orders] and counsels' own memorandum states they agreed to represent Defendants without compensation the Court HEREBY DENIES said Motion.

The Court would encourage all parties to this action to once again attempt to achieve the global settlement which was so often discussed. The Court would offer mediation services to both Plaintiff and Defendants if each side agrees that this would facilitate a resolution.

Costs to the Defendants.

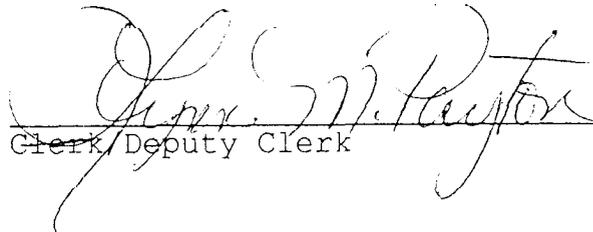
IT IS SO ORDERED.

THIS JUDGMENT ENTRY CONSTITUTES A FINAL APPEALABLE ORDER.


Kathleen A. Aubry, Judge

CERTIFICATION

The undersigned does hereby certify that a file-stamped copy of the foregoing was sent to the following by ordinary U. S. Mail this 24th day of September,


Clerk/Deputy Clerk

Ms. Melissa R. Yost
Mr. Michael E. Idzkowski
Mr. Shaun K. Peterson
Attorneys for the Plaintiff

Mr. A. Mark Segreti, Jr.
Mr. David F. Bacon
Attorneys for the Defendant