

**IN THE CIRCUIT COURT OF POLK COUNTY, ARKANSAS**

**BURKS' FAMILY INVESTMENTS, LLC;  
KATHY'S CORNER SHOPPE LLC;  
PONY EXPRESS PRINTING LLC; and  
MIKE AND KATHY BURKS**

**PLAINTIFFS**

**VS.**

**NO.** 57CV-22-130

**MENA SHORT STOP, LLC**

**DEFENDANT**

**JURY TRIAL REQUESTED**

**ORIGINAL COMPLAINT**

Plaintiffs, for their Original Complaint against Defendant, Mena Short Stop, LLC, state:

**INTRODUCTION**

1. This is an action for injury to personal and real property caused by one or more petroleum product releases originating from the Mena Short Stop, located at 420 Highway 71 South in Mena, Polk County, Arkansas ("the Facility"), resulting in the presence of petroleum contamination on plaintiffs' property.

**PARTIES**

2. Burks' Family Investments, LLC is an Arkansas Limited Liability Corporation with its principal place of business in Polk County, Arkansas. It owns property, located at 822 Mena Street in Mena, Arkansas (hereafter the Burks' building).

3. Kathy's Corner Shoppe LLC is an Arkansas Limited Liability Corporation whose principal place of business is at 822 Mena Street in Mena, Polk County, Arkansas.

4. Pony Express Printing LLC is an Arkansas Limited Liability Corporation whose principal place of business is at 822 Mena Street in Mena, Polk County, Arkansas.

5. Mike and Kathy Burks, husband and wife, are citizens and residents of Polk County, Arkansas. They own Burks' Family Investments, LLC, Kathy's Corner Shoppe LLC and Pony Express Printing LLC.

6. Mena Short Stop, LLC is a domestic limited liability corporation whose principal place of business is in Mena, Polk County, Arkansas.

#### **JURISDICTION AND VENUE**

7. This Court has jurisdiction pursuant to Ark. Code Ann. § 16-13-201.

8. Venue is proper because the acts complained of occurred in Polk County, Arkansas.

#### **FACTS**

9. On the morning of April 19, 2022, Mike and Kathy Burks' daughter, Ashley Turner, entered the Burks' building, located at 822 Mena Street in Mena, Arkansas, and immediately encountered a strong petroleum odor. Ms. Turner described the odor as so strong that it is "like putting my head directly into a gas can." Ms. Turner opened all doors in an effort to ventilate the building.

10. A short time later, Ms. Turner's brother, Chaise Burks, arrived. Chaise discovered the source of the odor appeared to be gasoline pooled in the crawl space beneath the floor of the building in the rear.

11. The Mena Fire Department was called. When the fire department arrived, it tested the air for explosive levels of petroleum vapors.

12. Plaintiffs' building at 822 Mena Street is approximately 200 feet south of the Mena Short Stop fueling station and convenience store.

13. The Arkansas Department of Energy & Environment, Division of Environmental Quality (DEQ) regulates certain petroleum storage tanks. DEQ maintains a Storage Tank Facility database (hereafter the “database”). The “Facility Information Summary” for the Mena Short Stop indicates that the Polk County Emergency Management Department contacted DEQ on April 20, 2022, and “advised of petroleum odors at a local business near the [Mena Short Stop].”

14. Lonny Goodwin, a contractor employed by the Mena Short Stop to perform regulatory compliance activities, confirmed a release of gasoline from the Underground Storage Tank (UST) system of the Mena Short Stop on April 20, 2021.

15. Jeff Tyler, an inspector for DEQ, investigated the release on April 21, 2022,

16. A short time later, defendant retained a consulting firm, Environmental Pollution Consultants, Inc. (EPC), to perform remedial action in response to the release.

17. A “Preliminary Assessment,” dated May 17, 2022, prepared by Camille Gernhart, a Geologist with DEQ, provides a timeline of actions taken in response to this release. The “Release Profile” section of this report states:

On April 20, 2022 the RST inspector was contacted by Polk County Emergency Management (PCEM). They were responding to a report from the owner of The Corner Shoppe of strong petroleum odors inside her business. The Corner Shoppe is located 175 feet south-southeast of the Mena Short Stop at 822 Mena Street. The PCEM and the Mena Fire Department investigated the building and found a mix of water and free product gasoline under the crawl space of The Corner Shoppe.

The RST inspector reached out to Lonny Goodwin, equipment and maintenance contractor for the [responsible party], and informed him of the situation at the nearby Corner Shoppe. Mr. Goodwin noted that the Automatic Tank Gauge (ATG) was showing a “sudden loss” alarm when he arrived at the Mena Short Stop a few hours later. He checked the unleaded submersible pump and identified a crack in the functional element on top of the pump. He also checked the monitoring wells installed in the tank pit. Well MW-2 contained 6 inches of free product gasoline. He immediately took the unleaded gasoline tank out of service and contacted the RST inspector to report his findings.

The RST inspector arrived at the Mena Short Stop on April 21, 2022. Repairs had been made to the submersible pump and the unleaded fuel tank put back in service. It is unknown how much gasoline was released into the environment due to the leak in the pump. No other leaks were observed. The tank pit monitoring wells were checked and the MW-2 well measured 2 inches of free product gasoline. The Corner Shoppe crawl space was checked. The inspector did not find any water or fuel/water mix in the crawl space and did not detect any smell of petroleum inside the store.

According to the Initial Response to a Release Report (IRR) submitted by EPC, on April 27, 2022 the owner of the Corner Shoppe contacted the RP's consultant, EPC, about the strong smell of petroleum in her store again. The consultant arrived at the business the same day and recorded photo-ionization detector (PID) readings in the store of 5.0 parts per million-vapor (ppm-v). He also checked the crawl space and the water meter box for the business outside the back entrance to the Corner Shoppe. His PID readings were 24.7 ppm and 248.6 ppm respectively. He set up a fan in the crawl space opening to draw out vapors from under the building (Photograph #1).

On April 29, 2022 EPC contacted the RST A&R supervisor to inform him of the deteriorating conditions at The Corner Shoppe and the efforts made to reduce the amount of vapor intrusion into the business. On April 30, 2022, RST A&R technical staff authorized ER activities that would include a 48-hour MDPE event to be performed as soon as possible.

On May 1, 2022 EPC found free product in each of the four (4) monitoring wells in the tank pit prior to an 8-hour MDPE event that was conducted by Waste Water Specialties and NewGen Resources. During the 8-hour event 748.96 vapor equivalent gallons (VEG) of fuel were recovered. The 48-hour MDPE event took place on May 3-4, 2022 and recovered 282.5 VEG of fuel. That is a total of 1,031.5 VEG from the combined MDPE events.

RST A&R technical staff and the writer conducted a site reconnaissance visit May 2-3, 2022 and observed the start of the 48-hour MDPE event. A visit was also made to the Corner Shoppe. A strong petroleum odor was detected inside the shop. A walk around the building found more petroleum odors coming out of each of the crawl space vents along Martin Street (Photograph #2) and the temporary exhaust fan set in the crawl space vent at the rear of the building along the alley.

On May 14, 2022, excavation around the water meter behind the Corner Shoppe uncovered free product gasoline under and behind the Corner Shoppe. According to the daily report sent in by EPC, significant soil contamination was found approximately 2 feet below ground surface (bgs). Groundwater and free product gasoline were seen entering the excavated area from all directions at 3-4 feet bgs (Attachment 6).

18. Under "Recommended Actions," the Preliminary Assessment provides:

Data collected thus far indicates free product and contaminated soils are in contact with groundwater. Efforts required by 40 CFR § 280.62 to monitor and mitigate safety hazards posed by vapors at the Corner Shoppe should continue. Interim soil and groundwater remediation is also recommended in accordance with 40 CFR § 280.64 to remove free product in a manner that minimizes the further spread of contamination. In accordance with 40 CFR § 280.65, a site investigation is also recommended to determine the full level and extent of contamination caused by the release at the Mena Short Stop.

19. Because of the continued presence of petroleum vapors in plaintiffs' building and its dissatisfaction with the efforts of EPC to take adequate steps to abate petroleum vapors in plaintiffs' building and the health risks these vapors posed to plaintiffs and their employees, on May 16, 2022, DEQ notified AECOM Technical Services, Inc. (AECOM), an environmental consulting firm that is contracted with DEQ for emergency abatement action to prepare a workplan to "eliminate an acute exposure to human health" in accordance with federal regulations pertaining to releases from UST systems.

20. AECOM submitted its workplan on May 20, 2022, which DEQ approved that same date.

21. On a May 20, 2022 conference call, DEQ advised the owner of the Mena Short Stop, Ms. Saraswati Bhandari, and her consultant, Mr. David Diehl of EPC, of additional steps that should be taken to address the source of contamination to plaintiffs' property. Ms. Gernhart's notes from this phone conference reflect the actions DEQ recommended:

DEQ recommends UST removal & digging up alleys to remove as much [free product] as possible as quickly as possible.

Data suggest this is the best course of action. We are not confident that the tanks are not leaking based on weathered fuel found.

All soil along east side of building and alley behind facility removed.

22. These same notes state DEQ advised defendant's representatives to remove all dispensers and product lines.

23. When DEQ asked if there were any questions, Mr. Diehl responded, "No. We understand. Thank you."

24. Defendant did not take each of the actions recommended in the May 20, 2022, conference call.

25. AECOM performed indoor air monitoring of plaintiffs' building on May 27, 2022. The results of this sampling showed the presence of gasoline constituents in every sample.

26. On June 2, 2022, AECOM activated a Vapor Intrusion (VI) Mitigation System in plaintiffs' building to reduce the concentration of petroleum vapors plaintiffs were exposed to.

27. Still not satisfied with defendant's efforts to investigate and eliminate petroleum releases impacting plaintiff's property, DEQ issued an Emergency Order (EO) on June 14, 2022, requiring defendant to immediately take the actions previously discussed (removal of UST system and excavation of contaminated soils).

28. When defendant failed to comply with the EO, DEQ assumed control of the emergency response and retained a second environmental consulting firm it has a contract with, SPATCO Energy Solutions (SPATCO), to remove defendant's UST system and initiate more aggressive efforts to address the release.

29. Since that time, SPATCO and AECOM have performed emergency response and abatement actions including, removal of defendant's UST system, monitoring for the presence of petroleum vapors in and around plaintiffs' property, vapor mitigation, investigative and corrective action work.

30. Additional site assessment activities are planned to include the installation of two horizontal monitoring wells beneath plaintiffs' property.

31. Petroleum constituents present on plaintiffs' property as a result of the release include benzene, gasoline range organics, and diesel range organics.

32. The substances present on plaintiffs' property and beneath their building and businesses are either known or suspected carcinogens and pose a risk to human health and the environment.

33. Petroleum compounds present in the subsurface have resulted in vapor intrusion into plaintiffs' building.

34. Defendant operated the Mena Short Stop in a manner which allowed petroleum products to escape and migrate to plaintiffs' property.

35. As a result of defendant's conduct, there is a plume of toxic substances beneath plaintiffs' property that have caused plaintiffs, their family members, employees and customers to experience physical symptoms associated with exposure to petroleum hydrocarbons, including, without limitation, headache and nausea. In addition, the presence of petroleum vapors in plaintiffs' building has caused disruption of plaintiffs' businesses, fear, fright, concern, inconvenience, and annoyance, in addition to damage to the value of their property.

36. Petroleum products from the Facility are the direct and proximate cause of the contamination on plaintiffs' property.

37. The contaminant plume below plaintiffs' property constitutes a trespass.

38. The contaminant plume and defendant's actions have unreasonably interfered with plaintiffs' use and enjoyment of their property.

39. Defendant failed to exercise reasonable care in the management and use of the Facility, thus causing contamination to reach plaintiffs' property, resulting in damage.

40. Defendant failed to comply with laws applicable to its management and use of the Facility, including, but not limited to, the Arkansas Solid Waste Management Act ("ASWMA"), state and federal statutes governing the operation of regulated petroleum storage tanks and Rule 12 of the Arkansas Pollution Control & Ecology Commission.

41. Plaintiffs' property value has been diminished or destroyed as a result of the contaminant plume and defendant's actions.

42. Defendant knew or ought to have known that, in light of the circumstances, the release and migration of petroleum products from the Facility could naturally and probably result in a contaminant plume migrating to and damaging plaintiffs' property. Defendant managed its Facility with reckless disregard of the consequences and in a manner from which malice may be inferred. Moreover, upon learning that releases had occurred from defendant's property and that the contaminant plume was migrating off-site, defendant recklessly disregarded the potential harm to plaintiffs and others by intentionally failing to clean up its contaminant plume to prevent it from spreading further onto plaintiffs' property. As a result, the conditions on plaintiffs' property were exacerbated.

#### **CAUSES OF ACTION**

43. Plaintiffs incorporate each of the previous paragraphs by reference herein as part of the allegations supporting plaintiffs' causes of action against defendant.

#### **COUNT I (TRESPASS)**

44. Defendant's intentional use and management of the Facility resulted in contamination which entered plaintiffs' property.



45. Plaintiffs peaceably possess the land above the contaminant plume.

46. Defendant allowed the contaminant plume to enter plaintiffs' property, where it remains today, without plaintiffs' consent or a legal right to do so.

47. The contaminant plume constitutes a trespass.

48. Plaintiffs have suffered damages as a result of the trespass.

COUNT II  
(NUISANCE)

49. Defendant's operation of the Facility and the contaminant plume have unreasonably interfered with plaintiffs' use and enjoyment of their property.

50. That interference has resulted in damages to plaintiffs.

51. Defendant's actions and the contaminant plume are a nuisance in fact to plaintiffs.

52. Defendant's actions and the contaminant plume are unreasonable as a matter of law, and thus also constitute a nuisance *per se*.

COUNT III  
(NEGLIGENCE)

53. Defendant owed plaintiffs a duty to manage the Facility in a manner which did not pollute plaintiffs' property.

54. Defendant knew, or ought to have known, that its operation of the Facility could or in fact did result in a release of petroleum products and a plume of contamination that would migrate to surrounding property, including plaintiffs' property.

55. Defendant breached its duty by releasing petroleum products and permitting its contaminant plume to reach plaintiffs' property. Defendant's failures include, but are not limited to:

- (a) Failure to inspect, repair, and maintain the underground storage tanks and other equipment at the Facility, including secondary containment;
- (b) Failure to operate the Facility in a safe manner or condition;
- (c) Failure to prevent spills and releases of petroleum products at the Facility;
- (d) Failure to monitor, discover and delineate the extent of contamination resulting from spill and releases at the Facility.
- (e) Failure to exercise due diligence to remediate contamination in the shortest period of time possible.
- (f) Failure to prevent the continued spread of the numerous spills and resulting contaminant plume.
- (g) Failure to warn or inform plaintiffs of the spill and resulting contaminant plume.

56. Defendant's negligence is evidenced by its violation of applicable laws and regulations, including, but not limited to, ASWMA.

57. In addition to the specified acts of negligence stated herein, an inference of negligence also exists because the defendant was in control of the instrumentalities which caused the contaminant plume and, if defendant had exercised the proper standard of care, plaintiffs would not have suffered damage.

58. Defendant's negligence is the proximate cause of the contaminant plume present on plaintiffs' property.

59. Plaintiffs have suffered damages as a result of defendant's negligence.

COUNT IV  
(VIOLATIONS OF THE ARKANSAS SOLID WASTE MANAGEMENT ACT)

60. The ASWMA prohibits the unlawful disposal of solid waste and empowers private parties harmed by the illegal disposal of solid waste to bring a private right of action for damages.

61. Ark. Code Ann. § 8-6-205(a) provides, in part:

(a) It shall be illegal for any person:

- (1) To violate any provision of this subchapter or any rule, regulation, or order of the Arkansas Pollution Control and Ecology Commission issued pursuant to this subchapter or of a permit issued under this subchapter by the Arkansas Department of Environmental Quality;
- (2) To construct, install, alter, modify, use, or operate any solid waste processing or disposal facility or disposal site without a permit from the department;
- (3) To dispose of solid wastes at any disposal site or facility other than a disposal site or facility for which a permit has been issued by the department. However, no provision of this subchapter shall be construed so as to prevent an individual from disposing of solid wastes resulting from his or her own household activities on his or her own land if the disposal does not create a public or private nuisance or a hazard to health and does not violate a city ordinance or other law and does not involve the open dumping of garbage;
- (4) To dump, deposit, throw, or in any manner leave or abandon any solid wastes, including, but not limited to, garbage, tin cans, bottles, rubbish, refuse, or trash upon property owned by another person without the written permission of the owner or occupant of the property or upon any public highway, street, road, public park or recreation area, or any other public property except as designated for disposal of waste; or
- (5) To sort, collect, transport, process, or dispose of solid waste contrary to the rules, regulations, or orders of the department or in such a manner or place as to create or be likely to create a public nuisance or a public health hazard or to cause or be likely to cause water or air pollution within the meaning of the Arkansas Water and Air Pollution Control Act, § 8-4-101 et seq.

62. While the term “disposal” is not defined in ASWMA, it is defined in the regulation promulgated pursuant to it:

‘Disposal’ means abandoning, depositing, releasing, dumping, spilling, leaking, or placing of any solid waste into or on any land or water so that such solid waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any water. Arkansas Pollution Control and Ecology Commission, Reg. No. 22, §22.102 (effective April 26, 2008).

63. The Arkansas Water and Air Pollution Control Act (“AWAPCA”) defines the term “pollution” as follows:

‘Pollution’ means such contamination or other alteration of the physical, chemical, or biological properties of any waters of the state, or such discharge of any liquid, gaseous, or solid substance in any waters of the state as will, or is likely to, render the waters harmful, detrimental, or injurious to public health, safety, or welfare; to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses; or to livestock, wild animals, birds, fish, or other aquatic life. Ark. Code Ann. § 8-4-102(6).

64. The AWAPCA defines “waters of the state” as:

‘Waters of the state’ means all streams, lakes, marshes, ponds, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion of the state. Ark. Code Ann. § 8-4-102(10).

65. Section 8-6-204(b) of the ASWMA states that DEQ “is authorized to institute a civil action in any court of competent jurisdiction to accomplish any or all of the following:”

- (1) Restrain any violation of or compel compliance with the provisions of this subchapter and of any rules, regulations, orders, permits, licenses, or plans issued pursuant to this subchapter;
- (2) Affirmatively order that remedial measures be taken as may be necessary or appropriate to implement or effectuate the purposes and intent of this subchapter;

- (3) Recover all costs, expenses, and damages to the department and any other agency or subdivision of the state in enforcing or effectuating the provisions of this subchapter, including natural resource damages;
- (4) Assess civil penalties in an amount not to exceed ten thousand dollars (\$10,000) per day for violations of this subchapter and of any rules, regulations, permits, or plans issued pursuant to this subchapter; or
- (5) Recover civil penalties assessed pursuant to subsection (c) of this section. Ark. Code Ann. § 8-6-204(b).

66. Section 8-6-206 of ASWMA authorizes the following private right of action:

Any person adversely affected by a violation of this subchapter or of any rules, regulations, or orders issued pursuant thereto shall have a private right of action for relief against the violation.

67. Plaintiffs are persons “adversely affected” for purposes of the private right of action under Ark. Code Ann. § 8-6-206.

68. Defendant is a “person” for purposes of ASWMA liability under Ark. Code Ann. § 8-6-203(7).

69. The petroleum constituents present in soils at or near plaintiffs’ property are a “solid waste” under ASWMA. Ark. Code Ann. § 8-6-203(9).

70. Defendant violated the original and all subsequent versions of ASWMA by “disposal” of a “solid waste” in such a manner as to cause “pollution” that has “adversely affected” the plaintiffs.

71. Defendant’s violations are continuing.

72. As a proximate cause of defendant’s violations of ASWMA, plaintiffs have suffered damages, entitling them to relief under ASWMA.

### **RELIEF REQUESTED**

73. Plaintiffs are entitled to damages including, without limitation, interruption of their businesses, lost profits, lost opportunity costs, the reasonable expense of necessary repair and

restoration of the affected property, diminution in the value of their property, the loss of use and enjoyment and deprivation of the true worth and value of their property, physical symptoms associated with exposure to petroleum vapors, discomfort, annoyance, disruption, inconvenience, fear and fright.

74. Plaintiffs are also entitled to damages for costs and expenses incurred as a result of defendant's conduct.

WHEREFORE, plaintiffs request a trial by jury, and pray that the Court grant the relief requested in this Complaint in an amount sufficient to compensate plaintiffs for all damages and injuries suffered as a result of the occurrences described herein in an amount in excess of that required for diversity of citizenship cases, attorneys' fees and costs herein expended, for pre- and post-judgment interest, and for all other relief to which plaintiffs may be entitled.

Respectfully submitted,

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