

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel.  
OHIO ATTORNEY GENERAL,

Plaintiff-Appellee

v.

THE SHELLY HOLDING CO., et al.,

Defendants-Appellants.

CASE NO. 11-0252

On Appeal from the  
Court of Appeals of Ohio  
Tenth Appellate District

Court of Appeals  
Case No. 09AP-938

MEMORANDUM OF AMICI CURIAE, THE OHIO CHAMBER OF COMMERCE,  
OHIO AGGREGATES AND INDUSTRIAL MINERALS ASSOCIATION AND  
FLEXIBLE PAVEMENTS, INC. IN SUPPORT OF JURISDICTION OF DEFENDANTS-  
APPELLANTS, SHELLY MATERIALS, INC. AND ALLIED CORPORATION

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**STATEMENT OF WHY THIS CASE INVOLVES A  
SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF PUBLIC  
AND GREAT GENERAL INTEREST**

Businesses understand that they have certain obligations that come with the privilege of doing business in Ohio. Environmental compliance is one of those obligations and in this light, hundreds, if not thousands, of Ohio businesses must periodically test their air emissions to determine compliance with Ohio's air regulations. If a stack test, which is a type of air emission test, shows noncompliance, the business usually retests or it may apply to change its air permit to bring the business into compliance. It is important to know from the outset that a stack test is just a snap shot of the emissions at the time of the test and as such does not represent normal operating conditions.

When a retest is required, due to scheduling of both testing personnel to conduct the test and Ohio EPA personnel, who must witness the test, the retest typically cannot happen for several months. If the air permit needs to be changed as a result of the initial test, that permit change also takes several months for Ohio EPA to process. But what is the status of the business's compliance between the time when the test showed noncompliance and when a retest or permit change happens? Should the business be deemed to be out of compliance every single day during that entire period of time, or should the business be allowed to show that it did not in fact operate for days, weeks, or months during the interim or that other factors brought the business into compliance?

In this case before the Court, Ohio's Tenth District Court of Appeals ("Tenth District") has held that not only is a business deemed to be out of compliance the entire time between the initial test and the retest, but Ohio Environmental Protection Agency ("OEPA" or "State") need show only that the initial test was out of compliance with no other showing of proof necessary.

Further compounding the problem, the Tenth District has held that once a test shows noncompliance, the business does not even have an opportunity to demonstrate that it did not operate every day during the time between tests or that other factors demonstrate compliance during that time period.

If Ohio businesses are subject to the decision of the Tenth District in this case, a decision that effectively allows OEPA to declare them to be noncompliant without giving businesses the opportunity to show otherwise, then Ohio runs the very real risk of driving businesses from the state without any concomitant benefit to the environment. As such, this case presents this Court with an opportunity to provide clear guidance to both the OEPA and Ohio's regulated business community with respect to how issues of noncompliance with Ohio's air pollution laws will be determined.

The Ohio Chamber of Commerce (the "Chamber"), Flexible Pavements, Inc. ("Flexible"), and the Ohio Aggregates and Industrial Minerals Association ("Ohio Aggregates") respectfully submit this memorandum in support of jurisdiction as amici curiae (collectively "Amici"). As will be shown, the memberships of the Chamber, Flexible, and Ohio Aggregates individually and together have a great interest in clarifying how OEPA's regulatory and enforcement programs impact their members.

Flexible is a non-profit business association comprised of approximately 90 producers, contractors, consultants, and manufacturers engaged in the Ohio asphalt pavement construction industry who live and work in every county in Ohio. The industry directly employs 6,000 Ohioans with a total payroll exceeding \$300 million. The industry indirectly creates and maintains thousands more Ohio jobs. Millions of Ohioans drive every day on roads that have been paved by Flexible's members. The asphalt industry has approximately 165 asphalt plants in

Ohio with nearly every plant having to conduct emission testing.

The Ohio Aggregates is a non-profit business association that represents all of Ohio's mining operations, with the exception of coal. Ohio Aggregates members are essential suppliers of construction materials, both natural and manmade, such as limestone and sand and gravel aggregates, salt, clay, shale, gypsum, industrial sand, building stone, lime, cement, and recycled concrete. Statewide, the mineral and aggregate industry employs nearly 5,000 Ohioans and results in the indirect employment of another 40,000 Ohioans in supporting industries. Production of crushed stone, sand and gravel and supporting industries contribute an annual total of \$38 billion to the national economy. In Ohio, the industry's non-fuel raw mineral production alone is valued at over one billion dollars. The asphalt paving and aggregate industries are highly interdependent, as nearly 95% of asphalt is comprised of aggregate materials.

Together, Flexible and Ohio Aggregates members support infrastructure development in every corner of the state through the use of sustainable and recyclable materials. In fact, many of the major users of aggregate and asphalt are the state, counties, townships and municipalities which depend on Flexible and Ohio Aggregates members to supply products and services efficiently and cost effectively using environmentally sound processes. Aggregates mined in Ohio and asphalt produced in Ohio generally stay in Ohio and support the state economy.

Founded in 1893, the Chamber is Ohio's largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its more than 5,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. As an independent and informed point of contact for government and business leaders, the Chamber is a respected participant in the public policy arena. Through its member-driven standing committees and the Ohio Small Business Council,

the Chamber formulates policy positions on issues as diverse as education funding, taxation, public finance, health care, workers' compensation, and importantly, environmental regulation.

Amici's members are located in every corner of Ohio and run the gamut in size and organization; some members are small, family-owned companies, whereas others are multi-national corporations. Despite these differences, Amici's members have unifying characteristics: Amici's members operate thousands of emission sources, facilities and businesses throughout Ohio, which are regulated and permitted by the OEPA and are subject to Ohio's environmental laws and OEPA's environmental enforcement program.

Amici's members and regulated businesses in this state must be able to operate in an environment with regulatory certainty, fairness and predictability in order to remain viable businesses. The essentially nonexistent standard of proof required of OEPA to show continuing noncompliance substantially harms Amici's members and all of Ohio's business. Thus, Amici have a significant interest in the outcome of this case. Amici respectfully request this Court grant jurisdiction and pronounce that the Tenth District's decision cannot be and is not the law of Ohio.

### **STATEMENT OF THE CASE AND FACTS**

Amici adopt the statement of the case and facts set forth in the Memorandum in Support of Jurisdiction filed by Defendants-Appellants, Shelly Materials, Inc. and Allied Corporation ("Shelly").

### **ARGUMENT**

**Proposition of Law No 1: When asserting that a violation of an environmental law is ongoing, the State cannot merely rest on the bald presumption of a continuing violation absent some evidence supporting that assertion.**

It is a fundamental law that in a civil action, the plaintiff bears the burden of proof on

each essential element of any claim for relief. *Ohio Valley Radiology Assocs. v. Ohio Valley Hosp. Ass'n*. (1986), 28 Ohio St.3d 118, 122, 502 N.E.2d 599. Likewise, the burden of proof in an enforcement action under the Clean Air Act lies with the government. *United States v. Hoge Lumber Co.* (N. D. Ohio, May 7, 1997), No. 3:95 CV 7044, 1997, U.S. Dist. LEXIS 22359, at 7, citing *Getty Oil Co. (Eastern Operations), Inc. v. Ruckelshaus* (C.A.3, 1972), 467 F.2d 349, 357, cert. denied, 409 U.S. 1125, 35 L.Ed. 256, 93 S. Ct. 937 (1973). Acknowledging that the state bears the burden of proof, Ohio law requires that the state make a “showing that such person has violated [R.C. Chapter 3704] or the rules adopted thereunder.” R.C. 3704.06(B).

In *Hoge*, supra, the government presented evidence of continuing noncompliance by means of testimony of the company’s witness. This established the government’s prima facie case, which could then be rebutted by the defendant company. See also *State ex rel. Celebrezze v. Thermal-Tron, Inc.* (1992), 71 Ohio App.3d 11, 16, 592 N.E.2d 912 (where the state presented evidence that the facility operated on certain days for certain hours.).

In the case at bar, the State did not offer, nor did the Tenth District’s reversal of the trial court require, testimony that the violation was of a continuing nature. In the trial court, Shelly argued that the stack test (the air emission test) was a snap shot and does not relate to day to day operations. The State argued that the violation continued until another stack test demonstrated compliance. After considering the competing arguments, and the evidence Shelly offered, the trial court held that the stack test does not represent normal operating conditions and that the State did not meet its burden of proof. The Tenth District held that “\*\*\* the trial court should have concluded the violation continued until the subsequent stack test determined the plant no longer was violating the permit limits.” *State ex rel. Ohio Attorney General v. The Shelly Holding Co., et al.*, 10th Dist. No. 09AP-938, 2010-Ohio-6526, at ¶66 (“*Shelly II*”).

In Ohio, the duration of violation must be proven by the state with actual evidence satisfying the burden of proof. R.C. 3704.06(B). In this case, the State presented no evidence to satisfy its burden before the trial court. Unlike the defendant in *Hoge*, Shelly did not concede that the hot mix asphalt plants at issue did not operate in compliance or were incapable of operating in compliance with emissions limits under normal operating conditions. In fact, as the trial court determined, Shelly presented “compelling” evidence to the contrary. *State ex rel. Ohio Attorney General v. The Shelly Holding Co., et al.* (Sept. 2, 2009), Franklin Cty. C.P. No. 07CVH07-9702, at 46 (“*Shelly I*”).

This “compelling” evidence, however, was ignored by the Tenth District to support that Court’s opinion that requiring the State to prove a violation on the days between stack tests would “allow a violator to continue the harmful conduct at least until the next stack test, knowing no penalty will be imposed for the interim violations.” *Shelly II* at ¶66. The circular nature of this legal proposition, as well as the underlying assumptions used to support it, are erroneous. The Tenth District assumes that the State cannot prove a violation if it has to meet a burden of proof by any means other than inference. Again, this is not the case. At the trial court, the State could have put on evidence of violations on days between stack tests and could have put on evidence that actual operating conditions mirror stack testing conditions; however, the State chose not to do so. Where the government in both *Hoge* and *Thermal-Tron* presented evidence supporting violations on intervening days between stack testing events, here the State presented no such evidence. *Hoge* at \*16-17; *Thermal-Tron* at 16. By allowing the State to “prove” days of violation through inference and without offering any evidence of violation on those specific days, the Tenth District is relieving the State, as the Plaintiff, of its burden of proof. *Thermal-Tron* and *Hoge* clearly do not support such a wholesale alteration of a Plaintiff’s

burden in contradiction of long-standing law.

The impact of the Tenth District's decision goes well beyond this single case. Ohio's environmental statutes (as well as many other civil statutes) require the state to carry the same burden of proof. See, R.C. 3734.13(C); 6111.07. As such, the Tenth District's decision effectively, but unlawfully, modifies the civil burden of proof in Ohio to a "mere inference" standard; a standard that is in direct conflict with Ohio law and the clear parameters set by Ohio's General Assembly.

**Second Proposition of Law: Assuming a Continuing Violation can be Inferred, a Regulated Business Must be Afforded the Opportunity to Rebut the Inference with Evidence.**

If an inference is sufficient for the state to meet its initial burden, then due process requires that the defendant be afforded the opportunity to prove the state wrong. In other words, Shelly should be afforded an opportunity to rebut the State's inference with evidence. To determine otherwise, as the Tenth District did, eliminates due process rights of a civil defendant and creates a new "irrefutable presumption of on-going guilt" standard not found in or contemplated by Ohio law. *Johns v. Univ. of Cincinnati Med. Assoc., Inc.* (2004), 101 Ohio St.3d 234, 240, 804 N.E.2d 19 (internal citations omitted) ("Due process of law assures to every person his day in court. It requires some legal procedure in which the person proceeded against shall have an opportunity to defend himself."); *Vlandis v. Kline* (1973), 412 U.S. 441, 446, 93 S.Ct. 2230 (irrebuttable presumptions are disfavored for the purposes of constitutional due process); *Wheeling Steel Corp. v. Glander* (1949), 337 U.S. 562, 574, 69 S.Ct. 1291 (Fourteenth Amendment due process extends to corporations); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary* (1925), 268 U.S. 510, 535, 45 S.Ct. 571 (due process protections extend to corporate assets).

Here, while the trial court considered evidence presented by Shelly, should the Tenth District's opinion stand, trial courts will no longer take such evidence. *Shelly II* at ¶59 (“the trial court concluded the stack test does not represent normal operating conditions”). Instead, the Tenth District, upon determining that mere inference of an ongoing violation was enough to carry the State's burden, ordered the trial court on remand to calculate the number of days of violation for purposes of assessing a penalty against Shelly. *Id.* at ¶66. This decision gives the State the ultimate advantage in prosecuting environmental cases, and the defendant's loss of due process rights has a high potential for abuse.

Due process requires the Court to consider the evidence presented by Shelly. For instance, Ohio EPA's own Air Division Chief testified that stack tests, like those performed at Shelly, are only a snapshot of actual emissions on a single, particular day and day-to-day emissions are influenced by a number of factors, including fuel usage and material usage. Shelly's management then testified that operations at its hot mix asphalt plants do not mirror stack test conditions. Shelly also presented evidence that its hot mix asphalt plants do not operate seven days a week, even in the busy summer season, and stop operating during the winter months.

In the face of such compelling, undisputed evidence presented by Shelly during a lengthy trial, the Tenth District nonetheless broadly held that air pollution violations continue from one stack test until a subsequent stack test determines a facility is no longer violating permit limitations. *Shelly II* at ¶66. Thus, regardless of the evidence presented by a defendant, the Tenth District has determined that the defendant will still be deemed in non-compliance. This new irrebuttable standard created by the Tenth District violates fundamental rights of due

process of civil defendants under more than just Ohio's air law and is a dangerous holding that cannot be allowed to stand.

**CONCLUSION**

The Tenth District's decision to significantly reduce a civil plaintiff's burden of proof and create a new irrebuttable presumption standard in violation of a defendant's due process rights violates constitutional and Ohio law and fundamentally alters civil jurisprudence in Ohio. For the reasons discussed herein, this case is of public or great general interest and involves a substantial constitutional question. As such, Amici urge this Court accept jurisdiction and order the case to be fully briefed and heard on the merits.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail postage prepaid on February 11, 2011 to:

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