[Cite as *Appollini v. Michael*, 2020-Ohio-4819.]

# IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

KIM APPOLLONI,

Plaintiff-Appellee,

v.

DARREN MICHAEL,

Defendant-Appellant.

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**OPINION AND JUDGMENT ENTRY**
**Case No. 19 BE 0012**

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Civil Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 18 CV 275

**BEFORE:**
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

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**JUDGMENT:**
Affirmed.

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*Atty. Keith A. Sommer*, K. Sommer Law LLC, 409 Walnut St., P.O. Box 279, Martins Ferry, Ohio 43935, for Plaintiff-Appellee

*Atty. Erik A. Schramm, Jr.* and *Atty. Kyle W. Bickford*, Hanlon, Estadt, McCormick, & Schramm Co., LPA, 46457 National Road West, St. Clairsville, Ohio 43950, for Defendant-Appellant.

Dated: September 28, 2020

**WAITE, P.J.**

**{¶1}** Appellant Darren Michael appeals an April 10, 2019 Belmont County Court of Common Pleas judgment entry granting replevin of a boat to Appellee Kim Appollini. In this action, Appellant argues that the trial court failed to consider whether he was a bona fide purchaser of value of Appellee's boat, whether the third-party seller had apparent authority to sell the boat, or whether the owner of the boat bore the risk by storing it with a seller of similar goods. Pursuant to R.C. 1548.04, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

**{¶2}** Appellee owned a 2004 Palm Beach Pontoon Boat which measured twenty-two feet in length. For three consecutive winter seasons, she and her husband stored the boat at Liberty Automotive Group dealership ("Liberty"). Third-party defendant Jeffrey Wojcik owned the dealership. Wojcik was a close friend of Appellee's husband. At one time, Appellee also stored a jet ski at Liberty, however, she gave Wojcik permission to sell the jet ski and it appears that he did facilitate this sale. (Appellee Depo., p. 52.) Before the 2016-2017 winter season, Appellee's husband died. After her husband's death, Appellee and Wojcik removed the boat from the Ohio River and placed it into storage at Liberty. After the winter season ended, Appellee did not ask Wojcik to take the boat out of storage. The boat remained in storage throughout most of the summer.

**{¶3}** On July 19, 2017, Appellant drove by Liberty and saw the boat parked in the front row of the dealership near cars that were offered for sale. (Appellant Depo.,

pp.10-11.) Neither the boat nor the nearby cars had "for sale" signs. Appellant approached Wojcik and asked whether the boat was for sale. Wojcik told Appellant that the boat was for sale, and he started the engine to show Appellant that the motor was operational. Appellant agreed to purchase the boat from Wojcik for $13,000 and obtained a loan from Bayer Heritage Federal Credit Union in that amount. When Appellant asked Wojcik about the certificate of title, Wojcik informed him that it would be mailed to him within seven to ten days, similar to the purchase of a car. (Appellant Depo., p. 16.) It appears that Appellee also purchased a trailer from Wojcik to transport the boat.

**{¶4}** Appellant took possession of the boat at the time of the purchase and obtained a temporary registration from the Bureau of Motor Vehicles ("BMV"). He took the boat to the Ohio River and began using it. When he did not receive the certificate of title within the seven to ten-day time period, he contacted Wojcik. Wojcik informed him that the certificate of title was processed electronically, and occasionally may take longer to receive.

**{¶5}** At some point after the sale occurred, Appellee's nephew contacted her and informed her that Appellant had possession of her boat. (Appellee Depo., pp. 35-36.) When Appellant learned that Appellee was the (apparent) former owner, he called her to learn more about the boat. Appellee concedes she told Appellant during this phone call to "enjoy the boat" and that she would get him the ladder and lifeboats. (Appellee Depo., pp. 42-43.) Apparently during this same conversation, Appellant asked Appellee if she had any information about the certificate of title. Appellee told him that she had the certificate of title in her possession.

**{¶6}** Sometime thereafter, a friend notified Appellee that the boat was being operated in the Ohio River. Appellee conceded that she did not ask Appellant to return the boat. Instead, she contacted the Ohio Department of Natural Resources ("ODNR") and complained that Appellant was operating the boat and she had not received payment for it. (Appellee Depo., p. 30.) She also voiced concern about potential liability issues, because the boat was still registered in her name. At no time did she allege that the boat had been stolen or taken without permission. An ODNR representative informed her that payment of the boat was not an ODNR issue but Appellant would receive a ticket if he operated the boat without a proper registration. After his temporary registration expired, Appellant did receive a ticket from the ODNR for operating the boat. (Appellant Depo., p. 41.) Appellant removed the boat from the water but maintained possession.

**{¶7}** At this point, Appellee contacted Appellant and, for the first time, demanded return of the boat because she had not received payment. Apparently, Wojcik had not paid Appellee any portion of the $13,000 he received for the boat. Appellant declined to return the boat, asserting that he had obtained a loan and validly purchased the boat.

**{¶8}** According to an affidavit filed by Appellee, she was later informed that her boat was located on what she believed was an abandoned piece of property, along with the trailer Appellant purchased from Wojcik. She took the boat and the trailer from the property. Apparently, the property is not abandoned and belongs to Appellant's uncle, who had agreed to temporarily store the boat for Appellant.

**{¶9}** On July 11, 2018, Appellee filed a complaint for replevin of the boat. On August 20, 2018, Appellant filed a motion to dismiss the complaint. While the motion to

dismiss was pending, Appellee filed a motion for summary judgment. On October 25, 2018, the trial court denied Appellant's motion to dismiss.

**{¶10}** On October 26, 2018, Appellant filed an answer and counterclaim. In the counterclaim Appellant sought a declaratory judgment that he was the valid owner of the boat, asserting that he was the buyer in the ordinary course, and raising claims of entrustment, apparent authority, and common law fraud.

**{¶11}** On the same date, Appellant filed a third-party complaint against Wojcik and Liberty. The complaint alleged breach of contract, quantum meruit and unjust enrichment, promissory estoppel and detrimental reliance, entrustment, apparent authority, negligence, common law fraud, and indemnity, and sought specific performance.

**{¶12}** On December 10, 2018, M&T Credit Services (the lien holder of Appellee's boat) was joined as a party at Appellant's request.

**{¶13}** On February 20, 2019, the trial court granted Appellant's motion for partial default judgment against Wojcik and Liberty on the third-party complaint.

**{¶14}** On April 10, 2019, the trial court granted summary judgment in favor of Appellee on her original complaint for replevin. Appellee subsequently withdrew her request for damages.

**{¶15}** Shortly after the court granted replevin, Appellee sold the boat and Appellant's trailer to a third party. Appellant subsequently requested from the trial court return of his trailer and several personal items that were apparently stored in the boat before Appellee removed it from his uncle's property. On April 25, 2019, Appellant sought a stay to prevent completion of the sale of the boat and trailer. The court granted the stay.

**{¶16}** As to the trailer, this record reflects that Appellee stated in her deposition her husband gave the trailer and its certificate of title to Wojcik as a down payment for a vehicle. Although at oral argument in this matter counsel contended that the trailer and title were provided as security for the vehicle, the record clearly demonstrates that they were given to Wojcik in lieu of a down payment and there was no expectation that the trailer would be returned. Additionally, Appellant provided emails showing Appellee did not contest that he properly owned the trailer, and informed him that she would return his trailer once she purchased a new one. This record reflects, however, that Appellee maintained possession of both the boat and trailer as of the date of the filing of the appeal. We note, however, that the only issue on appeal is the question of the trial court's decision to award replevin of the boat to Appellee.

**{¶17}** On October 20, 2019, while this matter was pending on appeal, the trial court granted a stay of the third-party default matter pending the resolution of Wojcik's bankruptcy filing. These bankruptcy proceedings have no effect on the instant appeal.

Summary Judgment

**{¶18}** An appellate court conducts a *de novo* review of a trial court's decision to grant summary judgment using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is

adverse to that party. *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is "material" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc*., 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995).

**{¶19}** "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.,* 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997.).

**{¶20}** The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327.

ASSIGNMENT OF ERROR NO. 1

> The Trial Court Erred in Failing to Consider Uncontroverted Evidence and Facts in Ruling on Summary Judgment, Namely the Affidavit of Bryan Mancini.

ASSIGNMENT OF ERROR NO. 2

The Trial Court Erred in Determining Liberty Automotive, LLC and/or Jeff Wojcik, aka, Jeffrey J. Wojick [sic], Were Not Merchants Who Sold Boats, Pursuant to R.C. 1302.01(A)(5).

ASSIGNMENT OF ERROR NO. 3

The Trial Court Erred in Determining Appellant Was Not a Buyer in the Ordinary Course, Pursuant to R.C. 1301.201(B)(9).

ASSIGNMENT OF ERROR NO. 4

The Trial Court Erred in Failing to Consider Appellee Bore the Risk by Entrusting Liberty Automotive, LLC and/or Jeff Wojcik, aka, Jeffrey J. Wojick [sic], Pursuant to R.C. 1302.44(B) and *Executive Coach Builders v. Bush & Cook Leasing, Inc.*, 81 Ohio App. 3d 808 (12th App. Dist., 1992).

ASSIGNMENT OF ERROR NO. 5

The Trial Court Erred in Failing to Consider Liberty Automotive, LLC and/or Jeff Wojcik, aka, Jeffrey J. Wojick [sic] had Apparent Authority to Sell the Boat at Issue.

**{¶21}** As Appellant's five assignments of error are intertwined, they will be jointly addressed. Appellant argues that the trial court failed to consider his counterclaims of buyer in the ordinary course, entrustment, and apparent authority. Appellant contends

Wojcik owned a dealership that sold boats and dirt bikes as well as automobiles. Appellant cites deposition testimony that a twenty-foot blue fishing boat and Appellee's jet skis were previously offered for sale at the dealership. Thus, he claims Appellant entrusted the boat to a merchant who deals in the sale of watercrafts. Appellant supports his arguments with Appellee's admission that she told him to enjoy the boat and made plans to transfer a ladder and life jackets to him.

**{¶22}** In response, Appellee relies on R.C. 1548.04, the certificate of motor vehicle title act, which provides that a court may not recognize the sale of a watercraft without the transfer of a certificate of title. According to Appellee, the Ohio Supreme Court has held in several cases that the person or entity in possession of the certificate of title prevails in replevin actions involving motor vehicles and watercraft vehicles. Even if this Court finds that R.C. 1302.44 regarding entrustment and good faith purchasers applies, Appellee argues that Liberty is a not merchant who deals in the sale of watercraft and Appellant was not a buyer in the ordinary course of business.

**{¶23}** Generally, when parties present competing claims as to ownership of a motor vehicle or watercraft, the certificate of title statute, R.C. 1548.04, is applied. However, in matters where an entrustment argument is presented, Ohio courts have applied the UCC entrustment provision which is codified within 1302.44. See *Executive Coach Builders v. Bush & Cook Leasing, Inc.,* 81 Ohio App.3d 808, 612 N.E.2d 408 (12th Dist.1992) and *Fuqua Homes, Inc. v. Evanston Building & Loan Co.,* 52 Ohio App.2d 399, 370 N.E.2d 780 (1st Dist.1977).

**{¶24}** R.C. 1302.44 applies where there has been an entrustment "of goods to a merchant who deals in goods of that kind." The definition of entrustment is found within R.C. 1302.44(B),(C) and provides in relevant part that:

> (B) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entrustee to a buyer in the ordinary course of business.
>
> (C) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

**{¶25}** In support of his argument, Appellant cites to *Executive Coach Builders* and *Fuqua Homes.* In *Executive Coach Builder,* the appellant manufactured and sold limousines. *Id.* at 809. A business named Gold Key, acting solely as a middleman, arranged to purchase a limousine from the appellant. Gold Key had entered into an agreement to sell the limousine to a merchant, the appellee, for the purpose of leasing it to a limousine service franchisee. When the franchisee picked up the limousine directly from the appellant, appellee issued a check to Gold Key for the amount of the sale. However, Gold Key did not send any portion of the payment to the appellant. As a result, the appellant refused to provide the manufacturer's statement of origin to appellee which prevented the appellee from properly licensing the limousine. A replevin action between the appellant and appellee commenced. On appeal, the Twelfth District applied R.C.

1302.44 and held that the appellant entrusted the limousines to a merchant (the appellee) who deals in goods of that kind. Thus, the appellee was empowered to transfer the rights of that good (the lease in that case) to a buyer in the ordinary course of business. *Id.* at 814.

**{¶26}** In *Fuqua Homes,* the appellant was a manufacturer of modular homes. The appellee financed the sale of the home to the Ryan family. A company described as a "middleman-dealer" arranged the sale. *Id.* at 401. This was the seventh deal the manufacturer and the middleman dealer had executed together. The appellee paid the middleman-dealer who did not remit payment to the appellant and later disappeared. A replevin action between the appellant and the appellee commenced. On appeal, the First District held that the modular house was a good, that the middleman dealer was a merchant who deals in goods of that kind, and that the Ryans were buyers in the ordinary course of business.

**{¶27}** Although Appellant heavily relies on *Executive Coach Builder* and *Fuqua Homes*, those cases are readily distinguishable from the instant matter. There is no evidence within the record of this case that Liberty engaged in the business of selling watercrafts. Appellee admitted in her deposition that Wojcik had been storing her jet ski and that she allowed him to sell it. In Appellant's deposition, he stated that he saw a blue fishing boat at the dealership. However, there is no evidence within the record that the boat was for sale or that it was, in fact, sold. Even so, the sale of two watercrafts alone are insufficient to prove that Liberty was engaged in the business of selling watercrafts. Based on this record, the sale of these two watercrafts are isolated sales by a dealership engaged in selling motor vehicles. Appellant cannot demonstrate that Appellee entrusted

her boat with a merchant who deals in the sale of watercrafts. Hence, R.C. 1302.44 does not apply, here.

**{¶28}** In relevant part, R.C. 1548.04, contained in the Watercraft Certificates of Titles Chapter, provides:

> No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any watercraft or outboard motor sold or disposed of, or mortgaged or encumbered, unless evidenced:
>
> (A) By a certificate of title or a manufacturer's or importer's certificate issued in accordance with Chapter 1548. of the Revised Code;
>
> (B) By admission in the pleadings or stipulation of the parties.

**{¶29}** Ohio appellate courts have not directly addressed this statute to date. However, several courts have interpreted the motor vehicle statute found in Chapter 4505 which mirrors the watercraft statute in regard to certificates of title and provides guidance, here. The Certificate of Motor Vehicles Title Act provides an individual in possession of a certificate of title with a unique status. *Allan Nott Ents, Inc. v. Nicholas Starr Auto, L.L.C.*, 110 Ohio St.3d 112, 2006-Ohio-3819, 851 N.E.2d 479, ¶ 16, citing *Executive Coach Builders v. Bush Cook Leasing, Inc.*, 81 Ohio App.3d 808, 612 N.E.2d 408 (12th Dist.1992); *Fuqua Homes, Inc. v. Evanston Bldg. Loan Co.*, 52 Ohio App.2d 399, 370 N.E.2d 780 (1st Dist.1977). This unique status allows the certificate of title holder to prevail against a bona fide purchaser of value where competing claims of ownership of a motor vehicle exist. *Allan Nott* at ¶ 16. However, the rights conferred on such individual

are not absolute and the individual "does not prevail against all the world under any and all circumstances." *Id.*

**{¶30}** The Certificate of Motor Vehicles Title Act applies to both physical thefts of a motor vehicle and to thefts by fraud or deception. *Id.* at ¶ 34. The boat at issue in this case appears to have been transferred from Wojcik to Appellant by fraud or deception. Thus, the analogy to this act is relevant, here.

**{¶31}** The Ohio Supreme Court has recognized exceptions to the general rule found in the Certificate of Motor Vehicles Title Act may apply. For instance, the Supreme Court has indicated that a question of estoppel arising from an act of the vehicle owner may provide an exception. *Hardware Mut. Cas. Co. v. Gall*, 15 Ohio St.2d 261, 240 N.E.2d 502 (1968), paragraph one of the syllabus. The Court has expressly recognized an exception involving insurance coverage. See *Smith v. Nationwide Mut. Ins. Co.,* 37 Ohio St.3d 150, 524 N.E.2d 507 (1988). Additionally, an exception has been carved out in cases where a vehicle is forfeited to the state. See *State v. Shimits*, 10 Ohio St.3d 83, 461 N.E.2d 1278 (1984). Caselaw does not reveal any other recognized exceptions to the general rule that the possessor of the title is the valid owner.

**{¶32}** Appellant concedes that he does not possess the certificate of title. Appellee submitted a copy of the certificate of title, which is in her possession. Appellant has stated that Wojcik told him he would receive the certificate of title within seven to ten days and later informed him that it had been delayed due to an electronic filing issue. Thus, although Appellant was led to believe he would receive a certificate of title, he concedes that Wojcik never sent it to him and he was never in possession of a certificate

of title. As such, in order to prevail, the sale to him would have to fall within one of the recognized exceptions.

**{¶33}** There is no question that this matter does not involve insurance coverage or forfeiture. Appellant's only available argument would be estoppel. Appellant mentioned estoppel in his answer to the complaint, but did not directly raise or address the theory at any point during the summary judgment proceedings. His summary judgment arguments (bona fide purchaser of value in the ordinary course, entrustment, and apparent authority) appear to have estoppel issues at their foundation. Thus, we cannot say that any estoppel arguments were waived.

**{¶34}** "Equitable estoppel prevents relief when one party induces another to believe certain facts exist and the other party changes his position on reasonable reliance on those facts to his detriment." *Wilson v. Beck Energy Corp.*, 7th Dist. Monroe No. 15 MO 0010, 2016-Ohio-8564, 77 N.E.3d 408, ¶ 8, citing *Casto v. Positron*, 4th Dist. Washington No. 14 CA 39, 2016-Ohio-285, ¶ 19.

**{¶35}** Through depositions, the following undisputed facts were established. Appellant saw the boat in the front row of the dealership near several cars that were offered for sale. Although the boat was not posted with a "for sale sign," none of the cars in the row were so designated. Appellant approached Wojcik and asked him if the boat was for sale and Wojcik responded that it was. Wojcik showed Appellant the motor and demonstrated that it was operational. Appellant secured a loan for the boat. During the exchange of payment, Appellant inquired about the certificate of title. Wojcik informed him that it would be mailed to him within seven to ten days.

**{¶36}** There is no question that Appellant changed his position to his detriment based on statements and actions by Wojcik. However, in order to prevail Appellant must demonstrate that he changed his position to his detriment based on a statement or action made by Appellee, not Wojcik.

**{¶37}** Appellee and Appellant discussed the sale of the boat during a phone call. Appellee concedes that she told Appellant to "enjoy the boat" and made plans to send him a ladder and lifejackets. Appellee did not demand return of the boat until after it was clear that Wojcik did not plan on giving her the $13,000 from the sale of the boat. While this failure cannot be attributed to Appellant, he cannot demonstrate that he changed his position in any way at all, and certainly not to his detriment, based on any statements or actions on the part of Appellee. Thus, he cannot successfully demonstrate the elements of estoppel. Appellee possesses title to the boat and has paramount claim to its ownership.

**{¶38}** As such, all five of Appellant's assignments of error are without merit and are overruled.

## Conclusion

**{¶39}** In this replevin action regarding a boat sold by a third party, Appellant argues that the trial court failed to consider whether he was a bona fide purchaser of value, whether the seller had apparent authority to sell the boat, or whether the owner of the property bore the risk by storing it with a seller of similar goods. At all times, however, Appellee possessed the boat's certificate of title. Pursuant to R.C. 1548.04, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, J., concurs.

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For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**