[Cite as *Ohio Environmental Protection Agency v. Lowry*, 2013-Ohio-2779.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ohio Environmental Protection Agency,	:	
Plaintiff-Appellee,	:	No. 12AP-982
v.	:	(C.P.C. No. 09-CVH05-8063)
William P. Lowry,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 28, 2013

Adam J. Bennett and *Andrew P. Cooke*, Special Counsel for the Attorney General, for appellee.

Jack L. Moser, Jr., for appellant.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶1} Defendant-appellant, William P. Lowry ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas in favor of plaintiff-appellee, Ohio Environmental Protection Agency ("OEPA"). For the following reasons, we affirm.

I. Facts and Procedural History

{¶2} This case is before the court for the second time. We incorporate the statement of facts and prior procedural history as detailed in our first decision in this case, *Ohio Environmental Protection Agency v. Lowry*, 10th Dist. No. 10AP-1184, 2011-Ohio-6820, ¶ 2-7 ("*Lowry I*"), as follows:

> On the night of February 13, 2008, the Jefferson Township Fire Department received a call reporting an odor of fuel oil and a visible "sheen" on a local waterway, Swisher Creek. The department responded to the call and followed the leak back from the creek to a machine shop on defendant's property

where two 250-gallon fuel oil tanks were being stored behind the building. Jefferson Township Fire Chief Dale S. Ingram was able to ascertain the source of the leak through stains in the snow and observed that the suspect tank was rusted through and completely drained. Ingram contacted defendant and learned the empty tank was filled a few days before with 250 gallons of fuel oil.

Because the spill was over 50 gallons, standard operating procedures for the fire department dictated they contact the OEPA. The OEPA sent a response team to defendant's property the next morning. Christopher Bonner, On-Scene Coordinator for the OEPA, was responsible for "assessing the damage from the spill, dealing with the responsible party, and overseeing remedial work." (Magistrate's Decision, 2.) According to the magistrate's determination, "Mr. Bonner asked Mr. Lowry to call his insurer to get a contractor to commence the cleanup and told him that if he did not obtain a contractor to do the cleanup, [the OEPA] would do so and bill Mr. Lowry." (Magistrate's Decision, 3.)

Bonner waited for Lowry to respond; when he did not, "[the OEPA] called in a contractor," Environmental Enterprises, Inc. ("EEI"). (Magistrate's Decision, 3.) The OEPA submitted to defendant a statement of billing to recover the costs allegedly incurred; included in the bill was a charge to compensate the OEPA for the amount it paid to EEI.

A magistrate conducted a bench trial on October 12, 2010. According to the magistrate's decision, defendant during the trial did not dispute that the oil spill came from the rusted-through fuel oil tank; nor did he challenge that the tank had been refilled only a few days before the spill. Instead, he contended the OEPA and EEI incompetently performed the cleanup work, so the costs charged to him were unreasonable.

On October 27, 2010, the magistrate issued a decision, finding "the credible evidence and the weight of the evidence establish that the cleanup of the spill was reasonable and necessary" and holding defendant liable for $15,855.92, plus prejudgment interest, pursuant to R.C. 3745.12. (Magistrate's Decision, 6, 10.) In addition to finding Bonner's testimony credible and adequate to establish the costs associated with the cleanup, the magistrate concluded the testimony of Ingram and Bonner constituted evidence sufficient to prove "there was a spill 'that require[d] emergency action to protect

> the public health or safety or the environment' as set forth in R.C. 3745.12(A)(1)." (Magistrate's Decision, 8.) To support his conclusion, the magistrate cited both the OEPA witnesses' testimony claiming they "personally observed spilled fuel oil in Swisher Creek," as well as Bonner's testimony "that it was urgent to respond to the spill" because "otherwise the fuel oil spill would proceed downstream and cost even more to cleanup." (Magistrate's Decision, 8.)
>
> Defendant timely filed objections to the magistrate's decision in conformity with Civ.R. 53. Among his objections were challenges to several of the decision's findings of fact regarding various aspects of Bonner's testimony. In particular, defendant asserted Bonner's testimony did not speak to the findings purportedly based on that testimony. On December 3, 2010, the trial court issued a judgment overruling defendant's objections and adopting the magistrate's decision. The court acknowledged several of defendant's objections concerned the magistrate's factual findings, but the court ruled that because defendant did not file a transcript or an affidavit of the relevant evidence presented at the hearing, the court was required to accept the magistrate's findings of fact and review only the conclusions of law.

{¶3} In *Lowry I*, we held that the trial court erred procedurally in overruling appellant's objections prior to the filing of the transcript of the hearing before the magistrate where the 30-day period provided by Civ.R. 53 in which to file the transcript had not yet expired. We remanded the case with instructions to the trial court that it reconsider appellant's objections to the magistrate's decision and to provide appellant an opportunity to supplement his objections based upon the transcript, which was filed with the court 28 days after appellant had filed its objections. *Id.* at 20.

{¶4} On remand, the trial court overruled appellant's objections to the magistrate's decision. It characterized those objections as relating to two issues: "1) whether emergency action was required to abate the spill; and 2) whether the Ohio EPA provided sufficient proof of the costs incurred to clean up the fuel oil." (Oct. 23, 2012 Decision, 12). The trial court independently answered both of those inquiries in the affirmative and expressly agreed with the magistrate's findings. It entered judgment in favor of OEPA in the amount of $15,855.92, plus prejudgment interest.

{¶5} Appellant timely appealed and posits the following three assignments of error:

> [1.] The trial court misconstrued its application and interpretation of O.R.C. § 3745.12, in adopting the magistrate's conclusion that "although federal law requires as a condition of recovery proof that the material released was a hazardous substance, R.C. 3745.12 imposes no requirement."
>
> [2.] The trial court misconstrued its application of Ohio Rule of Evidence 803(6) when it adopted the magistrate's finding that the testimony of state actor Charles Bonner was "sufficient to establish the costs" of the cleanup.
>
> [3.] The trial court misconstrued its application of Ohio Rule of Evidence 803(8) when it adopted the magistrate's finding that the testimony of state actor Charles Bonner was "sufficient to establish the costs" of the cleanup.

II. Legal Analysis

{¶6} In support of his first assignment of error, appellant argues that R.C. 3745.12, which authorizes the OEPA to recover cleanup costs for environmental spills, is not applicable in the absence of a finding that the spill involves a "hazardous material." He contends that the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. 9601, et seq., exempts petroleum spills from chargeable cleanup costs and argues that Ohio's statute should be similarly construed.

{¶7} R.C. 3745.12 provides:

> (A) There is hereby created in the state treasury the immediate removal fund, which shall be administered by the director of environmental protection. The fund may be used for both of the following purposes:
>
> (1) To pay costs incurred by the environmental protection agency in investigating, mitigating, minimizing, removing, or abating any unauthorized spill, release, or discharge of *material* into or upon the environment[1] *that requires*

[1] In this decision, we use the term "environmental spill" as an abbreviated term representing "any unauthorized spill, release, or discharge of material into or upon the environment."

> *emergency action to protect the public health or safety or the environment*;
>
> (2) Conducting remedial actions under section 3752.13 of the Revised Code.
>
> (B) Any person responsible for causing or allowing the unauthorized spill, release, or discharge is liable to the director for the costs incurred by the agency regardless of whether those costs were paid out of the fund created under division (A) of this section or any other fund of the agency. Upon the request of the director, the attorney general shall bring a civil action against the responsible person to recover those costs. Moneys recovered under this division shall be paid into the state treasury to the credit of the immediate removal fund, except that moneys recovered for costs paid from the hazardous waste clean-up fund created in section 3734.28 of the Revised Code shall be credited to the hazardous waste clean-up fund.

(Emphasis added.)

{¶8} R.C. 3745.12(A) thus expressly identifies the type of environmental spills that the OEPA is authorized to clean up and thereafter seek recoupment of cleanup costs. Those types of environmental spills are those requiring "emergency action to protect the public health or safety or the environment." The General Assembly could have limited the OEPA's authority to spills of hazardous waste specifically defined either in the Revised Code itself or by federal law, but did not do so.

{¶9} Appellant's assertion that "the discrepancy between federal law and state law on this subject is inequitable, unjust, and unfair in application and scope" would be more appropriately addressed to the General Assembly. (Appellant's brief, 10.) This court may not effectively rewrite R.C. 3745.12 by grafting provisions of federal statutory law into it when the General Assembly did not do so. We may not review the wisdom of the General Assembly's policy choices, as "it is not the role of courts to establish their own legislative polices or to second-guess the policy choices made by the General Assembly." *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 61. Whether the fuel oil that leaked from appellant's tank was a hazardous substance for purposes of the federal CERCLA does not control the determination whether that spill

posed a risk to the environment requiring emergency action to protect the environment for purposes of Ohio's Environmental Protection Agency Act (R.C. Chapter 3745).

{¶10} Appellant argues that the case before us presents a case of first impression in that no other Ohio court has interpreted the phrase "emergency action" as used in R.C. 3745.12. However, courts have available to them multiple rules of statutory construction to determine legislative intent where a statutory provision is ambiguous, among which is the rule that "[u]nless words are otherwise defined or a contrary intent is clearly expressed," we must give words contained in a statute "their plain and ordinary meaning." *Cincinnati Metro. Hous. Auth. v. Morgan*, 104 Ohio St.3d 445, 2004-Ohio-6554, ¶ 6, citing *Coventry Towers, Inc. v. Strongsville*, 18 Ohio St.3d 120, 122 (1985), and *Youngstown Club v. Porterfield*, 21 Ohio St.2d 83, 86 (1970). In common usage, the word "emergency" means "a sudden, urgent, usually unforeseen occurrence or occasion requiring immediate action." Webster's Encyclopedic Unabridged Dictionary of the English Language (Portland House 1997). As noted in *Lowry I,* Christopher Bonner, On-Scene Coordinator for the OEPA, testified that " 'it was urgent to respond to the spill' " because " 'otherwise the fuel oil spill would proceed downstream and cost even more to cleanup.' " *Lowry I* at ¶ 6. Bonner also testified that the ground surrounding the fuel tank was saturated with fuel oil; unless removed, the saturated soil would continue to leak into Swisher Creek; and allowing fuel oil to degrade into the water would delete oxygen killing fish and other organisms that fish relied upon for food. On the basis of this testimony, the trial court determined that the fuel oil that spilled from appellant's fuel tank and entered Swisher Creek was a material that required "emergency action to protect the public health or safety or the environment." As fact finder, the trial court found Bonner's testimony to be more credible than that of appellant's witnesses, who disputed that the fuel oil spill would cause harm to the environment warranting an emergency response. Bonner's testimony, which the trial court deemed competent and credible, adequately supported the trial court's finding that emergency action was required to address the environmental consequences of the fuel spill on appellant's property.

{¶11} We therefore overrule appellant's first assignment of error.

{¶12} Appellant's second and third assignments of error are related in that both posit challenges to the admissibility of evidence concerning the amount of cleanup costs

for which appellant was liable. Appellant contends that the trial court violated the rule against hearsay in considering an invoice totaling $13,681.17 that Environmental Enterprises, Inc. ("EEI"), sent to OEPA as evidence of the costs of the cleanup. He argues that neither Evid.R. 803(6), which provides an exception for business records to the rule against hearsay, nor 803(8), which provides an exception for public records to the rule against hearsay, operated so as to allow the invoice to be introduced into evidence. Appellant further argues that the invoice does not demonstrate that the costs billed were reasonable.

{¶13} We do not find it necessary, however, to resolve appellant's hearsay arguments because error, if any, in admitting the invoice into evidence was harmless at most. In this case, Bonner provided direct testimony supporting the trial court's award of judgment in favor of OEPA.

{¶14} A witness may not testify to matters of which the witness has no personal knowledge. Evid.R. 602. Accordingly, a trial court must be able to infer from the record that a witness has personal knowledge of facts before the witness may testify to them. *Starinchak v. Sapp*, 10th Dist. No. 04AP-484, 2005-Ohio-2715, ¶ 28. " 'Personal knowledge' is 'knowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay.' " *Id.*, quoting *Bush v. Dictaphone Corp.*, 10th Dist. No. 00AP-1117, 2003-Ohio-883, ¶ 72.

{¶15} Bonner testified, based on his personal knowledge, that EEI had obtained through a competitive bid process an OEPA contract to perform environmental cleanup services; that he had personally supervised the activities of EEI; that EEI billed OEPA $13,861.71 for its services; and that OEPA presumably paid that amount to EEI. He further testified that OEPA had sent an invoice to appellant charging appellant $13,861.71 for recoupment of the costs OEPA paid to the contractor; and that that amount represented "the actual physical labor that [EEI] performed, their services for the Ohio EPA under [Bonner's] direction, all their equipment time, disposal fees, manpower, equipment costs, mobilization costs from Cincinnati * * * all their costs." (Tr. 51.) Moreover, he testified that the itemized charges he had reviewed on the invoice were reasonable and necessary to accomplish the cleanup.

{¶16} Accordingly, error, if any, in formally accepting the EEI invoice into evidence, was harmless in view of Bonner's direct testimony as to matters of which he had personal knowledge. That direct testimony supported reimbursement in the amount of $13,861.71 to OEPA of the charges OEPA incurred as a result of EEI's cleanup activities. *Accord Turn-Key Bldg. Sys., Inc. v. Howard Copenhefer, Inc.*, 2d Dist. No. 2679 (Jan. 8, 1991) (trial court did not err in awarding plaintiff reimbursement for charges reflected on invoice based on testimony from witness with personal knowledge, even if invoices themselves were arguably inadmissible); *State v. McManus*, 8th Dist. No. 48118 (Nov. 1, 1984) (personal knowledge and experience qualified witness to testify as to replacement value of items).

{¶17} The Fifth District Court of Appeals has decided an analogous fuel spill case. In *Knox Cty. Loc. Emergency Planning Commt. v. Santmyer Oil Co.,* 5th Dist. No. 01CA0035, 2002-Ohio-3590, the plaintiff sought reimbursement of emergency management expenses incurred after a tanker truck owned by Santmyer Oil Company overturned. County fire departments responded and performed cleanup services, for which the plaintiff sought reimbursement from the oil company pursuant to R.C. 3745.13. At trial, one of plaintiff's employees testified that he had prepared an itemized schedule of costs incurred in the cleanup. The court opined that the defendant oil company had an obligation to do more than "tak[e] potshots," at the plaintiff's schedule of costs, and bore the burden of providing evidence rebutting the reasonableness of the charges stated on the schedule. *Id.* The court observed that there was no evidence in the record to suggest that the costs outlined on the schedule were not reasonable; the recoupment case was civil in nature; and the applicable burden of proof was preponderance of the evidence. Accordingly the defendant had an obligation to offer some alternative expert evidence to refute the evidence presented. *Id.*

{¶18} Even though a different cost recoupment statute was at issue in *Santmyer Oil Co.,* we find persuasive the court's reasoning in that case. It is true that, in the case before us, appellant himself testified that he believed the cleanup could have been performed for $1,000, rather than the nearly $14,000 charged by EEI. However, evaluation of the weight of the competing testimony as to the reasonable and necessary cost of the cleanup was a matter for the trial court, as fact finder, to determine. *Accord*

Roelle v. Orkin Exterminating Co., 10th Dist. No. 00AP-14 (Nov. 7, 2000) (holding that determination of the cost to repair home, as testified to by the homeowner, was primarily a factual issue for determination by the fact finder and that "deference should be given to the trier of fact's assessment of the credibility and the weight of the evidence before him").

{¶19} We, therefore, overrule appellant's second and third assignments of error in improperly admitting hearsay evidence.

III. Conclusion

{¶20} Accordingly, having overruled all three of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and SADLER, JJ., concur.

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