[Cite as *Emanuel's, L.L.C. v. Restore Marietta, Inc.*, 2023-Ohio-147.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

Emanuel's LLC,	:	Case No. 22CA6
Plaintiff-Appellant,	:	
v.	:	DECISION AND JUDGMENT ENTRY
Restore Marietta, Inc., et al.,	:	
Defendants-Appellees.	:	**RELEASED 1/17/2023**

APPEARANCES:

Anne C. Labes, Esq., Parkersburg, West Virginia, for appellant.

Jared A. Wagner and Jane M. Lynch, Green & Green, Lawyers, Dayton, Ohio, and Paul Betram, III, City of Marietta Law Director, Marietta, Ohio, for appellee City of Marietta.

Patrick Kasson and Kent Hushion, Columbus, Ohio, for appellees Restore Marietta, Inc. and Christie Lynn Thomas.[1]

Hess, J.

{¶1} Emanuel's LLC appeals from a judgment of the Washington County Common Pleas Court granting judgment on the pleadings in favor of the city of Marietta (the "City"), Restore Marietta, Inc., d/b/a Marietta Main Street ("MMS"), and Christie Lynn Thomas, defendants below. Emanuel's presents three assignments of error asserting that the trial court erred by extending statutory immunity to the defendants and by dismissing tortious interference with business relations and monopoly claims contrary to

[1] We have used the spelling of Thomas's first name in the complaint. However, we observe that in her answer, Thomas asserted that her first name was spelled "Cristie," and Emanuel's has used that spelling in its appellate brief.

facts asserted in the complaint. For the reasons which follow, we overrule the assignments of error and affirm the trial court's judgment.

I. FACTS AND PROCEDURAL HISTORY

{¶2} In June 2021, Emanuel's filed a complaint against the City, MMS, and Thomas which alleged the following. Emanuel's owns real estate in Marietta, Ohio, where it operates an Israeli restaurant, TLV Restaurant. In March 2021, the mayor of Marietta submitted to the Marietta City Council the final version of an application to establish a Designated Outdoor Refreshment Area, or "DORA," in an area of downtown Marietta where TLV is located. A DORA is an area "where the State's open container laws are lifted during designated times, allowing customers to purchase alcoholic beverages from permitted establishments and carry the containers within the confined DORA area." Emanuel's holds a D5L liquor license from the Ohio Division of Liquor Control for TLV, and the application identified TLV as a qualified permit holder. The application mentioned DORA cups, included a "mock-up design of the cups," and stated that the cups would be " 'made available' to qualified permit holders." On April 29, 2021, the Marietta City Council passed a resolution to establish the DORA. The City announced that its DORA program would begin on June 4, 2021.

{¶3} On or about May 18, 2021, Thomas, the Executive Director of MMS, a private not-for-profit corporation, "initiated a private e-mail chain to certain designated permit holders within the DORA zone, informing them of additional regulations [MMS] was requiring permit holders to comply with, including the purchase of designated cups" from MMS. Emanuel's was not included in the chain. The information in the chain, "including the link to purchase the cups, was not made publicly available at any time," and "[t]he

only way to receive this information and purchase the cups was through the private email chain generated by [MMS]." The cups are sold for $0.90 each, "with part of the profit allegedly inuring to [MMS], part of the profit inuring to the print shop that designed the cups and orders the cups, part of the profit inuring to the benefit of the company that actually prints the cups, and part of the profit allegedly inuring to the benefit of a fund maintained by [MMS]." It costs approximately $50.00 to ship 250 cups, "the minimum order permitted." And the link to purchase the cups "indicates that businesses are required to charge their customers $1.00 per cup."

{¶4} On May 24, 2021, Emanuel's "received its DORA license from the Ohio Division of Liquor [C]ontrol." On June 3, 2021, Emanuel's contacted the City "to obtain the DORA cups mentioned in" the application and was directed to contact Thomas of MMS. Thomas informed representatives of Emanuel's that "they may not participate in DORA on June 4, 2021, as they had not ordered the cups sold by [MMS], which take approximately 2 weeks to produce." Thomas also came to TLV and "expressed to restaurant employees and the manager, in front of customers," that Ari Gold, the CEO of Emanuel's, had accused her "of vandalizing his property with spray-painted swastikas" even though he "never accused anyone, let alone Ms. Thomas, of this hate crime," which had occurred in 2017. Gold and Emanuel's representative went to a city council meeting and expressed concerns about MMS's "apparent enforcement of the DORA legislation without any authority." The mayor said a city official or the city law director would call them the next day, but this did not occur.

{¶5} The complaint further alleged that the DORA application and resolution did not "delegate any authority to operate or enforce DORA to [MMS], or any other private

entity," or indicate that participating businesses had to buy cups from MMS, that the cups could only be manufactured and sold by a single entity, that the cups had to be compostable, or that businesses had to charge customers $1.00 per cup. The resolution only required the use of plastic cups that were "distinctly marked." MMS did not "have the authority to enforce legislation" in the City or "create additional restrictions regarding duly-passed city legislation," "wrongfully precluded some businesses, including Plaintiff, from participating in a city-authorized program designed to benefit downtown businesses," did not have "authority to usurp contract opportunities and create a monopoly under the guise of operating a city program," and "created a situation where certain businesses were able to benefit from the DORA program, while others were wrongfully excluded." And the City "failed to prevent [MMS] from assuming government functions and assuming governmental authority."

{¶6} The complaint set forth three counts. Counts One and Two incorporated "by reference all other material allegations" in the complaint and made additional allegations. Count One was titled "tortious interference with business relations" and alleged that MMS did not have "authority to impose additional restrictions on businesses willing to participate in DORA," "to enforce DORA legislation," or "to exclude businesses from the DORA program" and that MMS "wrongfully prevented [Emanuel's] from participating in the DORA program," causing Emanuel's to suffer damages. Count Two was titled "violation of O.R.C. 1331: rules against monopolies" and alleged that MMS "created a monopoly by requiring business owners to purchase cups through [MMS] only or be excluded from the DORA program, despite no legislative authority." Count Two further alleged that MMS caused "the cups to be sold at an inflated price well-above

market value, for the purported benefit of [MMS] and a fund [MMS] maintains," that this "monopoly also inured to the benefit of private manufacturers, a deal which was struck outside the confines of the government contract procurement process," and that the pricing scheme was not in the DORA application or resolution. Count Two also alleged that the City "allowed [MMS] to cause this monopoly" and that the monopoly caused Emanuel's to suffer damages. Count Three was titled "defamation and slander" and alleged that Thomas's false statement about Gold accusing her of vandalism caused Emanuel's damages.

{¶7} The complaint requested "preliminary injunctive relief preventing Marietta Main Street from continuing to enforce DORA legislation, impose additional restrictions not included in the legislation, and engage in a monopoly as detailed herein." The prayer for relief demanded "judgment against Defendants which will fairly and reasonably compensate Plaintiff for damages, plus interest, costs, and other such relief as this Court deems appropriate, and injunctive relief as stated herein."

{¶8} In July 2021, Emanuel's filed a "renewed motion for preliminary injunction" asking that MMS and the City be enjoined from certain conduct.[2] The defendants opposed this motion. The defendants also filed answers to the complaint and motions for judgment on the pleadings.

{¶9} The trial court granted the motions for judgment on the pleadings, denied the "Application for Preliminary Injunction" as moot, and dismissed the case. The court observed that it was "not entirely clear" whether Emanuel's asserted "all three causes of

[2] The City asserts that this motion only requested a preliminary injunction against MMS. However, the motion itself requests a preliminary injunction against both MMS and the City even though the "introduction" to Emanuel's memorandum in support of the motion, which the City quotes in its appellate brief, refers only to MMS.

action" in the complaint against the City. However, even if Emanuel's did, the City was "entitled to immunity from plaintiff's claims as a matter of law" under R.C. 2744.02(A)(1) "unless one of the exceptions in R.C. 2744.02(B)" applied. The court found that the facts in the complaint were "insufficient to establish any of the exceptions to immunity." The court also found the City immune from the Valentine Act claim under the state action doctrine. The court found that the claim for tortious interference with business relations against MMS and Thomas failed because the complaint did not allege (1) any prospective business relations with which they interfered, (2) that they actually interfered with any prospective business relations, (3) that they prevented Emanuel's from entering into any prospective business relations, (4) that any alleged interference was intentional, or that (5) Emanuel's suffered any damages. The court found the Valentine Act claim against MMS and Thomas failed because (1) the alleged antitrust violations were "not an unreasonable restraint of trade," (2) the complaint did not "allege an antitrust injury," and (3) MMS and Thomas were "immune under the state action doctrine." The court found that the defamation claim against Thomas failed because a corporation could not bring a claim for defamation based on "the alleged slander of its owners and officers," and the complaint failed to allege "special damages required for its *per quod* slander claim."

II. ASSIGNMENTS OF ERROR

{¶10} Emanuel's presents three assignments of error:

> **Assignment of [E]rror 1**: The trial court erred in granting Defendants' Motions for Judgment on the Pleadings, extending statutory immunity to nongovernmental Defendants ReSTORE Marietta, Inc. and Cristie Thomas, and extending immunity to the City of Marietta.
>
> **Assignment of Error 2**: The trial court erred by dismissing the claim for tortious interference with business relations contrary to facts asserted in [the] complaint.

Assignment of Error 3: The trial court erred by dismissing the monopoly claim contrary to facts asserted in [the] complaint.

III. STANDARD OF REVIEW

{¶11} "Appellate review of a judgment on the pleadings involves only questions of law and is therefore de novo." *New Riegel Local School Dist. Bd. of Edn. v. Buehrer Group Architecture & Eng., Inc.*, 157 Ohio St.3d 164, 2019-Ohio-2851, 133 N.E.3d 482, ¶ 8. Civ.R. 12(C) states: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." " 'Dismissal is appropriate under Civ.R. 12(C) when (1) the court construes as true, and in favor of the nonmoving party, the material allegations in the complaint and all reasonable inferences to be drawn from those allegations and (2) it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him or her to relief." *Maternal Grandmother v. Hamilton Cty. Dept. of Job & Family Servs.*, 167 Ohio St.3d 390, 2021-Ohio-4096, 193 N.E.3d 536, ¶ 13, quoting *Reister v. Gardner*, 164 Ohio St.3d 546, 2020-Ohio-5484, 174 N.E.3d 713, ¶ 17.

IV. R.C. CHAPTER 2744

{¶12} In its first assignment of error, Emanuel's contends the trial court erred by extending statutory immunity to the defendants.

A. The City

{¶13} Emanuel's maintains that the trial court erred when it "categorically" dismissed the City "from the action based on its argument of governmental immunity protections as codified in Ohio Revised Code Chapter 2744." Emanuel's asserts that it requested two forms of relief in its complaint—"damages in tort" and injunctive relief,

which is a form of equitable relief. Emanuel's suggests that the City is liable for damages for tortious interference with business relations and violation of the Valentine Act because the immunity exception in R.C. 2744.02(B)(2) for the negligent performance of acts with respect to proprietary functions applies.[3] Emanuel's claims that "purchasing materials and setting prices for goods" are proprietary functions, so "neither the City, nor its alleged 'agents,' [MMS] and Ms. Thomas, are immune from the consequences of their actions in attempting to force business owners to purchase supplies from one and only one enumerated supplier, and require the customer to charge an extra dollar for DORA drinks, or for negligently allowing a private organization to attempt to enforce these restrictions on the public, especially when these restrictions are not supported by the underlying legislation." Emanuel's also asserts that the trial court failed to consider that R.C. Chapter 2744 only provides political subdivisions immunity from tort claims for damages, not claims for equitable relief. Emanuel's contends that "[e]ven if the trial court was persuaded to grant the City immunity from tort damages, it erred by extending this immunity to Plaintiff's claims in equity, contrary to established Ohio law."

{¶14} "R.C. Chapter 2744, the Political Subdivision Tort Liability Act, sets forth a comprehensive statutory scheme for the tort liability of political subdivisions and their employees." *McConnell v. Dudley*, 158 Ohio St.3d 388, 2019-Ohio-4740, 144 N.E.3d 369, ¶ 20. " 'Determining whether a political subdivision is immune from tort liability pursuant to R.C. Chapter 2744 involves a familiar, three-tiered analysis.' " *Id.*, quoting *Pelletier v. Campbell*, 153 Ohio St.3d 611, 2018-Ohio-2121, 109 N.E.3d 1210, ¶ 15. The

[3] Emanuel's divided its first assignment of error into subsections related to the City and to MMS and Thomas. Emanuel's only made its proprietary function arguments under the subsection related to MMS and Thomas even though these arguments also mention the City.

first tier "involves the general grant of immunity to political subdivisions by R.C. 2744.02(A)(1), which provides that 'a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.' " *Id.* at ¶ 21. The second tier "involves determining whether any of the five exceptions to immunity that are listed in R.C. 2744.02(B) apply to expose the political subdivision to liability." *Id.* at ¶ 22. "If any one of the five exceptions to immunity in R.C. 2744.02(B) applies and if any defenses that may be asserted by the political subdivision under R.C. 2744.02(B)(1) do not apply, then the third tier of the sovereign-immunity analysis requires a court to determine whether any of the defenses in R.C. 2744.03 apply to reinstate the political subdivision's immunity." *Id.* at ¶ 23.

{¶15} Emanuel's does not dispute that the City is a political subdivision or that the claims against the City for damages for tortious interference with business relations and violation of the Valentine Act fall within the general grant of immunity under R.C. 2744.02(A)(1). Rather, Emanuel's asserts that the exception to immunity in R.C. 2744.02(B)(2) applies. That provision states that with exceptions not relevant here, "political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions." R.C. 2744.02(B)(2).

{¶16} Even if the conduct alleged in the complaint involved proprietary functions, which the City disputes, the R.C. 2744.02(B)(2) immunity exception would not apply to expose the City to liability for damages because that exception applies only to negligent

conduct. Although Emanuel's appellate brief characterizes the City's conduct as negligent, tortious interference with a business relationship requires " 'an *intentional* interference causing a breach or termination of' " a business relationship. (Emphasis added.) *DeepRock Disposal Solutions, LLC v. Forté Prods., LLC*, 4th Dist. Washington No. 20CA15, 2021-Ohio-1436, ¶ 107, quoting *Martin v. Jones*, 2015-Ohio-3168, 41 N.E.3d 123, ¶ 63 (4th Dist.). Moreover, with respect to the Valentine Act claim, Emanuel's suggests its complaint alleged a violation of R.C. 1331.01(C)(1), which defines a "trust," which R.C. 1331.01(C)(4) makes "unlawful and void." However, R.C. 1331.01(C)(1) defines a "trust" as "a combination of capital, skill, or acts by two or more persons for any of the [statutorily enumerated] purposes." (Emphasis added.) Because the R.C. 2744.02(B)(2) immunity exception does not apply to intentional or purposeful conduct, the exception is not applicable to the claims against the City for damages for tortious interference with business relations and violation of the Valentine Act. Emanuel's does not argue that any other immunity exception applies; therefore, Emanuel's has not shown that the trial court erred when it found the City immune from liability for damages under R.C. Chapter 2744.

{¶17} In addition, the trial court did not improperly extend statutory immunity to the City for a claim for equitable relief. Although R.C. 2744.02(A)(1) does not state that political subdivisions are immune from claims for equitable relief, the complaint did not include any such claims against the City. Emanuel's did file a motion for a preliminary injunction against the City and MMS, which Emanuel's originally requested against only MMS in the complaint. However, while a preliminary injunction is "an equitable remedy," it is "an impermanent one." *Community First Bank & Trust v. Dafoe*, 108 Ohio St.3d 472,

2006-Ohio-1503, 844 N.E.2d 825, ¶ 28. "[A] preliminary injunction proceeding is parallel, expedited, and separate from the main action. A preliminary injunction aids the main action by ensuring that a judgment in the main action will be meaningful." *Id.* "Unlike permanent injunctions, a preliminary injunction is not intended as a remedy for a litigant on the merits of a claim." *Hosta v. Chrysler*, 172 Ohio App.3d 654, 2007-Ohio-4205, 876 N.E.2d 998, ¶ 31. "The goal of a preliminary injunction is to preserve the status quo pending final determination of the matter." *State Employment Relations Bd. v. Youngstown*, 7th Dist. Mahoning No. 20 MA 0060, 2021-Ohio-4552, ¶ 17. Preliminary injunctions " 'are generally regarded as being superseded by a final judgment that is rendered on the merits in the underlying controversy' " and are therefore "not enforceable after final judgment has been entered." *Hosta* at ¶ 31, quoting *Burns v. Daily*, 114 Ohio App.3d 693, 708, 683 N.E.2d 1164 (1996). Therefore, the trial court correctly denied as moot the motion for preliminary injunction against the City when the court made a final determination of the claims against the City in the complaint.

{¶18} We observe that in *Kline v. Davis*, 4th Dist. Lawrence Nos. 00CA32 & 01CA13, 2001 WL 1590658 (Dec. 11, 2001), the plaintiff filed a complaint "seeking money damages, along with a request for a preliminary injunction and temporary restraining order." *Kline* at *1. The plaintiff alleged violations of the Ohio Sunshine Law, the Public Records Act, and the Open Meetings Act. *Id.* The trial court granted the defendants' motion for summary judgment "based on sovereign immunity." *Id.* We held that because R.C. Chapter 2744 does not apply to actions for equitable relief, the defendants "were not entitled to 'judgment as a matter of law' on [the plaintiff's] request for an injunction." *Id.* at *2. Therefore, we held that the trial court erred in part in granting the summary judgment

motion and remanded to the trial court with instructions to "proceed with a disposition of [the plaintiff's] claims for injunctive relief." *Id.* at *1. *Kline* is distinguishable from this case. Even though it appears that the plaintiff in *Kline* explicitly requested only a preliminary injunction, the trial court had a statutory duty to issue a permanent injunction if a violation of the Ohio Sunshine Law occurred. *Id.* at *3, citing R.C. 121.22(I)(1) ("Upon proof of a violation or threatened violation of this section in an action brought by any person, the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions"). This case does not involve an alleged violation of the Ohio Sunshine Law, and we are not aware of any statutory provision which would have required the trial court to issue a permanent injunction against the City in this case even though Emanuel's did not request one.

{¶19} For the foregoing reasons, we overrule the portion of the first assignment which asserts the trial court erred by extending statutory immunity to the City.

B. MMS and Thomas

{¶20} Emanuel's also maintains that the trial court erred by extending immunity to MMS and Thomas under R.C. Chapter 2744. However, Emanuel's misreads the trial court's decision. The court did not find MMS and Thomas immune from liability for any claims under R.C. Chapter 2744. The only immunity the court found MMS and Thomas were entitled to was immunity under the state action doctrine for the Valentine Act claim. Therefore, we also overrule the remaining portion of the first assignment of error which asserts the trial court erred by extending statutory immunity to MMS and Thomas.

V. TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS

{¶21} In its second assignment of error, Emanuel's contends that the trial court erred "by dismissing the claim for tortious interference with business relations contrary to facts asserted in [the] complaint." Although the assignment of error is broadly worded, the arguments under it challenge only the trial court's reasons for dismissing the tortious interference claim against MMS and Thomas. Emanuel's asserts that the complaint alleged sufficient facts to survive a Civ.R. 12(C) motion. Emanuel's maintains that "[f]rom the facts as pled, reasonable minds could deduce intent and impropriety on behalf of Defendants." Emanuel's claims that it "alleges that Defendants wrongfully attempted to prohibit it from participating in a city program that it was otherwise authorized to participate in by the State Department of Liquor Control." MMS and Thomas did not include Emanuel's in private emails about the DORA program, and based on the facts alleged in the complaint, Thomas "appears to have personal animosity toward Plaintiff's affiliates, potentially accounting for this omission." Emanuel's asserts that it "alleges damages in the form of lost sales" due to the attempts of MMS and Thomas to "exclude" Emanuel's "from the city program" and their omission of Emanuel's from published lists of "approved" locations to buy DORA drinks.

{¶22} " 'The elements of tortious interference with a business relationship are: (1) a business relationship; (2) the tortfeasor's knowledge thereof; (3) an intentional interference causing a breach or termination of the relationship; and (4) damages resulting therefrom.' " *DeepRock Disposal Solutions*, 4th Dist. Washington No. 20CA15, 2021-Ohio-1436, at ¶ 107, quoting *Martin*, 2015-Ohio-3168, 41 N.E.3d 123, at ¶ 63. "Tortious interference with a business relationship is similar to tortious interference with

a contract, but the result of the interference does not require the breach of contract. It is sufficient to prove that a third party does not enter into or continue a business relationship with the plaintiff." *Martin* at ¶ 63.

{¶23} The trial court gave five grounds for granting MMS and Thomas judgment on the pleadings with respect to the tortious interference with business relations claim. One ground was that the complaint failed to allege any prospective business relations with which they interfered. Emanuel's suggestion that it is sufficient that one can infer from its complaint that MMS and Thomas interfered with its business relationships with members of the public by preventing it from participating in the DORA program is not well-taken. A vague assertion that a party interfered with certain unspecified business relationships is insufficient to state a claim for tortious interference with a business relationship. *Wilkey v. Hull*, 366 Fed.Appx. 634, 638 (6th Cir.2010). *See generally One Energy Ents., LLC v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 17AP-829, 2019-Ohio-359, ¶ 75-76 ("vague reference to hypothetical future contracts and business relationships" insufficient to state claim for tortious interference with prospective business relationships); *Ethan Allen, Inc. v. Georgetown Manor*, *Inc.*, 647 So. 2d 812, 815 (Fla.1994) ("no cause of action exists for tortious interference with a business's relationship to the community at large"); *McCreight v. AuburnBank*, ___ F.Supp.3d ___, 2020 WL 1061675, *4 (M.D.Ala.2020), quoting *Glennon v. Rosenblum*, 325 F.Supp.3d 1255, 1267 (N.D.Ala.2018) (plaintiff alleging tortious interference with a business relationship must "allege a specific relationship" the defendant interfered with because "[n]obody has a 'legally protectable relationship with every potential participant in their local market' ").

{¶24} "[I]n any appeal, including this appeal, the appellant bears the burden to demonstrate error on the part of the trial court." *State v. West*, 4th Dist. Highland No. 14CA7, 2015-Ohio-2139, ¶ 4. Emanuel's did not meet its burden with respect to the trial court's finding that the complaint failed to allege any prospective business relations with which MMS and Thomas interfered. Therefore, we conclude that the trial court did not err when it dismissed the tortious interference claim against MMS and Thomas on that ground and that it is unnecessary for us to address the alternative grounds for that ruling. We overrule the second assignment of error.

VI. VALENTINE ACT

{¶25} In its third assignment of error, Emanuel's contends that the trial court erred "by dismissing the monopoly claim contrary to facts asserted in [the] complaint." Emanuel's maintains that "[t]he elements of a monopoly as defined by the Valentine Act are sufficiently pled in the complaint to survive a Rule 12 motion." Emanuel's asserts that MMS and Thomas "argue governmental immunity from" the Valentine Act claim "based on a claimed contractual relationship with the City of which there is no evidence. However, by definition in the Act, a 'person' includes corporations, partnerships, and associations." Emanuel's also asserts that the United States Supreme Court "has established that a municipal corporation can also be a 'person' for the purpose of statutory analysis" and that the Supreme Court of Ohio "has stated that when a political subdivision acts in a proprietary nature, there is less justification for affording it immunity * * *."

{¶26} In addition, Emanuel's contends that even though "the DORA expanded * * * trade," Emanuel's "does not argue the DORA itself violates the Valentine Act, rather, Defendants' actions in attempting to force business owners to purchase materials from

one supplier without any legal or rational justification is the unreasonable restraint on trade, and must be quashed." (Emphasis deleted.) Emanuel's maintains that the DORA resolution does not mandate that businesses buy cups from MMS, "require business owners to charge customers an additional dollar for DORA drinks," or state that the profit from cup sales "inures to the benefit" of the City, MMS, and the manufacturer. According to Emanuel's, there is "an unreasonable restraint on trade for the businesses as described in the Plaintiff's Complaint, as the cost per cup including shipping exceeds $1.00, and plastic cups are readily available from any number of suppliers for significantly less money, and may very well be already in the business's inventory." Emanuel's maintains that decisions about "where to purchase supplies and how much to charge belong to the business owners," and that "Defendants have no authority to make these decisions for local businesses."

A. Statutory Provisions

{¶27} "Ohio's antitrust statutes, known as the Valentine Act, are contained in R.C. Chapter 1331, which is entitled 'Monopolies.' " *Aladdins Lights Inc. v. Eye Lighting Internatl.*, 2017-Ohio-7229, 96 N.E.3d 864, ¶ 13 (9th Dist.). R.C. 1331.01(C)(1) states:

> (1) "Trust" is a combination of capital, skill, or acts by two or more persons for any of the following purposes:
>
> (a) To create or carry out restrictions in trade or commerce;
>
> (b) To limit or reduce the production, or increase or reduce the price of merchandise or a commodity;
>
> (c) To prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce, or a commodity;
>
> (d) To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of

> merchandise, produce, or commerce intended for sale, barter, use, or consumption in this state;
>
> (e) To make, enter into, execute, or carry out contracts, obligations, or agreements of any kind by which they bind or have bound themselves not to sell, dispose of, or transport an article or commodity, or an article of trade, use, merchandise, commerce, or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity, or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers, or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine, or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected;
>
> (f) To refuse to buy from, sell to, or trade with any person because such person appears on a blacklist issued by, or is being boycotted by, any foreign corporate or governmental entity.

"A trust as defined in this division is unlawful and void." R.C. 1331.01(C)(4). And R.C. 1331.08 authorizes "the person injured in the person's business or property by another person by reason of anything forbidden or declared to be unlawful in [R.C. 1331.01 to 1331.14]" to "sue therefor" and "recover treble the damages sustained by the person and the person's costs of suit."

B. The City

{¶28} The trial court found that the City was immune from the Valentine Act claim under both R.C. 2744.02(A)(1) and the state action doctrine. In its arguments under the third assignment of error, Emanuel's asserts that the Supreme Court of Ohio "has stated that when a political subdivision acts in a proprietary nature, there is less justification for affording it immunity * * *." To the extent Emanuel's is implying that the City is not immune under R.C. 2744.02(A)(1) because the R.C. 2744.02(B)(2) immunity exception related to

proprietary functions applies, we already rejected that contention in Section IV.A. of this decision.

{¶29} Emanuel's also suggests that the City qualifies as a "person" who can violate the Valentine Act, asserting that the United States Supreme Court "has established that a municipal corporation can also be a 'person' for purpose of statutory analysis * * *." Though unclear, Emanuel's may be implying that the City is not immune under R.C. 2744.02(A)(1) because the immunity exception in R.C. 2744.02(B)(5) applies. R.C. 2744.02(B)(5) states that "a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code * * *." However, "to 'expressly' impose liability on a political subdivision, a statute must state that a political subdivision is liable and not simply recite that some general category of persons is liable." *Student Doe v. Adkins*, 2021-Ohio-3389, 178 N.E.3d 947, ¶ 61 (4th Dist.) Emanuel's does not direct our attention to any such provision in the Valentine Act.

{¶30} Emanuel's has not shown that the trial court erred when it found the City immune under R.C. 2744.02(A)(1). Consequently, even if any of Emanuel's arguments under the third assignment of error could be construed to challenge the court's alternative finding that the City is immune under the state action doctrine, it would be unnecessary for us to address them. Accordingly, we overrule the third assignment of error insofar as it challenges the dismissal of the Valentine Act claim against the City.

C. MMS and Thomas

{¶31} The trial court gave three grounds for granting MMS and Thomas judgment on the pleadings with respect to the Valentine Act claim. First, the court found the alleged

antitrust violations were not an unreasonable restraint of trade. The court explained that to establish the Valentine Act claim, Emanuel's had to show a combination of effort by two or more actors that unreasonably restrained trade in a relevant market but could not because the City's DORA program expanded, rather than restrained, trade. And "even if the DORA somehow restrained trade," it did "not do so unreasonably" because the City exercised its authority under R.C. 4301.82 "to regulate the containers used in the DORA program by deciding that participating businesses must use the official cup chosen by the City" and chose "to implement its DORA, including the sale of its 'official cup' to qualified businesses, by partnering with nonprofit MMS, a permissible arrangement under Ohio law." The court further stated: "Plaintiff cites no legal authority that the regulations imposed to carry out Marietta's DORA—by which trade is expanded—are an unreasonable restraint of trade."

{¶32} Second, the court found that the complaint failed to allege an antitrust injury, stating:

> To establish standing to assert a claim under the Valentine Act, "a plaintiff must prove the existence of antitrust injury, which is to say injury of the type the antitrust laws intended to prevent and that flows from that which makes defendants' acts unlawful." *See Acme Wrecking Co. v. O'Rourke Constr. Co.*, 1995 Ohio App. LEXIS 745, at *6 (1st Dist. March 2, 1995) quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990). This requirement "ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." *See id.* (emphasis in original). Thus, the Complaint "must allege an injury to the market, not just a personal injury." *Caudill v. Lancaster Bingo Co.*, 2005 U.S. Dist. LEXIS 24621, at *18 (S.D. Ohio Oct. 24, 2005).
>
> Plaintiff fails to allege that the requirement to purchase official cups for $0.90 *reduced* competition among establishments in the DORA zone or caused an injury to the market. By suspending Ohio's Open Container laws for certain days and times within the DORA zone, the City granted qualified businesses permission to conduct otherwise unlawful activity—selling alcohol to be consumed outdoors—which *created* a market for such activity.

> Qualifying businesses are all subject to the same requirements to participate in DORA, and thus, are all on equal footing. Thus, Plaintiff failed to allege an antitrust injury: under no set of facts can Plaintiff establish that the City's DORA—implemented to *expand* business activity for qualifying businesses—*reduced* competition among such businesses. *See Caudill*, 2005 U.S. Dist. LEXIS 24621, at *18-19 (granting motion for judgment on the pleadings on Plaintiff's antitrust claim because the complaint "is void of any allegations as to how the market has changed or been damaged as a result of their inability to compete," and "fails to identify any competitors . . . describe the market . . . [or] discuss any market conditions.")

(Emphasis and alteration sic.) And third, the court found that even if Emanuel's "could make a showing of an antitrust claim," MMS and Thomas were immune under the state action doctrine.

{¶33} Although Emanuel's generally challenges the grant of judgment on the pleadings to MMS and Thomas with respect to the Valentine Act claim, we are unable to discern any arguments under the third assignment of error which specifically challenge the trial court's determination that the complaint failed to allege an antitrust injury. Emanuel's arguments appear to focus on the trial court's alternative conclusions that the alleged antitrust violations were not an unreasonable restraint of trade and that MMS and Thomas have immunity. At no point does Emanuel's mention the topic of antitrust injury, address the legal authority the trial court cited on that topic, cite any other legal authority on that topic, or address the trial court's point that requiring all qualifying business to comply with the same requirements to participate in the newly created market for DORA drinks in downtown Marietta could not reduce competition where none existed before.

{¶34} As previously stated, "in any appeal, including this appeal, the appellant bears the burden to demonstrate error on the part of the trial court." *West*, 4th Dist. Highland No. 14CA7, 2015-Ohio-2139, ¶ 4. Emanuel's has not demonstrated error in the trial court's finding that the complaint failed to allege an antitrust injury. Accordingly, we

conclude that the trial court did not err in granting MMS and Thomas judgment on the pleadings on that ground with respect to the Valentine Act claim and that it is unnecessary for us to address the alternative grounds for that ruling. Therefore, we overrule the remainder of the third assignment of error, which challenges the dismissal of the Valentine Act claim against MMS and Thomas.

VII. CONCLUSION

{¶35} Having overruled the assignments of error, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Wilkin, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Michael D. Hess, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

[Cite as *Estate of Tomlinson v. Mega Pool Warehouse, Inc.*, 2023-Ohio-229.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ESTATE OF KATHERINE TOMLINSON	:	JUDGES:
	:	Hon. Earle E. Wise, Jr., P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
MEGA POOL WAREHOUSE, INC.	:	
STEPHEN GOLD	:	Case No. 22 CAE 03 0020
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 18 CV H 06 0317
JUDGMENT:	Affirmed in Part, Reversed in Part and Remanded
DATE OF JUDGMENT:	January 26, 2023

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
MICHAEL E. REED MARC J. KESSLER ELISE K. YARNELL 65 East State Street Suite 1400 Columbus, OH 43215	JONATHON L. BECK NATALIE M. E. WAIS ANTHONY V. GRABER 130 W. Second Street Suite 1500 Dayton, OH 45402

Wise, Earle, P.J.

{¶ 1} Defendants-Appellants Mega Pool Warehouse Inc., et al appeal four judgments of the Delaware County Court of Common Pleas, specifically the August 6, 2020 judgment entry denying appellants motion to hold a jury trial in January 2021, the November 19, 2021 Findings of Fact, Conclusions of Law and Entry of Verdict, the January 7, 2022 Judgment Entry Granting Plaintiff's Application for Attorney Fees and Awarding Damages, and the February 18, 2022 Judgment Entry Denying Defendant's Motion for New Trial. Plaintiff-Appellee is the Estate of Katherine Tomlinson.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

{¶ 2} Mega Pool does not dispute the underlying facts. The general facts are as follow.

{¶ 3} In 2016, Mega Pool and its sole shareholder Stephen Gold contracted with appellee Katherine Tomlinson to install a pool, remove an existing deck, and install a new deck at Tomlinson's home. The contract price was $75,000 payable as a $7,500 deposit, $33,250 on delivery of the pool, $33,250 on installation of the liner, and $1,000 retainage due upon completion. The contract provided for liquidated damages and attorney fees in the event of a breach by Tomlinson, but no reciprocal provision in the event of a breach by Mega Pool. The contract additionally contained a mutual waiver of a right to a jury trial.

{¶ 4} The contract at issue covered only the pool and the concreate deck. Mega Pool, however, performed additional work outside the contract without a cost estimate and without reducing the change orders to writing. Mega Pool accepted a $10,000 advance payment from Tomlinson for the extra work. In later communications Mega Pool asked for further payment, indicated it would accept an additional payment of $15,000 as

payment in full for total payments of $99,000, but then later kept changing the amount owed.

{¶ 5} When Tomlinson refused to make further payment, Mega Pool refused to complete the work. Gold told Tomlinson none of his subcontractors would complete any additional work, and stated he would withhold any warranty work until he was paid. Tomlinson had to hire another contractor to clean up debris left on her property by Mega Pool. Additionally, the pool installed by appellant was defective in many regards. Because the cost to repair the defects was greater than the replacement cost of the pool, the pool had to be replaced.

{¶ 6} On June 18, 2018, Tomlinson filed a complaint against Mega Pool alleging breach of contract, breach of warranty, negligent workmanship, and violations of the Consumer Sales Practices Act (herein CSPA). Tomlinson made a jury demand and on July 25, 2019, paid a jury deposit as required by the Local Rules of Practice of the Delaware County Court of Common Pleas (Loc.R.) 25.04. The rule requires a jury deposit be made at least 60 days before the scheduled trial date.

{¶ 7} Following numerous continuances and an unsuccessful court-ordered mediation, a jury trial was scheduled for September 8, 2020. Mega Pool moved the trial court to again continue the matter to January of 2021. Because this would constitute the sixth continuance, and further due to scheduling difficulties, the magistrate conducted a telephone conference with the parties to determine if they would be amenable to a bench trial which could take place on the scheduled date. Tomlinson chose to abandon her jury deposit and agreed to a bench trial. Mega Pool, however, refused to consent to a bench

trial, and filed a written objection. On August 6, 2020, the trial court overruled Mega Pool's objection based on its failure to pay the jury deposit required by Loc.R. 25.04.

{¶ 8} The matter proceeded to a bench trial on September 8-9, 2020. The parties submitted proposed findings of fact and conclusions of law. Mega Pool argued in part that the CSPA was inapplicable to the installation of an in-ground swimming pool and that they were unjustly denied a jury trial. On November 19, 2021, the trial court issued its Findings of Fact, Conclusions of Law, and Entry of Verdict. The trial court found in favor of Tomlinson on her claims for breach of contract, breach of warranty, and violations of the CSPA. The trial court found in favor of Mega Pool on the negligence claim. The court awarded damages and compensation to Tomlinson along with treble damages under the CSPA.

{¶ 9} On December 20, 2021, Tomlinson's estate[1] submitted an application for attorney fees. Mega Pool did not file a response before the trial court's January 7, 2022 decision granted the estate's application in full, awarded damages, and noted its judgment constituted a final appealable order.

{¶ 10} On February 3, 2022, Mega Pool filed a motion for a new trial. The motion raised the same issues appellant raises here on appeal. On February 18, 2022, the trial court denied Mega Pool's motion.

{¶ 11} Mega Pool filed an appeal and the matter is now before this court for consideration. It raises three assignments of error as follow:

[1] Tomlinson passed away shortly after trial.

I

{¶ 12} "THE TRIAL COURT COMMITTED AN ERROR OF LAW BY FINDING THE CSPA APPLICABLE TO THE UNDERLYING DISPUTE REGARDING THE INSTALLATION OF A DECK AND IN-GROUND POOL."

II

{¶ 13} "THE TRIAL COURT COMMITTED AN ERROR OF LAW BY AWARDING LITIGATION COSTS, EXPERT WITNESS FEES, PARALEGAL FEES, AND NON-CSPA ATTORNEY FEES UNDER THE CSPA."

III

{¶ 14} "THE TRIAL COURT DENIED APPELLEES [SIC] THEIR CONSTITUTIONAL RIGHT TO A JURY TRIAL WHERE APPELLEE'S JURY DEMAND WAS PERFECTED UNDER THE LOCAL AND CIVIL RULES AND APPELLANTS OBJECTED TO THE WITHDRAWAL OF IT."

I

{¶ 15} In its first assignment of error, Mega Pool argues the trial court committed an error of law by finding the CSPA applicable to the installation of a swimming pool and deck. We disagree.

Standard of Review

{¶ 16} Appellant's motion for a new trial was raised pursuant to Civ.R. 59(A)(1) and (9). A motion for a new trial premised upon "error of law occurring at the trial and brought to the attention of the trial court" under Civ.R. 59(A)(9), is reviewed under a de novo

standard. *Sully v. Joyce*, 10th Dist. No. 10AP-1148, 2011-Ohio-3825, ¶ 8, citing *Ferguson v. Dyer*, 149 Ohio App.3d 380, 383, 2002-Ohio-1442, 777 N.E.2d. 850.

Applicability of the CSPA

{¶ 17} The CSPA applies to consumer transactions and prohibits unfair, deceptive, or unconscionable acts or practices by suppliers in consumer transactions whether they occur before, during, or after the transaction. R.C. 1345.02(A). A "consumer transaction" is defined by R.C. 1345.01(A) as:

> A sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. "Consumer transaction" does not include transactions between persons, defined in sections 4905.03 [companies subject to the public utilities commission] and 5725.01 [financial institutions, stock brokers, insurance companies] of the Revised Code, and their customers, except for transactions involving a loan made pursuant to sections 1321.35 to 1321.48 of the Revised Code and transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers; transactions involving a home construction service contract as defined in section 4722.01 of the Revised Code; * * *.

{¶ 18} R.C. 4722.01 et seq. contains The Home Construction Services Suppliers Act (HCSSA). Enacted in August of 2012, the HCSSA also prohibits certain deceptive acts in home construction service and seeks to protect individual homeowners entering into such contracts.

{¶ 19} Mega Pool argues the installation of the pool and deck in this matter was not subject to the CSPA, but rather the HCSSC. According to Mega Pool, the construction of a deck and swimming pool is specifically exempt from the definition of a consumer transaction under the CSPA as a transaction "involving a home construction service contract."

{¶ 20} R.C. 4722.01(C) defines "home construction service contract" as "a contract between an owner and a supplier to perform home construction services, including services rendered based on a cost-plus contract, for an amount exceeding twenty-five thousand dollars." R.C. 4722.01(B) defines "home construction service" as "[T]he construction of a residential building." R.C. 4722.01(F) defines "residential building" as "a one-, two-, or three-family dwelling and any accessory construction incidental to the dwelling."

{¶ 21} Mega Pool argues the CSPA does not apply to the transaction at issue because a swimming pool is "an accessory construction incidental to the dwelling" and therefore covered by R.C. 4722.01(F). As noted by the parties herein, "accessory construction" is not defined in R.C. 4722.01.

{¶ 22} Both parties direct this court to several cases in support of their respective positions regarding the status of a swimming pool as an "accessory construction." None of the cited cases, however, address the question of whether or not a pool is an

"accessory construction" pursuant to R.C. 4722.01. But we do not believe the question is relevant to the matter at hand. R.C. 4722.01 applies to the construction of a residential building *and* any accessory construction incidental to the construction of that building.

{¶ 23} Recently, in *Beder, et al v. Cerha Kitchen and Bath Designs Studio, LLC, et al*, 11th Dist. Geauga No. 2022-G-0008, 2022-Ohio-4463, Judge Westcott Rice dissenting, the 11th District found the CSPA and not the HSCCA applies to a home remodeling contract as the CSPA applies to transactions involving an already-existing construction and the HSCCA applies to new constructions. In arriving at its decision, the court noted:

> The Supreme Court of Ohio has previously defined "construct" as " 'to *build*; put together; make ready for use" and "construction" as " '[t]he *creation of something new*, as distinguished from the repair or improvement of something already existing.' " (Emphasis sic.) *State ex rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377, 382 627 N.E.2d 538 (1994), quoting Black's Law Dictionary 312 (6th Ed.1990); see also *United States v. Narragansett Improvement Co.,* 571 F.Supp. 688, 693 (D.R.I. 1983) ("The uniform conclusion is that 'construction' imports the creation of something new and original that did not exist before").

{¶ 24} *Id*., ¶ 13.

{¶ 25} We find the addition of the swimming pool and improvement of the existing concreate deck at Tomlinson's home was an improvement to an already-existing home. Accordingly, we find the transaction covered by the CSPA and not the HSCCA.

{¶ 26} The first assignment of error is overruled.

II

{¶ 27} In its next assignment of error, Mega Pool argues the trial court erred in awarding unreasonably high attorney fees, litigation expenses, expert witness fees, and paralegal fees under the CSPA. We disagree in part and agree in part.

Waiver

{¶ 28} We first address the estate's argument that Mega Pool has waived this argument for failure to challenge the award of attorney fees in the trial court. The estate supports its argument with reference to *L.A. & D., Inc v. Bd. of Lake Cty. Comm'rs*, 67 Ohio St.2d 384, 387, 423 N.E.2d 1109 (1981). That matter involved a question of waiver where appellants appealed from a denial of a motion for a new trial when there had been no trial. Rather, the trial court had granted appellee's motion for summary judgment. *Id*. 384. Because a trial did take place in this matter and because Mega Pool did challenge the award of attorney fees in its February 3, 2022 motion for a new trial, we find the argument preserved for appeal.

Standard of Review

{¶ 29} Mega Pool argues this matter is subject to de novo review. However, the only attorney fees awarded by the trial court were pursuant to appellee's CSPA claims. Judgment Entry Granting Plaintiff's Application for Attorney Fees and Awarding Damages filed January 7, 2022 at 4. R.C. 1345.09(F)(2) permits an award of reasonable attorney fees to the prevailing party where the supplier has knowingly committed an act or practice that violates the CSPA.[2] "[W]here a court is empowered to award attorney fees by statute, the amount of such fees is within the sound discretion of the trial court. Unless the amount of fees determined is so high or so low as to shock the conscience, an appellate court will not interfere." *Bittner v. Tri-County Toyota, Inc*., 58 Ohio St.3d 143, 146, 569 N.E.2d 464 (1991). We therefore review the award of attorney fees for an abuse of discretion. The term abuse of discretion implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

Determination of Attorney Fees Under the CSPA

{¶ 30} An award of attorney fees pursuant to R.C. 1345.09(F)(2) is calculated by the reasonable hourly rate multiplied by the number of hours reasonably expended on the case, a calculation sometimes referred to as the "lodestar." *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 146, 569 N.E.2d 464 (1991), syllabus. There is a strong presumption that the amount arrived at using this formula is the proper amount for an attorney-fee award. *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C*., 160 Ohio St.3d 32, 2020-Ohio-1056, 153 N.E.3d 30 ¶ 19.

[2] Whether Mega Pool knowingly violated the CSPA is not at issue here.

{¶ 31} Mega Pool first argues the award of $230,840.50 in attorney fees in this matter is excessive in comparison to the $84,000 in actual damages and shocks the conscience. The Supreme Court of Ohio, however, has rejected "the contention that the amount of attorney fees awarded pursuant to R.C. 1345.09(F) must bear a direct relationship to the dollar amount of the settlement, between the consumer and the supplier." *Bittner v. Tri-County Toyota, Inc*., 58 Ohio St.3d 143, 144, 569 N.E.2d 464 (1991). The court went on to explain that "[a] rule of proportionality would make it difficult, if not impossible, for individuals with meritorious * * * claims but relatively small potential damages to obtain redress from the courts." *Id*, quoting *Riverside v. Rivera*, 477 U.S. 561, 578, 106 S.Ct. 2686, 2696, 91 L.Ed.2d 466 (1986).

{¶ 32} Mega Pool does not argue the hourly rate used by the trial court is unreasonable, but rather that the entire award is unreasonable. Mega Pool characterizes the award as unreasonably high while ignoring the fact that the handing of this matter was lengthy and labor intensive. Beginning in July 2017, before a complaint was filed, counsel for the estate attempted to negotiate with and obtain a settlement with Mega Pool. Litigation in this matter followed and went on for more than two years; from June 2018 when the complaint was filed until September 2020. Further, as noted in the estate's December 20, 2021 application for attorney's fees, Mega Pool was initially represented by two separate firms, one defending against appellee's claims and the other pursuing Mega Pool's counterclaim until the counterclaim was dismissed in February 2019. The matter was also continued several times for mediation, ongoing discovery, and at the request of the parties. We therefore reject the argument that an attorney-fee award which exceeds the actual damages figure is excessive.

{¶ 33} Mega Pool also argues the trial court abused its discretion by awarding litigation costs, expert fees, paralegal fees, and non-CSPA related attorney fees. Mega Pool cites *Bryant v. Walt Sweeny Auto*, 1st Dist. Hamilton Nos. C-010395, C-010404, 2002-Ohio-2577 to support its argument that these fees are not recoverable under the CSPA. The *Bryant* court noted the Supreme Court of Ohio has found "litigation expenses cannot be taxed as costs, unless specifically provided for by statute." *Id*. at ¶ 42 citing *Centennial Ins. Co. v. Liberty Mutual Ins. Co*., 69 Ohio St.2d 50, 430 N.E.2d 925 (1982) and *Cunningham v. Goodyear Tire & Rubber Co*., 104 Ohio App.3d 385, 662 N.E.2d 73 (1995).

{¶ 34} Appellee counters citing *Hamilton v. Ball*, 2014-Ohio-1118, 7 N.E.3d 1241 wherein the court noted an award of attorney fees under the CSPA may include "fees at a lower rate * * * for work done by law clerks, legal interns, and paralegals." *Id*. at ¶ 81. T

{¶ 35} In *Jarmon v. Friendship Auto Sales Co, Inc*, 8th Dist. Cuyahoga No. 86589, 2006-Ohio-1587 the Eighth District noted:

> This court and other courts have held, that, legal fees incurred as a result of work performed by law clerks or legal interns should be taken into account when awarding attorney fees. As we stated in *Jackson v. Brown*, the use of law clerks may decrease litigation expenses since they are charged at a lower rate; therefore, their use should not be discouraged.

{¶ 36} *Id*. at 10 citing *Jackson v. Brown*, 83 Ohio App.3d 230, 232 (1992); *Non-Employees of Chateau Estates Resident Ass'n v. Chateau Estates, Ltd*., 2d Dist. No. 2004 CA 19, 2003, CA 20, 2004-Ohio-3781; *Ron Scheiderer & Associates v. City of London* (Aug. 5, 1996), 12th Dist. No. CA95-08-022, CA95-08-024.

{¶ 37} Therefore, while paralegal fees may be included in attorney's fees, they should be charged at a lower rate.

Attorney Fees in This Matter

{¶ 38} First, when making the fee award under R.C. 1345.09(F)(2), the trial court must state the basis for the fee determination in order to aid appellate review of the reward. Here, the trial court stated it "accepts Plaintiff's application and the hourly rates charged by counsel as evidence of the prevailing market rate for legal representation of this nature in connection with similar cases." We note, however, neither the application nor the affidavit attached to appellee's application for attorney fees provide an hourly rate. Additionally, the application indicates work was performed in this matter by both attorneys and paralegals but provides no indication as to which tasks were performed by paralegals and would be subject to a lower hourly rate. Without clarification as to who performed the work at which hourly rates we are unable to properly review the appropriateness of the awarded fees. We remand the matter of attorney fees to the trial court for such clarification and recalculation if appropriate.

{¶ 39} Second, the application requests compensation for expert witness fees and litigation costs. While the above outlined authority supports a finding of an award of attorney fees for work performed by paralegals, it does not support a finding that expert fees and litigation costs are recoverable under the CSPA claim. The trial court in this

instance awarded both under the estate's CSPA claim. We find an award which is not provided for by the CSPA is an abuse of discretion. We therefore vacate the award of litigation costs and expert fees under the estate's CSPA claim.

{¶ 40} The second assignment of error is sustained in part and overruled in part.

III

{¶ 41} In its final assignment of error, Mega Pool argues it was denied its constitutional right to a jury trial. We disagree.

{¶ 42} "There is a clear constitutional right to a jury trial in civil law suits. See Section 5, Article I, Ohio Constitution; Seventh Amendment to the United States Constitution. The right to a jury trial may not be impaired, but it 'may be subject to moderate and reasonable regulation.' " *Skiadas v. Finkbeiner*, 6th Dist. No. L-05-1094, 2007-Ohio-3956, ¶ 23, quoting *Walters v. Griffith*, 38 Ohio St.2d 132, 133, 311 N.E.2d 14 (1974).

{¶ 43} It is undisputed that Mega Pool failed to comply with Delaware County Loc.R. 25.04 which requires a party desiring a jury trial to make a jury deposit at least 60 days before trial. The rule further states failure of a party to make a jury deposit shall be deemed as a waiver of the jury. Even so, according to Mega Pool the trial court violated its constitutional right to a jury trial because Tomlinson had made the required jury deposit and Mega Pool did not consent to Tomlinson's withdraw of her jury demand as required by Civ.R. 38(D).

{¶ 44} In *Walters v. Griffith*, 38 Ohio St.2d 132, 311 N.E.2d 14 (1974), the Supreme Court of Ohio held that "[l]ocal court rules, requiring an advance deposit as security for the costs of a jury trial and providing that the failure of a party to advance such deposit

constitutes a waiver of the right to a trial by jury, are moderate and reasonable regulations of the right of trial by jury, and are constitutional and valid." *Id*. at syllabus. The court found that the local rule was supplementary to Civ.R. 38(B). *Id*. at 133-134, 311 N.E.2d 14.

{¶ 45} While Mega Pool cites matters from other courts wherein a party that did not make a jury demand was permitted to rely on a party that did, the language of the Delaware County local rule at issue controls our analysis.

{¶ 46} Per the language of Delaware County Loc.R. 25.04, "if *a party* is seeking a jury trial in a civil case, *the party* must submit a $500 jury deposit * * " Emphasis added. As noted by the trial court, this language "places the burden to pay the jury deposit on any party that 'is seeking a jury trial.' " Judgment Entry Denying Defendant's July 29, 2020 Motion to Hold Jury Trial in January 2021, August 6, 2020 at 3. The trial court went on to note a defendant cannot "simply "piggyback" on a plaintiff's deposit, but rather must also make a jury deposit if the defendant wants a jury trial too." *Id*. We agree.

{¶ 47} The third assignment of error is overruled.

{¶ 48} The judgment of the Delaware County Court of Common Pleas is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

By Wise, Earle, P.J.

Hoffman, J. and

Delaney, J. concur.

EEW/rw

[Cite as *JoMar Group, Ltd. v. Brown*, 2023-Ohio-98.]

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOMAR GROUP, LTD.

Plaintiff-Appellee

-vs-

GARY M. BROWN

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 22 CA 005

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 20 CV 039
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 12, 2023

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Wise, J.

{¶1} Defendant-Appellant, Gary M. Brown, appeals from the March 17, 2022, Judgment Entry by the Holmes County Court of Common Pleas. Defendant-Appellee is JoMar Group, Ltd. The relevant facts leading to this appeal are as follows.

STATEMENT OF THE FACTS AND CASE

{¶2} On June 19, 2020, Appellee, an Ohio limited liability company, filed a complaint alleging breach of contract and seeking specific performance.

{¶3} On July 13, 2020, Appellant filed his Answer.

{¶4} On August 18, 2020, Appellee filed an Amended Complaint. The amended complaint contained one count of breach of contract seeking specific performance, one count seeking damages for breach of contract, and one count of intentional interference with a contract also seeking damages.

{¶5} On September 8, 2020, Appellant filed his Answer to the Amended Complaint.

{¶6} On October 9, 2020, Appellee filed a Motion for Partial Summary Judgment.

{¶7} On November 13, 2020, Appellant filed a Response in Opposition.

{¶8} On November 25, 2020, Appellee filed a Reply to Appellant's Response in Opposition.

{¶9} On December 23, 2020, Appellant filed a Sur Reply.

{¶10} On January 27, 2021, the trial court held a hearing on Appellee's Motion for Partial Summary Judgment.

{¶11} On February 25, 2021, the trial court overruled Appellee's Motion for Partial Summary Judgment.

{¶12} On October 6, 2021, Appellee filed a Second Amended Complaint. The final amended complaint alleged Appellant sold a 260-acre tract of land. The contract called for Appellee to purchase around 158 acres from Appellant. The contract included a provision that provided Appellee the ability to purchase the remaining 102 acres ("Option").

{¶13} Within the time period of the Option, Appellee notified Appellant of his intention to exercise his option to purchase the remaining acreage. After receiving no response from Appellant, Appellee sent a certified letter notifying Appellant of his intention to exercise the Option.

{¶14} After sending the certified letter, Appellee began negotiations with a third party for the sale of the real estate subject to the Option. An agreement was reached on June 25, 2020. Appellee then informed Appellant of the contract between Appellee and the third party for the sale of the real estate.

{¶15} On November 2, 2021, Appellant filed an Answer.

{¶16} On December 16, 2021, the trial court held a bench trial.

{¶17} On March 17, 2022, the trial court issued a judgment entry finding in favor of Appellee on the First and Third Counts. Count two was found to be moot.

{¶18} On April 13, 2022, Appellee filed a notice of waiver of damages and a motion for the court to enter a final appealable order.

{¶19} On May 24, 2022, the trial court entered its final judgment entry.

ASSIGNMENTS OF ERROR

{¶20} Appellant filed a timely notice of appeal and herein raises the following two Assignments of Error:

{¶21} "I. THE TRIAL COURT ERRED BY GRANTING APPELLEE'S COUNT I FOR BREACH OF CONTRACT AND ORDERING SPECIFIC PERFORMANCE.

{¶22} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FOUND INTENTIONAL INTERFERENCE OF CONTRACT AND AWARDED DAMAGES FOR ALLEGED INTERFERENCE THAT TOOK PLACE PRIOR TO THE EXISTENCE OF THE CONTRACT."

I.

{¶23} In Appellant's first Assignment of Error, Appellant argues the trial court erred by finding the existence of a valid option contract, and if a breach occurred, ordering specific performance. We disagree.

a. Standard of Review

{¶24} The interpretation and construction of written contracts is reviewed de novo. *Long Beach Assn., Inc. v. Jones*, 82 Ohio St.3d 574, 576, 697 N.E.2d 208 (1998). However, an appellate court is not the finder of fact, we neither weigh evidence nor judge credibility of witnesses. Our role is to determine whether relevant, competent, and credible evidence exists upon which the fact finder could base his or her judgment. *Peterson v. Peterson*, 5th Dist. Muskingum No. CT2003-0049, 2004-Ohio-4714, ¶10, citing *Cross Truck v. Jeffries*, 5th Dist. Stark No. CA 5758, 1982 WL 2911 (Feb. 10, 1982).

b. Consideration for Option Contract

{¶25} "In the ordinary real estate option contract, the seller offers to sell his real property upon fixed terms, and he and his prospective buyer agree that, in exchange for a consideration paid by the buyer, the seller will leave his offer open for a specified time. Within this context, the option contract is not a contract to buy and sell the property, but

only a contract whereby the seller agrees to leave his offer open for a time certain. Confusion often arises since the option is combined with the main offer to sell and its attendant detailed terms." *Ritchie v. Cordray*, 10 Ohio App.3d 213, 215, 461 N.E.2d 325 (1983).

{¶26} "However, the two are separate and independent, even though found in one document; the option is collateral to the main offer to sell. The main offer does not become a contract to buy and sell unless and until its terms are accepted. The option, on the other hand, is already a binding complete contract to leave the offer open-there has been both offer and acceptance, supported by consideration." *Id*.

{¶27} This particular case has another layer of complexity as the document which allegedly contains the Option is also part of a contract for the sale of a different parcel of real estate.

{¶28} Appellant argues that since the Option was part of a larger contract, and no distinct consideration was called out, then the option contract is unenforceable. For support they cite *Bhavnani v. Voldness*, 10th Dist. Franklin No. 95APE03-284, 1995 WL 578124. *Bhavnani* clearly states, "appellant has failed to affirmatively demonstrate that he gave *separate* consideration for the option." *Id*. However, the Tenth District Court of Appeals uses the term "separate consideration" as "something other and independent of the consideration that will pass between the parties in the event that the option is exercised." *Mirich v. Safarek*, 7th Dist. Mahoning No. 81 C.A. 48, 1982 WL 6105, citing, 17 Ohio Jurisprudence 3d 453-454, Contracts, Section 22.

{¶29} In the case *sub judice*, Appellant received consideration of $1,425,000, a van, a promise not to divide the real estate for two and half years, and the right to walk or

ride over the property during his lifetime. Appellant gave consideration of real estate and the option to purchase 102 acres of land located south of SR 241 for $1,800,000.

{¶30} Accordingly, separate consideration of "something other and independent of the consideration that will pass between the parties in the event that the option is exercised" was provided.

c. Specific Performance

{¶31} The remedy of specific performance rests in the sound discretion of the trial court, "not arbitrary, but controlled by principles of equity, on full consideration of the circumstances of each particular case." *Hog Heaven of New Philadelphia, Inc. v. M & M W. High Ave, L.L.C.*, 5th Dist. Tuscarawas No. 2014AP020006, 2014-Ohio-5125, ¶16.

> The remedy of specific performance is governed by the same general rules which control the administration of all other equitable remedies. The right to it depends upon elements, conditions, and incidents which equity regards as essential to the administration of all its peculiar modes of relief. When all these elements, conditions, and incidents exist, the remedial right is perfected in equity. These elements, conditions, and incidents, as collected from the cases, are the following: The contract must be concluded, certain, unambiguous, mutual, and based upon a valuable consideration; it must be perfectly fair in all its parts; it must be free from any misrepresentation or misapprehension, fraud or mistake, imposition or surprise; it cannot be an unconscionable or hard bargain; its performance must not be oppressive upon the defendant; and, finally, it must be capable of specific execution through a decree of the court."

Manning v. Hamamey, 8th Dist. Cuyahoga No. 72072, 1998 WL 57093.

{¶32} Appellant argues that because the parties exchanged various versions of a real estate purchase agreement, this makes the final contract ambiguous. We disagree.

{¶33} Appellant hired an attorney to represent him in the negotiations. The prior versions of the proposed real estate purchase agreement show ongoing negotiations to arrive at the final signed contract of May 28, 2015. Nothing in the record shows the final contract was unclear or ambiguous, that fraud, mistake, or misrepresentation took place, or that it was unconscionable. As such the trial court did not abuse its discretion in ordering specific performance of the contract.

{¶34} Appellant's first Assignment of Error is overruled.

II.

{¶35} In Appellant's second Assignment of Error, Appellant argues the trial court erred when it found intentional interference of a contract. We disagree.

{¶36} The elements of tortious interference with a contract are "(1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages." *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 176, 707 N.E.2d 853 (1999).

{¶37} Appellant argues he was unaware of the third-party contract and that because his initial refusal to honor the Option took place before the third-party contract was signed, the trial court erred finding Appellant committed intentional interference of a contract.

{¶38} Appellant testified that on July 29, 2020, he was aware that the third-party contract existed. Therefore, we must determine if the trial court abused its discretion in finding the Appellant's refusal to honor the Option after being made aware of the third-party contract was justified. An abuse of discretion implies the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶39} A court determining whether an actor's interference with a contract was justified should consider the following factors:

> (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties.
>
> *Siegel*, 85 Ohio St.3d at 176, 707 N.E.2d 853.

{¶40} It has been established that Appellee properly exercised the Option within the timeframe noted. A series of preparatory draft contracts were exchanged leading to the final contract. Each draft contract and the final contract contained some form of the Option. Appellant knew the Option existed and never objected to the Option until Appellee attempted to exercise it. Appellant knew Appellee entered into a third-party contract selling the real estate subject to the Option and still refused to honor the Option.

{¶41} Based on the forgoing, we find the trial court did not abuse its discretion in finding Appellant intentionally interfered with Appellee's third-party contract.

{¶42} Appellant's Second Assignment of Error is overruled.

{¶43} For the foregoing reasons, the judgment of the Court of Common Pleas of Holmes County, Ohio, is hereby affirmed.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

JWW/br 0106