

DISTRICT COURT
DOUGLAS COUNTY
FILED

STATE OF MINNESOTA
COUNTY OF DOUGLAS

DEC 30 1998

IN DISTRICT COURT
SEVENTH JUDICIAL DISTRICT

Phyllis L. Haarstad

~~Court Administrator~~
MPB

State of Minnesota, by its Attorney
General Hubert H. Humphrey III, and its
Minnesota Pollution Control Agency,

Plaintiff,
vs.

Rollies Sales & Service Inc., Dale
Walsh and Roland A. Walsh,

Defendants.

) Deputy

)
) **AMENDED FINDINGS OF**
) **FACT, CONCLUSIONS OF LAW**
) **AND ORDER**

) **PENALTY PHASE**

) File No. C2-95-296
)
)
)

The penalty phase of the above-entitled matter came before the Honorable Paul L. Ballard, Judge of District Court, on the second and third day of February, 1998. Pursuant to the defendants' post-penalty trial phase motions for amended findings and a new trial and subsequent post-trial motions, the above-entitled matter came before the Honorable Paul L. Ballard, on July 20, 1998 at the Douglas County Courthouse, Alexandria, Minnesota.

Having considered the arguments of counsel, the written memoranda of counsel, all the documents and files herein, and the relevant law, the Court now makes the following:

FINDINGS OF FACT

1. The State's complaint charged the Defendants, Rollies Sales & Service, Inc. (Hereinafter Rollies Inc.) Dale Walsh and Roland Walsh with nine environmental regulation violations.

2. The Defendant, Rollies Inc. was the prevailing party on the following four of the nine alleged violations: 1) operation of a hazardous waste storage facility without a permit, 2) discharge of pollutants to the unsaturated zone, 3) failure to store liquids on a curbed, impermeable surface and 4) failure to submit accurate information about quantities of hazardous waste generated.

3. The State was the prevailing party against Rollies Inc. on five of the nine alleged violations. Rollies Inc. is liable to the State of Minnesota for the following violations of Minnesota statutes and rules relating to the management of hazardous waste and the prevention of water pollution in the amount stated:

- A. **FAILURE TO EVALUATE HAZARDOUS WASTE:** Minn. R. 7045.0214, subp. 1. Rollies violated this rule by failing to evaluate the waste of the sludge/settling pots and of the paints and thinners to determine if those materials were hazardous; penalty - \$500.00.
- B. **FAILURE TO LABEL HAZARDOUS WASTE CONTAINERS:** Minn. R. 7045.0292, subp. 5, items C and H. Rollies' failure to label hazardous waste containers of the sludge/settling pots and the paint and thinner containers violated this rule; penalty - \$500.00.
- C. **FAILURE TO PERFORM AND DOCUMENT INSPECTIONS OF HAZARDOUS WASTE CONTAINERS:** Minn. R. 7045.0292, subp. 5, item B. Rollies violated this rule by failing to inspect hazardous waste containers and areas where containers were stored and to keep a written record of the dates and findings of the inspections; penalty - \$200.00.

D. FAILURE TO MEET EMERGENCY PREPAREDNESS

REQUIREMENTS: Minn. R. 7045.0292, subp. 5, items I and J. Rollies violated this rule by failing to take actions designed to keep the company and local authorities properly prepared in case of an emergency at Rollies' facility; penalty - \$200.00.

E. UNLAWFUL TRANSPORTATION OF HAZARDOUS WASTE: Minn. R. 7045.0371. Rollies violated this rule by transporting hazardous waste without complying with the requirements of this rule. Violations included failure to have a hazardous waste transporter license and failure to have a manifest when transporting hazardous waste; penalty - \$2000.00.

4. The State failed to show that Rollies Inc. demonstrated an intentional disregard or plain indifference to the law with respect to the above violations.

This Court finds that none of the acts were "willful" violations of Federal or State Statutes or Rules.

5. The five violations by Rollies Inc. were minor. There was limited potential to harm the environment from these violations and no actual harm to the environment occurred as a result of these violations. There were no prior violations by Rollies Inc. and its non-compliance was of a short duration.

6. Rollies invested \$500,000.00 into its petroleum recycling operations branch of its business, which Rollies Inc. abandoned as a result of this action by the State.

7. Defendant, Rollies Inc., incurred no economic benefit from its non-compliance.

8. No special circumstances exist in this case that compel an upward or downward adjustment to the assigned civil penalty.

9. Rollies Inc. did not convince the Court that the State's position against it, was not substantially justified. Therefore, Rollies Inc. is not entitled to an award of fees and/or expenses pursuant to the Minnesota Equal Access to Justice Act. Minn.Stat. Section 15.472. (Hereinafter MEAJA.)

10. The defendant, Dale Walsh was the prevailing party against the plaintiff on all nine (9) violations. The defendant, Roland Walsh was also the prevailing party against the plaintiff on all nine (9) violations. The central issue in the plaintiff's claim against each of the individual defendants was that they were personally liable for the alleged violations. The Court concluded that neither Dale nor Roland Walsh were individually liable. (See Conclusion of Law, Liability Phase, Paragraph # 3.)

11. Each individual defendant, Dale and Roland Walsh, convinced the Court that the state's position against him was not substantially justified. The state's position against both Dale and Roland Walsh did not have a reasonable basis in law and fact before and during the litigation. Minn.Stat., Section 15.471, subd. 8.

12. Neither an increase in the cost of living or other special factor is present in this case to justify an increase in the hourly rate of \$100.00 provided in Minnesota Statute Section 15.471 subd. 5 (c).

13. The defendants' attorneys and staff have charged the defendants \$146,428.10 in fees to defend this case. Fees charged to the defendants by the firm of Strusinski and Associates were at a rate of \$95.00 per hour. Fees charged

to the defendants by Thomas Fabel, of the firm, Lindquist and Vennum, were at the rate of \$185.00 per hour. Fees charged to the defendants by Joseph Maternowski, David Larson, Donna Strusinski, Richard Leighton, Jaymes Littlejohn and Lee Henderson of the firm, Hessian & McKasy, P.A. were at a rate of \$130.00 per hour. Fees charged to the defendants by L. Marshall Smith of Hessian & McKasy, were at a rate of \$125.00/130.00 per hour. Fees charged to the defendants by John J. Choi of Hessian & McKasy were at a rate of \$100.00/110.00 per hour. All other fees charged to the defendants were at a rate of \$100.00 per hour or less.

14. This case became a "civil action" on or about February 10th, 1995, when the Defendants' counsel acknowledged service. The Court recognizes February 7, 1995 as the date the case became a "civil action" for purposes of determining an appropriate award under the Minnesota Equal Access to Justice Act. Minn.Stat. Section 15.472 (a).

15. The defendant, Rollies Inc., incurred \$4978.59 in expenses eligible under MEAJA. Three thousand eight hundred seventy-three dollars and forty-eight cents, \$3873.48, of the expenses benefited both Rollies Inc. and the individual defendants; one-half, \$1936.74, benefited Rollies and one-half, \$1936.74, benefited the individual defendants. One thousand one hundred five dollars and eleven cents, \$1105.11, of the expenses solely benefited the individual defendants, Dale and Roland Walsh.

16. No special circumstances exist that make an award of fees and expenses under MEAJA unjust.

Based on the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. Rollies is liable to the State of Minnesota in the amount of \$3400.00 for violating five environmental rules and regulations.
2. The defendant, Rollies Inc., is not entitled to any portion of its fees or Expenses pursuant to the Minnesota Equal Access to Justice Act. Minn.Stat. Section 14.572.
3. The defendant, Dale Walsh, is entitled to a fee award pursuant to MEAJA in the amount of \$31,469.16.
4. The defendant, Roland Walsh, is entitled to a fee award pursuant to MEAJA in the amount of \$31,469.16.
5. The defendant, Rollies Inc., is entitled to receive \$3,041.85 for expenses it incurred that benefited the individual defendants, Dale and Roland Walsh.

Based on the foregoing Findings of Fact and Conclusions of Law, the Court

HEREBY issues the following:

ORDER

1. Rollies Inc. is **HEREBY ORDERED** to pay the following civil penalty to the State of Minnesota: \$3400.00.
2. The Minnesota Pollution Control Agency and the Office of the Attorney General are **HEREBY ORDERED** to pay the fees of the defendant, Dale Walsh, in the amount of \$31,469.16 payable directly to Dale Walsh.

3. The Minnesota Pollution Control Agency and the Office of the Attorney General are **HEREBY ORDERED** to pay the fees of the defendant, Roland Walsh, in the amount of \$31,469.16 payable directly to Roland Walsh.
4. The Minnesota Pollution Control Agency and the Office of the Attorney General are **HEREBY ORDERED** to pay the expenses of the defendants, Dale and Roland Walsh, in the amount of \$3,041.85 directly to the defendant, Rollies Inc.
5. The State's motion to strike the defendants' motion for a new trial is **HEREBY GRANTED**. The Court Administrator shall strike the motion from the court record.
6. The State's motion to strike the affidavits of Dale Walsh and Joseph Maternowski submitted by the defendants with their motions for amended findings and for a new trial is **HEREBY GRANTED**. The Court Administrator shall strike the-above stated affidavits from the court record.
7. The state's motions to strike affidavits submitted after the motion for amended findings was filed or in response to this Court's request are **HEREBY DENIED**.
8. All parties are **HEREBY ORDERED** to bear their own remaining costs and disbursements.
9. The State's request for the Court to stay the enforcement of the judgment herein, pursuant to Minn. R. Civ.P. 62, until resolution of the State's appeal of this Court's ruling, is **HEREBY GRANTED**.
10. All other motions submitted to this Court are **HEREBY DENIED**.

11. The attached memorandum is incorporated into this **ORDER** as though fully set forth herein.

12. The Defendant's motion for amended findings is **HEREBY GRANTED** as set forth herein.

Dated this 30 day of December, 1998

Paul L. Ballard

Paul L. Ballard
Judge of District Court

LET JUDGMENT BE ENTERED ACCORDINGLY.

Upon this 30 day of December, 1998

Paul L. Ballard

Paul L. Ballard
Judge of District Court

JUDGMENT

The foregoing **Findings of Fact, Conclusions of Law and Order** constitute the **JUDGMENT** of this Court.

Upon this 30th day of December, 1998.

Phyllis L. Haarstad

Phyllis L. Haarstad
Douglas County Court Administrator

COURT SEAL

By: *Margaret Ruess*
Deputy

state on all nine (9) alleged violations and each individual defendant has shown to the Court that the state's position against him was not substantially justified.

"Substantially Justified"

MEAJA requires the state's position to be substantially justified. The statute defines "substantially justified" as having a reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation. *Minn.Stat.* Section 15.471 subd. 8. The following discussion demonstrates that the state's position against both Dale and Roland Walsh was not substantially justified.

The state based its position against both Dale and Roland Walsh on the "Responsible Corporate Officer Doctrine", hereinafter the doctrine. Minnesota has adopted the following three-part test. *In re: Dougherty*, 482 N.W.2d 485 (Minn. Ct. App.1982):

1. The individual must be in a position of responsibility which allows the person to influence corporate policies or activities,
2. There must be a nexus between the individual's position and the violation,
3. The individual's actions or inactions must facilitate the violations. *Id.* at 490.

While both individual defendants satisfied the first prong of the three part test above, the facts show that neither Dale nor Roland Walsh satisfied the second or third prongs of the doctrine before or during the litigation.

Dale Walsh

On the date of the June 4, 1992 inspection, Dale Walsh was the president of Rollies. As such, he was in a position to influence corporate policy and the first prong of the doctrine is met. However, it is the Court's finding that although Dale Walsh was President of Rollies Inc. at the time of the June 4, 1992 inspection, there is no nexus between his position and the violations and prong two was not met. Furthermore, Dale Walsh's actions or inactions did not facilitate the violations and prong 3 is not met.

Roland Walsh

Although Roland Walsh was not an officer at Rollies Inc. at the time of the June 4, 1992 inspection, the Court finds that he maintained a position of influence over corporate policy. However, there was no nexus between his position and the violations and his actions or inactions did not facilitate the violations.

Bruce Store

In February, 1990, Rollies Inc. hired Bruce Store as the Director of Environmental Services to ensure compliance with all environmental regulations. In 1991 Bruce Store identified himself as the *responsible person* at Rollies Inc. regarding environmental compliance on the Annual Report. This information was available to the plaintiff prior to the June, 1992 inspection.

In addition, Bruce Store was the person from Rollies Inc. who toured the facilities with the MPCA representative on June 4, 1992 and Bruce Store, was the main person who addressed the issues in the notice received by Rollies Inc. Neither Dale nor Roland Walsh was involved in that process.

It is the Court's opinion that Bruce Store, not Dale or Roland Walsh, was the person responsible for the violations at Rollies Inc. However, the plaintiff never named Bruce Store individually as a defendant.

Fees v. Expenses under MEAJA

MEAJA requires that the prevailing party be *charged* fees to be awarded them. However, MEAJA requires the prevailing party to actually *incur* expenses to be awarded them. As set forth below, the Court determined that the individual defendants, Dale and Roland Walsh are entitled to receive an award of fees payable directly to them. However, the expenses charged by their attorneys are to be payable to Rollies Inc., not the individual defendants because the individual defendants did not *incur* the expenses as required by the statute. Minn.Stat. Section 15.471 subd. 4.

Calculation of fee award pursuant to MEAJA:

The Minnesota Equal Access to Justice Act defines “fees” as the reasonable attorney fees or reasonable fees charged by a person not an attorney who is authorized by law or rule to represent the party and may include reasonable charges by the party, the party’s employee, or agent. *Minn.Stat. Section 15.471, subd. 5*. Attorney fees may not be awarded in excess of \$100 per hour unless the court . . . determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee. *Minn.Stat. Section 15.471, subd. 5 (c)*.

The Court determined, based upon the evidence before it, that a fee higher than \$100 per hour was not justified in this case. Unlike expenses (see below), fees need only be charged, not actually incurred by the party being awarded them.¹

The Court also determined that the individual defendants were not entitled to receive fees charged or expenses incurred prior to the case becoming a “contested case” or “civil action” pursuant to MEAJA. *Minn.Stat. Section 15.472 (a)*.² This case does not fit within the definition of a “contested case” as defined by the statute. *Id.* MEAJA does not define “civil action”. However, an “action” is defined by *Black’s Law Dictionary*, as a suit brought in a court. *Blacks Law Dictionary*, Sixth Edition, p. 28 (1990). This case became a civil action on or about February 10th, 1995 when the Defendants’ counsel acknowledged service. For purposes of an award of fees and expenses pursuant to MEAJA, the Court is using the beginning of phase two, (2), the “Preliminary Litigation” phase, or February 7, 1995, as the time when this case became a “civil action”. (See Defendants Supplemental Memorandum filed October 2, 1998, pp. 4-5.)

¹ This also differs from the Federal Equal Access to Justice Act, which requires the prevailing party to incur fees and expenses before being entitled to an award under that section. *United States Code Annotated, Title 28, Sections 2255-2460, 2412 (d)(1)(A)*.

² The Minnesota Equal Access to Justice Act requires that expenses be incurred “in the litigation.” *Minn.Stat. Section 15.471, subd. 4*. This is in contrast to the Federal Equal Access to Justice Act, which provides for an award of fees and other expenses of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the *preparation* of the party’s case. *28 USCA 2412 (d)(1)(C) (2) (A)*.

The plaintiff argued that pursuant to Minn.R.Civ. Pro. 52.02, any award under MEAJA is limited by the files, exhibits and minutes of the court. However, it is the holding of this Court, that to limit the MEAJA award in this case would be contrary to logic. In the instant case, the central issue of the motion for amended findings is the amount of fees and expenses to be awarded to the individual defendants. It makes little, if any, sense to limit the fees and expenses that may be awarded to the defendants as they continue to incur fees and expenses in defending their case against the plaintiff's non-substantially justified positions.

The Court calculated the award of fees under the Minnesota Equal Access to Justice Act as follows:

Step 1: The Court reduced the *fees* charged by the defendants' attorneys to the \$100 per hour maximum allowed in MEAJA. This reduced the total of the fees actually charged, \$146,428.10, to \$120,145.00 for work performed on this case from the initial negotiations between the defendants and the Minnesota Pollution Control Agency through the post-penalty phase motions, or from 3/94 through 9/14/98. (See Defendants Supplemental Memorandum addressing the amount of attorneys' fees to be awarded to defendants Dale and Roland Walsh, pp. 10-11, filed October 2, 1998.)

Step 2: The Court then added the total amount of eligible MEAJA *expenses* for the same time period, \$5,909.35, to the reduced amount from step 1 for a total of \$126,054.35. (See Defendants Supplemental Memorandum filed October 2, 1998, p 5.)

Step 3: The Court then subtracted the *fees charged and the expenses incurred* prior to the case becoming a "contested case" as defined by the MEAJA statute or a "civil action" as defined by Blacks Law Dictionary, which were \$9013.43. (See the Plaintiff's Memorandum of Law Concerning MEAJA Award To Defendants Dale and Roland Walsh, page 16, filed October 5, 1998.) This left the Court with \$117,040.92, the amount of fees and expenses charged after the case came within the definition of "civil action" through the post penalty phase trial motions, or phases two (2) through eight (8). (See Defendants Supplemental Memorandum filed October 2, 1998, p. 5.)

Step 4: The Court then subtracted the amount of MEAJA eligible expenses for that time period, \$5790.42, to obtain the amount of MEAJA eligible fees for the time period beginning when the case became a "civil action" through the post-penalty phase trial motions, or \$111,250.50. (See Defendants Supplemental Memorandum filed October 2, 1998, p. 5.) This left the Court with the amount of eligible MEAJA fees.

Step 5: The Court then calculated the amount of fees actually charged for phases two (2) through eight (8), or \$137,050.50. The Court next calculated the amount of fees actually charged that benefited both Rollies Inc. and the individual defendants, Dale and Roland Walsh, for phases two (2) through eight (8) or \$85,351.50. Then the Court calculated the amount of fees actually charged that benefited the individual defendants, Dale and Roland Walsh only, for phases two (2) through (8), or \$35,699.00. (See Defendants Supplemental Memorandum filed October 2, 1998, p. 5.)

Step 6: Using the numbers from step 5, the Court calculated the percentage of actual fees charged during phases 2-8 that benefited both, Rollies Inc. and the individual defendants, Dale and Roland Walsh, 62.3%, as well as the percentage of fees that benefited only the individual defendants, Dale and Roland Walsh, 26%.

Step 7: The Court then applied those percentages to the amount of fees eligible under MEAJA, pursuant to the \$100/hr. limitation calculated in step 4. The Court determined that \$69,309.06 of the eligible fees under MEAJA benefited both Rollies Inc. and the individual defendants, Dale and Roland Walsh and that \$28,925.13 of the eligible fees under MEAJA benefited the individual defendants, Dale and Roland Walsh, only.

Step 8: The Court then awarded one-half of the \$69,309.06, \$34,654.53, to the individual defendants to share equally, or \$17, 327.27 each. It is the Court's opinion that one-half of those fees benefited Rollies Inc. and the Court determined that Rollies Inc. is not entitled to an award of fees or expenses under MEAJA. The Court also awarded each individual defendant one-half of the \$28,925.13 or \$14,462.57, for a total of \$31,789.84 in fees for each individual defendant.

Step 9: The Court then subtracted one-half of the \$532.60, or \$266.30, of the 10-31-95 discount granted by the defendants attorneys that benefited the individuals only, as well as one-half of one-half of the \$217.52, or \$54.38, that benefited both Rollies Inc. and the individual defendants, Dale and Roland Walsh. (See Defendants' supplemental memorandum filed October 2, 1998, p. 5.) This left each individual defendant with a MEAJA fee award of \$31,469.16.

Calculation of expense award pursuant to MEAJA:

The Court determined that each individual defendant is entitled to one-half of the MEAJA eligible expenses that solely benefited the individual defendants and one-half of one-half of the MEAJA eligible expenses that benefited both Rollies Inc. and the individual defendants.

However, MEAJA defines "expenses" as the costs *incurred* by a party in the litigation. *Minn.Stat. Section 15.471 subd. 4*. Pursuant to Minn.Stat. Section 302A.521 (1996), Rollies Inc. is required to indemnify Dale and Roland Walsh for . . . attorneys fees and expenses incurred in connection with the lawsuit. Therefore, in this case, the individual defendants have not actually *incurred* any expenses. To avoid a windfall by the individual defendants, the Court has ordered that the award of expenses incurred by Rollies Inc., that benefited both Rollies Inc. and the individual defendants, Dale and Roland Walsh, as well as the expenses that expenses incurred by Rollies Inc. that solely benefited the individual defendants be payable to Rollies Inc. rather than to the individual defendants.

The eligible MEAJA expenses that benefited both Rollies Inc. and the individual defendants for phases two (2) through (8) are \$3,873.48. One half of that amount, \$1,936.74, is to be paid to Rollies Inc., for expenses it incurred on behalf of the individual defendants, Dale and Roland Walsh. Since the award is being made payable to Rollies Inc., there is no need to further divide the one-half into payments for each individual defendant. Furthermore, Rollies Inc., is awarded the \$1,105.11 of eligible MEAJA expenses that solely benefited the individual defendants during phases two (2)

through eight (8). In sum, the defendant, Rollies Inc. is awarded \$3,041.85 for expenses it incurred that benefited the individual defendants, Dale and Roland Walsh.

Dated this 30 day of December, 1998

PLB

A handwritten signature in black ink, appearing to be the initials 'PLB' with a stylized flourish.