

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

IN THE MATTER OF
THE ESTATE OF
JAMES E. THOMPSON

OPINION AND JUDGMENT ENTRY
Case No. 22 CO 0004

Civil Appeal from the
Court of Common Pleas, Probate Division, of Columbiana County, Ohio
Case No. 2017 ES 00120

BEFORE:

Cheryl L. Waite, David A. D'Apolito, Mark A. Hanni, Judges.

JUDGMENT:

Affirmed.

Atty. Glenn R. Osborne and Atty. T. Scott Kamenitsa, Jr., Friedman & Rummell Co., LPA,
3801 Starrs Centre Drive, Canfield, Ohio 44406, for Plaintiff-Appellant

Atty. Robert J. Tscholl, 236 Third Street SW, Canton, Ohio 44702 and *Atty. James F. Mathews*, Baker, Dublikar, Beck, Wiley & Mathews, 400 South Main Street, North Canton, Ohio 44720, for Defendants-Appellees

Dated: July 13, 2023

WAITE, J.

{¶1} This appeal challenges a probate court’s decision in a concealment action as part of the administration of the estate of James E. Thompson, deceased (the “Estate”). The decedent partially owned, worked for, and had financial dealings with a family farm, Thompson Farms, Inc. (“TCI”). TCI made a claim against the estate for reimbursement for seeds and agricultural chemicals, which was denied. TCI filed a complaint in the general division of the court to recover on the denied claim against the Estate, and the Estate filed a counterclaim to recover Estate property allegedly being held by TCI. More than a year later, the executrix filed a concealment action in the probate court to recover the same property. The probate judge deferred to the jurisdiction of the general division because the general division complaint was filed first. After the general division case concluded, the probate court determined that the general division judgment was *res judicata* in the concealment action and ruled against the Estate. This appeal was filed by former executrix Susan Mowery, the surviving spouse of the decedent, and alleges errors in the probate court judgment. The Estate did not file the appeal and has not appeared.

{¶2} In Appellant's two assignments of error she argues that the general division case was not *res judicata* in the probate court, and that the probate judge should have awarded extra damages that were only available by means of a probate concealment action. The record reflects that the Estate (while Susan Mowery was executrix) chose to litigate its claims in the general division, that the disputed assets and parties were identical in both cases, and therefore, *res judicata* applies. The probate judge determined that TCI did not act in bad faith or conceal property while litigating the disputed assets, and this is confirmed by the record. Because TCI did not conceal any property, no damages or costs

were awarded. The probate court judgment is supported by competent credible evidence and is affirmed.

Case History and Facts

{¶13} This matter began on May 4, 2017, with the application to probate the will of the late James E. Thompson in the Columbiana County Court of Common Pleas, Probate Division, Case No. 2017 ES 120. Mr. Thompson died testate on April 6, 2017. The decedent's wife, Susan Mowery, was named as executrix and was the primary beneficiary of the will. On August 9, 2017, the executrix filed a motion for an extension of time to file the inventory in the Estate because of difficulties determining what equipment belonged in the Estate and its value. The difficulties arose out of the decedent's interest in the family farm, TCI, and years of unresolved financial transactions and commitments between the decedent, his separate 200-acre grain farm, and TCI.

{¶14} On September 18, 2017, TCI filed a claim in the Estate for \$460,699.13 for unpaid crop inputs such as seeds, fertilizer, and pesticides. The claim asserted that from 2010 until his death the decedent purchased, but had not paid for, the inputs. On October 4, 2017, the claim was rejected by the Estate.

{¶15} On December 1, 2017, TCI filed an R.C. 2117.12 complaint against the Estate in the general division of the Court of Common Pleas, Case No. 2017 CV 600. The complaint sought declaratory judgment on its rejected claim against the Estate for \$460,699.13, and asked for monetary damages. On March 5, 2018, the Estate filed an answer and counterclaim. In the first claim for relief in the counterclaim the Estate alleged that, pursuant to R.C. 2109.50 et. seq., TCI "concealed and withheld from the Executrix the following equipment belonging to James E. Thompson: (1) a 350 computrac monitor

and radar gun * * *; (2) tractor weights * * *; (3) a tractor on which Thompson made Twenty Thousand Dollars (\$20,000.00) of payments; (4) a half interest in an Allis Chalmers dozer; (5) a hay rake; (6) a center three connection for the tractors; and (7) combine equipment manuals." The Estate also listed a 2009 Freightliner Truck as a concealed asset. The Estate asked for the return of Estate assets "including, but not limited to, the transactions listed below." (3/5/18 Counterclaim, p. 5.) The Estate's second claim for relief sought a declaratory judgment regarding all assets in dispute between the parties. Claim three was a conversion claim for farm equipment, machinery, tools, and grain. The fourth was for breach of contract for services that the decedent allegedly performed for TCI. The fifth claim for relief was for unjust enrichment for services that the decedent allegedly performed for TCI.

{¶6} On January 10, 2019, the Estate filed a R.C. 2109.50 concealment action against TCI, Lynelle Thompson Zimmerman, and Shirley Thompson. The concealment action mirrored the counterclaim filed in the general division case. The assets included a 2009 Freightliner truck, a 350 Computrac monitor and radar gun, a tractor, an Allis Chalmers bulldozer, a corn head and grain head for a combine, and proceeds from the sale of wheat. The complaint asked for the items to be returned to the Estate, along with attorney fees and costs.

{¶7} On March 1, 2019, TCI filed an answer to the concealment complaint. TCI admitted to having a Computrac monitor and radar gun, and stated that they would be released upon confirmation of the serial numbers. The answer noted that the parties disputed the ownership of other property. TCI denied concealing any assets.

{¶8} On March 14, 2019, the probate court filed a judgment entry staying the concealment action, without objection from either party, until the resolution of the lawsuit filed in the general division concerning many, if not all, of the same issues in the concealment action.

{¶9} On October 2, 2019, the probate court filed a judgment entry addressing pretrial for the concealment action and on objections to the inventory of the Estate. The court stated that “[t]he issues and controversies before the General Division of the Court are some, if not all, of the issues and controversies framed by the Complaint for Concealment and Objections to the Inventory before the Probate Court.” (10/2/19 J.E.)

{¶10} The case of *Thompson Farms, Inc. v. Estate of James E. Thompson, Deceased*, 2017 CV 600, was resolved by jury verdict on July 6, 2020. TCI was awarded, by general jury verdict, \$260,000.00 on its complaint. The Estate was awarded, by general jury verdict, \$42,528.00 on its counterclaim. The net result was a judgment in favor of TCI for \$217,472.00. The jury also resolved the Estate's other claims with respect to items in possession of TCI that belonged to the Estate. The jury awarded the Estate the 350 Computrac monitor and radar gun. The general verdict form stated: “We, the Jury in this case, being duly empaneled and sworn, do hereby find in favor of Defendant on its Counterclaim against Plaintiff for equipment and further determine Defendant is the owner of and is entitled to possession of the following equipment in possession of Plaintiff: Computrac, radar gun.” (7/6/20 General Verdict.)

{¶11} The July 6, 2020 Judgment Entry in Case No. 2017 CV 600 stated that “the Estate of James E. Thompson, deceased, is the owner of and is entitled to possession of

the Computrac and radar gun in possession of Thompson Farms, Inc.” (7/6/20 J.E., p. 4.) The court assessed 20% of court costs to TCI and 80% to the Estate.

{¶12} The Estate filed an appeal of Case 2017 CV 600 to this Court on August 3, 2020. We held that the trial court was within its discretion to deny a motion to amend the counterclaim regarding a claim of unjust enrichment; that the trial court did not err in allowing testimony about alcoholism; and that the trial court erred in awarding prejudgment interest prematurely. *Thompson Farms, Inc. v. Estate of Thompson*, 7th Dist. Columbiana No. 20 CO 0014, 2021-Ohio-2364. The opinion was filed on June 25, 2021.

{¶13} Susan Mowery was removed as executrix of the Estate on May 26, 2021. The court order stated Mowery had “failed to strictly comply with the Court’s prior instructions and has what the Court deems to be an inherent conflict with the creditor, Thompson Farms.” (5/26/21 J.E.) Michael J. Roth is currently serving as administrator of the Estate.

{¶14} The probate court issued its judgment as to the concealment action on January 4, 2022. The court held that the general division judgment entry conclusively determined the ownership of property and claims of TCI and the Estate, which were the same items listed in the concealment action. The court held that the general division judgment was *res judicata* regarding the property. The court held that the only issues remaining to be litigated were whether TCI was guilty of concealment of assets pursuant to R.C. 2109.50 and 2109.52, and whether the Estate was entitled to special damages, including attorney’s fees, penalties, and costs. The court noted that TCI had formally and informally represented at various hearings throughout the litigation in both probate court

and the general division that it was in possession of the Computrac monitor and radar gun, and would release them upon verification of serial numbers. Counsel for the parties discussed at various times how the items could be returned. The court held that offsetting damages awards in the general division case was not evidence of concealment. The court held the Estate had not proven concealment or bad faith, and that the litigation between the parties arose from the good faith claims of each party. The court overruled and dismissed the concealment action with prejudice, and denied recovery of any penalty, costs, interest, or other fees for concealment.

{¶15} This appeal was initiated on February 7, 2022, by former executrix Susan Mowery. The current administrator of the Estate has not filed an appeal and has not made an appearance in this appeal. Appellant has submitted two assignments of error for review.

ASSIGNMENT OF ERROR NO. 1

THE PROBATE COURT ERRED AS A MATTER OF LAW IN EXCLUDING NUMEROUS PERSONAL PROPERTY ITEMS FROM THE CONCEALMENT PROCEEDING BASED UPON THE JUDGMENT OF A SEPARATE COURT, WHICH ISSUED NO DETERMINATION OF OWNERSHIP OF THE ASSETS AND HELD NO SUBJECT MATTER JURISDICTION ON CONCEALMENT PROCEEDINGS.

{¶16} Appellant Susan Mowery raises several arguments under this assignment of error, all of which are aimed at remanding this case to the probate court to relitigate matters already decided in the general division case. Appellant argues that the trial court

erroneously applied principles of *res judicata* when there was no *res judicata* effect from the general division lawsuit. She also argues that, contrary to every indication from the record, the general division case never litigated whether TCI wrongfully possessed assets of the Estate other than the Computrac monitor and radar gun.

{¶17} In this case, the general division complaint was filed on December 1, 2017. The action was for TCI's rejected claim against the Estate. R.C. 2117.12. On March 5, 2018, the Estate filed its counterclaim alleging that TCI concealed, embezzled, conveyed away, or was in possession of tools, equipment, machinery, and grain “in fraud of the rights of those interested in his estate including, but not limited to, the transactions listed below.” (3/5/18 Counterclaim, p. 5.) The counterclaim listed a Freightliner truck, 56 acres of wheat, and seven other items that allegedly belonged to the Estate. The counterclaim asserted five claims for relief, including concealment of assets, declaratory judgment, conversion, breach of contract, and unjust enrichment. The final judgment, by general verdicts from the jury, had three parts: \$260,000 for TCI; \$42,528 for the Estate; and the return of a Computrac monitor and radar gun to the Estate.

{¶18} “A valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995), syllabus. “The previous action is conclusive for all claims that were or that could have been litigated in the first action.” *In re G.T.B.*, 128 Ohio St.3d 502, 2011-Ohio-1789, 947 N.E.2d 166, ¶ 9, quoting *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, 905 N.E.2d 1210, ¶ 27. “The doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first

action, or be forever barred from asserting it.” *Natl. Amusements, Inc. v. City of Springdale*, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178, 1180 (1990).

{¶19} A second aspect of *res judicata* is issue preclusion, also called collateral estoppel.

The doctrine of issue preclusion, also known as collateral estoppel, holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different.

Blackwell v. Gorman, 142 Ohio Misc.2d 50, 2007-Ohio-3504, 870 N.E.2d 1238, ¶ 38.

{¶20} Appellant argues that *res judicata* does not apply because the general division of the court of common pleas had no jurisdiction to litigate a claim raised pursuant to R.C. 2109.50. Appellant argues that R.C. 2109.50 falls under the exclusive jurisdiction of the probate court. It is odd that Appellant argues this now, since it specifically raised an R.C. 2109.50 counterclaim in the general division lawsuit. Nevertheless, Appellant is correct, at least with respect to labeling something a R.C. 2109.50 action, because the statute states: “Upon complaint made to *the probate court* of the county having jurisdiction of the administration of an estate * * *.” (Emphasis added.) Also true, though, is that an action pursuant to R.C. 2109.50 merely duplicates claims and remedies available by filing a civil action in the general division of the court.

[T]he inquiry under R.C. 2109.50 focuses on the ownership of the asset and whether possession of the asset is being impermissibly concealed or withheld from the estate. Thus, a plaintiff has stated an actionable cause under R.C. 2109.50 if he alleges that the asset is the exclusive property of the estate and that the defendant has unauthorized possession of the asset or in some way has impermissibly disposed of it.

Wozniak v. Wozniak, 90 Ohio App.3d 400, 407, 629 N.E.2d 500 (9th Dist.1993).

{¶21} “The purpose of R.C. 2109.50 is not to furnish a substitute for a civil action to recover a judgment for money owing to an administrator or executor, but rather to provide a speedy and effective method for discovering assets belonging to the estate and to secure possession of them for purposes of administration.” *Matter of Estate of Bolog*, 7th Dist. Mahoning No. 18 MA 0127, 2019-Ohio-4083, ¶ 19; see also *Guardianship of Vasko v. Brown*, 8th Dist. Cuyahoga No. 82433, 2003-Ohio-6858, ¶ 6. “R.C. 2109.50 is designed to facilitate the recovery of portable objects, fungible goods and money, quickly and across county lines, when necessary.” *In re Estate of Rotilio*, 7th Dist. Belmont No. 11 BE 9, 2013-Ohio-2878, ¶ 9.

{¶22} “An R.C. 2109.50 proceeding for the discovery of concealed or embezzled assets of an estate is a special proceeding of a summary, inquisitorial character whose purpose is to facilitate the administration of estates by summarily retrieving assets that rightfully belong there.” *State v. Harmon*, 5th Dist. Tuscarawas No. 2016AP080042, 2017-Ohio-320, 72 N.E.3d 704, ¶ 14.

{¶23} All of these authorities clearly hold that R.C. 2109.50 is designed to be a quick, summary, and streamlined method in probate court for obtaining possession of

estate assets, rather than being forced into a more elaborate process in the general division of the court. It would be absurd at this point to relitigate the identical controversy over Estate assets via a summary, streamlined procedure in R.C. 2109.50 when a full jury trial on the matter has already taken place. The record is clear that the issue of possession of several alleged Estate assets was raised in Appellant's counterclaim and that the Estate sought to fully litigate in the general division of the court all of its claims regarding Estate assets. The jury ruled that only two disputed items were Estate assets and were to be returned to the Estate. Based on that verdict, the Estate has no more valid claims for possession of any other TCI property.

{¶24} There is another reason why the probate court's exclusive jurisdiction over an R.C. 2109.50 action does not prevent *res judicata* from applying. TCI's R.C. 2117.12 complaint challenging the rejection of its claim against the Estate had to be brought in the general division. *Fougere v. Fougere*, 10th Dist. Franklin No. 11AP-791, 2012-Ohio-4830, ¶ 15 (the probate court has no jurisdiction to litigate a claim under R.C. 2117.12.) See also, *Kraus v. Hanna*, 11th Dist. No.2002-P-0093, 2004-Ohio-3928 (an action under R.C. 2117.12 must be filed in the general division.) Once that claim was filed in the general division, the Estate made the choice to bring its competing claims against TCI in the general division. Just because the Estate labeled its counterclaim as an R.C. 2109.50 action does not change what was actually litigated in the general division case. "[T]he labels used in a particular cause of action do not control the nature of the cause of action." *Mounts v. Ravotti*, 7th Dist. Mahoning No. 07 MA 182, 2008-Ohio-5045, ¶ 25. The matter that was litigated was the recovery of alleged Estate assets from TCI, and the resulting judgment is valid between the parties on that issue.

{¶25} Appellant had many months to file a concealment action in the probate court prior to the filing of the complaint by TCI in the general division. Instead, Appellant filed a counterclaim in the general division case. Appellant, who was the administrator of the Estate at the time, chose to reclaim Estate assets through the general division. Appellant listed the specific items that were alleged to have been concealed, but also asked the court to resolve the ownership dispute between the parties about Estate assets. The jury determined that, of all the items listed in the counterclaim, Appellant was the owner of, and was entitled to possession of, only the Computrac monitor and the radar gun. The remainder of Appellant's claim for equipment and other property was rejected.

{¶26} The Estate appealed the judgment. The three assignments of error had nothing to do with challenging the specificity of the jury verdict, or questioning why the jury awarded the Estate only two items of property, or objecting to the remedy in any way. The appeal was resolved primarily in favor of TCI, except for a matter involving prejudgment interest. No further appeal was taken to the Ohio Supreme Court. That case is now *res judicata*.

{¶27} Appellant also claims that *res judicata* does not apply because there was no decision on the merits as to any items other than the Computrac monitor and the radar gun. As mentioned above, Appellant's counterclaim sought relief in the form of resolution of all controversies regarding all assets of the Estate held by TCI. The fact that the jury only found in favor of the Estate regarding the Computrac monitor and the radar gun does not mean the other items were not litigated. It only means that Appellant lost as to those items. "If a trial court fails to rule on a request for relief contained in a motion, an appellate court will presume that the trial court denied the requested relief." *Burkart v. Burkart*, 10th

Dist. No. 10AP-314, 191 Ohio App.3d 169, 2010-Ohio-5363, 945 N.E.2d 557, ¶ 30. See also, *Risch v. Samuel*, 1st Dist. Hamilton No. C-190159, 2020-Ohio-1094, ¶ 23 (silence regarding a security deposit is tantamount to a denial on that issue). Appellant’s argument otherwise appears disingenuous, at best.

{¶28} Appellant also argues that *res judicata* does not apply because she sought a declaratory judgment. Appellant is partially correct, but it does not aid her argument on appeal. It is true that “[u]nlike other judgments, however, and consistent with the persuasive weight of authority, a declaratory judgment is not *res judicata* on an issue or claim not determined thereby even though it was known and existing at the time of the original action.” *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 69, 765 N.E.2d 345 (2002).

{¶29} This legal determination does not help Appellant. First, TCI’s 2017 complaint in the general division of the court of common pleas did not only seek declaratory judgment. It also asked for money damages. Further, Appellant’s counterclaim included a variety of causes of action other than declaratory judgment, such as recovery of estate assets, conversion, unjust enrichment, and breach of contract. Second, the very matter that Appellant hopes to relitigate in the probate court is the exact matter decided by the general division, i.e., the return of Estate assets possessed by TCI. That is the issue the probate judge decided was *res judicata* when it ruled on the R.C. 2109.50 concealment action. Even if the general division case were only brought as a declaratory judgment action, it would still have *res judicata* effect in this case.

{¶30} For all the reasons stated above, Appellant’s first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

THE PROBATE COURT ERRED IN ITS DECISION NOT TO AWARD ANY DAMAGES FOR THE WRONGFUL POSSESSION OF PROPERTY OF THE ESTATE IN ITS DECISION ON THE COMPLAINT FOR CONCEALMENT OF ASSETS.

{¶31} Appellant argues that the trial court was required to find TCI guilty of concealing assets and to award the remedies set forth in R.C. 2109.52. Appellant contends that TCI concealed a Computrac 350 monitor and a radar gun. R.C. 2109.52 states:

When passing on a complaint made under section 2109.50 of the Revised Code, the probate court shall determine, by the verdict of a jury if either party requires it or without if not required, whether the person accused is guilty of having concealed, embezzled, conveyed away, or been in the possession of moneys, personal property, or choses in action of the estate, testamentary trust, or guardianship. If the person is found guilty, the probate court shall assess the amount of damages to be recovered or the court may order the return of the specific thing concealed or embezzled or may order restoration in kind. * * * In all cases, except when the person found guilty is the fiduciary, the probate court shall render judgment in favor of the fiduciary or if there is no fiduciary in this state, the probate court shall render judgment in favor of the state, against the person found guilty, for the amount of the moneys or the value of the personal property or choses in action concealed,

embezzled, conveyed away, or held in possession, together with ten per cent penalty and all costs of the proceedings or complaint; except that the judgment shall be reduced to the extent of the value of any thing specifically restored or returned in kind as provided in this section.

{¶32} Appellant argues that there is no dispute TCI had the monitor and radar gun and was ordered to return them to the Estate. Appellant contends that TCI failed to return the items until well after the conclusion of the general division lawsuit. Appellant seeks to have this case remanded to the probate court in order to obtain a 10% penalty and for TCI to be assessed court costs and attorney's fees.

{¶33} An appellate court will not overturn the judgment of a lower court where that court's judgment is supported by competent, credible evidence going to all the essential elements of the case. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). “Probate courts have much discretion over the factual determinations, which will not be disturbed absent an abuse of discretion.” *Matter of Adoption of H.L.W.B.*, 2nd Dist. Clark No. 2022-CA-25, 2022-Ohio-3161, ¶ 9 In addition, “[t]he decision whether to grant attorney fees is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion.” *In re Estate of Brate*, 12th Dist. Warren No. CA2007-08-103, 2008-Ohio-3517, ¶ 6. There does not appear to be any specific standard of review for concealment actions filed under R.C. 2109.50 et seq.

{¶34} Appellee argues that the dispute between the parties over property, back pay, and fees began very early in the probate process and continued through two lawsuits. The fact that the general division case ended primarily in TCI's favor, and that TCI was only required to pay 20% of the costs in that case, show that TCI's part in the

dispute was genuine, presented in good faith, and reasonable. The record reveals TCI was open and honest about its possession of the monitor and radar gun throughout litigation, and admitted in its answer to the concealment action it possessed the monitor and that it would be returned upon confirmation of the serial number. At oral argument Appellee explained that the serial number was needed because TCI possessed many Computrac monitors used for various pieces of farming equipment, and Appellee sought confirmation necessary to return the correct one. We certainly recognize the requirement of providing a serial number is not unreasonable, as it appears akin to providing a VIN number to verify and confirm that an automobile was, in fact, the specific automobile sought in a dispute.

{¶35} We note that neither party has provided us with the exact date that the monitor was returned or when the serial number was provided. Appellant, then, asks us to provide relief based on a silent record. We have thoroughly examined the record and have not been able to verify Appellant's claim that she provided the serial number in a timely fashion or that the monitor was returned an unreasonably long period after the general division case terminated.

{¶36} Appellee argues that “mere possession, by itself, is an insufficient basis on which to make a finding of guilt under R.C. 2109.52.” *Longworth v. Childers*, 2nd Dist. No. 22151, 180 Ohio App.3d 162, 2008-Ohio-4927, 904 N.E.2d 904, ¶ 21. Appellee also correctly notes that “a violation of R.C. 2109.50 involves wrongful or culpable conduct on the part of the person accused.” *Ukrainiec v. Batz*, 24 Ohio App.3d 200, 202, 493 N.E.2d 1368 (9th Dist.1982).

{¶37} Further, Appellee is correct that that there is no right to attorney fees pursuant to R.C. 2109.52, and that such fees may only be awarded when there is a specific statute allowing for them, or when a party has acted “in bad faith, vexatiously, wantonly, obdurately or for oppressive reasons.” *Apergis v. Boccia*, 11th Dist. Trumbull No. 2009-T-0079, 2010-Ohio-2954, ¶ 29. Appellee contends that none of those reasons apply in this case. Our review of the matter reveals Appellee is, once again, correct.

{¶38} R.C. 2109.52 does not require an award of damages even if the court determines that concealment occurred: “[T]he probate court shall render judgment in favor of the fiduciary * * * against the person found guilty, for the amount of the moneys or the value of the personal property or choses in action concealed * * * except that the judgment shall be reduced to the extent of the value of any thing specifically restored or returned in kind as provided in this section.” Based on this language, a probate judge may find that concealment occurred but award no damages because the specific items had been restored to the estate.

{¶39} The probate judge in this matter stated: “The Court has been privy to the claims and pre-trial assertions of both parties during the ongoing litigation involving the Estate for nearly three years.” (1/4/22 J.E., p. 4.) The court found that “[t]he defendants have never concealed, withheld or unreasonably disputed ownership of the Radar Gun or Computrac Monitor justifying this Court's finding of ‘guilty’ of concealment of those assets.” (1/4/22 J.E., p. 4.) Appellant has not cited any evidence to contradict these statements. Regardless of when the property was returned, the probate judge was satisfied that, due to the ongoing dispute between the parties (largely resolved in favor of

TCI), possession of the monitor and radar gun during the litigation did not demonstrate culpable conduct.

{¶40} Appellee also argues that any claim the Estate may have for punitive damages, penalties, or attorney's fees should have been brought in the general division case, because that is where the entire dispute between the parties was first litigated. One appellate court has held that choosing between whether to file a R.C. 2109.50 action to recover assets or to file a suit in the general division results in an election of remedies and the party accepts the risk that *res judicata* will apply to the parallel suit. *Rinehart v. Bank One, Columbus, N.A.*, 125 Ohio App.3d 719, 733, 709 N.E.2d 559 (10th Dist.1998). Again, it was Appellant who chose to litigate the return of the disputed Estate assets by means of a counterclaim in the general division of the common pleas court.

{¶41} The probate court was not required to find that TCI engaged in culpable conduct, and thus concealment, simply because it was in possession of two disputed items belonging to the Estate during the course of the litigation. The probate court had the discretion to make or deny a finding of culpability, and nothing in the record demonstrates the court abused its discretion in this regard. Appellant's arguments are not persuasive, and her second assignment of error is without merit and is overruled.

Conclusion

{¶42} Appellant argued that the lawsuit initiated in the general division of the court of common pleas regarding Thompson Farm, Inc.'s rejected claim in the Estate of James E. Thompson should not have been treated as *res judicata* in the R.C. 2109.50 concealment action filed in probate court. The record shows that the identical property being claimed in the concealment action was in dispute in the general division case, and

the result of the jury verdict in the general division case was primarily in favor of TCI. The issues and parties were the same in both cases. The probate judge was correct in applying principles of *res judicata* in the concealment action, and therefore, finding that concealment did not occur.

{¶43} Appellant also argues that the probate judge was required to find that TCI was guilty of concealment simply because TCI maintained possession of a monitor and radar gun throughout the proceedings. Appellant concludes that the remedies available in R.C. 2109.52 applied, including a monetary penalty, costs, and attorney's fees. Appellant's assertions are not supported in the record. Additionally, caselaw reveals that mere possession is not the same as concealment, which involves a level of culpability. The probate court was within its discretion to find TCI not guilty of concealment. R.C. 2109.52 also does not specifically allow for an award of attorney's fees. Absent a finding of some kind of culpability or bad faith, attorney's fees may not be awarded. The probate court judgment is supported by competent credible evidence, and the record reveals no abuse of discretion. Both of Appellant's assignments of error are overruled, and the judgment of the probate court is affirmed.

D'Apolito, P.J., concurs.

Hanni, J., concurs.

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, Probate Division, of Columbiana 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.