[Cite as *State ex rel. DeWine v. Sugar*, 2016-Ohio-884.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE ex rel. MICHAEL DeWINE OHIO ATTORNEY GENERAL PLAINTIFF-APPELLEE VS. ARTHUR DAVID SUGAR, SR., et al. DEFENDANTS-APPELLANTS	)	CASE NOS. 14 JE 0004 14 JE 0006 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeals from the Court of Common Pleas of Jefferson County, Ohio
Case No. 10 CV 149

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Mike DeWine
Attorney General of Ohio
Atty. Sarah Bloom Anderson
Atty. Clint R. White
Atty. Aaron S. Fanner
Assistant Attorneys General
Environmental Enforcement Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215

For Defendants-Appellants:

Atty. Jeffrey A. Kurz
42 N. Phelps Street
Youngstown, OH 44503

JUDGES:
Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: March 3, 2016

[Cite as *State ex rel. DeWine v. Sugar*, 2016-Ohio-884.]
WAITE, J.

{¶1} Appellants Arthur David Sugar ("Sugar"), Honey Creek Contracting Company, Inc. ("Honey Creek"); Dave Sugar Excavating, LLC ("Sugar Excavating"); ADS Leasing Corp. ("ADS"); and Excavating Technologies, Inc. ("Excavating Tech") (collectively "Appellants") appeal a March 27, 2013 environmental enforcement civil penalty awarded to the Appellee State of Ohio by the Jefferson County Common Pleas Court.

{¶2} Appellant Sugar argues that the trial court improperly found him personally liable for environmental violations that occurred during the asbestos removal in a mill owned by his company. Appellants collectively argue that since Sugar Excavating, Excavating Tech, and ADS did not own or operate the property, they also cannot be held liable. Even if this Court would uphold the trial court's liability determination against Sugar personally, Appellants argue that the civil penalty imposed by the trial court is excessive. For the reasons provided, Appellants' arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

Background

{¶3} Sugar owns several companies that are involved in excavation projects. Relevant to this appeal, he is the owner of: Honey Creek, Sugar Excavating, ADS, and Excavating Tech. Although Sugar is the sole shareholder of each company, all four companies are operated as separate entities. It appears that Honey Creek contracts for work while Sugar Excavating and Excavating Tech employ workers and

complete the work. ADS leases Sugar Excavating and Excavating Tech the equipment necessary to complete each job. (5/17/12 Tr., pp. 72-80; 126.)

Weirton Steel Mill

{¶4} In 2003 or 2004, Sugar learned that the Weirton Steel Mill ("the mill") in Steubenville, Ohio would be auctioned off and he had some interest in purchasing the mill. (Tr., p. 47.) Sugar and at least one of his consultants, Harry Manganaro, toured the mill before the auction commenced. During the tour, Sugar was informed that the mill contained friable asbestos which would have to be removed by the purchaser. Friable asbestos is material that contains more than one percent of asbestos and can be crumbled or crushed to powder by hand pressure.

{¶5} Sugar was specifically told that the mill had 30,000 linear feet of friable asbestos, including 5,992 linear feet of friable asbestos in the green room, which is a building located within the mill. Sugar was also told that the mill was full of machines and equipment that would have to be removed before any asbestos remediation could take place. With this knowledge, Sugar placed the winning bid on behalf of Honey Creek. After his bid was accepted, the mill went through bankruptcy and Honey Creek obtained ownership of the mill in August 2004.

{¶6} Sugar rarely visited the mill. Instead, he placed Harry Manganaro in charge of the demolition process due to his apparent expertise in the area. (Tr., p. 49.) Shortly thereafter, Sugar employees began removing the machines and equipment in preparation for asbestos remediation. During this process, any time a problem arose at the site, Sugar would send Manganaro to investigate.

Violations

{¶7} During both the preparation and remediation process, several environmental violations were reported. The facts are unclear as to how many violations were reported and the respective dates of such violations. However, some specific dates and instances are contained within the record. The first noted instance occurred in March of 2005.

{¶8} In March of 2005, the Ohio Environmental Protection Agency ("EPA") received a complaint from a former Sugar employee. The complaint alleged that from November 1, 2004 through March 14, 2005, Appellants were performing demolition activities which were disturbing the asbestos. The EPA sent a representative to inspect the mill who made several findings that confirmed the allegations in the complaint. The EPA contacted Sugar, who sent Manganaro to the site to investigate. Manganaro discovered significant asbestos levels at the site due to Sugar employees pulling down pipes that were covered in asbestos. Manganaro described the site as looking like a "snowstorm."

{¶9} A few days later, the City of Steubenville Health Department ("health department") received a phone call from a neighboring steel plant who complained that a white, greyish powder was floating in the air above the mill. (7/9/12 Plaintiff's Proposed Findings of Fact and Conclusions of Law, pp. 10-11.) The health department sent a representative to investigate the claim. The representative could not access the mill, but did confirm the presence of a white, greyish powdery substance floating above the mill. A few days later, the representative returned to the

site and was turned away by Sugar employees. The representative later met with Sugar, who claimed that a remediation contractor had just been hired. However, approximately one week later, the EPA representative and the health department representative returned to the site and found that no actions had taken place to actually remediate the asbestos. Both representatives were asked to leave the premises by a Sugar employee.

{¶10} On April 6, 2005, the EPA sent Sugar a notice of a violation of an asbestos regulatory requirement to provide the EPA with written notification of intent to demolish and to comply with asbestos requirements pursuant to Ohio Adm.Code 2745-20-03, 2745-20-04 and 2745-20-05. A certified mail receipt confirmed Sugar's receipt of the notice. From April of 2005 through June of 2005, Sugar sent several notices of intent to demolish to the EPA. It is unclear whether violations were alleged to have occurred between June 2005 and March 2006.

{¶11} In March of 2006, the EPA again called Sugar and notified him that the activity at the mill remained in violation of the asbestos regulations. In April of 2006, the EPA sent Appellant another notice of violation. In April and July of 2006, Sugar sent the EPA several more notices of intent to demolish.

{¶12} In August of 2006, the health department again inspected the mill and found serious violations had occurred, leading it to issue an asbestos public health emergency, which is reserved for rare, serious instances. In August, the health department issued two separate asbestos public health emergencies. Although

these are the only incidents discussed at length within the record, the state alleged that there were more than fifty violations found by the health department, alone.

Remediation Efforts

{¶13} Throughout Honey Creek's ownership of the mill, Sugar hired several asbestos remediation contractors. Importantly, each remediation company was recommended by Manganaro and approved by Sugar. Again, the timeline of this process is not entirely clear. The first company, Environmental Protection Systems ("EPS"), was hired by Sugar sometime around March of 2005. A remediation expert, along with representatives from the EPA and the health department, visited the site to inspect EPS's removal efforts. The inspection revealed several areas that needed to be addressed. EPS returned to fix these areas before the health department eventually approved of this remediation phase. It appears that EPS was hired to remediate only one area of the mill.

{¶14} Once EPS finished its work, Sugar hired a second contractor, Phase One. No specific testimony was provided about Phase One's involvement, but Sugar subsequently hired a third company, the Howland Company ("Howland"). Howland was hired specifically to complete the remediation of the boiler room. In 2007, Sugar made a rare visit to the site to determine why the remediation process had stalled. When he arrived, he observed Howland employees stealing copper from the mill and found that the company had caused friable asbestos to become disturbed. Several employees were arrested for theft and Howland stopped work on the project while the

theft issue was resolved. The record reflects, however, that in 2008, Howland returned to work at the site.

{¶15} In 2010, the state obtained a preliminary injunction. Shortly thereafter, Howland completed the remediation process. Appellant was then able to demolish the building and sell the scraps. He testified that he lost considerable money on the project.

Federal Charges

{¶16} In 2011, the U.S. Attorney General filed an information charging both Honey Creek and Sugar, personally, with five counts of asbestos violations: count one, conspiracy between Sugar and Honey Creek to profit without paying for proper asbestos remediation; count two, failure to notify the EPA at least ten days before commencing renovations; count three, failure to remove friable asbestos prior to commencing renovations; count four, work practice violation, causing employees to handle asbestos in a way to disturb the asbestos in violation of the law; and count five, work place violation, causing employees to hide friable asbestos in violation of the law.

{¶17} Honey Creek and Sugar each pled guilty to all five counts. Pursuant to a plea agreement, Honey Creek received a $40,000 fine. Sugar, as an individual, received a $10,000 fine, 90 days in jail, nine months of house arrest and two years of probation.

State Charges

{¶18} At the request of the EPA, the state filed a complaint against Sugar, Sugar Excavating, Honey Creek, Excavating Tech, and ADS on March 10, 2010. The complaint alleged both nuisance and asbestos violations arising from Appellants' failure to correctly remove and dispose of asbestos at the site.

{¶19} Two years later, on March 1, 2012, the state moved for partial summary judgment against Sugar on counts three (negligence), four and six (asbestos violations). Sugar confessed judgment on these counts as they pertained to the time period October 1, 2004 to April 4, 2005, the same time period covered by the federal plea agreement. Accordingly, the trial court granted partial summary judgment against Sugar for violations occurring between October 1, 2004 and April 4, 2005.

{¶20} In May of 2012, a bench trial was conducted on the remaining allegations in the complaint. The trial court found Sugar and his companies jointly and severally liable for an $850,000 civil penalty. The trial court additionally ruled that Sugar and his companies were responsible for attorney fees; however, the state later agreed to waive attorney fees. Appellants filed this timely notice of appeal challenging "all adverse entries related to the trial." Appellants' notices of appeal have been consolidated.

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT HELD DAVE, ADS, ETI AND DSE JOINTLY AND SEVERALLY LIABLE, WHEN THE OWNER OF THE PROPERTY (STIPULATED) WAS HONEY CREEK AND THE

OPERATORS WERE THE ASBESTOS ABATEMENT CONTRACTORS.

{¶21} Sugar contends that the trial court erred in finding him personally liable on the basis of his alleged personal conduct. Sugar explains that Ohio's administrative code, which is controlling in this case, allows liability to lie against any person who owns, operates, controls, or supervises demolition or renovation. Here, Appellant argues that the state stipulated to the fact that Honey Creek was the owner of the mill and the asbestos remediation companies were the operators. Sugar additionally argues that he was not in control of nor did he supervise the site, as those duties were given to Manganaro. As such, Appellant contends that the record does not support the trial court's determination that he was subject to personal liability.

{¶22} In response, the state agrees that the well-established law in Ohio applies asbestos related laws to any "owner or operator." However, the state disagrees that these laws prevent the trial court from holding Sugar personally liable. The state cites to Ohio Adm.Code 3745-20-01(B)(39)(a), which defines an owner or operator as "any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated." As each of Sugar's companies provided employees for or leased the equipment to the site, the state argues that the companies fall within the above definition. As to Sugar's liability as an individual, the state cites two cases: *Schaefer v. D.J. Produce, Inc.,* 62 Ohio App.2d 53, 403 N.E.2d 1015 (6th Dist.1978) and *State ex rel. Celebreeze v. Dearing, et al.,* 8th Dist. Nos.

51209, 51220, 51221, 1986 WL 12853 (Nov. 13, 1986). According to the state, these hold an owner of a company personally liable when the owner personally participates in the unlawful conduct or knew or should have known about the conduct but failed to take action. The state urges that even though Sugar may not have been physically present at the site, he controlled every aspect of the project.

{¶23} "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *Schambach v. Afford-A-Pool & Spa,* 7th Dist. No. 08 BE 15, 2009-Ohio-6809, ¶7, citing *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 280, 376 N.E.2d 578 (1978).

{¶24} In Ohio, "[c]ourt's have consistently held that the civil penalty provision imposes strict liability on both owners and operators." *State ex rel. DeWine v. Musleh*, 7th Dist. No. 12 MA 121, 2013-Ohio-4323, ¶37, citing *Beerman Realty Co. v. Alloyd Asbestos Abatement Co.*, 100 Ohio App.3d 270, 275, 653 N.E.2d 1218 (2d Dist.1995).

{¶25} There are two categories of charges in this case: those related to nuisance and to asbestos abatement. The respective laws will be discussed separately. However, as the law for each concept is similar, one analysis will discuss both theories.

Nuisance Law: Counts 1 & 2

{¶26} Pursuant to Ohio Adm.Code 3745-15-07(A):

> The emission or escape into the open air from any source or sources whatsoever, of smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, or any other substances or combinations of substances, in such manner or in such amounts as to endanger the health, safety or welfare of the public, or cause unreasonable injury or damage to property, is hereby found and declared to be a public nuisance. It shall be unlawful for any person to cause, permit or maintain any such public nuisance.

{¶27} Ohio Adm.Code 3745-15-01(U) defines a person as "the state or any agency thereof, any political subdivision, or any agency thereof, public or private corporation, individual, partnership, or other entity."

{¶28} R.C. 3767.02(A) states:

> Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets in the use, occupancy, establishment, or conduct of a nuisance; the owner, agent, or lessee of an interest in any such nuisance; any person who is employed in that nuisance by that owner, agent, or lessee; and any person who is in control of that nuisance is guilty of maintaining a nuisance.

{¶29} R.C. 3767.01(B) defines a person as "any individual, corporation, association, partnership, trustee, lessee, agent, or assignee."

Asbestos Law: Counts 3 through 10

{¶30} Asbestos related regulations are found within Chapter 3745-20 of the Ohio Administrative Code. There are three provisions within Chapter 3745-20 that are relevant, here. First:

> Each owner or operate to whom this rule applies shall * * * [p]rovide the director of Ohio EPA with written notice of intention to demolish or renovate * * * [a]t least ten working days before the beginning of any demolition operation, asbestos stripping or removal work, or any other activity including salvage activities and preparations that break up, dislodge or similarly disturb asbestos material.

Ohio Adm.Code 3745-20-03(A)(1), (3)(a).

{¶31} Second, "[e]ach owner or operator of a demolition * * * shall * * * [r]emove all regulated asbestos-containing material from a facility being demolished or renovated before any activity begins that would break up, dislodge, or similarly disturb the materials or preclude access to the materials for subsequent removal." Ohio Adm.Code 3745-20-04(A)(1).

{¶32} Third, "[e]ach owner or operator of any demolition [or] renovation * * * shall discharge no visible emissions to the outside air during the collection, processing (including incineration), packaging, transporting, or deposition of any asbestos-containing waste material, and adequately wet asbestos-containing waste material." Ohio Adm.Code 3745-20-05(B).

{¶33} In addition to these regulations, the Ohio Administrative Code provides two important definitions. First, " '[o]wner or operator' means any person who owns, leases, controls, operates or supervises a facility, an emission source, or air pollution control equipment." Ohio Adm.Code 3745-15-01(T). Second, " '[p]erson' means the state or any agency thereof, any political subdivision, or any agency thereof, public or private corporation, individual, partnership, or other entity." Ohio Adm.Code 3745-15-01(U).

Civil Penalty: Sugar as an Individual

{¶34} The trial court held Sugar personally liable based on his personal conduct. The court emphasized that:

> Throughout the ordeal David Sugar himself was contacted by the EPA officials on numerous occasions. While he tried to stay away from the facility in order to maintain plausible deniability of the violations occurring there, the fact is that he was informed of the violations over and over *as the sole man in charge of all Sugar entities. Whatever was done was on his order, whatever was not done was on his failure to order. He alone had authority to control activity on the site.* (Emphasis added.)

(3/27/13 J.E., p. 5.) The court continued to note that "Sugar was the sole decision-maker for all of his companies. * * * He is liable not because he owned the company but because he made the decisions and gave the orders." (3/27/13 J.E., p. 6.)

{¶35} Recently, the Eleventh District reviewed personal liability based on the personal participation theory in an environmental enforcement action. In *Deer Lake,* the trial court found the manager of a mobile park personally liable for violations of clean water regulations. *DeWine v. Deer Lake Mobile Park,* 11th Dist. No. 2013-G-3156, 2015-Ohio-1060, 29 N.E.3d 35, ¶57. On appeal, the trial court's penalty was upheld based on the finding that his individual participation established his personal liability. *Id.* The court found that the following facts established the manager's liability: he supervised the park, he managed the budget and records, he oversaw the operations of the facility, he served as the administrative contact person, and importantly, he failed to correct known violations even though he had the requisite authority to do so. *Id.* Finally, the Court emphasized that the regulatory statute applies to "any person" who violates the regulations. *Id. at ¶58.*

{¶36} The record before us is replete with evidence to establish Sugar's personal liability. While Sugar rarely physically visited the site, there is evidence that he oversaw the operations. He organized the project, sent workers from his companies (Sugar Excavating and Excavating Tech) to remove the machinery and leased equipment through another of his companies (ADS) to enable his workers to complete the project. He also served as the administrative contact person, as he received and responded to all notices of violations. He also gave all of the orders regarding the project. Every time a problem arose at the site, he ordered Manganaro, as his agent, to visit the site. He also ordered his workers to prevent the inspectors from entering the site.

{¶37} Most importantly, Sugar made all decisions as to the project. Sugar hired Manganaro. He also hired each remediation contractor. Although Manganaro recommended the contractors, it was Sugar who made the decision to hire them. He also made the decision not to fire Howland, even though he testified that several violations were due to Howland's poor work performance. He continued to employ Howland even after one particularly troublesome violation where investigators found hidden asbestos and ripped bags of asbestos across the site during Howland's period of employment. Despite receiving numerous notices of violations throughout Howland's employment, Sugar chose not to discharge or replace them. Although he now attempts to place the blame on Howland, it is clear that it was Appellant who chose to allow the company to continue working on the site despite repeated violations.

{¶38} Finally, the record clearly demonstrates that Sugar failed to correct known violations from the start of the project in 2005 until the end of the project in 2010, despite the fact that he was the sole person who had the authority to correct these violations. As previously discussed, there is no question as to Sugar's authority. As the trial court found, "he was the sole decision-maker for all of his companies," each of which were involved in this project. (3/27/13 J.E., p. 6.) Although Manganaro apparently supervised the site, this record reflects that all major decisions and orders came from Sugar.

{¶39} The record also reveals that Sugar unquestionable knew of the violations. He received and responded to notices of violation and frequently

discussed violations with the EPA and health department on the phone. Despite his awareness of these violations, he did not hire an asbestos remediation company until pressured by the EPA and he allowed Howland to continue work even though he now alleges that they were entirely at fault for those violations. Thus, he failed to take action even though he continued to receive notices of violations.

{¶40} Although Sugar relies on *State ex rel. DeWine v. Baldarelli,* 11th Dist. No. 2010-T-0086, 2011-Ohio-5339, the instant case is factually distinguishable from *Baldarelli*. First, the appellant in *Baldarelli* did not own the building in any way, he was merely a contractor. *Id.* at ¶4-5. Second, the appellant did not know that the building contained asbestos. *Id.* at ¶5. Third, the appellant did not hire workers, instruct workers, or otherwise operate, control, or supervise the demolition. *Id.* at ¶52.

{¶41} As there is substantial evidence that Sugar oversaw the project and failed to correct known violations even though he possessed the authority to do so, the trial court did not err in finding him personally liable as an individual based on the personal participation theory.

Civil Penalty: Sugar Excavating, Excavating Tech, & ADS

{¶42} Collectively, Appellants argue that the trial court improperly found that Sugar Excavating, Excavating Tech, and ADS were jointly and severally liable for the civil penalty. Appellants argue that none of these companies owned or operated the property, thus cannot be held liable pursuant to Ohio Adm.Code 3745-20-01.

{¶43} In response, the state asserts that evidence was presented at trial to show that these companies and their employees conducted demolition activities at the site and disturbed friable asbestos. Although the companies are labeled as separate entities, the state argues that they were entangled into one entity during this project: Honey Creek owned the building, Sugar Excavating and Excavating Tech provided workers, and ADS leased to the other Sugar companies the necessary equipment.

{¶44} Ohio Adm.Code 3745-20-01 provides that asbestos statutes apply to "any person." Pursuant to Ohio Adm.Code 3745-15-01, public and private corporations, individuals, partnerships, and other entities are considered "any person" within the statute.

{¶45} Here, there is no question that the three companies participated in demolition activities at the site. At trial, Sugar admitted that his workers had been performing demolition activities which caused friable asbestos to become disturbed. (5/17/12 Tr., pp. 53-56.) The record more than adequately supports this finding. For instance, in 2005, Manganaro arrived at the site to investigate after Sugar received a notice of violation. Manganaro testified that the site looked like a "snowstorm." (5/17/12 Tr., pp. 18, 53-54.) The disturbance was so significant that Sugar temporarily shut down further operations at the site.

{¶46} As each of these companies actively took part in the demolition process, they are "operators" within the purview of Ohio Adm.Code 3745-20-01. Although Sugar attempts to deflect the blame and point the finger at his remediation

contractors, this argument fails for two reasons. First, the presence of an independent remediation contractor does not alleviate a building owner from liability. *Beerman Reality Co. v. Alloyd Asbestos Abatement Co.,* 100 Ohio App.3d 270, 275-276, 653 N.E.2d 1218 (2d Dist.1995), citing *United States v. Geppert Bros., Inc.,* 638 F.Supp 996 (E.D. PA.1986). Second, "[i]t is well established that more than one party at a demolition site may be fined." *Beerman* at 273. As there is competent, credible evidence within the record to show that each of Sugar's companies participated in demolition activities and disturbed friable asbestos, the trial court did not err in finding the companies jointly and severally liable for the resulting violations.

{¶47} Accordingly, Appellants' first assignment of error is without merit and is overruled.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT ISSUED AN $850,000 CIVIL PENALTY AGAINST DAVE, HONEY CREEK, ADS, DVE AND ETI, JOINTLY AND SEVERALLY.

{¶48} Appellants collectively argue that the trial court abused its discretion in imposing an $850,000 civil penalty. Appellants additionally argue that the trial court failed to explain how it arrived at this amount. Appellants urge that this is particularly troublesome as the federal civil penalty for the same violations was only $40,000 for Honey Creek and $10,000 for Sugar. In response, the state argues that the trial court has discretion in determining the amount of a civil penalty so long as the amount does not exceed the statutory maximum.

{¶49} A trial court does have great discretion in assessing environmental civil penalties. *Deer Lake, supra,* at ¶76, citing *State ex rel. Ohio Atty. Gen. v. Shelly Holding Co.,* 135 Ohio St.3d 65, 2010-Ohio-5700, 984 N.E.2d 996, ¶23.

{¶50} Although Appellant encourages us to apply the factors found in *U.S. v. Golf Water Park Co., Inc.*, 14 F.Supp.2d 854 (S.D. Miss.1984), these factors originate from a specific statute that is not raised with the instant case. Further, at least seven Ohio districts (including the Seventh District) have adopted the factors found in *State ex rel. Brown v. Malleable,* 1 Ohio St.3d 151, 438 N.E.2d 120 (1982). Thus, we will review this matter using the *Malleable* factors.

Harm or Risk of Harm Posed to the Environment

{¶51} Appellants concede that the violations caused harm. However, they argue that the mediation contractors were the actual cause of the harm. The state responds that as no known amount of asbestos is considered safe, Appellants' actions caused significant harm, the extent of which will not likely be known for years. The state also points to evidence that a greyish powder was found in the air above the mill, which borders both the heavily traveled St. Rt. 7 and the Ohio River, to demonstrate the potential effect on both the environment and citizens who have traveled through the area.

{¶52} We agree with the state that the record demonstrates the violations caused harm to the environment, local citizens, and those traveling through the area. While Appellants again attempt to deflect liability to the remediation contractors, we have previously discussed that more than one party can be fined for an

environmental violation. In any event, Sugar hired and retained these companies even though he received notices of violations throughout the remediation process. In addition to the state's arguments, the record demonstrates the sense of urgency created by the violations, as evidenced by the health department's decision to call several public emergencies, an act reserved for rare, serious instances. Thus, we find that this factor weighs in favor of the state.

Recalcitrance, Indifference, Defiance of the Law

{¶53} The second *Malleable* factor examines the level of recalcitrance, indifference, or defiance of the law. Appellants do not address this factor but do argue that they made several good efforts to comply with the law, notably by hiring three contractors to remediate the asbestos. The state argues that Appellants began demolition without hiring a remediation expert, despite being advised by the EPA to do so. The state also points to evidence that Appellants attempted to hide asbestos and Sugar instructed his employees to prevent the EPA and health department from entering the site.

{¶54} The record demonstrates that Appellants acted with recalcitrance, indifference, and defiance of the law. There is evidence of record that Appellants did not provide protective gear for its employees despite their demolition activities in an asbestos ridden building. Further, there is evidence of as many as fifty violations over the six years it took Appellants to complete the remediation process. Despite receiving these notices of violations, Appellants continued to violate the regulations

and appeared to have done very little to maintain compliance with the law. Accordingly, we find that this factor weighs in favor of the state.

Economic Benefit

{¶55} The third factor regards the economic benefit achieved by the violation(s). Appellants argue that not only did Sugar not benefit from the violations, he lost a substantial amount of money on this project. In response, the state argues that, according to this Court's decision in *State v. Tri-State Group, Inc.,* 7th Dist. No. 03 BE 61, 2004-Ohio-4441, an economic benefit can be presumed as it is nearly impossible to calculate. Even so, the state asserts that Sugar was told before purchasing the building that the remediation process would cost an estimated $1.5 million. By Appellants' own admission, the remediation process cost only $500,000. As Appellants saved one million dollars by hiring inexperienced and ineffective contractors and not purchasing protective gear for the employees, the state contends that there is evidence here that Appellants received an economic benefit from the violations.

{¶56} Although Appellants presented evidence that Sugar lost money on the project as a whole, the evidence shows that the violations can be directly linked to Sugar's economic benefit. As the state maintains, Appellants apparently saved a million dollars by hiring sub-par remediation contractors. They additionally saved money by choosing not to purchase protective gear for the workers, despite the knowledge that exposure to asbestos could lead to significant health problems, including death. The record also shows that Appellants' loss on the project as a

whole was likely caused by their failure to properly and promptly remediate the asbestos. This factor also weighs in the state's favor.

Extraordinary Enforcement Costs

{¶57} The fourth factor examines the costs incurred by the state in violation enforcement. Appellants have not addressed this factor. The state asserts that it incurred substantial costs in conducting site visits, sampling at the site, and in producing and sending notices of violations.

{¶58} Although the state did not produce evidence as to the exact costs of these actions, it does appear that even marginal costs would become significant when taking into account the fact that the state was actively involved in enforcement at this site for approximately six years. Accordingly, there is evidence to find that this factor, too, weighs in the state's favor.

Statutory Maximum

{¶59} In addition to analyzing the four *Malleable* factors, it must be determined that the civil penalty did not exceed the statutory maximum. *Musleh* at ¶41. Pursuant to R.C. 3704.06(C), "[a] person who violates section 3704.05 or 3704.16 of the Revised Code shall pay a civil penalty of not more than twenty-five thousand dollars for each day of each violation."

{¶60} Appellants were charged with 1,491 days of violations. The maximum penalty, according to R.C. 3704.06(C), amounts to $37,275,000. The trial court imposed an $850,000 civil penalty, which is roughly two percent of the maximum penalty. Thus, the penalty was well within the statutory guidelines. Additionally,

although the trial court found Appellants lacked credibility, it appears from the court's decision to impose a penalty of only two percent of the maximum that the court did consider Appellants' arguments regarding mitigation.

{¶61} As all four *Malleable* factors weigh in favor of the state and the civil penalty is less than the statutory maximum, the state did not abuse its discretion in imposing an $850,000 civil penalty, jointly and severally.

Conclusion

{¶62} Appellants argue that the trial court erred in finding all Appellants jointly and severally liable for the environmental violations at the Weirton Mill. However, the record demonstrates that the trial court properly held Sugar liable pursuant to the personal participation theory. The record also shows that the trial court properly held the three companies liable pursuant to Ohio Adm.Code 3745-20-01. Appellants also argue that the $850,000 civil penalty was excessive. Despite Appellants' arguments, the record demonstrates that the $850,000 civil penalty is not excessive. Accordingly, Appellants' assignments of error are without merit and the judgment of the trial court is affirmed in full.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.