

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

STATE EX REL. LINDER V. LDD ENTERS.

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STATE OF NEBRASKA EX REL. MICHAEL J. LINDER, DIRECTOR, NEBRASKA  
DEPARTMENT OF ENVIRONMENTAL QUALITY, APPELLANT,

v.

LDD ENTERPRISES, INC., ET AL., APPELLEES.

Filed March 11, 2008. No. A-06-1091.

SIEVERS, CARLSON, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

The State of Nebraska ex rel. Michael J. Linder, the director of Nebraska's Department of Environmental Quality (DEQ) brought an action against LDD Enterprises, Inc. (LDD); Donald Schmitz; Chance Harruff; Central States Tire Recycling of Nebraska, LLC (Central States); and William S. Miner (collectively the defendants) for violations of the Waste Reduction and Recycling Incentive Act (WRRIA), Neb. Rev. Stat. § 81-15,158.01 et seq. (Reissue 1999 & Cum. Supp. 2002), in the district court for Rock County. After a consent decree was entered with respect to the defendants besides Harruff, the district court entered a partial summary judgment in the DEQ's favor upon finding no dispute as to Harruff's violation of a permit issued to him by the DEQ for the operation of a scrap tire collection facility on his property located near Bassett, Nebraska. The court entered a judgment for civil penalties against Harruff, and the DEQ appeals, alleging that the court erred in calculating the penalty amount due. Because we find that the court did not abuse its discretion in calculating the penalty amount, we affirm.

BACKGROUND

This litigation arises out of an abundance of scrap tires deposited upon real estate owned by Harruff in Rock County in violation of a permit issued by the DEQ to Harruff. The DEQ issued Harruff a scrap tire collection site permit on February 13, 2003, pursuant to its authority under the WRRIA and administrative regulations concerning the management of scrap tires. Among other things, the permit provided that within 90 days of its issuance, that is, May 13,

2003, the existing stockpile of tires on the site should not exceed a passenger tire equivalent (PTE) of 21,000. A PTE is a unit of measurement based on the approximate 20-pound weight of a passenger tire such as is normally found on an automobile. The section of the WRRIA which required Harruff to obtain such a permit was § 81-15,162.01 (since repealed by 2003 Neb. Laws, L.B. 143). The penalty provision of § 81-15,162.01(3), which is at issue in the present appeal, provided in part:

Any person required to obtain a permit pursuant to this section who . . . violates the conditions or limitations of a permit shall be subject to a civil penalty of not more than one thousand dollars per day per violation. Each day the violation continues shall be considered a separate violation.

Portions of the WRRIA, including the permitting and penalty provisions of § 81-15,162.01, were repealed in 2003. The legislative history for L.B. 144, which was eventually amended into L.B. 143, the bill which repealed § 81-15,162.01, shows that its purpose was to repeal the then-current permit program for scrap tire haulers, collectors, collection sites and processors, and to delete obsolete language and consolidate certain provisions of the WRRIA. See Introducer's Statement of Intent, L.B. 144, Natural Resources Committee, 98th Leg., 1st Sess. (Jan. 30, 2003). A review of the floor debate on L.B. 144 also shows that the bill made certain modifications to the Integrated Solid Waste Management Act (ISWMA), currently found at Neb. Rev. Stat. §§ 13-2001 to 13-2043 (Reissue 1997, Cum. Supp. 2006 & Supp. 2007). For example, PTE's are now defined in § 13-2013.01, scrap or waste tires are defined in § 13-2013.02, and § 13-2033 contains provisions concerning the storage of PTE's and requires permits for the business of picking up, hauling, and transporting scrap tires for storage, processing, or recycling.

We note that Neb. Rev. Stat. § 81-1508.02(1) (Reissue 1999) makes it unlawful, among other things, for any person:

(b) To violate any air, water, or land quality standards, any emission or effluent standards or limitations, any permit or license condition or limitation, any order of the director, or any monitoring, reporting, or record-keeping requirements contained in or issued or entered into pursuant to the Environmental Protection Act, the Integrated Solid Waste Management Act, or the Livestock Waste Management Act or the rules or regulations adopted and promulgated pursuant to such acts.

Subsection (2) imposes a civil penalty of no more than \$10,000 per day for each violation of § 81-1508.02, provides that each day of a continuing violation constitutes a separate offense, and provides that "[i]n assessing the amount of the fine, the court shall consider the degree and extent of the violation, the size of the operation, and any economic benefit derived from noncompliance."

An extensive recitation of the facts in the record on appeal is not necessary. For the sake of expediency, we quote certain portions of the factual background portion of the district court's final order in this case, for their relevancy to our resolution to this appeal and because they are consistent with our own review of the record:

Defendants, to one extent or another, all sought to profit from the collection and storage of scrap tires. Harruff had obtained a collection site permit from [DEQ] to store tires on his real estate. Harruff rented the real estate to [LDD] and received \$6,700 rent.

By his own admission, Harruff had brought 20,000 [PTE's] to the site. The other defendants apparently traveled the highways and byways collecting scrap tires from around the state and moving tires from closed sites. The permit issued by the [DEQ] to Harruff allowed the storage of 21,000 [PTE's] on the real estate. At the time of the trial it was estimated [that] in excess of 260,000 [PTE's] were stored on the real estate.

The collection site permit was issued to Harruff. The evidence disclose[d] Harruff did little but sign the application prepared by LDD agents or employees. Harruff, LDD, [Central States], and Miner all hauled tires to the site. Harruff estimated that 95-percent of the tires on the site were delivered there by Miner. LDD had plans to obtain a tire shredder to dispose of some of the tires. The shredder was never acquired and the tires continued to accumulate until Harruff told LDD and Miner that they would not be allowed to deposit any more tires at the site.

....

The testimony revealed the cost to properly dispose of a scrap tire was \$1.21 per PTE. Harruff finds the removal of the tires from the site difficult because his permit to haul tires was revoked by the [DEQ] in June, 2004. [Harruff] has applied for another hauler's permit and been denied. [Harruff] cannot afford to pay someone to dispose of the tires.

The DEQ filed the original complaint in this matter in the district court on August 29, 2003, and filed an amended complaint against the defendants on May 27, 2005. The DEQ sought civil penalties for violations of the WRRIA and injunctive relief to prohibit further storage and require cleanup of tires on real estate owned by Harruff.

The district court entered a consent decree regarding LDD, Central States, Schmitz, and Miner on August 26, 2005. The decree provided in part that LDD and Schmitz would pay a civil penalty of \$2,500 for their violations of certain statutory provisions.

The district court granted partial summary judgment against Harruff on April 7, 2006. The court found no genuine issue as to the material fact that Harruff violated the permit issued to him by the DEQ in that after May 13, 2003, he maintained more than 21,000 PTE's on the site. The court determined that the sole issue remaining for trial was the DEQ's request for civil penalties against Harruff. The court ordered Harruff to immediately cease collecting or receiving any additional scrap tires at the property; to take all reasonable steps to prevent others from depositing scrap tires or tire products at that location; to promptly remove and properly dispose of all scrap tires, scrap tire product, or other scrap tire residuals at the facility by April 30, 2007; and to proceed with closure of the facility pursuant to his permit and the rules and regulations of the DEQ.

A trial was held before the district court on August 24, 2006, to determine whether civil penalties should be imposed for Harruff's violation of his permit, and if so, the amount of any such penalties. We do not detail the evidence received at trial beyond that which we have already set forth above and that which is referenced below in the details of the district court's final order.

The district court entered a judgment for civil penalties on September 7, 2006. The court noted that the DEQ was seeking civil penalties pursuant to § 81-15,162.01(3), which provided a maximum penalty of \$1,000 per day. The court observed that § 81-15,162.01 was repealed by the Legislature on August 31, 2003, and that remaining portions of the WRRIA were relocated to

the ISWMA. The court noted the \$10,000-per-day maximum current civil penalty for violation of the ISWMA found at § 81-1508.02. The district court determined that the initial permit violation by Harruff occurred on May 14, 2003, 90 days after issuance of his permit on February 13, and continued through August 31, the date on which § 81-15,162.01 was repealed. The court found that Harruff was subject to a maximum civil penalty of \$1,000 per day for that period of 109 days.

The district court stated that neither the court nor counsel were able to find any guidance on the factors to consider and the amount of penalty to be imposed under § 81-15,162.01(3), but the court noted that the current penalty provision of § 81-1508.02(2) contains factors to consider such as the degree and extent of the violation, the size of the operation, and any economic benefit derived from noncompliance. The court concluded that it would use the factors set forth in § 81-1508.02 in determining the amount of civil penalties to impose.

The district court noted that Harruff rented his property for the storage and processing of scrap tires to LDD and that the permit allowed Harruff the storage of 21,000 PTE's. The court did not accept "Harruff's attempt to discount his culpability for the permit violations." The court stated that Harruff had the responsibility of ensuring compliance with the permit issued in his name. According to the court, "Harruff's two biggest failings" were relying upon assurances given him by LDD that the tires would be shredded and allowing Miner to take tires to the Rock County site." The court noted Harruff's deposition testimony concerning his attempts to prohibit further storage by chaining the gate and placing wood across the road to the site, which barriers were removed without authorization. The court also noted Harruff's testimony that access was gained to the site by someone using a particular trail and that the majority of the tires were brought to the site by someone other than Harruff. The court noted that at the time of trial, there were over 260,000 PTE's at the site--more than 120 times the permitted amount, and that the extent of the violation was considerable.

The district court discussed the evidence adduced by the DEQ of the economic benefit received by Harruff for his failure to comply with the permit limitations. The DEQ introduced calculations from a computer program used by the U.S. Environmental Protection Agency. The calculations in the exhibits introduced by the DEQ to show the economic benefit of Harruff's noncompliance used a noncompliance period of May 14, 2003, through May 12, 2006. The district court recognized that the consent decree between the DEQ and the defendants other than Harruff required LDD, Central States, and another entity to remove 208,000 PTE's, approximately 80 percent of the tires on the site at the time of trial, from the site by December 31, 2006, and that the court had entered an order requiring Harruff to remove the tires from the site by April 30, 2007. The court determined that exhibit 20, one of the exhibits submitted by the DEQ with computer program calculations, most closely approximated the economic benefit received by Harruff and the other defendants by virtue of the violation of the collection site permit. Exhibit 20 shows a cleanup cost estimate of \$315,454 at a cost of \$1.21 per PTE (of approximately 260,706 PTE's) and a final economic benefit of delaying these cleanup costs of \$39,345 based on the period from May 14, 2003, to May 12, 2006.

Another economic benefit considered by the court was the amount of rent money actually received by Harruff from LDD in the amount of \$6,700. The court recalled no evidence

establishing what money was received by the various parties for the collection of tires from various retailers and others.

Finally, the court considered the fact that LDD and Schmitz had been ordered to pay a civil penalty in the amount of \$2,500. We note that the penalty assessed against LDD and Schmitz in the consent decree was for violations pursuant to § 81-1508.02 rather than § 81-15,162.01, the penalty provision under which Harruff was assessed.

The district court assessed a civil penalty against Harruff in the amount of \$2,725 and taxed costs to Harruff. The DEQ subsequently perfected its appeal to this court.

#### ASSIGNMENTS OF ERROR

The DEQ asserts that the district court erred in its judgment for civil penalties by (1) incorrectly calculating the number of days Harruff was in violation of § 81-15,162.01(3) in that it failed to consider the impact of the general saving clause found in Neb. Rev. Stat. § 49-301 (Reissue 2004), (2) entering a lower civil penalty than was supported by the evidence, and (3) considering the voluntary settlement reached between the DEQ and the other defendants in determining the amount of civil penalties imposed against Harruff.

#### STANDARD OF REVIEW

Section 81-15,162.01(3) left the amount of civil penalty imposed for a permit violation to the discretion of the court. See *State ex rel. Grams v. Beach*, 243 Neb. 126, 498 N.W.2d 83 (1993) (stating that statute imposing penalties for violations of environmental protection and other acts left amount of penalty to discretion of courts). Accordingly, we review the district court's imposition of civil penalties under this provision for an abuse of discretion. A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Poppe v. Siefker*, 274 Neb. 1, 735 N.W.2d 784 (2007).

Statutory interpretation presents a question of law. *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

#### ANALYSIS

##### *Number of Days in Violation of Permit.*

The DEQ asserts that the district court erred in its judgment for civil penalties by incorrectly calculating the number of days Harruff was in violation of § 81-15,162.01(3) in that it failed to consider the impact of the general saving clause found in § 49-301. The district court found that Harruff was subject to the penalty provisions of § 81-15,162.01(3) for 109 days from May 14 through August 31, 2003, ending on the date § 81-15,162.01 was repealed. The DEQ argues that Harruff's violation should have been found to have continued to the date of the pretrial conference, May 12, 2006, if not the date of the trial itself. The DEQ urges us to find that Harruff's violation lasted for 1,095 days.

In its partial summary judgment order, the district court discussed the effect of § 49-301. Section 49-301 provides, “Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute.” The general saving clause, § 49-301, applies as though it were expressly incorporated in a repealing act, unless abrogated therein. *State ex rel. City of Grand Island v. Union Pac. R. R. Co.*, 152 Neb. 772, 42 N.W.2d 867 (1950). Such general saving clause is all inclusive, and has the force and effect of saving all pending actions founded upon a statute repealed and all causes of action that accrued thereon prior to any such repeal, except where the repealing statute itself clearly discloses that it was not the intention of the Legislature that such rights and remedies should be saved. *Id.*

The district court observed that while sections of the WRRIA were repealed effective August 31, 2003, at the time the violations began on May 14, 2003, and the time the action was originally filed on August 28, 2003, the WRRIA was in full force and effect. Because the DEQ’s cause of action against Harruff accrued before the statute’s repeal, the court reasoned that § 49-301 was applicable and operated to preserve the cause. Neither party challenges this determination.

The issue preserved by the DEQ is whether Harruff can be penalized for a continuing violation of § 81-15,162.01(3) beyond the date of the statute’s repeal. Section § 81-15,162.01(3) was a penal statute. A penal statute is one by which a forfeiture is imposed for transgressing the provisions of the act and where the extent of liability imposed is not measured or limited by the damage caused by the act or omission. *Hancock v. State ex rel. Real Estate Comm.*, 213 Neb. 807, 331 N.W.2d 526 (1983). A liability which is created by statute to follow as a consequence of the doing or omission of some act, and the extent of which is not measured or limited by the damages caused by the doing or omission of the act, is in the nature of a penalty, and the statute penal in its character. *Kleckner v. Turk*, 45 Neb. 176, 63 N.W. 469 (1895). Although penal statutes are strictly construed, they are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *In re Interest of Jeffrey K.*, 273 Neb. 239, 728 N.W.2d 606 (2007).

With regard to penal statutes, the following has been stated:

Since penalty statutes are strictly construed, *the unqualified repeal* of a statute imposing a penalty abrogates all rights of action which have not been reduced to judgment, and prevents any prosecution, trial, or judgment for penalties accruing while the statute was in force, *unless the contrary is provided in the repealing statute or some other existing statute*. This general rule is applicable where the statute imposing the penalty is modified by a later act, thereby eliminating the penalty.

(Emphasis supplied.) 36 Am. Jur. 2d *Forfeitures and Penalties* § 58 at 515 (2001). The following has also been stated:

Where a saving clause in a repealing act provides that nothing therein contained affects “any penalty or forfeiture already incurred under the provisions of any law in force prior to the passage of this act,” the act does not affect any penalty incurred before it takes effect. Such a savings clause may be found in a separate statute of general application, as in the case of the federal statutes.

*Id.*, § 59 at 515-16 (2001).

We conclude that the general saving clause in this case operated to preserve the pending action against Harruff, which had accrued prior to the repeal of § 81-15,162.01. However, the unqualified repeal of this statute on August 31, 2003, effectively limited any judgment to penalties accruing while the statute was in force. Although the DEQ amended its original complaint after August 31, it did nothing to amend the claims relating to Harruff or to allege that he was in violation of any new statutory provisions. Accordingly, after August 31, 2003, Harruff was no longer in violation of § 81-15,162.01, since it no longer existed. We find no abuse of discretion in the district court's decision to limit the penalties to violations which had occurred up to August 31.

*Amount of Penalty.*

The DEQ asserts that the district court erred in its judgment for civil penalties by entering a lower civil penalty than was supported by the evidence. In setting the amount of civil penalty in this case, the district court looked to the current penalty provisions of § 81-1508.02(2) for guidance in what factors to consider in setting the penalty under § 81-15,168.02. Some of the same subject matter found in the WRRIA prior to August 31, 2003, became encompassed in the ISWMA after August 31, 2003. Section 81-1508.02 contains penalty provisions for violations of, among other things, provisions of the ISWMA. In order to ascertain the proper meaning of a statute, reference may be had to later as well as earlier legislation upon the same subject. *Cox Nebraska Telecom v. Qwest Corp.*, 268 Neb. 676, 687 N.W.2d 188 (2004). In interpreting statutes, all existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one. *Whipps Land & Cattle Co. v. Level 3 Communications*, 265 Neb. 472, 658 N.W.2d 258 (2003).

Section 81-1508.02(2) provides that “[i]n assessing the amount of the fine, the court shall consider the degree and extent of the violation, the size of the operation, and any economic benefit derived from noncompliance.” The district court in this case clearly and carefully considered and weighed the evidence in support of each of these factors in its analysis of the amount of the penalty. Under § 81-15,168.02, the district court had discretion to determine how large the penalty should be, up to \$1,000 per day, and to even determine that despite a violation, no penalty was warranted. We cannot say that the district court abused its discretion in setting the amount of penalty.

*Settlement With Other Defendants.*

Finally, the DEQ asserts that the district court erred in its judgment for civil penalties by considering the voluntary settlement reached between the DEQ and the other defendants in determining the amount of civil penalties imposed against Harruff. “Penalties in similar cases may serve as guides to an appropriate level of a civil monetary penalty, but undue focus on past penalties fails to account for changes in policy or inflation, and thus may undermine deterrence.” 36 Am. Jur. 2d *Forfeitures and Penalties* § 61 at 517 (2001). While the district court did take into consideration the amount of penalty imposed on other defendants pursuant to the consent decree, we see nothing in the record to indicate that the court placed undue emphasis on its consideration of this fact. The DEQ's assignment of error is without merit.

## CONCLUSION

The district court did not abuse its discretion in calculating the amount of civil penalties due from Harruff.

AFFIRMED.