[Cite as *Kmotorka v. Wylie*, 2013-Ohio-321.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Jerry Kmotorka

Appellant/Cross-Appellee

v.

Thomas Wylie, Sr., et al.

Appellees/Cross-Appellant

Court of Appeals Nos. WD-11-018
WD-11-026

Trial Court No. 2008CV1159

DECISION AND JUDGMENT

Decided: February 1, 2013

* * * * *

Barry W. Fissel and Jeffrey M. Stopar, for appellant/cross-appellee.

Robert J. Bahret and Andrew J. Ayers, for appellee/cross-appellant Thomas J. Wylie, Sr.

Thomas L. Rosenberg and Klodiana B. Tedesco, for appellee General Casualty Company of Wisconsin.

* * * * *

OSOWIK, J.

{¶ 1} This is a consolidated appeal from two related judgments of the Wood County Court of Common Pleas. The first appellate case, WD-11-018, is an appeal from a judgment in which the jury found in favor of appellant, Jerry Kmotorka, on claims of

trespass, engaging in a pattern of corrupt activity, willful damage to property, battery and civil assault and ordered appellee/cross-appellant, Thomas Wylie, Sr., d/b/a Wylie and Sons Landscaping ("Wylie") to pay $35,500 in damages. At a separate proceeding, the jury further found that, since Kmotorka's claims were not proved by clear and convincing evidence, Kmotorka was not entitled to attorney's fees. The second appellate case, WD-11-026, is an appeal from a judgment in which the trial court ordered Wylie to pay $11,385.67 in costs, which included transcripts of depositions, subpoena fees, and witness fees in case No. WD-11-018.

{¶ 2} On appeal, appellant/cross-appellee Kmotorka sets forth the following four assignments of error:

> Assignment #1: The court erred in allowing trial by ambush, by allowing defendant Thomas Wylie, Sr. to testify about boxes of surprise documents which he had refused to produce in discovery, and which were not on his pre-trial exhibit list.
>
> Assignment #2: The court gave an erroneous, confusing and prejudicial "Changed Condition" instruction to the jury on the nuisance claim * * *, over objections by Kmotorka.
>
> Assignment #3: The court erred in the statutory interpretation of [the] Ohio Corrupt Practices Act, R.C. §2923.34, when denying attorney fees to plaintiff Jerry Kmotorka whom the jury found proved a violation of R.C. § 2923.34 by a preponderance of the evidence.

Assignment #4: The court erred in denying Kmotorka's post-trial motion for additional relief under R.C. § 2923.34(B)(2) on the grounds that it was "untimely filed, highly prejudicial to the Defendant, and against the interests of judicial economy."

{¶ 3} Appellee/cross-appellant Wylie sets forth the following as his sole cross-assignment of error:

Assignment of Error No. 1: The trial court erred in requiring defendant to subsidize plaintiff's case expenses, not authorized by statute, case law or court rules.

{¶ 4} In 2002, Kmotorka purchased 11.96 acres of land on County Road B in Fulton County, Ohio, from his friend and then-neighbor, Thomas Wylie, Sr. ("Wylie"). At the time of the purchase, Kmotorka knew that his lot was part of a larger parcel owned by Wylie, and that Wylie, the owner of an excavation and landscaping business, was engaged in digging a sand pit on the parcel adjoining Kmotorka's new lot. Shortly after the purchase was completed it became obvious to Kmotorka and other residents in the surrounding area that Wylie was expanding his business to include commercial trucking and stone hauling. The business continued to expand and the number of trucks increased until 2004. That year, neighbors in the area contacted the local zoning authorities in an attempt to prevent Wylie from having the zoning of the area changed from agricultural to commercial, which would have allowed further expansion of the trucking and hauling business. Kmotorka assisted in those efforts.

{¶ 5} Ultimately, the zoning change was denied. However, during the time that the zoning request was pending, Kmotorka and other neighbors were subjected to loud noises, diesel fumes, and increased truck traffic on County Road B. Between 2001 and 2007, Kmotorka reported several incidents of apparent vandalism on his property, including holes drilled into the roof of his home, trash on his lawn, and an automobile and aerosol cans being set on fire outside his home. In addition, Kmotorka was injured in a fight with Wylie and several other individuals, which he reported to the police. In 2007, Wylie was ordered to move his trucking business away from County Road B. The business was then relocated to Perrysburg, Ohio, in Wood County.

{¶ 6} On December 9, 2008, Kmotorka filed a complaint in the Wood County Court of Common Pleas against Thomas Wylie, Sr. and his wife, Lisa Wylie, his son Thomas Wylie, Jr., and Wylie and Sons Landscaping, in which he set forth claims of private nuisance, trespass, vandalism, civil assault and battery, intentional infliction of emotional distress, civil conspiracy, and violations of both R.C. Chapter 2923, Ohio's Corrupt Practices Act, and the Federal Racketeer Influenced and Corrupt Organizations Act.[1] On January 28, 2009, with leave of court, Wylie's insurer, General Casualty Company of Wisconsin, was allowed to intervene as an additional defendant.

{¶ 7} On August 21, 2009, Wylie filed a motion for summary judgment and memorandum in support as to each of the claims set forth in the complaint. Kmotorka

[1] Hereafter, for purposes of clarity, these claims will be collectively referred to "OCPA" claims.

filed a memorandum in opposition to summary judgment on October 26, 2009. In addition to both parties filing numerous transcribed and videotaped depositions, partial transcripts of a criminal trial in which Wylie was acquitted after Kmotorka accused him of criminal assault were also made part of the trial court's record. Wylie filed a reply memorandum in support of summary judgment of November 24, 2009.

{¶ 8} On February 25, 2010, Wylie filed a motion to bifurcate the impending jury trial, in which he asked the trial court to submit the issues of liability and damages to the jury in separate court proceedings, which the trial court later granted. On March 2, 2010, the trial court journalized an order in which it denied Wylies' summary judgment motion, after finding that genuine issues of material fact existed as to all of Kmotorka's claims against Wylie. However, in response to a separate motion for summary judgment, the trial court dismissed claims of trespass, civil assault, and battery brought against Lisa Wylie, and a private nuisance claim brought against Thomas Wylie, Jr. The trial court further found that genuine issues of fact existed as to Kmotorka's remaining claims against Lisa Wylie and Thomas Wylie, Jr. that precluded summary judgment.

{¶ 9} On March 12, 2010, with leave of court, Kmotorka filed a supplemental complaint in which he claimed that Wylie engaged in spoliation of evidence by destroying a hog pen which previously had the words "Jerry's House" painted on the side. Kmotorka asked the trial court to award him in excess of $25,000 for the spoliation claim.

{¶ 10} The first portion of the bifurcated jury trial, on the issue of liability, was held over for several days, beginning on March 15, 2010. Testimony was presented on behalf of Kmotorka by Karri Nusbaum, Kathy Keeler, Elizabeth Athaide-Victor, Anita Snoderly, Brenda Ryan, Leo and Sue Lisk and Earl Rowland. Testimony was also presented by Swanton Township Trustees James Meyer and Phillip Willand; Fulton County Assistant Prosecutor Paul Kennedy; Dave Gillette; Township Zoning Inspector Walter Hallett III, Fulton County Sheriff's Deputies Rick Brock, Roy Miller, Matt Smithmyer, Jerry Simon and Brian Marvin, and Providence Township Firefighter Chad Boru. In addition, Kmotorka, Sally Wiley, Lynette Swantack, Matt Andrews, Beau Lavigne and Howard Black also testified. At the close of the plaintiff's case, the defense made a motion to dismiss, which the trial court denied. However, the trial court stated that it would take the claims of OCPA violations and intentional infliction of emotional distress under advisement. Testimony was presented on behalf of the defense by Michael Bayer, Jeffrey Gillen and Thomas Wylie, Sr.

{¶ 11} At the close of all the evidence, the defense renewed its motion for a directed verdict, which the trial court denied. Discussions were then held between the parties and the trial court as to the admission of evidence and proposed jury instructions, which will be reviewed as they relate to specific assignments of error and the cross-assignment of error. After deliberation, the jury returned verdicts for all of the defendants as to the claims of private nuisance, vandalism and civil conspiracy, and awarded no damages on those claims. The jury also returned a verdict in favor of

Kmotorka on the claim of trespass against all the defendants; however, the jury awarded no damages for that claim. The jury found for Kmotorka and against Thomas Wylie, Jr. on the claim of willful damage to property, and awarded $500 in damages to Kmotorka; however, the jury found against Kmotorka and for Thomas Wylie, Sr. on that same claim. The jury found for Kmotorka and against Thomas Wylie, Sr. on the claim of civil assault, and awarded Kmotorka $5,000 in damages. As to the claim of battery, the jury found for Kmotorka and against Thomas Wylie, Sr., and award Kmotorka $5,000 in damages on that claim. The jury found in favor of Thomas Wylie, Jr. on the claims of civil assault and battery. Finally, the jury found against Thomas Wylie, Sr. on the OCPA claim and awarded Kmotorka $25,000 in damages on that claim.

{¶ 12} The second phase of the bifurcated trial, to determine whether Kmotorka was entitled to triple damages and/or attorney's fees on the non-RICO claims, was held on April 26, 2010. Testimony was presented by Thomas Wylie, Sr., and Kmotorka. After deliberations, the jury found that Kmotorka failed to establish any of his claims by clear and convincing evidence, and refused to award Kmotorka either attorney's fees or punitive damages.

{¶ 13} On May 26, 2010, Kmotorka filed a motion for reimbursement of his attorney's fees and costs incurred in pursuing the OCPA claims. In support, Kmotorka argued that such fees are to be paid pursuant to R.C. 2923.34(F), even in the absence of a jury's finding that the claims were proven by clear and convincing evidence. On May 4, 2010, Wylie filed a response in opposition to the granting of such fees, in which he

argued that Kmotorka's motion should be denied because Kmotorka did not appeal the jury's refusal to award attorney fees and, the time for filing a motion for a new trial had expired. On June 14, 2010, with leave of court, Kmotorka filed a reply in which he argued that: (1) the jury was not asked to consider whether Kmotorka should receive attorney fees on his OCPA claim, (2) the trial court's May 5 order was not yet final and appealable because the issue of statutory attorney's fees for the OCPA claim was not yet resolved, and (3) R.C. 2923.32 gives Kmotorka an "absolute right" to recover attorney's fees because he was awarded $25,000 in damages on his OCPA claim, even though the jury found he was not entitled to triple damages.

{¶ 14} On June 30, 2010, the trial court journalized an order in which it found that Kmotorka was entitled to attorney's fees on the OCPA claim pursuant to R.C. 2923.34(F). An evidentiary hearing was set to determine the amount of such fees. Six months later, on January 3, 2011, Wylie filed a motion for reconsideration, in which he asked the trial court to reverse its decision to award attorney's fees. In support, Wylie argued for the first time that Kmotorka is not eligible to receive attorney's fees pursuant to R.C. 2923.34(F) because he is not a "prevailing party" in this action, as statutorily defined by R.C. 2923.34(B) and (E), and his claim was not proven by clear and convincing evidence. On January 13, 2011, Wylie filed a motion in which he asked the trial court to determine whether General Casualty Company of Wisconsin ("General Casualty") could be held liable for attorney fees that are awarded to Kmotorka, which General Casualty opposed.

{¶ 15} On January 20, 2011, Kmotorka filed a motion for additional relief pursuant to R.C. 2923.34(B)(2), which allows the court to grant injunctive relief after a violation of R.C. 2923.32 is shown by a preponderance of the evidence. In his motion, Kmotorka asked the trial court to enjoin Wylie from engaging in numerous "corrupt acts," including arson, property damage, harassment, intimidation, assault, and threats against Kmotorka and other individuals.

{¶ 16} On February 9, 2011, the trial court journalized an order in which it vacated the award of attorney fees to Kmotorka pursuant to R.C. 2923.34(F). In addition, the trial court denied Kmotorka's request for injunctive relief and Wylie's request to hold General Casualty liable for an attorney fee award, and ordered Wylie to pay "the costs of these proceedings."

{¶ 17} On February 25, 2011, Kmotorka filed a motion pursuant to Civ.R. 54(D), in which he asked the trial court to order Wylie to pay the costs of transcribing video depositions that were taken in support and/or opposition to the parties' motions for summary judgment, as well as the cost of partial transcriptions of the criminal proceedings against Wylie that were made part of the trial court's record in this case. In support, Kmotorka argued that the various depositions were necessary to defend against Wylie's summary judgment motion, which was filed before the commencement of formal discovery. Kmotorka further argued that he incurred expenses for medical records, witness and subpoena fees and the transcription of his own deposition.

{¶ 18} On March 11, 2011, Kmotorka filed a notice of appeal from the trial court's February 9 order. Wylie filed a memorandum in opposition to Kmotorka's Civ.R.54(D) motion on March 14, 2011, in which he argued that he should not bear the cost of video depositions that were never entered into evidence at trial. Similarly, Wylie argued that many of the subpoena fees and the fees and costs of travel for out-of-state witnesses generated by the taking of those depositions should not be taxed as costs. Finally, Wylie argues that Kmotorka's request for reimbursement for the service of subpoenas that were necessary for trial are not set forth in sufficient detail for the court to determine whether they exceed the statutory $10 service fee per subpoena.

{¶ 19} On March 29, 2011, the trial court journalized a supplemental judgment entry in which it ordered Wylie to pay costs in the amount of $11,385.67, for the cost of "procuring transcripts of proceedings, subpoena fees, and witness fees." The trial court denied Kmotorka's request for inclusion of the procurement of medical records as "costs." Wylie filed a notice of appeal from the supplemental judgment on April 18, 2011, and the two cases were consolidated by this court, sua sponte, on April 27, 2012. On June 14, 2011, in response to a motion filed by Kmotorka, this court determined that the trial court's judgment was final and appealable and that we have jurisdiction to hear this appeal.

{¶ 20} In his first assignment of error, Kmotorka asserts that the trial court erred by allowing Wylie to testify concerning two boxes of purported commercial trucking invoices during the first trial. In support, Kmotorka argues that allowing the boxes of

documents to be seen by the jury amounts to a prejudicial "trial by ambush," since Wylie refused to produce such documents during discovery in response to Kmotorka's request.

{¶ 21} It is well-settled that the admission or exclusion of evidence is within the sound discretion of the trial court. *Rigby v. Lake Cty.*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991). An appellate court will not reverse the trial court's decision to admit or exclude evidence absent "a clear showing of an abuse of discretion with attendant material prejudice." *State v. Ruppen*, 4th Dist. No. 11CA22, 2012-Ohio-4234, ¶ 11, quoting *State v. Green*, 184 Ohio App.3d 406, 412, 921 N.E.2d 276, ¶ 14 (4th Dist.). An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "When an appellate court applies this standard, it must not substitute its judgment for that of the trial court." *State v. Ruppen*, *supra*, at ¶ 12, citing *State v. Jeffers*, 4th Dist. No. 08CA7, 2009-Ohio-1672, ¶ 12.

{¶ 22} Pursuant to Evid.R. 403(A) evidence, though relevant, "is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(B) further states that relevant "evidence may [also] be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence."

{¶ 23} In addition, reversal of the trial court's judgment is not warranted "unless the court's actions were inconsistent with substantial justice and affected the substantial rights of the parties." *Perry v. Univ. Hosps. of Cleveland,* 8th Dist. No. 83034, 2004-Ohio-4098, ¶ 25. In determining whether or not substantial justice has been done, the appellate court must weigh the prejudicial effect, if any, of such errors and determine whether the trier of fact would have made the same decision if they had not occurred. *Id.* at ¶ 30; *Cappara v. Schibley*, 85 Ohio St.3d 403, 408, 709 N.E.2d 117 (1999).

{¶ 24} It is undisputed that, during discovery, Kmotorka requested documentation of Wylie's agricultural, excavation and commercial hauling activities from 2001 through the date of the trial. Wylie's response was that such documents were irrelevant and immaterial to the issues in this case. The record does not show that Kmotorka filed a motion to compel discovery pursuant to Civ.R. 37[2], or made any further attempt to obtain the documents.

{¶ 25} At trial, testimony was presented through Kmotorka and his ex-wife, Karri Nusbaum, as well as several other residents on County Road B, and zoning inspector Hallett that Wylie had at least 43 commercial trucks on the County Road B property by

---

[2] Civ.R. 37(A)(2), which provides for a motion to compel discovery states, in relevant part, that

> If a deponent fails to answer a question propounded or submitted under Rule 30 or Rule 31, or a party fails to answer an interrogatory submitted under Rule 33, * * * the discovering party may move for an order compelling an answer or an order compelling inspection in accordance with the request. * * *

the time zoning was enacted in 2002, a number which grew in several years to 100 trucks. The neighbors, Nusbaum and Kmotorka all testified that Wylie's business generated a lot of noise, diesel fumes, and traffic on the rural road.

{¶ 26} On the last day of the first jury trial, in response to testimony presented by Kmotorka that Wylie was engaged in substantial amounts of commercial hauling activities, Wylie attempted to introduce two boxes of documents which he characterized as invoices from commercial hauling activities in 2001. Wylie testified that the invoices were for services performed before the area on County Road B was zoned to prohibit such activities, in an attempt to show that his commercial hauling business was "grandfathered in" before Kmotorka built his home next door. At that point, Kmotorka's attorney objected to the introduction of the two boxes on grounds that they were requested, but not produced, in discovery. Wylie's attorney responded by stating that

> Judge, they were never asked for, first of all, and secondly we didn't know that they [Kmotorka] were going to make such a big issue out of whether or not there is commercial trucking going on prior to the zoning as opposed to [Wylie's] entire operation. They've made it quite an issue in this case, the business of being, trucking being separate from the mining operation to where now we have to reply to it. We're rebutting what they're trying to establish.

{¶ 27} Kmotorka's attorney next argued that Wylie presented a much shorter written summary of his business activities at the criminal trial, which Wylie represented

as an "exhaustive list." Wylie responded that the list he produced at the earlier proceeding was a list of clients, not a summary of his business activities. In response to the parties' arguments, the trial court allowed Wylie to enter one invoice, Exhibit KK, into evidence, and to testify that it was a representative sample of the other documents in the two boxes. Although the jury was allowed to see the boxes, they were not entered into evidence.

{¶ 28} When the issue was revisited at the close of all the evidence, the court expressed concern as to the timing of Wylie's attempt to introduce the boxes into evidence. After hearing further arguments from both parties, the trial court reaffirmed its earlier decision to allow only Exhibit KK into evidence, and to exclude the two boxes containing the other alleged invoices.

{¶ 29} The trial court's decision to allow the jury to see the two boxes of documents purportedly relating to Wylie's commercial trucking business, even though Wylie clearly objected to the production of those same documents during discovery, is troubling. Also troubling is the fact that Wylie attempted to introduce the documents for the first time during cross-examination. However, the record shows that much of the evidence regarding Wylie's business activities had already been introduced by Kmotorka, in an attempt to demonstrate that Wylie had a large commercial trucking business on County Road B. Also, as set forth above, Kmotorka made no attempt to compel Wylie to produce the documents in discovery, and the trial court did not admit them into evidence because they were not produced in response to Kmotorka's discovery request.

{¶ 30} On consideration of the foregoing we find that any implications raised by the presence of the two boxes were cumulative of facts already in evidence. Therefore, the prejudicial effect of their presence in the courtroom, if any, was not sufficient to convince this court that the jury would have reached a different conclusion in their absence. Appellant's first assignment of error is not well-taken.

{¶ 31} In his second assignment of error, Kmotorka asserts that the trial court erred by giving the jury an instruction as to the "changed conditions" of the neighborhood. In support, Kmotorka argues that the instruction was misleading because no evidence was presented that any conditions in the neighborhood changed except those that pertained to Wylie's business. Kmotorka further argues that the trial court compounded its error by not instructing the jury to consider "changed conditions" in the neighborhood as mere factors, and not as a complete defense to a nuisance action.

{¶ 32} It is well-established that an appellate court will not overturn a trial court's jury instruction on appeal absent a finding of abuse of discretion, when evaluated under the particular facts and circumstances of each case. *Motorists Mut. Ins. Co. v. Hohman*, 3d Dist. No. 17-06-08, 2007-Ohio-108, ¶ 26, citing *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989). An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore*, 5 Ohio St.3d at 219, 450 N.E.2d 1140. In addition, "[w]hen applying the abuse of discretion standard, a reviewing court may not simply substitute its judgment for that of the trial court." *Motorists Mut., supra*, citing

Blakemore, supra. Instead, we are to view jury instructions in their entirety to determine whether or not they constitute prejudicial error. *Id.* citing *State v. Porter*, 14 Ohio St.2d 10, 235 N.E.2d 520 (1968).

{¶ 33} In this case, the trial court instructed the jury as follows:

> Coming to the nuisance. Coming to the nuisance with regard to both absolute nuisance and qualified nuisance means that the plaintiff acquired land, moved onto it, or improved it after the conduct occurred that interfered with the plaintiff's use or enjoyment of the land. Coming to the nuisance is a factor that you should consider in deciding whether the plaintiff may recover on the nuisance claim. If the plaintiff knew of the situation, or in the exercise of ordinary care should have known the situation, and voluntarily placed himself in the area of the activity that he now claims to be a nuisance [sic]. A person who becomes a resident of a residential/agricultural neighborhood is bound to submit to the ordinary annoyances, discomforts and injuries which are fairly incidental to the reasonable and general conduct of such neighborhood activity. If you find that the plaintiff came to the nuisance, you will consider this factor in determining whether the defendant's conduct was unreasonable.
>
> Changed condition. A person who remains as a resident in a neighborhood which gradually becomes an industrial/business neighborhood, is bound to submit to the ordinary annoyances, discomforts, and injuries which are

> fairly incidental to the reasonable and general conduct of such business in the neighborhood.

{¶ 34} It is undisputed that the jury instructions given by the trial court are substantially the same as the standard Ohio Jury Instruction ("OJI") CV 621, regarding nuisance. The official comment to CV 621 states that:

> [a]ccording to the weight of authority, the fact that a person voluntarily comes to a nuisance by moving into the sphere of its injurious effect does not prevent the plaintiff from pursuing injunctive relief or damages, especially where, by reason of changes in the defendant's conduct, the annoyance has been increased. See, *Harden Chevrolet Co. v. Pickaway Grain Co.*, 27 Ohio Op.2d 144, 92 Ohio Law Abs. 161 (1961), *Eller v. Koehler*, 68 Ohio St. 51, 67 N.E. 89 (1903); Restatement of Law 2d, Tort (1965), Section 840D.

{¶ 35} At trial, Kmotorka testified on direct examination that he knew about Wylie's sand mining activities on County Road B before he purchased the lot; however, he believed that Wylie would move the business after the lake was completed. Kmotorka further testified that there was a dramatic increase in truck traffic, noise and diesel smoke after he began working on his dream home. Kmotorka further testified that, after he moved to County Road B, he observed Wylie's trucks dumping concrete on Wylie's land next to Kmotorka's property. Later, on cross-examination, Kmotorka testified that Wylie violated an unwritten "gentleman's agreement" in which Wylie agreed to move his

business after Kmotorka's dream home was completed. Kmotorka's neighbor, Leo Lisk, testified that the area "just went from a beautiful cornfield to big mountains of sand" after 2001. Neighbor Earl Rowland testified that Wylie's business expanded after 2001, resulting in "tremendous amounts of noise," particularly between 9 p.m. and 10 p.m.

Neighbor Sally Wiley testified that Kmotorka was aware that he was moving beside a landscaping and sand mining business when he built his dream home. She also testified that residents of County Road B wanted the area zoned because there were seven sand pits within five miles of her home and a total of 22 such operations in the township. On redirect, Sally Wiley testified that the trucking business ran seven days a week, producing constant noise, and diesel fumes.

{¶ 36} On consideration of the trial court's record and the law, this court finds that the trial court's instructions regarding nuisance, when regarded as a whole and in light of the evidence presented at trial, do not amount to prejudicial error in this instance. Appellant Kmotorka's second assignment of error is not well-taken.

{¶ 37} In his third assignment of error, Kmotorka asserts that the trial court erred by reconsidering and reversing its earlier decision to award him attorney's fees and expenses pursuant to R.C. 2923.34. In support, Kmotorka argues that he is entitled to an award of attorney's fees and expenses because the jury found that he proved Wylie's violation of the OCPA by a preponderance of the evidence.

{¶ 38} Generally, a trial court's decision to grant or deny attorney fees is reviewed under an abuse of discretion standard. *LaFarciola v. Elbert*, 9th Dist. No. 08CA-009471,

2009-Ohio-4615, ¶ 9, citing *Jarvis v. Stone*, 9th Dist. No. 23904, 2008-Ohio-3313, ¶ 33. However, in this case, we first must analyze whether the trial court had statutory authority pursuant to R.C. 2923.34 to award attorney's fees and expenses as a matter of law. Accordingly, our review in this case is de novo, with no deference given to the trial court's decision. *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, ¶ 11, 809 N.E.2d 1151, 2004-Ohio-829 (9th Dist.).

{¶ 39} R.C. 2923.34(A) of the OCPA provides for the bringing of a private cause of action by "[a]ny person who is injured or threatened with injury by a violation of R.C. 2923.32 * * *." *See Baxter v. Jones*, 83 Ohio App.3d 314, 318, 614 N.E.2d 1094 (6th Dist.1992). Although R.C. 2923.32 is a criminal statute, R.C. 2923.34 allows for a different standard of proof in order to justify the imposition of civil remedies. For example, R.C. 2923.34(F) provides for recovery of "reasonable attorney fees" and costs of investigation and litigation if the plaintiff "prevails" under either (1) R.C. 2923.34(B), which provides for certain enumerated types of relief if the plaintiff proves a violation by a preponderance of the evidence, or (2) R.C. 2923.34 (E), which states that a plaintiff may recover triple damages by both proving a violation of R.C. 2923.32 and establishing an amount of actual damages by clear and convincing evidence.

{¶ 40} In this case, the jury specifically found that Kmotorka did not prove a violation of R.C. 2923.32 by clear and convincing evidence. Therefore, Kmotorka failed to satisfy the requirements of R.C. 2923.34(E). However, the jury did find that Kmotorka proved his claims by a preponderance of the evidence, and awarded him $25,000 in

actual damages. Accordingly, the question to be resolved is whether the trial court erred when it determined that Kmotorka does not meet the qualifications for an award of attorney's fees and costs under R.C. 2923.34(B).

{¶ 41} R.C. 2923.34(B) states that:

> If the plaintiff in a civil action instituted pursuant to this section proves the violation by a preponderance of the evidence, the court, after making due provision for the rights of innocent persons, may grant relief by entering any appropriate orders to ensure that the violation will not continue or be repeated. The orders may include, but are not limited to, orders that:
>
> (1) Require the divestiture of the defendant's interest in any enterprise or in any real property;
>
> (2) Impose reasonable restrictions upon the future activities or investments of any defendant in the action, including, but not limited to, restrictions that prohibit the defendant from engaging in the same type of endeavor as the enterprise in which the defendant was engaged in violation of section 2923.32 of the Revised Code;
>
> (3) Order the dissolution or reorganization of any enterprise;
>
> (4) Order the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any department or agency of the state;

(5) Order the dissolution of a corporation organized under the laws of this state, or the revocation of the authorization of a foreign corporation to conduct business within this state, upon a finding that the board of directors or an agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of section 2923.32 of the Revised Code, and that, for the prevention of future criminal conduct, the public interest requires the corporation to be dissolved or its license revoked.

{¶ 42} Kmotorka asserts on appeal that R.C. 2923.34(B) must, by necessity, allow the remedy of actual damages. In support, Kmotorka argues that the use of the phrase "but not limited to" in R.C. 2923.34(B) conclusively allows for an award of actual damages once a violation has been proved by a preponderance of the evidence. Kmotorka further argues that such an award is proper because it could be seen as a deterrent to future misconduct and bolsters his claim with the fact that R.C. 2923.34(B) does not specifically prohibit such an award. Accordingly, Kmotorka asks us to find that he prevailed under R.C. 2923.34(B), and that attorney's fees can be awarded to him pursuant to R.C. 2923.34(F).

{¶ 43} Generally, when construing a statute, "a court's paramount concern is the legislative intent." *State ex rel. Herman v. Klopfleisch*, 72 Ohio St.3d 581, 584, 651 N.E.2d 995 (1995), citing *State ex rel. Solomon v. Police & Firemen's Disability & Pension Fund Bd. of Trustees*, 72 Ohio St.3d 62, 65, 647 N.E.2d 486 (1995). "In

determining legislative intent, the court first looks to the language in the statute and the purpose to be accomplished." *State v. S.R.*, 63 Ohio St.3d 590, 594-595, 589 N.E.2d 1319 (1992). If the meaning of a statute is unambiguous and definite, then it must be applied as written and no further interpretation is appropriate. *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Assn.*, 69 Ohio St.3d 521, 524-525, 634 N.E.2d 611 (1994). "A court should give effect to the words actually employed in a statute, and should not delete words used, or insert words not used, in the guise of interpreting the statute." *State v. Taniguchi*, 74 Ohio St.3d 154, 156, 656 N.E.2d 1286 (1995), citing *State v. Waddell*, 71 Ohio St.3d 630, 631, 646 N.E.2d 821 (1995) ; *see State v. Rose*, 89 Ohio St. 383, 389, 106 N.E. 50 (1914). (Courts should not construe words that need no construction or interpret language that needs no interpretation.)

{¶ 44} In this case, as set forth above, although R.C. 2923.34(B) sets forth a non-exclusive list of equitable remedies, it does not mention an award of compensatory damages.[3] The statute does, however, state that relief under R.C. 2923.34(B) is to be tailored by the court in such a way as to ensure that violations will not be repeated. We find it significant that the only remedies listed in R.C. 2923.34(B) to achieve this stated

[3] The question of whether or not R.C. 2923.34(B) prohibits an award of compensatory damages if a violation is proved by only a preponderance of the evidence cannot be considered in this appeal because it was not raised in the trial court. *See CSAHA/UHHS-Canton, Inc. v. Aultman Health Found.*, 5th Dist. No. 2010CA00303, 2012-Ohio-897, ¶ 102-103 (A challenge on the issue of whether a jury could ever award actual damages under R.C. 2923.34(B) was waived for purposes of appeal because it was not timely submitted to the trial court.)

goal are equitable in nature. Further supporting this interpretation is the language used in R.C. 2923.34(F), which authorizes an award of triple damages and/or attorney fees and costs only after both a violation and the amount of actual damages have been established under R.C. 2923.34(E) by clear and convincing evidence.

{¶ 45} On consideration of the foregoing, we find that, although R.C. 2923.34(B) contains the phrase "but not limited to" in reference to remedies that may be fashioned by the court, the overall intent of that section of the statute is to limit such relief to equitable remedies. Accordingly, as a matter of law, the trial court did not err by denying Kmotorka's request for attorney's fees pursuant to R.C. 2923.34(F). Kmotorka's third assignment of error is not well-taken.

{¶ 46} In his fourth assignment of error, Kmotorka asserts that the trial court erred by denying his motion for additional relief under R.C. 2923.34(B)(2) because it was untimely filed, against the interest of judicial economy and highly prejudicial to Wylie. Kmotorka argues that R.C. 2923.34(B) contains no time limit for asking for additional equitable relief. In addition, Kmotorka argues that asking for injunctive relief during the trial would have been inappropriate since a violation of the OCPA had not yet been proven. Accordingly, Kmotorka concludes that it was in the interest of judicial economy to file his motion for attorney's fees and injunctive relief at the same time.

{¶ 47} R.C. 2923.34(B), the civil portion of Ohio's version of the Federal RICO statute, vests the trial court with broad discretion to fashion equitable remedies. *See Baxter,* 83 Ohio App.3d at 319, 614 N.E.2d 1094 (6th Dist.1992), interpreting former

R.C. 2923.34(C)).[4] As set forth above, an abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore*, 5 Ohio St.3d at 219, 450 N.E.2d 1140 (1983).

{¶ 48} Kmotorka correctly asserts that R.C. 2923.34(B) contains no time limit in which to seek injunctive relief. In his appellate brief, Kmotorka asserts that he is entitled to injunctive relief because Wylie engaged in behavior such as "verbally threatening or harassing, or physically touching, assaulting, intimidating, threatening or retaliating against" his person or property. Kmotorka further alleges that Wylie "engaged in a pattern of intimidation and retaliation against witnesses and public officials who attempted to enforce zoning regulations" against his business. However, as the trial court observed, Kmotorka does not attempt to explain why he did not ask for injunctive relief until after Wylie asked the trial court to reverse its decision to award him attorney's fees and other costs. In addition, entitlement to relief under R.C. 2923.34(B) requires a showing by preponderance of the evidence that the party to be enjoined violated R.C. 2923.32. As stated in our analysis of Kmotorka's third assignment of error, the purpose of granting injunctive relief under R.C. 2923.34(B) is to prevent future behavior of the type that constituted a violation of the OCPA. Kmotorka has made no such allegation on

[4] The language of former R.C. 2923.34(C) is substantially the same as R.C. 2923.34(B), which is at issue in this case.

appeal; rather, he seems to argue that he may seek to enjoin Kmotorka from any potentially undesirable behavior, whether or not it was related to a statutory violation.

{¶ 49} Upon consideration, we find that the trial court's denial of Kmotorka's request to file a brief in support of his motion for injunctive relief, and the resulting denial of such relief, was not arbitrary, unconscionable, or unreasonable. Accordingly, the trial court did not abuse its discretion, and Kmotorka's fourth assignment of error is not well-taken.

{¶ 50} Having disposed of all of Kmotorka's assignments of error, we now turn to Wylie's sole cross-assignment of error, in which he asserts that the trial court erred by awarding Kmotorka $11,545.33 as "costs" in this action. In support of his cross-assignment of error, Wylie argues that there is no legal authority to support the trial court's decision to tax "all of [Kmotorka's] deposition expenses as costs." Kmotorka counters by asserting that, pursuant to Civ.R. 56(D), such evidence was necessary to support his opposition to summary judgment.

{¶ 51} This court has held that, "[g]enerally, whether or not the trial court makes an award of allowable expenses is a discretionary matter, reviewable in the court of appeals under an abuse of discretion standard." *Jackson v. Sunforest Ob-Gyn Assoc. Inc.*, 6th Dist. No. L-08-1133, 2008-Ohio-6170, ¶ 7, citing *Atkinson v. Toledo Area Reg'l Transit Auth.*, 6th Dist. No. L-05-1106, 2006-Ohio-1638, ¶ 9. However, before reviewing the amount of costs ordered in this case, we must first consider whether, as a matter of law, deposition expenses can be awarded as "costs." *Id.*

{¶ 52} Civ.R. 54(D) states that "[e]xcept when express provision therefor is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs." The Ohio Supreme Court has held that the "costs" allowed by Civ.R. 54(D) "are limited to those allowed by statute." *Id. at* ¶ 8, citing *Williamson v. Ameritech Corp.*, 81 Ohio St.3d 342, 691 N.E.2d 288 (1998), syllabus. Pursuant to R.C. 2303.21,

> [w]hen it is necessary in an appeal, or other civil action to procure a transcript of a judgment or proceeding, or exemplification of a record, as evidence in such action or for any other purpose, the expense of procuring such transcript or exemplification shall be taxed in the bill of costs and recovered as in other cases.

{¶ 53} In *Boomershine v. Lifetime Capital, Inc.*, 182 Ohio App.3d 495, 913 N.E.2d 520, 2009-Ohio-2736 (2d Dist.), the Second District Court of Appeals, citing *Keaton v. Pike Comm. Hosp.*, 125 Ohio App.3d 153, 705 N.E.2d 734 (4th Dist.1997), held that deposition expenses may be recovered if they are used to support or oppose a motion for summary judgment, where no trial was held. *Id.* at ¶ 13. In that case, the appellate court reasoned that, since Civ.R. 56(C) refers to "evidence" which, pursuant to the rule, includes "deposition," "affidavits," and "transcripts of evidence," the "costs" of procuring such evidence may, in the trial court's discretion, be taxed to a non-prevailing party. *Id.* With regard to specific types of evidence, other Ohio courts have held that the transcription of video depositions, as well as deposition expenses, in general, may not be

taxed as costs unless they are "used as evidence in an action * * *. *See Hagemeyer v. Sadowski*, 86 Ohio App.3d 563, 621 N.E.2d 707 (6th Dist.1993). In addition, this court has held that the cost of depositions which are filed in an action and are "necessary to the trial" may be taxed as "costs" pursuant to Civ.R. 54(D). *Jackson, supra,* at ¶ 8. In such cases, "[t]he issue of whether the deposition was used to question a witness about a material issue in the case is irrelevant." *Id.* at ¶ 9.

{¶ 54} A review of the record shows that, on summary judgment, Wylie opposed each and every allegation of the complaint that was brought by Kmotorka. Those claims included private nuisance, assault, battery, intentional infliction of emotional distress, OCPA violations, civil conspiracy, trespass and vandalism. The facts stated in Wylie's memorandum were supported by his own affidavit and Kmotorka's deposition. Kmotorka's memorandum in opposition is supported by numerous depositions. None of the depositions used to oppose summary judgment were offered at trial; however, many of the deposed individuals testified at trial.

{¶ 55} On consideration this court finds that, as a matter of law, Kmotorka's deposition expenses could be taxed as "costs" in this action, even though they were not used at trial. As to whether the trial court abused its discretion by fixing the amount of those costs at $11,545.33, the record shows that, in his motion to tax costs, Kmotorka submitted total expenses of $13,073.89. Those expenses included the cost of transcribing more than 20 depositions and a partial transcription of Wylie's criminal trial, subpoena and witness fees for the witnesses presented by Kmotorka at trial, and the costs of

procuring copies of medical records. After reviewing Kmotorka's motion, the trial court issued a supplemental judgment entry on March 28, 2011, in which it found that the medical records were not taxable as costs, and allowed the other expenses as itemized in "Plaintiff's Amended Bill of Costs for Case No. 2008 CV 1159," which was attached to the judgment entry.

{¶ 56} As set forth above, the trial court's award of allowable expenses to be taxed as costs will not be overturned on appeal absent a finding of abuse of discretion. *Jackson*, 6th Dist. No. L-08-1133, 2008-Ohio-6170, at ¶ 9. An abuse of discretion requires a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore*, 5 Ohio St.3d at 219, 450 N.E.2d 1140.

{¶ 57} On further consideration, we find that the trial court considered each of the expenses submitted by Kmotorka to be charged as costs, as evidenced by the exclusion of medical expenses from Kmotorka's request. Accordingly, we cannot say that the trial court's award was arbitrary, unreasonable or unconscionable. Wylie's cross-assignment of error is not well-taken.

{¶ 58} The judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE