[Cite as *State ex rel. Dewine v. Deer Lake Mobile Park*, 2015-Ohio-1060.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

STATE OF OHIO ex rel. MICHAEL DEWINE ATTORNEY GENERAL OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2013-G-3156**
- vs -	:	
DEER LAKE MOBILE PARK, INC., et al.,	:	
Defendants-Appellants.	:	

Civil appeal from the Geauga County Court of Common Pleas, Case No. 11M000168.

Judgment: Affirmed.

Mike DeWine, Ohio Attorney General, *Christine L. Rideout, Alana R. Shockey,* and *Aaron S. Farmer,* Assistant Attorneys General, State Office Tower, 30 East Broad Street, 25th Floor, Columbus, OH 43215 (For Plaintiff-Appellee).

Clifford C. Masch, Reminger & Reminger Co., L.P.A., 1400 Midland Building, 101 Prospect Avenue, West, Cleveland, OH 44115 (For Defendants-Appellants).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, Deer Lake Mobile Park, Inc. and Eugene, Alice, and Mark Malliski, appeal the judgment of the Geauga County Court of Common Pleas ordering them to pay $212,000 in damages to appellee, State of Ohio ex rel. Michael DeWine Attorney General of Ohio. At issue is whether the trial court erred in finding appellants

liable for violations of the Safe Drinking Water Act and the Water Pollution Control Act and whether the court abused its discretion in assessing a civil penalty against appellants. For the reasons that follow, we affirm.

{¶2} Eugene and Alice Malliski own the subject property, which is comprised of about 40 acres of land on Kinsman Road in Burton, Geauga County, Ohio. They used the land as a 43-unit manufactured home park with central water and sewage facilities called Deer Lake Mobile Park ("Deer Lake"). In June 2003, Eugene created the Malliski Family Trust to benefit himself; his wife, Alice; and their son, Mark. Eugene and Alice are co-trustees of the Trust. Around that same time, Deer Lake was incorporated. Alice was designated president and Eugene was named vice-president. Since June 2003, the Trust has owned Deer Lake, and Mark is employed as its manager.

{¶3} Deer Lake provides drinking water to its residents and has a waste water treatment plant used to treat sewage from the mobile park. Mark's responsibilities at Deer Lake include park supervision, maintaining the budget and records, and overseeing the operation of the water system and waste water treatment plant.

{¶4} On February 9, 2011, the state filed a complaint in the trial court against appellants for injunctive relief and civil penalties. The complaint alleged violations of safe drinking water laws under R.C. Chapter 6109 and surface water pollution violations under R.C. Chapter 6111. The complaint also alleged violations under the Ohio Administrative Code. On the same day the complaint was filed, the trial court issued a temporary restraining order.

{¶5} On March 9, 2011, the court conducted a hearing on the state's request for a preliminary injunction. At the conclusion of that hearing, the parties entered into a

consent order for a preliminary injunction in which appellants agreed to perform certain activities required of a public water system. Under the terms of the consent order, appellants agreed to chlorinate and maintain the required chlorine residuals and sample and monitor for contaminants; provide alternative water for drinking and cooking for Deer Lake residents until the required chlorine levels were achieved; and hire a certified operator within two weeks.

{¶6} On May 9, 2011, the state filed contempt charges against appellants due to their failure to comply with the consent order. In turn, appellants filed a motion for preliminary injunction, declaratory relief, and attorney fees. Appellants sought to prevent the state from imposing the requirements of a public water system on Deer Lake. They also argued the Ohio EPA's interpretation of O.A.C. 3745-84-01(C), requiring the disconnection of a service line at the water main, was not appropriate.

{¶7} The court held a hearing on May 18, 2011. Stivo DiFranco, an environmental specialist with the Ohio Environmental Protection Agency, Division of Drinking and Ground Water, testified for the state that he reviewed the report of George Hess, an engineer retained by Deer Lake. The report reflected Hess' opinion that Deer Lake was not a public water system because Hess opined there were only eight trailers hooked into the water system. However, DiFranco testified that Deer Lake was a public water system because it had more than 15 service connections.

{¶8} DiFranco testified that a "public water system" is defined by rule as serving "at least 25 people at least 60 days out of the year or has 15 service connections." He defined "service connection" as "the active or inactive connections, pipes, goosenecks, fittings connecting the water main to any building outlet." DiFranco also interpreted

"building outlet" to mean the location where the pipe may be connected to the building or mobile home which is separate from the building or mobile home. As of the date of the hearing, Deer Lake's water system had 43 service connections. DiFranco said that before a public water system may deactivate by removing service connections, the Ohio EPA requires that the service connections be severed at the water main through detailed engineering plans for agency approval demonstrating removal at the main.

{¶9} DiFranco further testified that the Ohio EPA advised appellants of the requirement to remove service connections at the main. Appellants made an attempt to comply by hiring a master plumber, Bill Conti. Conti prepared a proposal and testified for appellants that he capped pipes at Deer Lake. Conti capped between five and 19 of the public water system's service connections above an isolation valve, rather than at the main. Conti saw no functional difference between severing a service connection using a hard cap system, as opposed to a disconnection at the system main.

{¶10} In addition, DiFranco testified that if a service connection was not severed at the system main, reconnection could easily be accomplished if appellants "shut-off the valve, connect [the inactive pipe], and reopen the valve." Severing the pipe other than at the main also presents problems because an inactive pipe can collect stagnant water or suffer impacts from lead, copper, or bacteria. Until February 21, 2012, the date that appellants officially demonstrated to the Ohio EPA that their public water system should be deactivated, appellants only removed one service connection at the main.

{¶11} Eugene testified that he and his wife, Alice, both of advanced years, are the owners of Deer Lake and their son, Mark, is responsible for the day-to-day operations. Eugene testified he had talked with someone at the Ohio EPA 15 years

ago. He said that because he believed Deer Lake had less than 15 service connections, he did not think Deer Lake was subject to EPA regulations as a public water system.

{¶12} On May 24, 2011, the court found that appellants were operating a public water system because it had more than 15 service connections. The court found appellants in contempt for failing to comply with the prior consent order. The court imposed a $250 fine on each appellant and 30 days in jail, which was stayed as to Eugene and Alice, and suspended as to Mark, pending an opportunity to purge by complying with R.C. Chapter 6109.

{¶13} As noted above, on or about February 21, 2012, Deer Lake followed the procedures demanded by the Ohio EPA in decommissioning all non-used service connections at the system main, thereby becoming recognized as a private water system.

{¶14} On June 15, 2012, the state filed a motion for partial summary judgment on the issue of liability. Appellants filed a brief in opposition. On October 22, 2012, after finding that the state proved appellants committed numerous violations of the Safe Drinking Water Act and the Water Pollution Control Act and that appellants failed to meet their burden under Civ.R. 56 to rebut the state's evidence, the court granted partial summary judgment in favor of the state finding appellants liable. The court found Eugene and Alice liable as trustees of the Trust and also found Deer Lake liable. The court also found that Eugene, Alice, and Mark were personally liable for any damages based on their capacity as owners and operators of the public water and sewage disposal systems. Appellants appealed the trial court's partial summary judgment. On

February 25, 2013, this court dismissed the appeal for lack of a final appealable order. *State ex rel. DeWine v. Deer Lake Mobile Park, Inc.*, 11th Dist. Geauga No. 2012-G-3119, 2013-Ohio-637.

{¶15} The civil penalty trial began on May 16, 2013. The state sought injunctive relief and a $500,000 civil penalty against appellants for violations of R.C. Chapter 6109, the Safe Drinking Water Act, and R.C. Chapter 6111, the Water Pollution Control Act. The state indicated that it was not seeking a civil penalty against Eugene and Alice personally. The state said it would not oppose a motion to dismiss Eugene and Alice individually. Those defendants moved for the dismissal of any claims against them involving their personal liability. The state did not oppose the motion. The trial court dismissed Eugene and Alice in their individual capacities, and proceeded to trial against Deer Lake, the Trust, and Mark. The state presented five witnesses.

{¶16} Lynn Saralli, a business specialist at UBS Financial Services, authenticated monthly resource management account statements for the Trust. The April 2013 statement revealed a total asset value of $453,694.50, an increase of over $150,000 from the January 2006 statement.

{¶17} Dean Stoll, an employee with the Ohio EPA, Division of Surface Water, authenticated letters sent to appellants, beginning in early 2010, advising them that they were required to apply for and obtain a National Pollution Discharge Elimination Systems ("NPDES") permit for their waste water treatment plant. However, as of the date of the trial, appellants had not even applied for a permit.

{¶18} Brittany Schuch, also with the Ohio EPA, Division of Surface Water, testified that appellants committed 1,163 days of violations of the surface water laws

regulating waste water treatment plants. From March 10, 2010, through the date of the trial, appellants avoided $6,512 in costs by failing to sample for chemicals and hire a certified operator as required.

{¶19} Julie Spangler, with the Ohio EPA, Division of Drinking and Groundwater, testified that appellants also avoided $5,558.55 in costs for drinking water violations by failing to sample for chemicals, employ a certified operator, and obtain a license to operate their public drinking water system. Before the public water system deactivated on February 21, 2012, appellants were not in compliance, despite some 40 notices from the Ohio EPA documenting the drinking water violations throughout the years. The total days of drinking water violations exceeded 19,000.

{¶20} Lastly, Kathy Metropulos, also with the Ohio EPA, Division of Drinking and Groundwater, testified regarding the purpose behind the Ohio EPA's drinking water requirements, including the following: the purpose of requiring a certified operator; the purpose of obtaining a license to operate the public water system; the purpose for requiring the submission of reports and plans; and the purpose for water well maintenance. She also testified that, despite her extensive contacts with appellants, they continued to show indifference to the requirements and failed to comply with them.

{¶21} Appellants did not present any witnesses or exhibits. Thus, the state's evidence at trial was undisputed.

{¶22} On July 18, 2013, the court found in favor of the state and assessed damages against Deer Lake, the Trust, and Mark in the amount of $212,000. The court determined that appellants caused a risk of harm to the public; showed indifference and recalcitrance to the environmental requirements; avoided costs and obtained an

economic benefit through their noncompliance; and found that the state incurred extraordinary enforcement costs. Appellants filed the instant appeal asserting five assignments of error. For their first, they allege:

{¶23} "The trial court erred in adopting the EPA's interpretation of O.A.C. 3745-84-01(c)."

{¶24} This court reviews questions of law such as statutory construction under a de novo standard of review. *Beaumont v. Kvaerner, N. Am. Constr*., 11th Dist. Trumbull No. 2013-T-0047, 2013-Ohio-5847, ¶8.

{¶25} However, "[i]n the interpretation of administrative regulations, 'considerable deference should be accorded to an agency's interpretation of rules the agency is required to administer.'" *State v. Consolo*, 11th Dist. Portage No. 2012-P-0106, 2013-Ohio-2611, ¶29, quoting *State ex rel. Celebrezze v. Natl. Lime & Stone Co*., 68 Ohio St.3d 377, 382 (1994). "[T]he Ohio Supreme Court has held that, unless the [agency's] construction is unreasonable or repugnant to that statute or rule, this court should follow the construction given to it by the agency." *Salem v. Koncelik*, 164 Ohio App.3d 597, 2005-Ohio-5537, ¶16 (10th Dist.), citing *Leon v. Ohio Bd. of Psychology*, 63 Ohio St.3d 683 (1992).

{¶26} Based on the evidence presented, the trial court correctly found that appellants owned and/or operated a public water system pursuant to O.A.C. 3745-81-01 and 3745-84-01 until February 21, 2012, the date they demonstrated severance at the main and less than 15 service connections. Contrary to appellants' argument, the agency is not creating a new rule regarding severance of a service connection. Rather, the agency has interpreted its own rules, O.A.C. 3745-81-01(BBBB) and 3745-84-01(C).

{¶27} A "public water system" is defined at O.A.C. 3745-81-01(BBBB) as:

{¶28} "'Public water system' * * * means a system which provides water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves an average of at least twenty-five individuals daily at least sixty days out of the year."

{¶29} Further, a "service connection" is defined at O.A.C. 3745-84-01(C) as "the active or inactive pipes, goosenecks, pigtails, and any other fittings connecting a water main to any building outlet." The undefined term, "building outlet," according to the Ohio EPA's environmental specialist, DiFranco, means the location where the pipe may be connected to the building or mobile home, which exists independently of the building or mobile home.

{¶30} The record reveals appellants had more than 15 service connections before February 21, 2012. According to the Ohio EPA's interpretation, a service connection may only be removed by severing the active or inactive pipes at the water main, not by capping the active or inactive pipe at another location. Based on DiFranco's testimony, the agency's interpretation of "service connection," including the process of severing a service connection as it relates to a public water system, is not unreasonable or repugnant to the statutes or rules, and thus must stand. *See Salem, supra,* at ¶16.

{¶31} Until February 21, 2012, appellants had only properly removed one of the 43 service connections by severing the connection at the main. Even if the unapproved method of capping pipes above isolation valves mentioned by appellants' plumber was acceptable to the Ohio EPA, appellants still had at least 23 of the 43 service

connections until February 21, 2012. DiFranco's testimony also revealed concerns regarding disconnecting pipes below isolation valves as lead or copper may leach into the stagnant water. The trial court properly deferred to the state's reasonable interpretation of "service connection," including severance at the main, in order to maintain the integrity of the regulatory scheme and, most importantly, to protect the public from unsafe drinking water.

{¶32} Appellants' first assignment of error is overruled.

{¶33} For appellants' second assigned error, they allege:

{¶34} "The trial court's interpretation of a 'service connection' such that it can only be decommissioned by severing the line at the system main is against the manifest weight of the evidence."

> **{¶35}** Under the civil manifest weight of the evidence standard, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202 ¶24 (quoting *C.E. Morris Co. v. Foley Constr. Co*., 54 Ohio St.2d 279 (1978), syllabus). "A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." *Id*. (quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 81 (1984)). *Crowe Ent., Inc. v. Amicon Med. Group, Inc.*, 11th Dist. Portage No. 2013-P-0031, 2014-Ohio-11, ¶30.

{¶36} Further, witness credibility rests solely with the finder of fact. *River Oaks Homes, Inc. v. Twin Vinyl, Inc*., 11th Dist. Lake No. 2007-L-117, 2008-Ohio-4301, ¶27. The finder of fact is entitled to believe all, part, or none of the testimony of any witness. *Id*. If the evidence is susceptible to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict. *Id.*

{¶37} Appellants argue that the trial court's interpretation of "service connection" was not supported by the weight of the evidence. However, in interpreting this phrase, the trial court considered the credibility of the agency's witnesses and properly deferred to the Ohio EPA's interpretation of "service connection." The trier of fact was in the best position to make a determination as to the credibility of the witnesses. Based on our review of the record, we cannot say the court's interpretation was against the manifest weight of the evidence.

{¶38} Appellants' second assignment of error is overruled.

{¶39} For appellants' third assigned error, they contend:

{¶40} "The trial court assessment of monetary damages in the amount of $212,000.00 is against the manifest weight of the evidence."

{¶41} Assessing an environmental civil penalty lies within the trial court's discretion. *State ex rel. Ohio AG v. Shelly Holding Co.*, 135 Ohio St.3d 65, 2012-Ohio-5700, ¶23, citing *State ex rel. Brown v. Dayton Malleable*, 1 Ohio St.3d 151, 157-158 (1982). As long as the amount assessed is less than the statutory maximum, it is within the trial court's discretion to fix that amount. *Dayton Malleable* at 157. This court has stated that the term "abuse of discretion" is one of art, connoting judgment exercised by

a court, which does not comport with reason or the record. *Gaul v. Gaul*, 11th Dist. Ashtabula No. 2009-A-0011, 2010-Ohio-2156, ¶24.

{¶42} The General Assembly intended to use economic sanctions to deter violations of R.C. Chapters 6109 and 6111, and thereby to promote the goal of clean water in the state of Ohio, when it provided for substantial monetary penalties. *See Dayton Malleable, supra.* Specifically, R.C. Chapter 6109 concerns safe drinking water and provides, at 6109.33, that "[a]ny person who violates section 6109.31 of the Revised Code shall pay a civil penalty of not more than twenty-five thousand dollars for each violation[.]" R.C. Chapter 6111 addresses water pollution control, and states, at 6111.09(A), that "[a]ny person who violates section 6111.07 of the Revised Code shall pay a civil penalty of not more than ten thousand dollars per day of violation."

{¶43} The record reveals that appellants owned and operated their property in violation of the Safe Drinking Water Act and Water Pollution Control Act over a long period of time, i.e., more than 20,000 violation days. Over 19,000 of those days are attributable to safe drinking water per diem violations, which carry a maximum potential civil penalty of $25,000 each pursuant to R.C. 6109.33. Over 1,100 of the remaining days are attributable to water pollution per diem violations, which carry a maximum potential civil penalty of $10,000 each pursuant to R.C. 6111.09(A). Thus, the maximum potential civil penalty for appellants' violations exceeded $500 million.

{¶44} The trial court in this case assessed a penalty in the amount of $212,000, well below the potential maximum. In reaching its decision, the trial court exercised its discretion, using the *Dayton Malleable* factors, which are: (1) the harm or risk of harm posed to the environment by the violations; (2) the violator's level of recalcitrance,

defiance, or indifference to the law; (3) the economic benefit gained by the violation; and (4) the extraordinary enforcement costs incurred by the state. *Dayton Malleable, supra*; *Mentor v. Nozik*, 85 Ohio App.3d 490, 494 (11th Dist.1993) (a trial court may, but is not statutorily required to, employ the *Dayton Malleable* itemization-of-damages factors.) It should be noted that the state was *not* required to prove "actual harm" to the public caused by appellants' violations. Threatening environmental health is an actionable offense; actual injury need not be shown. *State ex rel. Petro v. Mercomp, Inc*., 167 Ohio App.3d 64, 2006-Ohio-2729, ¶32 (8th Dist.).

{¶45} The trial court gave reasons, based on the record, for its findings under each of the four *Dayton Malleable* factors. *First, the trial court found these violations created a risk of harm to the public health. With respect to appellants' safe drinking water violations*, the court found that appellants failed to monitor the levels of various chemicals in the public water supply; to post public notice; to file required periodic reports; to deliver consumer confidence reports and contingency plans; and to obtain a license to operate before providing water to the public. Further, the court found these violations exposed the public to drinking water that was potentially unsafe for human consumption. Next, *with respect to appellants' waste water violations*, the court found that, even now, Ohio's waters are subject to unlawful sewage discharges from appellants' treatment plant as the plant continues to discharge into a tributary of the Cuyahoga River.

{¶46} *Second, the court found that appellants exhibited open recalcitrance and pronounced indifference to their duties.* They were aware of the duty to monitor, to hire a certified operator, and to obtain a National Pollutant Discharge Elimination System

("NPDES") permit, yet appellants failed to do any of these things. The court found appellants displayed an attitude of disregard for the public health and open hostility to those who sought to protect the health of the public and the environment.

{¶47} *Third, the court found that appellants benefitted economically by their violations.* For example, they did not: (1) pay the fees associated with properly operating the waste water treatment plant; (2) perform the required sampling; (3) pay for the license; or (4) otherwise do the things they were required by law to do when operating a public water supply and waste water treatment plant. The record demonstrated that appellants thus saved at least $12,000.

{¶48} *Fourth, the court found the state incurred significant enforcement costs in bringing suit against appellants.* In support, the court found that the statutory scheme governing enforcement of Ohio's environmental laws is designed to be self-regulating. It depends on cooperation of the regulated industry through its self-monitoring, self-reporting, and self-correction. It is designed to avoid reaching litigation. The court found that the Ohio EPA made every reasonable effort to avoid referring this case to the Ohio Attorney General for litigation.

{¶49} It is well settled that the penalty should "hurt" a violator in order to deter future violations, but not be so large as to result in the violator's bankruptcy. The violator has the burden to prove the penalty would be "ruinous" to it. *Coen, supra*. However, the court found that appellants presented no credible evidence of an inability to pay the penalty. We note that, in addition to the fact that appellants had more than $453,000 in liquid assets in a trust, they also owned a valuable 40-acre parcel in Burton,

Ohio, which they used in their business to operate a manufactured home park. Thus, the trial court's civil penalty was not excessive.

{¶50} Finally, appellants argue their alleged good faith disagreement with the Ohio EPA's determination that appellants were operating a "public water system" should be used to mitigate the penalty. However, owners and operators of public water and sewage disposal systems are liable for water supply and pollution violations *regardless of intent. See* R.C. 6109.31 and 6111.99; *State ex rel. Cordray v. Helms*, 192 Ohio App.3d 426, 2011-Ohio-569 (9th Dist.). Further, appellants cite no pertinent case law in support of such holding.

{¶51} Because the penalty assessed was less than the statutory maximum and the trial court gave reasons for the amount of the penalty it assessed that were supported by the record, the trial court did not abuse its discretion in awarding $212,000 to the state.

{¶52} Appellants' third assignment of error is overruled.

{¶53} For appellants' fourth assigned error, they allege:

{¶54} "The trial court erred in finding that Mark Malliski can be personally liable for the violations at issue."

{¶55} Appellants argue the trial court erred in finding Mark personally liable in its October 22, 2012 award of partial summary judgment on the issue of liability. Appellants stress that Mark is neither a corporate officer of Deer Lake nor a trustee of the Trust.

{¶56} Summary judgment is proper where (1) there is no genuine issue of material fact remaining to be litigated; (2) the movant is entitled to judgment as a matter

of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and, viewing the evidence in the non-moving party's favor, that conclusion favors the movant. Civ.R. 56(C). We review a trial court's entry of summary judgment de novo. *Meloy v. Circle K Store*, 11th Dist. Portage No. 2012-P-0158, 2013-Ohio-2837, ¶6.

{¶57} The state established that Mark was personally liable through evidence of his individual participation without regard to his status as a corporate officer. At all relevant times, Mark was employed by the Trust, Deer Lake, or Eugene and Alice to manage and operate Deer Lake. In that capacity, Mark supervised the park and managed the budget and records. He also oversaw the operation of the water and sewage facilities. Mark served as the Ohio EPA administrative contact for the public drinking water system and had substantial phone contacts with the Ohio EPA. Mark did not correct waste water treatment plant violations, despite his knowledge of the violations and his authority to correct them. Mark was found to be personally liable for the drinking water and water pollution violations on the basis of his duties, actions, and omissions as the manager and operator of Deer Lake.

{¶58} Further, the plain language in R.C. Chapters 6109 and 6111 provides for personal liability against an individual causing the violation. Ohio's drinking water laws state, at R.C. 6109.31(A): "[n]o *person* shall violate this chapter, a rule adopted under it, or any order or term or condition of a license, license renewal, variance, or exemption granted by the director of environmental protection under it." (Emphasis added.) R.C. 6109.01(C) provides that the term "person" includes any person as defined in R.C. 1.59. A "'[p]erson' includes an individual[.]" R.C. 1.59(C).

{¶59} Likewise, Ohio's water pollution control laws provide, at R.C. 6111.04(A)(1): "[n]o person shall cause pollution or place or cause to be placed any sewage, sludge, sludge materials, industrial waste, or other wastes in a location where they cause pollution of any waters of the state." In addition, R.C. 6111.07(A) states: "[n]o person shall violate or fail to perform any duty imposed by sections 6111.01 to 6111.08 of the Revised Code or violate any order, rule, or term or condition of a permit issued or adopted by the director of environmental protection pursuant to those sections." R.C. 6111.01(I) provides that the term "person" includes any person as defined in R.C. 1.59. As noted above, R.C. 1.59(C) provides that a "'[p]erson includes an individual[.]"

{¶60} Mark seeks to escape personal liability by arguing that he is an employee, not a corporate officer. *But see Schaefer v. D & J Produce, Inc.*, 62 Ohio App.2d 53, 60-62 (6th Dist.1978) (personal liability may be imposed on corporate officer, agent, or employee); *see also State v. Stirnkorb*, 63 Ohio App.3d 778, 782-783, 786 (12th Dist.1990) (finding an employee guilty of illegally disposing hazardous waste). Further, operators of public water and sewage disposal systems are responsible for water supply and pollution violations. *See e.g. Helms, supra* (imposing personal liability on operators of an apartment building who violated Ohio's safe drinking water and wastewater treatment laws).

{¶61} We therefore hold the trial court did not err in imposing personal liability on Mark for appellants' drinking water and water pollution violations.

{¶62} Appellants' fourth assignment of error is overruled.

{¶63} For appellants' fifth and final assigned error, they contend:

{¶64} "The trial court abused its discretion in failing to permit the defense to present evidence of a communication between George Hess and the Attorney General's Office indicating that Deer Lake should hold off filing for its NPDES permit until after the court proceedings."

{¶65} Appellants argue the trial court abused its discretion in failing to permit the defense, at the civil penalty trial, to present evidence of an alleged e-mail between Hess, appellants' engineer, and some unidentified person at the Attorney General's Office, who allegedly said that Deer Lake should delay applying for its NPDES permit until after the court proceedings. It is worth noting that no evidence was ever presented regarding the name, position, or authority of this person to speak on behalf of or to bind the Attorney General's Office. Moreover, despite this alleged communication, it is undisputed that the Ohio EPA sent many letters to appellants beginning in early 2010, advising them that they were legally required to apply for and to obtain an NPDES permit. Further, appellants never proffered this alleged e-mail. Thus, it is not part of the record and cannot be considered on appeal. *State v. Lovelace*, 137 Ohio App.3d 206, 223 (1st Dist.1999).

{¶66} In any event, even if the e-mail was in the record, this assigned error would lack merit. A trial court has broad discretion to admit or exclude evidence, and such decision will not be reversed on appeal absent an abuse of discretion. *Urso v. Compact Cars, Inc.*, 11th Dist. Trumbull No. 2006-T-0062, 2007-Ohio-4375, ¶47.

{¶67} A trial court has discretion pursuant to its local rules to enforce pre-trial management orders and exclude witness testimony if a party fails to comply with the court's orders. *Ayad v. Gereby*, 8th Dist. Cuyahoga No. 92541, 2010-Ohio-1415, ¶53.

{¶68} Geauga County Court of Common Pleas Loc.R. 9(G) states: "[t]he parties or counsel shall be required upon request before, at, or after any Pre-Trial conference to provide opposing counsel with a list of names, identities and whereabouts of those witnesses counsel expects to call at trial. The refusal or willful failure of any counsel to disclose a witness may render evidence by that witness inadmissible at the trial."

{¶69} On March 12, 2013, more than two months before the civil penalty trial, the trial court entered an order stating "[t]hat a list of all exhibits and witnesses shall be submitted to the Court and opposing counsel seven (7) days prior to trial." The state complied with the foregoing rule and order; however, appellants did not. Appellants did not file a trial brief, *witness list, or exhibit list*. Further, appellants did not list Hess as a potential witness in their answers to the state's discovery requests asking for the names of appellants' witnesses.

{¶70} Nevertheless, at the end of the first day of trial, appellants notified the court for the first time that they would call Hess as a witness. On the state's objection, the court excluded Hess as a witness and denied admission of the e-mail. On these facts we cannot say the trial court abused its discretion.

{¶71} Appellants' fifth assignment of error is overruled.

{¶72} For the reasons stated in this opinion, appellants' assignments of error are not well-taken and are overruled. It is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part, with a Dissenting Opinion.

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COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part, with a Dissenting Opinion.

{¶73} The majority affirms the trial court on all five of appellants' assignments of error. I concur with the majority to affirm appellants' first, second, fourth, and fifth assignments. However, I believe appellants' third assignment is with merit and should be reversed and remanded. Thus, I respectfully dissent regarding appellants' third assignment.

{¶74} At the outset, this writer notes that a bona fide dispute existed between the parties, as the professional opinions of appellants' engineer and master plumber differed from the Ohio EPA's interpretation of Ohio Admin. Code 3745-84-01(C). I also note that citizens should be allowed to have a bona fide difference of opinion and should not be penalized for disagreeing with the government. I further note that no harm has been done to any citizen or the environment.

{¶75} In their third assignment of error, appellants allege the trial court's assessment of monetary damages in the amount of $212,000 is against the manifest weight of the evidence. I agree.

{¶76} Assessing an environmental civil penalty lies within the trial court's discretion. *State ex rel. Ohio Atty. Gen. v. Shelly Holding Co.*, 135 Ohio St.3d 65, 2012-Ohio-5700, ¶23, citing *State ex rel. Brown v. Dayton Malleable*, 1 Ohio St.3d 151, 157-158 (1982). As long as the amount assessed is less than the statutory maximum, discretion to fix that amount lies in the trial court's discretion. *Dayton Malleable* at 157.

{¶77} The term "abuse of discretion" is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). An abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 (8th Dist.2008).

{¶78} The General Assembly intended to use economic sanctions to deter violations of R.C. Chapters 6109 and 6111, and thereby to promote the goal of clean water in the state of Ohio, when it provided for substantial monetary penalties.

{¶79} Specifically, R.C. Chapter 6109 concerns safe drinking water and provides at 6109.33 that "[a]ny person who violates section 6109.31 of the Revised Code shall pay a civil penalty of not more than twenty-five thousand dollars for each violation[.]"

{¶80} R.C. Chapter 6111 addresses water pollution control and states at 6111.09(A) that "[a]ny person who violates section 6111.07 of the Revised Code shall pay a civil penalty of not more than ten thousand dollars per day of violation."

{¶81} As stated, the record reveals a bona fide dispute existed between the parties. The state maintained that appellants operated in violation of the Safe Drinking Water Act and Water Pollution Control Act over a long period of time, thereby establishing over 20,000 violation days. Over 19,000 of those days are attributable to safe drinking water per diem violations which carry a maximum potential civil penalty of $25,000 each pursuant to R.C. 6109.33. Over 1,100 of the remaining days are attributable to water pollution per diem violations which carry a maximum potential civil penalty of $10,000 each pursuant to R.C. 6111.09(A). Thus, the maximum potential

civil penalty for all violations exceeds $500 million, an exorbitant and unreasonable amount under these facts.

{¶82} In reaching its decision to assess a $212,000 penalty, the court exercised its discretion in following the *Dayton Malleable* factors, which includes: (1) the harm or risk of harm posed to the environment by the violations; (2) the economic benefit gained by the violation; (3) the violator's level of recalcitrance, defiance, or indifference to the law; and (4) the extraordinary enforcement costs incurred by the state. *Dayton Malleable, supra,* at 157; *see also Mentor v. Nozik*, 85 Ohio App.3d 490, 494 (11th Dist.1993) (holding that a trial court may but is not statutorily required to employ the *Dayton Malleable* itemization of damages factors.)

{¶83} Following *Dayton Malleable*, the trial court came up with its $212,000 damage amount as follows:

1. $50,000 – redress the harm or risk of harm to the public health or environment;
2. $12,000 – removal of economic benefit gained from non-compliance or delayed compliance;
3. $100,000 – recalcitrance, defiance, or indifference to the law; and
4. $50,000 – recovery of unusual enforcement costs.

{¶84} No further specific break-down of the above figures was made by the trial court. Although the court exercised its discretion in following *Dayton Malleable* in determining the award, appellants generally claim that the total civil penalty is excessive and that the penalty, especially as it relates to recalcitrance, should be mitigated. Based on the facts presented, I agree.

{¶85} Although the record reveals appellants were notified and warned of the violations and consequences, and the $212,000 damage award is substantially less than the $500 million maximum civil penalty, the damage award constitutes roughly half of the Trust's total liquid assets. Appellants correctly point out that "[i]n order to deter future violations, a civil penalty must be large enough to hurt the offender, but not so large as to result in the violator's bankruptcy." *State ex rel. Dann v. Coen*, 5th Dist. Stark No. 2008 CA 00050, 2009-Ohio-4000, ¶34, citing *State ex rel. Petro v. Maurer Mobile Home Court, Inc*., 6th Dist. Wood No. WD-06-053, 2007-Ohio-2262, ¶62.

{¶86} More importantly, however, as a bona fide dispute existed between the parties, and appellants acted reasonably in hiring and relying on the professional opinions of their engineer and master plumber, there was no non-compliance until the issue/terminology was later interpreted and ruled upon by the court. A reasonable and sincere disagreement upon an undefined term in a statute does not equate to willful non-compliance. *See* Black's Law Dictionary (7th Ed.2000) 1292 (defining "willful" as "[v]oluntary and intentional[.]") *See also Conie Constr. v. Reich*, 73 F.3d 382, 384 (D.C. Cir.1995) ("willful non-compliance" is an act done voluntarily with either an intentional disregard of, or plain indifference to, the requirements of acts, regulations, or statutes.)

{¶87} Thus, I fail to see any recalcitrance, defiance, or indifference to the law. In addition, I fail to see any injury to the public. As stated, the record reveals that no actual harm was done to any citizen or to the environment.

{¶88} Upon consideration, I believe the trial court abused its discretion in its award of $212,000, in light of the $453,694.50 in total liquid assets in the Trust. More importantly, I believe the trial court erred because a bona fide dispute existed between

the parties as to the actual definition of the term used to establish compliance and the record indicates no injury actually occurred. There appears to be no issue of noncompliance until the court itself decided the controversy. Furthermore, the court's damage award is unsupported in the record and failed to take into account appellants' future monetary obligations in complying with Ohio EPA requirements as well as other daily business expenses.

{¶89} I believe appellants' third assignment of error is with merit and that the trial court's judgment on that assignment should be reversed and remanded. On remand, I would instruct the trial court to determine a lower, appropriate damage amount, based upon this writer's analysis, as the current amount, $212,000, is clearly excessive based on the facts and circumstances presented.

{¶90} Accordingly, I concur in part and dissent in part.