ORIGINAL

In the
SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. OHIO ATTORNEY GENERAL	:	Case No. 2011-0252
Plaintiff-Appellee,	:	
v.	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District Case No. 09 AP 00938
THE SHELLY HOLDING COMPANY, ET AL.	:	
Defendants-Appellants.	:	

PLAINTIFF-APPELLEE'S MEMORANDUM IN OPPOSITION TO JURISDICITON

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INTRODUCTION

State and federal environmental laws impose civil penalties of up to $25,000 per violation per day in order to promote the public health and welfare aims of the federal Clean Air Act and parallel state programs. The purpose of such penalties is to encourage prompt environmental compliance and to deter emitters from allowing violations to continue as a means of gaining an economic benefit or competitive advantage. The Ohio Supreme Court has consistently upheld these civil penalties and the deterrent principles that underlie them.

There is nothing controversial whatsoever about what the Tenth District did below. It simply applied the well settled law of environmental noncompliance penalties whereby a failed emissions compliance test is considered prima facie proof that an emissions violation is occurring, and that a violation is presumed to be a continuing one until compliance is demonstrated, unless the violator can prove by a preponderance of the evidence that the violation was not, in fact, continuing. Through its first proposition of law, Shelly seeks to turn that principle on its head. Shelly wants the Court to rewrite the law of civil penalties so that a failed emissions test is presumed to be *wrong*, or a mere one-off, and that come the following day, everyone should assume that compliance has resumed, *even absent any proof of compliance or a change in circumstances*. As the Tenth District correctly recognized, that proposition is unfounded, senseless, and pernicious.

Shelly's second proposition of law fares no better. Shelly says that emitters should have an opportunity to rebut the presumption of a continuing violation following a failed emissions test. But that presents nothing weighty for this Court to consider—for it already *is* the law. A violator can overcome the presumption of a continuing violation if it proves

by a preponderance of the evidence that the violation was not, in fact, continuing. Indeed, Shelly was given the opportunity at trial to put on evidence—and did put on evidence—to try to rebut the presumption of a continuing violation. But Shelly was not successful—the court below found Shelly's rebuttal evidence insufficient. Now, Shelly just wants another bite at the apple, and so it dresses up its own factual and evidentiary deficiencies as allegations of legal error by the court below. The Court should easily see through that ploy.

For all of these reasons and the reasons below, the Court should deny jurisdiction.

STATEMENT OF THE CASE

The State of Ohio filed a 23 count civil enforcement action under its air pollution control laws against the wholly-owned Ohio subsidiaries of an overseas multi-national building materials corporation (collectively "Shelly"). The State was pursuing a raft of violations that occurred at Shelly's asphalt manufacturing, aggregate mining, and liquid asphalt storage operations across Ohio.

Shelly stipulated to liability on 32 claims within 12 counts of the Complaint. For the rest of the claims, a bench trial was held. It spanned numerous days over the course of seven months and generated over 2,000 pages of trial transcripts. The trial court found Shelly liable on 13 of the 20 counts and assessed a $350,123.52 civil penalty against Shelly.

Shelly appealed none of the liability findings against it; but the State appealed four issues to the Tenth District. Key among them was the State's contention that the trial court erred by limiting the emissions violations and penalties to the date of the failed emissions tests. The State pointed out on appeal that well-settled statutory and case law required the court to find that any violation continued until another emissions test

demonstrated Shelly's compliance.

The Tenth District agreed with the State on all of its assignments of error, including rejecting Shelly's "snapshot" theory for ascertaining the violations period. *State ex rel. Ohio Att. Gen. v. Shelly Holding Co.*, 10th Dist. No. 90 AP 938, 2010-Ohio-6526. The appellate court explained: "[T]he trial court should have concluded the violation continued until the subsequent stack [emissions] test determined the plant no longer was violating the permit limitations." *Id.* at ¶ 66. The appellate court also called out the devious logic and potential for abuse behind Shelly's proposition: "[T]o hold otherwise 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." *Id.*

THIS CASE DOES NOT PRESENT A SUBSTANTIAL CONSTIUTIONAL QUESTION OR A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST

Shelly's appeal offers nothing for this Court to consider except for aberrant legal theories and revisionist case history. In its first proposition of law, Shelly contends that only the day of a failed emissions test should constitute a violation and warrant a civil penalty. That is wrong. It is a novel proposition that runs counter to logic, federal and state environmental enforcement law, and the long-settled practices of the States, including Ohio.

The well-established test is this: a violation discovered through a failed emissions test is presumed to continue until the violator establishes that compliance has been achieved. See Section 7413(e)(2), Title 42, U.S. Code; *United States v. Hoge Lumber Company* (N.D. Ohio 1997), 1997 U.S. Dist. LEXIS 22359 *("Hoge I").* There is also a safety valve: the presumption of a continuing violation can be overcome if the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.

Shelly and its amici want this Court to turn those presumptions on their head. But there is no need for this Court to entertain such an illogical and devious suggestion. The current state of the law is well-settled and anchored in sound logic and public policy. A failed emissions test is taken as proof of a violation; and that violation is presumed to continue until there is proof of compliance. In other words, the standard test involves a highly proof-based approach. There is nothing controversial about that.

But Shelly thinks it should be otherwise. Indeed, its view amounts to nothing less than the absurd suggestion that a failed emissions test should be presumed to be *wrong,* or a mere one-off, and that come the following day, everyone should assume that compliance has resumed, *even absent any actual proof of compliance or a change of circumstances.* That self-serving suggestion is illogical and unworkable.

The Clean Air Act and Ohio's implementing regulations get the balance of incentives right. As the Tenth District correctly pointed out, a rule like Shelly's would foster flagrant disregard for the environmental laws. Under Shelly's rule, an entity would have little reason to take any steps to come into compliance. And it could easily decide that a failed emissions test here or there was simply a cost of doing business. By contrast, when penalties are calculated on a continuing-violation theory of liability, emitters have the proper incentives to correct emissions problems promptly. *Shelly Holding Co.*, supra. at ¶ 56. What is more, the current state of the law already includes a safety valve, whereby the presumption of a continuing violation can be overcome where an emitter proves by a preponderance of the evidence that the problem was corrected before the next successful emissions compliance test. That safety valve gives emitters a tremendous amount of leeway to avoid potential civil penalties from continuing violations. Shelly, though, is uninterested in the safety valve; it instead wants this Court

to create a full-blown escape hatch. The Court should decline that baseless invitation. The current, well-settled law, which the Tenth District applied below, is a proof-based approach (i.e., a violation is measured from the moment of proof of the violation until the proof of compliance) and gets the balance of incentives exactly right.

Shelly's second proposition of law is equally unworthy of this Court's attention because the law already is as Shelly describes it, and Shelly had the chance at trial to take advantage of that law. Shelly maintains that emitters should have an opportunity to rebut the presumption of a continuing violation. But that presents nothing weighty for this Court to consider because *it already is the law and Shelly had every opportunity to avail itself of it.* There is no dispute: A violator can overcome the presumption of a continuing violation if it proves by a preponderance of the evidence that the violation was not, in fact, continuing. The Tenth District recognized that explicitly. *Shelly Holding Co.*, supra at ¶¶ 65-66. Indeed, Shelly was given the opportunity at trial to put on evidence—and *did* put on evidence—to try to rebut the presumption of a continuing violation. Ultimately, that effort was not successful. Shelly now simply wants another bite at the apple, so it dresses up its own tactical failings as accusations that the courts below committed legal error. That is patently wrong. It would be inappropriate for this Court to exercise jurisdiction to allow Shelly to rewind and redo its rebuttal evidence to cover evidentiary deficiencies it now perceives in hindsight.

This case does not merit review.

ARGUMENT

Plaintiff-Appellee's Proposition Law:

A failed emissions compliance test is prima facie proof of an emissions violation that is presumed to continue until compliance is demonstrated, unless the violator can prove by a preponderance of the evidence that the violation was not continuing in nature.

A. **The continuing-violation approach governs the environmental enforcement actions at issue here.**

This case pertains to permits issued under R.C. Chapter 3704, the governing law for which is deeply rooted in the federal Clean Air Act ("CAA"). The CAA is designed to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Section 7401(b)(1), Title 42, U.S. Code. The CAA includes a system of delegation of authority to individual states. The CAA allows a state to formulate a state implementation plan ("SIP") designed to meet air quality standards based upon what is a complex matrix of state statutes, rules, emissions estimates, and modeling analyses. Section 7410, Title 42, U.S. Code. Once the U.S. EPA approves an individual state's plan, the State is authorized to administer it as a federally approved SIP. Section 7414(b)(1), Title 42, U.S. Code. This provides a regulatory scheme where an individual state and the federal government consistently enforce the air pollution laws with permits issued under the same effective set of statutes and rules. Id. Revised Code 3704.05 makes permit violations sanctionable, and subjects the violator to injunctive relief and civil penalties of up to $25,000 per violation per day under R.C. 3704.06. Once granted their permit, permit holders bear the onus of proving they are operating within the permit's emissions limits.

For Shelly's permits, the applicable emissions limits exceeded were those for nitrogen oxide (NO_x), sulfur dioxide (SO_2), and particulate matter (PM). Each permit contains a term entitled "Applicable Compliance Method," stating that "emissions testing shall be conducted *to demonstrate compliance*" and that the emissions testing shall be done "at or near its *maximum capacity*." (Emphasis added.) The compliance methods—a stack test of air emissions, referred to in Shelly's permits—are federally enforceable,

which means that the compliance terms incorporated into the Ohio EPA permits held by Shelly are also consistent with federal standards. Ohio Adm.Code 3745-31-05(A)(2)(b) requires that facilities be held to the "federal standards of performance for new stationary sources." See also Ohio Adm.Code 3745-77-07(A)(3)(a)(i).

In short, enforcement of Ohio EPA's permitting and compliance programs tracks the controlling structure of the CAA.

Congress made crystal clear in the 1990 CAA amendments how civil penalties are to be calculated for ongoing violations. Congress was explicit: "A penalty may be assessed for each day of each violation. For purposes of determining the number of days of violation for which a penalty may be assessed * * * the days of violation shall be presumed to include the date of such notice and each and every day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature." Section 7413(e)(2), Title 42, U.S. Code.

The U.S. EPA has the right to seek injunctive relief and civil penalties of up to $25,000 per day for each violation for violations of air pollution laws. Section 7413(b), Title 42, U.S. Code. As discussed above, the State's regulatory enforcement scheme tracks the federal one. R.C. 3704.06. Civil penalties under both the state and federal regimes serve identical interests—to deter those who discharge air pollutants from violating the law.

As a result, the courts have consistently the applied the test for calculating civil penalties repeated by the Tenth District in this case. See e.g., *United States v. B & W Investment Properties, Inc.,* (N.D. Illinois 1994) 1994 U.S. Dist. LEXIS 1751, *8

(upholding the rule of law that "the days of violation continue until the violator establishes that continuous compliance with the Clean Air Act has been achieved," citing to Section 7413(e)(2), Title 42, U.S. Code).

B. The Ohio Supreme Court and the federal courts have repeatedly endorsed the deterrence principles underlying the continuing-violation approach to air quality enforcement and penalties and the continuing-violation approach is consistent with established precedent under tested principles of environmental enforcement.

The Ohio Supreme Court has long recognized deterrence as integral to the public policy behind civil penalties. *State ex rel. Brown v. Dayton Malleable, Inc.,* 2d Dist. No. 6722, 1981 Ohio App. Lexis 12103 at *8, rev'd on other grounds in *State ex rel. Brown v. Dayton Malleable* (1982), 1 Ohio St.3d 151. So, too, have the federal courts. See e.g., *United States v. Mac's Muffler Shop, Inc.* (N.D. Georgia 1986), 1986 U.S. Dist. LEXIS 18108, *22 (civil penalties are imposed to discourage offenders from repeated transgressions and to deter others from doing likewise and they should be large enough to "hurt" the offender, citing *Dayton Malleable,* supra). Without reservation and as recently as last month, Ohio courts have uniformly followed suit by applying the civil penalty deterrence policy upheld by this Court nearly 30 years ago. See *State ex rel. Ohio Att. Gen. v. Joel Helms*, 9th Dist. No. 24754, 2011-Ohio-569, ¶ 63, citing *Dayton Malleable,* supra.

Properly, none of this was lost on the Tenth District. The threat of liability for accruing hefty civil penalties is a powerful incentive for facilities to take corrective action and demonstrate compliance as promptly as possible. See *Shelly Holding Co.*, supra at ¶ 66. Without this, there is little to no incentive for emitters to correct violations. Appropriately, the burden lies with the regulated entity to demonstrate compliance. This is no accident. Not only is it sound public policy, it is also required by the applicable

permit terms. Further, it is supportive of the CAA's public health and welfare mission. See Section 7401(b)(1), Title 42, U.S. Code, supra. See also R.C. 3745.011(F) ("It is the intent of the general assembly that the environmental protection agency shall: * * * Provide for enforcement of the right of the people to environmental quality consistent with human health and welfare.")

The Tenth District understood how Shelly's emissions violations fit within the overarching environmental enforcement regime. Applying clearly-settled law, the Tenth District rejected Shelly's argument that an emissions test established only a single day of violation. The court below emphasized that accepting that argument would yield nonsensical results: "Indeed, to hold otherwise 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 Holding Co.*, supra at ¶ 66. Thus, Shelly's liability was grounded on consistent CAA principles, relied upon by the Tenth District and upheld by this Court in *Dayton Malleable,* supra.

Moreover, the test employed by the Tenth District is indistinguishable from other jurisdictions that have reviewed the issue. And almost all of those cases are born of the same regulatory framework set forth above.

Hoge I was an Ohio air pollution enforcement case with virtually the same facts as here. The court rejected the violator's proposition that a failed emissions test merely amounts to one day of violation based on their assertion that the emissions test does not depict "representative conditions" or normal operating conditions. *Hoge I,* supra at *13. Dismissing that argument—like the Tenth District did in casting aside Shelly's "normal operating conditions" argument—the court held that conducting the emissions tests at maximum capacity is entirely consistent with federal regulations and case law. Id.

Shelly's permits, as those in *Hoge I*, required them to operate the emissions tests "at or near maximum capacity." *Shelly Holding Co.*, supra at ¶ 56.

The court then examined the violations in light of the government's burden and the presumptions under Section 7413(e)(2), Title 42, U.S. Code. *Hoge I,* supra at *15-17. The company admitted that its emissions tests were not in compliance with the emission limits, just like Shelly's multiple stipulations that it exceeded emissions limits during its emissions tests. *Shelly Holding Co.*, supra at ¶ 56. The court went on to determine whether the company's violations were continuous. As here, there was no evidence of intervening days in which violations did not occur or that they were not continuous. *Hoge I* at *17. The court stated: "Given the evidence presented by the Plaintiffs, the Court finds that Plaintiffs have established a prima facie case of continuing violations which has not been rebutted by the Defendant." Id.

Identical to Hoge Lumber's "representative performance" argument, Shelly has argued that the emissions test is a snapshot in time and "does not relate to day-to-day operations, so that only the day of the stack test should constitute a violation." *Shelly Holding Co.*, supra at ¶ 58. The Tenth District disagreed, properly ruling that "in determining the number of days each violation existed, the trial court should have concluded the violation continued until the subsequent stack test determined the plant no longer was violating the permit limitations." Id. at ¶ 66.

Neither the decision below nor any of the cases cited in it are isolated decisions. See e.g., *B & W Investment Properties, Inc.,* supra at *8. Another Ohio court of appeals has also held that a company was in violation of its permit for a continuous period inclusive of the date of failed emissions tests through the date of compliant emissions tests and thus violated R.C. 3704.05. *State ex rel. Celebrezze v. Thermal–Tron., Inc.* (8th Dist.

1992), 71 Ohio App.3d 11, 1992 Ohio LEXIS 723, cited in *Shelly Holding Co.*, supra at ¶¶ 63-65. The reasoning behind decisions like *Shelly Holding Co.*, *Thermal–Tron, Inc.*, *B & W Investment Properties, Inc.*, *Hoge I,* applies in other contexts as well.

The continuing-violation principle has broad application. See *In re Appeal of: Max E. Jewell* (1999), 169 Vt. 604 (construing Vermont's environmental remedial statute in a zoning dispute over sorting and storage recyclable materials). *Id.* at *604. Like the Tenth District, the Vermont Supreme Court examined the government's burden of proof vis-à-vis a civil penalty's deterrence value, and stated that otherwise "the Town's burden of proof would be so onerous as to vitiate the statute's deterrent purpose by rendering it nearly impossible to demonstrate a continuing violation." *Jewell* at *606. That is the same fundamentally sound logic the Tenth District applied to deny Shelly's theory. *Shelly Holding Co.*, supra at ¶ 66.

Elsewhere, the value of the continuing-violation concept has been used to reject a cynical "cost of doing business" strategy. In *United States v. Mac's Muffler Shop, Inc.*, (N.D. Georgia 1986), 1986 U.S. Dist. LEXIS 18108, the violator testified that he understood the risks of removing catalytic converters and willingly risked a civil penalty per violation purely for personal economic gain and because of competitive pressures. *Id.* at *26-27. As the court stated: "[e]limination of the benefits of noncompliance is an essential element of the penalty, so that there is no incentive to violate the law, and so that businesses that obey the law are not penalized by unfair competition from defendants." *Id.* at *27. The Tenth District recognized that when the burden is improperly shifted, as rejected in *Mac's Muffler Shop, Inc.*, the incentive to comply with the law is minimal at best. *Shelly Holding Co.*, supra at ¶ 66.

The regulatory interplay of deterrence and compliance avoidance applies to continuing violations in other contexts as well. The United States Supreme Court applied these very principles to an anti-trust case where the violator would benefit in the absence of government imposed continuing violations. *United States v. I.T.T. Continental Banking Co.* (1974), 420 U.S. 223. Further explaining deterrence in the face of ongoing violations, one federal court wrote: "In determining whether acquisition of a company in violation of an FTC order could constitute a continuing violation, the Supreme Court noted that the purpose of the "continuing failure or neglect to obey" provision is to assure that the penalty provisions will meaningfully deter violations whose effect is continuing and whose detrimental effect could be terminated by the violator." *United States v. American Hospital Supply Corp.* (N.D. Ill. 1986), 1986 U.S. Dist. LEXIS 29501 at *2-*3, citing to *I.T.T. Continental Banking Co*, supra at 232.

Thus, whether under anti-trust, zoning, or environmental laws, courts uniformly recognize the strategic importance of deterrence in protecting defined, vital public interests. See e.g., Section 7401(b)(1), Title 42, U.S. Code, supra; R.C. 3745.011(F), supra. The Tenth District likewise recognized and applied this principle. *Shelly Holding Co.*, supra at ¶ 63 (citing *I.T.T. Continental Banking Co*, supra, for the proposition that "Substantial penalties are used as a mechanism to deter conduct contrary to the regulatory program.")

The common thread in each of these cases is that the deterrent pillar of the regulatory scheme is already integral to an effective environmental enforcement program. See e.g., *Mac's Muffler Shop, Inc.*, supra at *28 ("Vindication of the government's efforts in enforcing the Clean Air Act is an aspect of general deterrence. If the regulated community perceives that violations of the law are treated lightly, the government's

regulatory program is subverted.") The legal principles the Tenth District employed are fixed. And, most importantly, they are consistent with deterrence policy upheld by this Court in *Dayton Malleable,* supra.

C. Shelly's second proposition of law is meritless because Shelly had the opportunity to—and *did*—put on evidence at trial to attempt to rebut the presumption of a continuing violation. That evidence was factually insufficient.

In its second proposition of law, Shelly maintains that emitters should have an opportunity to rebut the presumption of a continuing violation. They do. Permittees may overcome the presumption of a continuing violation if they can prove by a preponderance of the evidence that the problem was corrected before the next successful emissions compliance test. Shelly's suggestion that it has been denied that opportunity flatly contradicts the record. Shelly simply wants another bite at the apple, and so it dresses up its own tactical failings as accusations that the court below committed legal error. That is wrong and the Court should see this claim as the ploy that it is.

The fact is that Shelly was given the opportunity, and in fact tried, to rebut the State's proof of continuing violations. *Shelly Holding Co.*, supra at ¶¶ 56-58; App. B to Shelly Am. Mem. (Trial Court decision) at pp. 44-46. Shelly chose as its ill-fated rebuttal the so-called "normal operations" defense, the same defense that also failed in *Hoge I*, supra.

The Tenth District meticulously considered how Shelly presented its rebuttal case and properly found that Shelly failed to rebut the presumption of continuing violations. *Shelly Holding Co.*, supra at ¶¶ 56-58, 61-66. Shelly first claims that the Tenth "never considered the burden of proof in ruling for the State on Claim 7." Shelly Am. Mem., p. 9. That is wrong. The Tenth District explicitly addressed the State's prima facie showing and the presumption behind it. *Shelly Holding Co.*, supra at ¶¶ 56-58.

Shelly next claims that the Tenth District ignores certain evidence: "[h]ere, the Tenth District ignored the significant, compelling evidence Shelly presented to refute the State's inference of an on-going violation at each HMA plant." See Shelly Am. Mem. at p. 13. But the Tenth District scrutinized that point exactly, it considered Shelly's "normal operating conditions" defense, and, based upon its application of those facts to the law, found Shelly's argument completely unavailing. *Shelly Holding Co.*, supra at ¶¶ 58, 64-66, citing *Thermal–Tron, Inc.* and *Hoge I.* The appellate court found the "normal operations" defense insufficient to rebut the State's proof of continuing violations. *Shelly Holding Co.*, supra at ¶¶ 65.

In short, Shelly has no leg to stand on before this Court—its claim that it was denied the opportunity to present rebuttal evidence is nonsense. The record establishes that Shelly *was* given the opportunity to put on rebuttal evidence and *did* put on such evidence. The Tenth District explicitly gave it due consideration, but it was insufficient to refute the State's case.

CONCLUSION

For the foregoing reasons, the State respectfully asserts that this matter presents no substantial constitutional question nor does it present a question of public or great general interest. Accordingly, this Court should decline jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a foregoing Plaintiff-Appellee's Memorandum In Opposition To Jurisdiction was served by U.S. Mail this 15th day of March, 2011 upon the following counsel:

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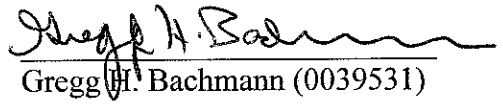

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