[Cite as *State of Ohio ex rel. Ohio Atty. Gen. v. Tabacalera Nacional S.S.A.*, 2013-Ohio-2070.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Ohio Attorney General,	:	
Plaintiff-Appellant/ Cross-Appellee,	:	
	:	No. 12AP-606
v.		(Ct. of Cl. No. 2008-09848)
	:	
Tabacalera Nacional, S.A.A.,		(REGULAR CALENDAR)
	:	
Defendant-Appellee/ Cross-Appellant.	:	

D E C I S I O N

Rendered on May 21, 2013

Michael DeWine, Attorney General, *Christopher P. Conomy* and *Angela M. Sullivan*, for appellant/cross-appellee.

Gioorgianni Law LLC and *Paul Giorgianni*, for appellee/ cross-appellant.

APPEAL from the Court of Claims of Ohio

KLATT, P.J.

{¶ 1} Plaintiff-appellant/cross-appellee, the Ohio Attorney General, appeals from a judgment of the Court of Claims of Ohio in favor of defendant-appellee/cross-appellant, Tabacalera Nacional, S.A.A. ("Tanasa"). On cross-appeal, Tanasa appeals discovery rulings in favor of the Attorney General. For the following reasons, we affirm the trial court's judgment in all respects.

{¶ 2} Tanasa was a cigarette manufacturer based in Peru. Ohio, along with other states, entered into a settlement agreement with the majority of cigarette manufacturers known as the Master Settlement Agreement. Some cigarette manufacturers, like Tanasa,

did not participate in the Master Settlement Agreement. Such manufacturers are known as non-participating manufacturers.

{¶ 3} In Ohio, non-participating manufacturers must place money into a qualified escrow fund on an annual basis pursuant to R.C. 1346.02(B)(1). The amount due is determined by multiplying the amount of individual cigarettes sold in Ohio in a given year, either directly or through an intermediary, by a rate set by statute and adjusted for inflation. Each non-participating manufacturer must deposit the amount due by April 15 of the year following the year during which the cigarettes were sold.

{¶ 4} If a non-participating manufacturer fails to escrow the funds as required under R.C. 1346.02(B)(1), the Attorney General may bring a civil action on behalf of the state to force compliance. R.C. 1346.02(B)(3). On June 20, 2003, the Attorney General asserted such an action against Tanasa. In the complaint, the Attorney General contended that Tanasa had not made an adequate escrow deposit for the Tanasa-manufactured cigarettes sold in Ohio during 2002.

{¶ 5} The parties settled the 2003 action through a "Settlement Agreement and Mutual Release" entered into on March 1, 2004. In that agreement, the parties agreed that:

> 3.2 The sum of One Hundred Thousand and 00/100 Dollars ($100,000.00) (the "Settlement Payment") shall be paid by or on behalf of Tanasa to the State on or before March 15, 2004. The agreed order of dismissal with prejudice attached hereto as Exhibit "1" shall be entered within seven days of Tanasa remitting the Settlement Payment to the State.
>
> 3.3 The State, does hereby remise, release and forever discharge Tanasa, its officers, directors, affiliates, shareholders, employees, attorneys, agents, successors and assigns, of and from all claims and defenses which were or could have been raised by the State in the Litigation.
>
> * * *
>
> 3.5 Tanasa shall not sell Cigarettes (as that term is defined in the Model Escrow Statute) in the State directly or through an intermediary from the Effective Date through March 1, 2009 * * *.

> 3.6 After making its proper 2003 escrow deposit for the State no later than April 15, 2004, Tanasa shall not be required to make any further escrow deposits for the State until such time, if ever, that it sells Cigarettes in the State directly or through an intermediary.

{¶ 6} Both parties complied with the obligations set forth under paragraph 3.3. Tanasa paid $100,000, and the Attorney General dismissed the 2003 action with prejudice.

{¶ 7} Pursuant to both R.C. 1346.02(B)(1) and paragraph 3.6 of the settlement agreement, Tanasa had to make its 2003 escrow deposit by April 15, 2004. Tanasa, however, encountered difficulty determining the amount due. For the most part, Tanasa manufactured cigarettes for sale by third parties, who owned various cigarette brands. Those third parties sold Tanasa-manufactured cigarettes in Ohio, but they did not provide Tanasa with any sales information. Consequently, Tanasa looked to the Attorney General for information regarding the amount of Tanasa-manufactured cigarettes sold in Ohio. Without that information, Tanasa could not calculate the amount it had to escrow.

{¶ 8} The Attorney General determines the number of cigarettes sold in Ohio by a particular manufacturer by extrapolating from the amount of excise taxes collected on the cigarette packs bearing the excise tax stamp of the state. R.C. 1346.01(J). In a letter dated March 2, 2004, the Tobacco Unit of the Attorney General shared with Tanasa its determination of the amount of Tanasa-manufactured cigarettes sold in Ohio in 2003. The letter stated:

> Pursuant to your letter dated February 27, 2004, this office is providing you with information regarding 2003 sales of Tanasa-manufactured cigarette brands in Ohio reported by stamping distributors. We are furnishing this information to you solely to facilitate compliance with and enforcement of Ohio law, and any determinations contained in this letter are based upon information currently available to this office, and we reserve the right to supplement and/or amend any determinations as more information related to Tanasa-manufactured cigarettes may become available.
>
> Please feel free to contact this office closer to the April 15 deadline for escrow deposits, if you wish to confirm the sales numbers available at that time.

> **As of this date**, distributor reports show a total of 23,380,200 sticks of Tanasa-manufactured cigarettes sold in Ohio in 2003.

(Emphasis sic.)

{¶ 9} By April 15, 2004, Tanasa deposited $440,960.29 into a qualified escrow account. The Attorney General, however, found the deposit deficient. In a letter dated May 10, 2004, the Attorney General stated:

> As of this date, our state records indicate that 23,380,200 units of [Tanasa-manufactured cigarettes] were sold in Ohio in 2003. * * * Thus, TANASA's total escrow obligation is $455,797.00, leaving a deficiency of $14,836.71.

After receiving the April 15, 2004 letter, Tanasa deposited an additional $14,836.71 into the escrow account.

{¶ 10} On September 3, 2004, the Attorney General notified Tanasa that his office had discovered that an additional 211 cartons of Tanasa-manufactured cigarettes were sold in Ohio in 2003. The Attorney General requested that Tanasa deposit an additional $822.69 into the escrow account to account for those cigarettes. Tanasa complied.

{¶ 11} Almost two years elapsed without any communication between the Attorney General and Tanasa about Tanasa's 2002 and 2003 escrow obligations. Then, on August 9, 2006, the Attorney General sent Tanasa a letter informing Tanasa that his office had recently learned that more Tanasa-manufactured cigarettes were sold in Ohio in 2002 and 2003 than previously had been determined. The Attorney General requested that Tanasa deposit an additional $37,978.74 into the escrow account for the additional 2,469,600 cigarettes sold in 2002, and an additional $45,479.88 for the additional 2,332,900 cigarettes sold in 2003. Tanasa balked. It contended that it had fulfilled its duties under the settlement agreement, and it refused to escrow any more money for 2002 and 2003.

{¶ 12} On December 2, 2007, the Attorney General filed a second R.C. 1346.02(B)(3) action against Tanasa. In the complaint, the Attorney General alleged that Tanasa's escrow account was underfunded by $37,978.74 for 2002 and $45,479.88 for 2003. Tanasa answered the complaint and filed a counterclaim for breach of the

settlement agreement. The Attorney General later amended the state's complaint to include a claim for breach of the settlement agreement.

{¶ 13} Both parties moved for summary judgment. The trial court granted Tanasa's motion and denied the Attorney General's motion. The trial court then set the date for a damages hearing on Tanasa's counterclaim before a magistrate. After the hearing, the magistrate recommended that the trial court award Tanasa judgment in the amount of $38,053.30. Both parties objected. The trial court overruled all objections and adopted the magistrate's decision in a judgment dated June 15, 2012.

{¶ 14} Both parties now appeal to this court from the June 15, 2012 judgment. The Attorney General assigns the following errors:

> [1.] The Court of Claims erred in denying Plaintiff/Counter-Defendant's Motion for Partial Summary Judgment.
>
> [2.] The Court of Claims erred in granting Defendant/Counter-Plaintiff's Motion for Summary Judgment.
>
> [3.] The Court of Claims erred and abused its discretion in awarding attorney fees as damages to Defendant/Counter-Plaintiff.
>
> [4.] The Court of Claims erred and abused its discretion in not applying appropriate sanctions for Defendant/Counter-Plaintiff's failure to abide by discovery orders.

{¶ 15} On cross-appeal, Tanasa assigns the following errors:

> 1. The trial court erred by excluding attorney Weis's testimony and invoices and by failing to award additional damages based thereon.
>
> 2. The trial court erred by excluding Mr. Mazza's testimony regarding the reasonableness of attorney Weis's invoices.

{¶ 16} We will begin our analysis by addressing the Attorney General's first two assignments of error, by which the Attorney General challenges the trial court's summary judgment rulings. Summary judgment is appropriate when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and

that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 17} Initially, the Attorney General argues that the trial court erred in concluding that Tanasa did not breach the settlement agreement. According to the Attorney General, Tanasa breached the agreement when it failed to "mak[e] its proper 2003 escrow deposit for the State no later than April 15, 2004." The Attorney General asserts that the quoted provision imposed on Tanasa an obligation to deposit an additional $45,479.88 to account for the cigarettes sold in 2003 that the Attorney General first learned about in 2006. Tanasa disputes the Attorney General's interpretation of the contractual language, and it contends that it fulfilled all of its obligations under the provision when it escrowed $455,797.00 for its 2003 sales.

{¶ 18} When confronted with a question of contractual interpretation, a court's principal objective is to give effect to the intent of the parties to the agreement. *Hamilton Ins. Servs., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273 (1999). A court must presume that the intent of the parties resides in the language they chose to employ in the agreement. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus. When that language is clear, a court may look no further than the writing itself to find the intent of the parties. *Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, ¶ 37. However, when that language is ambiguous, a court may consider extrinsic evidence to ascertain the parties' intent. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 12.

{¶ 19} Whether contractual language is clear or ambiguous is a question of law for the court. *Nationwide Life Ins. Co. v. Canton*, 10th Dist. No. 09AP-939, 2010-Ohio-4088, ¶ 20. In answering that question, a court restricts its review to the four corners of the contract. *Id.* Contractual language is ambiguous if a court cannot determine its meaning from the four corners of the contract, or if the language is susceptible of two or

more reasonable interpretations. *Covington v. Lucia*, 151 Ohio App.3d 409, 2003-Ohio-346, ¶ 18 (10th Dist.). A court, however, must beware of and avoid reading ambiguity into contractual provisions. *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, ¶ 11. Only when a definitive meaning proves elusive after an objective and thorough examination may a court determine that the language is, in fact, ambiguous. *Id.*

{¶ 20} Here, an objective and thorough reading of the settlement agreement does not provide any explanation of what the parties meant when they required Tanasa to "mak[e] its proper 2003 escrow deposit for the State no later than April 15, 2004." That provision, therefore, is ambiguous. In so finding, we reject the Attorney General's argument that the relevant language has a clear legal meaning; it explicitly directs the reader to a source outside the contract—R.C. 1346.02(B)(1)—to supply a contractual term. The Attorney General likens the instant language to a term in a variable-rate loan that refers to a rate set by an outside source, such as the London Interbank Offered Rate, to calculate the rate for the loan. The provision at issue, however, does not mention R.C. 1346.02(B)(1); it merely includes the subjective phrase "proper 2003 escrow deposit." Thus, this is not a case of a contract naming a specific outside source to give meaning to a particular term.

{¶ 21} Once a court finds ambiguity in a contract, a finder of fact generally undertakes the role of resolving that ambiguity. *Galatis* at ¶ 13. We, therefore, shift our analysis to whether a reasonable finder of fact could resolve the ambiguity here in the Attorney General's favor. To do this, we must examine the extrinsic evidence offered by the parties.

{¶ 22} As it happens, once we look to extrinsic evidence to determine the parties' intent, we encounter the parties' agreement that R.C. 1346.02(B)(1) sets forth the calculation for computing the "proper 2003 escrow deposit." This agreement, however, does not fully resolve the ambiguity in the contract provision at issue. The parties disagree about what number they meant to plug into the R.C. 1346.02(B)(1) calculation for the number of cigarettes sold.[1] Tanasa contends that the parties intended that number to be the number of cigarettes known to be sold by April 15, 2004. The Attorney General

[1] As we explained above, the amount that must be escrowed is determined by multiplying the amount of individual cigarettes sold in Ohio in a given year, either directly or through an intermediary, by a rate set by statute and adjusted for inflation. R.C. 1346.02(B)(1).

asserts that the number includes both the number cigarettes known to be sold by April 15, 2004 *and* the number of cigarettes the state, through subsequent audits, determined were sold.

{¶ 23} To support its interpretation of the relevant contractual language, the Attorney General points to Tanasa's actions after the execution of the settlement agreement. The Attorney General asserts that Tanasa's actions demonstrate that Tanasa also interprets the agreement as the Attorney General does.

{¶ 24} To clarify ambiguity in contractual language, a finder of fact may consider the parties' course of performance. *St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, ¶ 39; *Ohio Fresh Eggs, LLC v. Wise*, 10th Dist. No. 07AP-780, 2008-Ohio-2423, ¶ 41; *Cincinnati Ins. Co. v. ACE INA Holdings, Inc.*, 175 Ohio App.3d 266, 2007-Ohio-5576, ¶ 33 (1st Dist.). "Where * * * words used in [a] contract are reasonably susceptible of more than one interpretation and the parties to such contract have by their acts and conduct in the performance of the contract over a reasonable period of time mutually adopted one of those interpretations, the interpretation so adopted will be given to those words." *State ex rel. Burgess & Niple v. Linzell*, 153 Ohio St. 545 (1950), syllabus; *accord* Restatement of Law 2d, Contracts, Section 202(4) ("Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.").

{¶ 25} The Attorney General relies on two incidents to establish that Tanasa also interpreted the contractual language to require it to make additional escrow deposits to account for cigarettes sold in 2003, but not learned about until after April 15, 2004. First, in May 2004, Tanasa escrowed an additional $14,836.71 in response to the Attorney General's contention that Tanasa's initial 2003 escrow deposit was deficient. However, the increased deposit was not a result of the Attorney General's discovery of more cigarettes sold in 2003. Both the Attorney General's and Tanasa's R.C. 1346.02(B) calculations were based on the number of cigarettes known to have been sold as of April 15, 2004, which the Attorney General identified as 23,380,200 in both the March 2, 2004 and May 10, 2004 letters. The deficiency in Tanasa's escrow deposit arose from its

use of an incorrect inflation-adjusted rate to determine the amount due. The May 2004 supplemental deposit, therefore, sheds no light on whether the parties intended that Tanasa escrow additional amounts whenever the Attorney General learned of additional cigarettes sold.

{¶ 26} In the second incident, Tanasa escrowed an additional $822.69 in September 2004. Unlike the May 2004 deposit, this deposit was made in response to the Attorney General's representation that his office had learned of additional Tanasa-manufactured cigarettes sold in Ohio in 2003. Nevertheless, the September 2004 payment does not elucidate the parties' intent. Tanasa made the September 2004 payment as a nuisance payment, not because it believed the payment was owed under the settlement agreement. Tanasa merely wished to avoid the cost of battling the Attorney General over a relatively small amount. Moreover, an action on a single occasion does not establish a course of performance. *Burgess & Niple* at syllabus (requiring performance "over a reasonable period of time"); *accord* Restatement, Section 202(4), Comment g; *Quick v. Natl. Labor Relations Bd.*, 245 F.3d 231, 247 (3d Cir.2001); *In re Prudential Lines Inc.*, 158 F.3d 65, 78 (2d Cir.1998); *Estate of Polushkin v. Maw*, 170 P.3d 162, 171-72 (Alaska 2007). Therefore, no reasonable finder of fact could conclude that the September 2004 deposit demonstrated the parties' interpretation of the disputed provision.

{¶ 27} Beside evidence of course of performance, a finder of fact may also resolve contractual ambiguity through consideration of the circumstances surrounding the parties at the time the contract was made and the objectives the parties intended to accomplish by entering into the contract. *Covington*, 151 Ohio App.3d at 18. Thus, we turn to that evidence to determine the parties' intent.

{¶ 28} Here, the disputed provision, in its entirety, states that, "[a]fter making its proper 2003 escrow deposit for the State no later than April 15, 2004, Tanasa shall not be required to make any further escrow deposits for the State until such time, if ever, it sells Cigarettes in the State directly or through an intermediary." At the time they executed the settlement agreement, both parties understood that Tanasa was relying on the Attorney General to supply it with information regarding the number of cigarettes sold in 2003. Thus, when the parties agreed that Tanasa would "mak[e] its proper 2003 escrow deposit

for the State no later than April 15, 2004," both parties knew that Tanasa would use the number provided by the Attorney General to determine what amount it had to escrow by April 15, 2004. In other words, both parties understood that the deposit Tanasa would make by the contractual deadline would be based on the amount of cigarettes known to be sold by the deadline.

{¶ 29} The Attorney General contends that Tanasa's obligation to "mak[e] its proper 2003 escrow deposit for the State no later than April 15, 2004," also required Tanasa to deposit more as the Attorney General learned about the sale of additional cigarettes. This reading, however, would mean that any time the Attorney General discovered the sale of additional cigarettes, Tanasa would be in breach of the settlement agreement for not having made the "proper 2003 escrow deposit" back on April 15, 2004. This reading would also contradict the remainder of the provision at issue, which relieved Tanasa from making any further escrow deposits after the April 15, 2004 deposit (until Tanasa sold cigarettes in Ohio again). Implicit in the provision is the understanding that Tanasa could make a "proper 2003 escrow deposit" on April 15, 2004 that would excuse Tanasa from escrowing additional money for 2003 sales. Given the circumstances, the amount of that definitive deposit could only be calculated using the number of cigarettes known to have been sold as of April 15, 2004.

{¶ 30} Moreover, the Attorney General's interpretation runs contrary to the parties' objective when entering into the settlement agreement. Both parties wished to end their dispute over the amounts Tanasa had to deposit into the escrow account. Under the Attorney General's construction of the disputed provision, Tanasa would never see the end of that dispute. The Attorney General's construction would allow the Attorney General to seek additional deposits from Tanasa over and over again ad infinitum.

{¶ 31} Where a contract is susceptible to two constructions, the construction that makes the agreement fair and reasonable and gives the agreement meaning and purpose trumps the other construction. *Van Ligten v. Emergency Servs., Inc.*, 10th Dist. No. 11AP-901, 2012-Ohio-2994, ¶ 14. Here, Tanasa's construction correlates with the settlement agreement's language and purpose, while the Attorney General's construction conflicts with both. Based on the circumstances surrounding the execution of the settlement agreement and the parties' objective in entering into the agreement, we

conclude that no reasonable finder of fact could interpret the settlement agreement as the Attorney General does. Therefore, we conclude that the trial court did not err in finding that Tanasa did not breach the settlement agreement by failing to make a "proper 2003 escrow deposit."

{¶ 32} Next, the Attorney General argues that the trial court erred in finding that the state had breached the settlement agreement by suing to have the agreement enforced. The Attorney General misunderstands the reason why the state breached the settlement agreement. In paragraph 3.3, the Attorney General released Tanasa from the claims the state raised or could have raised in the 2003 litigation. Those claims included the R.C. 1346.02(B)(3) claim to force Tanasa to deposit into an escrow account the amounts due for the sale of Tanasa-manufactured cigarettes in 2002. Despite this release, the instant action includes an R.C. 1346.02(B)(3) claim against Tanasa for failing to escrow adequate funds for the 2002 sales of cigarettes. The refiling of the released claim breached the settlement agreement.

{¶ 33} In sum, we reject both of the Attorney General's arguments under the first and second assignments of error. Accordingly, we overrule the first and second assignments of error.

{¶ 34} By the Attorney General's third assignment of error, he argues that the trial court erred in awarding Tanasa its attorney fees as compensatory damages for the Attorney General's breach of the settlement agreement. We disagree.

{¶ 35} The trial court awarded Tanasa compensatory damages in the amount of its attorney fees based on *Shanker v. Columbus Warehouse Ltd. Partnership*, 10th Dist. No. 99AP-772 (June 6, 2000). In *Shanker*, the defendant filed a counterclaim for breach of a settlement agreement after the plaintiffs continued to litigate the matter resolved by the settlement agreement. When the defendant prevailed on his counterclaim, the trial court awarded him his attorney fees. The plaintiffs appealed and argued that Ohio law precluded the award of attorney fees. We recognized that Ohio adheres to the "American Rule," which generally prevents a prevailing party from recovering attorney fees as part of the costs of litigation. We found the "American Rule" inapplicable, however, because the defendant did not claim attorney fees as costs of the action. Rather, the defendant sought

attorney fees as compensatory damages flowing from the plaintiffs' breach of the settlement agreement. We held that:

> When a party breaches a settlement agreement to end litigation and the breach causes a party to incur attorney fees in continuing litigation, those fees are recoverable as compensatory damages in a breach of settlement claim. Because defendant's attorney fees are attributable to and were incurred as the result of plaintiffs' breach of the settlement agreement, defendant is entitled to recover those fees in order to make whole and compensate him for losses caused by plaintiffs' breach.

Id. Both this court and other courts have followed this holding. *Rohrer Corp. v. Dane Elec. Corp. USA*, 482 Fed.Appx. 113, 115-17 (6th Cir.2012); *Brown v. Spitzer Chevrolet Co.*, 5th Dist. No. 2012 CA 00105, 2012-Ohio-5623, ¶ 20-21; *Berry v. Lupica*, 196 Ohio App.3d 687, 2011-Ohio-5381, ¶ 19-20 (8th Dist.); *Raymond J. Schaefer, Inc. v. Pytlik*, 6th Dist. No. OT-09-026, 2010-Ohio-4714, ¶ 33-34; *Tejada-Hercules v. State Auto Ins. Co.*, 10th Dist. No. 08AP-150, 2008-Ohio-5066, ¶ 7-23.

{¶ 36} The Attorney General argues that the statutes governing the Court of Claims prohibited the trial court from applying *Shanker*. The Attorney General points to R.C. 2743.02(A)(1), which allows the Court of Claims to determine the state's liability but makes that determination "subject to the limitations set forth in [R.C. Chapter 2743]." According to the Attorney General, one of the limitations on the Court of Claims appears in R.C. 2743.19(A). That provision mandates that "[t]he court of claims shall award compensation for fees to a prevailing party in an action under this chapter in accordance with section 2335.39 of the Revised Code." We do not share the Attorney General's opinion that R.C. 2743.19(A) limits the instances in which the Court of Claims may award attorney fees. R.C. 2743.19(A) requires the award of compensation for fees if the prevailing party meets the criteria of R.C. 2335.39; it does not restrict the Court of Claims' ability to award compensation for attorney fees in other instances.

{¶ 37} Although R.C. 2743.19(A) is not restrictive, the Court of Claims Act does prohibit an award of attorney fees against the state under the exception to the "American Rule" that allows punishment for the unsuccessful party's bad faith. *See Drain v. Kosydar*, 54 Ohio St.2d 49, 56 (1978) ("[T]he General Assembly never intended that the state be held liable for other than compensatory damages."). Here, however, the amount

of attorney fees is merely the measurement of Tanasa's compensatory damages. The exception to the "American Rule" for bad faith conduct is not implicated. *Shanker*.

{¶ 38} In sum, we find no bar in the Court of Claims Act to the trial court's award of attorney fees as compensatory damages for the Attorney General's breach of the settlement agreement. Accordingly, we overrule the Attorney General's third assignment of error.

{¶ 39} We will address the Attorney General's fourth assignment of error and Tanasa's first cross-assignment of error together because they both challenge the trial court's discovery rulings. Essentially, Tanasa argues that the trial court erred in excluding some evidence, and the Attorney General argues that the trial court erred in not excluding more evidence. We disagree with both arguments.

{¶ 40} Prior to the trial court's ruling on summary judgment, the Attorney General moved to compel Tanasa to respond to its discovery requests. In response, the trial court issued an order requiring Tanasa to allow the Attorney General to review the documents in Tanasa's counsel's possession. If the Attorney General selected documents to copy, then Tanasa had to permit the copying or interpose an objection. The trial court directed Tanasa to submit any objected-to documents to the trial court for an in camera review.

{¶ 41} Counsel for the Attorney General examined some of the documents in Tanasa's counsel's possession, and summarily declared that they wanted copies of all of the documents. Tanasa then objected to turning over the documents because it feared that the Attorney General would disseminate the documents to other states' attorneys general for use against Tanasa. At that point in the discovery dispute, the trial court decided the motions for summary judgment, which mooted the necessity for the documents at issue.

{¶ 42} After the trial court's ruling on summary judgment, the Attorney General submitted additional discovery requests to Tanasa. Again, Tanasa resisted discovery, but it did provide some redacted documents. The Attorney General moved to compel full compliance with its document requests. In an entry issued September 26, 2011, the trial court ordered Tanasa to provide complete and un-redacted responses to the Attorney General's discovery requests with 10 days of the date of the entry. Tanasa transmitted additional documents by the October 6, 2011 deadline. It transmitted more documents, including the bills from Tanasa's Chicago attorneys, after that deadline. However, Tanasa

never turned over documents evidencing payment of its attorney fees as the Attorney General requested. Not satisfied with Tanasa's discovery responses, the Attorney General filed a motion in limine requesting the trial court preclude all evidence of damages and/or dismiss Tanasa's counterclaim.

{¶ 43} At the damages hearing, the magistrate excluded the bills from Tanasa's Chicago attorneys, but allowed the presentation of evidence regarding the bills and expenses of Tanasa's Columbus attorneys. Based on the evidence presented, the magistrate recommended judgment in Tanasa's favor in the amount of $38,053.30. Both Tanasa and the Attorney General objected to the magistrate's discovery rulings, but the trial court overruled those objections and adopted the magistrate's decision.

{¶ 44} If a party fails to obey an order to provide or permit discovery, a trial court may "make such orders in regard to the failure as are just." Civ.R. 37(B)(2). Thus, trial courts have great latitude in choosing the particular sanction to impose for a discovery violation. *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 256 (1996). Given this latitude, appellate courts merely review discovery rulings for an abuse of discretion. *Id.* at syllabus. An appellate court cannot substitute its judgment regarding the appropriateness of the sanction for the trial court's judgment. *Betz v. Penske Truck Leasing Co., L.P.*, 10th Dist. No. 11AP-982, 2012-Ohio-3472, ¶ 43. Consequently, in applying the abuse-of-discretion standard, appellate courts only consider whether the trial court arbitrarily selected too harsh or too lenient a sanction. *Id.*

{¶ 45} In determining a suitable sanction, a trial court should consider the history of the case; all the facts and circumstances surrounding the noncompliance; what efforts, if any, the faulting party made to comply; the ability or inability of the faulting party to comply; and any other relevant factors. *Billman v. Hirth*, 115 Ohio App.3d 615, 619 (10th Dist.1996). Taking into account the background of the noncompliance, the trial court must balance the severity of the violation against the degree of possible sanctions and select the sanction that is most appropriate. *Huntington Natl. Bank v. Zeune*, 10th Dist. No. 08AP-1020, 2009-Ohio-3482, ¶ 27. Depending on the circumstances, the same types of violation may call for different degrees of sanction. *Betz* at ¶ 42.

{¶ 46} Here, we conclude that the trial court did not abuse its discretion in overruling Tanasa's and the Attorney General's objections to the magistrate's discovery

rulings. Additionally, the trial court did not abuse its discretion in its handling of the Attorney General's earlier request for discovery sanctions. In excluding some evidence of damages, while allowing other evidence of damages, the trial court did not arbitrarily select a too harsh or too lenient sanction. Accordingly, we overrule the Attorney General's fourth assignment of error and Tanasa's first cross-assignment of error.

{¶ 47} By Tanasa's second cross-assignment of error, it argues that the trial court erred in excluding expert testimony regarding the reasonableness of its Chicago attorney's fees. As we have concluded that the trial court did not err in excluding evidence of the fees themselves, this assignment of error is moot.

{¶ 48} For the foregoing reasons, we overrule all of the Attorney General's assignments of error. We overrule Tanasa's first cross-assignment of error, and render moot Tanasa's second cross-assignment of error. We affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed

TYACK and BROWN, JJ., concur.