CAB:8339

STATE OF INDIANA
SS:
COUNTY OF HOWARD

IN THE HOWARD SUPERIOR COURT
IN VACATION, 1959

FILE
AUG 10
DON R. SELLERS

DONALD O. RUFF, CLARENCE J. VOTAVA, ARTHUR M. WOOD,

Plaintiffs,

VS.

CAUSE NO. 3022

EDWARD E. GRAVES
MELBA C. GRAVES,

Defendants

MOTION FOR NEW TRIAL

The defendants, Edward E. Graves and Melba C. Graves, and each of them, do hereby respectfully move the court for a new trial of this cause so far as it pertains to the proceedings had by reason of the affidavit filed denominated "Affidavit Showing Violation of Injunction", which proceedings resulted in a ruling and decision of this court on July 21sc, 1959, for the following reasons, and each of them, to-wit:

1. That the decision of the court is not sustained by sufficient evidence.

2. That the decision of the court is contrary to law.

3. For error of law occurring at the trial of this cause in that at a time when Donald Ruff, a witness produced by the plaintiffs, was testifying, certain evidence was admitted over the motion to strike of the defendants, the question propounded, the answer given, the motion of defendants to strike, and the court's ruling thereon being as follows:

Question: Will you tell the Court what dates, specifically you did observe this dump after the date I have asked about here?

Answer: The dates which I made a specific effort to make a note of on the violations or at least what I considered violations of

the order was April 4th and 7th and the last of the week up to April 11th. April 24th and 29th and 30th. May 2nd, May 3rd, May 5th, May 17th, 18th, 27th and 28th and 30th. June 3, June 8, June 9 are the specific dates that I have observed these occurrances in the dump.

Mr. Noel: We move to strike the answer entirely for the reason it evades the province of the Court. His answer says these are the times he observed what he considered to be violations of this order. We aren't concerned with what he considers a violation of this order. He was asked what dates he observed the so-called dump.

Judge: Overruled.

4. For error of law occurring at the trial of this cause in that at a time when Donald Ruff, a witness produced by the plaintiffs, was testifying, certain evidence was admitted over the motion to strike of the defendants, the question propounded, the answer given, the motion of defendants to strike, and the court's ruling thereon being as follows:

Question: Mr. Ruff, on the 4th day of April, 1959, will you tell the Court what you observed specifically in relation to this dump?

Answer: It was evening about 6 o'clock that I noticed smoke blowing towards our area. So, about 8 o'clock, I got in my car and drove to the dump area. There were fires burning immediately adjacent to Dixon Road near the north drive entrance to the dump. Mr. Graves had a barricade with a sign saying "no dumping" or "do not dump on this ground" or something to that effect. However, burning was taking place at this particular area. Further back, where the city dumps there were big fires burning throwing dense clouds of smoke which were being carried North by the wind, saturating the area of my house.

Mr. Noel: I move to strike the conclusions of the witness as to the "dense clouds, big fires, black smoke".

Judge: Overruled.

5. For error of law occurring at the trial of this cause in that at a time when Donald Ruff, a witness produced by the plaintiffs, was testifying, certain evidence was admitted

over the motion to strike of the defendants, the question propounded, the answer given, the motion of defendants to strike, and the court's ruling thereon being as follows:

Question: How recently has this occurred?

Answer: On June 9, a big fire was set in the evening which would light up the sky all the way to the south. Smoke was rising directly up over the dump. Wind was blowing it to the north. Paper ashes were falling, out of the sky into the yard. I observed ashes one inch or maybe two inches big. The same day, my wife tried to dry clothes on the line. By the time we took the clothes off the line, they were smelling of smoke and odors.

Mr. Noel: I move to strike the conclusions of the witness as to what the clothes smelled like.

Judge: I think it is voluntary information but germaine to the issues. Motion overruled.

6. For irregularities occurring in the proceedings during the trial of this cause in that the presiding Judge entered the following minutes on July 21st, 1959:

> "Defendant failing to file brief and failing to appear for oral argument, the court being duly advised in the premises, the court now finds that the defendant has violated the decree of enjoinder heretofore entered on March 18, 1959, by the burning of refuse in an area closer than 700 feet east of Dixon Road and 700 feet south of Markland Avenue, that the defendant is fined the sum of $250.00, costs of this action, and the defendant shall stand committed in the Howard County jail until the fine and costs are paid."

in that the court did not require any brief to be filed, nor did the court require oral argument, and that said minutes could only be inserted in the record for the purpose of prejudice to defendants by inference that defendants had failed to comply with some request of the court, the specific facts relative thereto being supported by affidavit attached hereto, incorporated herein and made a part hereof, and designated as "Exhibit A".

7. For irregularities in the proceedings in the trial of this cause in that the court made a finding that "defendant" has

violated the decree of enjoinder, and that the "defendant" is fined, and that the "defendant" stand committed in the Howard County jail until the fine and costs were paid, whereas, the record is clear and unambiguous that there are two defendants, and that there is a total failure to indicate which of said defendants the court found had violated the previous order of March 18th, 1959.

8. For irregularities in the proceedings during the trial of this cause in that the court's order of July 21st, 1959, undertakes to assess a fine against a defendant in a civil contempt proceeding.

9. For irregularities occurring in the proceedings during the trial of this cause in that the court entered an order on July 21st, 1959, that a defendant would be committed to jail until "costs are paid".

WHEREFORE, the defendants, and each of them, pray the court that a new trial of this cause be granted, so far as it pertains to the proceedings had on June 19th, 1959, and thereafter to and including July 21st, 1959, when this court entered the minutes of its decision.

JUMP, NOEL, LACEY AND ANGEL

BY Joseph A. Noel
Joseph A. Noel

ATTORNEYS FOR DEFENDANTS

STATE OF INDIANA
SS:
COUNTY OF HOWARD

AFFIDAVIT

Joseph A. Noel, being first duly sworn according to law, deposes and says:

1. That he is one of the attorneys of record for the defendants in Cause No. 3022 in the Howard Superior Court entitled Ruff, et al v. Graves, et al.

2. That upon the conclusion of the evidence in the proceeding held in said court on June 19th, 1959, the presiding Judge of the court did not, at any time, request that briefs be filed by either of the parties, plaintiff of defendant, but that on said date, this affiant stated "I would like to have an opportunity to present a little brief on the matter, however.", at which time the court inquired of Paul I. Hillis, counsel for plaintiffs, whether or not he desired to file a brief. The said Paul I. Hillis answered that he did not care to file a brief and the court then advised this affiant that "if he desired to file a brief" the same would be due on June 29th, 1959, and that time to file an answer brief would be given to the second day of July, 1959, for plaintiffs to file an answer brief.

3. Affiant further avers that thereafter, on or before June 29th, 1959, this affiant advised Paul I. Hillis, counsel for plaintiffs, that he would not file a brief, and that on July 6th, 1959, at or near 7:00 A.M., this affiant advised Paul I. Hillis that he would not be able to be in court for argument of the cause at 11:00 A.M., by reason of the necessity that he be in Indianapolis, and requested the said Paul I. Hillis to advise the court of such fact.

4. That on said date, before the hour of 11:00 A.M., the

"EXHIBIT A"

said Paul I. Hillis did advise the court of the inability of this affiant to be in court, and requested that the time for argument be changed to another date, but was refused by the court, the said Paul I. Hillis being advised by the Judge of the court that he would not hear argument but was ready to rule on the issue presented, which facts were related to this affiant by Paul I. Hillis on July 6th, 1959, and again on August 5th, 1959.

5. That thereafter, on July 21st, 1959, the court entered the decision set forth in the motion for a new trial filed concurrently herewith.

6. That this affidavit is made for the purpose of incorporating into the record the facts in contradiction to the implication and inference contained in the minutes which the court dictated to the reporter and caused to be incorporated as a part of the record in this cause.

Dated this 6th day of August, 1959.

Joseph A. Noel

Joseph A. Noel

Subscribed and sworn to before me this 6th day of August, 1959.

Catherine Mills

Catherine Mills, Notary Public
Howard County, Indiana

My Commission Expires:
January 17, 1960