

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-002491-MR

BARGAINS GALORE, INC.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE DENISE CLAYTON, JUDGE  
ACTION NO. 00-CI-006189

CITY OF LOUISVILLE

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; HENRY AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment valuing items of personal property (39 boxes of cigarette rolling papers) which disappeared while in the possession of the Louisville Police Department, pursuant to an award of damages for the lost property. Appellant argues that the court erred in valuing the property using certain documentary evidence in the record, instead of the testimony of witnesses regarding the property's value. Appellant also argues that it was entitled to

prejudgment interest on its award. We reject both arguments and thus affirm.

The undisputed facts of this case are set forth in the trial court's first opinion in this case entered on March 21, 2002:

On March 27, 1996, the Louisville Police Department, pursuant to a valid search warrant for Kentuckiana Lease Department, Inc. d/b/a B-mart, took possession of a large amount of inventory owned by Bargains Galore, Inc. Bargains Galore is a wholesale business and goods were sold to customers all over the country. The inventory that was seized was not placed in the usual Police property room, but was stored in a building located at 340 West Chestnut Street, Louisville, Kentucky.

The Commonwealth Attorney's Office and Alvin Borowick, the owner of Bargains Galore, entered into negotiations to resolve this criminal matter. The resolution was that certain confiscated items would be returned to the plaintiffs and other items would be destroyed. Richard Borowick, who is the son of Alvin Borowick, is an employee of Bargains Galore and is the primary buyer for the corporation. The corporation entered a guilty plea. However, this plea was not entered until December 19, 1997, although it is clear that the parties had been in negotiations regarding this matter for some time. On January 8, 1998, Richard Borowick and the representatives from the Police Department, including Detective David James who testified in this matter, went to the facility so that Mr. Borowick could retrieve the items. However, when they arrived at the facility, some of the plaintiff's inventory had been stolen.

Bargains Galore ("BG") filed an action against the City of Louisville ("the City") for the damages resulting from its lost inventory and business records, as well as reimbursement for delivery expenses and interest paid on a loan that it took out to purchase replacement inventory. The city conceded its liability, thus the only issue for trial was BG's damages.

Prior to trial, the parties stipulated to the items that had been lost and agreed that the measure of damages would be the fair market value of the lost property. A large part of the lost inventory was classified in the stipulation as "39 cases of cigarette rolling papers." After a bench trial held on February 13, 2002, the court entered its order awarding BG the following: \$13,230 for lost inventory; \$4,791 for shipping expenses; \$4,950 for interest; and \$30,000 for lost profits from the loss of the business records.

Both parties then appealed to this Court, BG appealing the lower court's valuation of the lost inventory and the City challenging the \$30,000 award for lost profits. On February 13, 2004, the Court of Appeals rendered its opinion affirming the \$30,000 award for lost profits, and reversing as to the lower court's valuation of the lost inventory.

The Court of Appeals specifically rejected the lower court's method of valuing the lost inventory. The lower court

started with the \$40,000 loan obtained by BG to purchase new inventory after the loss (which presumed the loan amount was the value of all of the seized inventory), added 17% for profit margin (\$49,000), and multiplied that figure times 27%, which was the percentage of seized property that should have been returned to BG, equaling \$13,230. The Court of Appeals reasoned that using the \$40,000 loan amount as a starting point was in error because the \$40,000 loan was clearly not intended to replace all of the previous inventory (illegal and legal) but for new inventory, and all of the confiscated merchandise was not of equivalent value. This Court adjudged that the evidence as to the value of the non-rolling paper merchandise was undisputed and thus the trial court should have found the fair market value of those items to be \$18,732.05. As to the value of the 39 cases of cigarette rolling papers, this Court remanded the issue to the circuit court for re-valuation, stating:

As noted above, the City did contest the value of the 39 cases of cigarette rolling papers that should have been returned to Bargains Galore. Officer James testified that on January 8, 1998, when they discovered that the merchandise was missing, Richard Borowick estimated the value of the cigarette rolling papers at between \$200.00 and \$600.00 a case. At trial, however, Borowick testified that Bargains Galore paid \$1,008.00 a case for "premium" cigarette papers, and that they would have wholesaled for \$1,154.00 a case. Although the trial court was undoubtedly frustrated by the lack of documentary evidence in this case, there

was sufficient evidence of at least a range of values for these papers.

On remand, no new evidence was submitted to the court; the court merely reconsidered the evidence presented at the February 13, 2002, bench trial. In addition to the testimony of Borowick and Officer James at the trial, as noted above, BG presented the testimony of Michael Cardin, a regional sales manager for a company that manufactured cigarette rolling papers. Cardin testified regarding the price of several brands of rolling papers, but could not give an estimated value of the rolling papers seized by the City in this case because he was not aware of BG's inventory of rolling papers. Also, certain documentary evidence was admitted. Invoices of BG for the fiscal year July 1, 1996 - June 20, 1997, reflect that BG spent approximately \$7,600 on cigarette rolling papers that year. BG's tax return from the fiscal year July 1, 1995 - June 30, 1996, listed its inventory value at \$47,000, and then listed a deduction of \$26,150 for the "involuntary conversion" of its property.

On remand, the trial court started with the \$26,150 figure from the 1995-1996 tax return, subtracted the \$18,732.05 which was the amount awarded for the non-rolling paper inventory and arrived at a \$7,423.95 value for the rolling paper inventory. In its order on remand entered on July 14, 2004, the

court awarded BG \$7,423.95 plus interest from March 21, 2002, the date of its original order on the matter. BG again appealed to this Court.

BG first argues that the lower court again erroneously calculated the value of rolling paper inventory. BG maintains that the court disregarded the language of the prior Court of Appeals opinion when it failed to accept the testimony of Richard Borowick, Officer James, or Michael Cardin regarding the value of the rolling papers. BG claims that the testimony of those individuals was the only competent evidence on the subject. We disagree.

Although the parties stipulated that there were "39 cases of cigarette rolling papers", the undisputed testimony of Officer James revealed that the boxes of rolling papers confiscated by the police were not of uniform size or fullness. James testified that several kinds of boxes were used - some large boxes from a truck rental company and some small boxes the size of a box of Xerox paper - and some were full, while others were only partially filled. James also testified that there were many different brands of rolling papers in the boxes. In the trial court's initial opinion, the court found that because the undisputed evidence was that the "cases" were not of uniform size, brand or fullness, it could not value the rolling papers using the testimony regarding the price of rolling papers per

case. Although the court found the testimony of Borowick, James and Cardin credible, the court reasoned it could not utilize their testimony to the extent they testified to the price of rolling papers per case.

When the trial court is the fact finder, due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses, and its findings of fact will not be disturbed unless they are clearly erroneous. CR 52.01; Croley v. Alsip, 602 S.W.2d 418 (Ky. 1980). When the trial court has before it conflicting evidence, it may choose between the evidence and accept any part of the evidence and not the other, as the determination of the weight and credibility of the evidence rests exclusively with the trier of fact. Cross v. Clark, 308 Ky. 18, 213 S.W.2d 443, 446 (1948).

In the present case, the tax return and the invoices of BG were properly admitted into evidence, and the court was entitled to accept them as the most credible and accurate evidence to determine the value of the rolling papers. From our reading of the prior Court of Appeals opinion, the Court did not require the lower court to accept the testimony of Borowick or Officer James on remand. Rather, the Court was merely expressing that there was more reliable evidence in the record of the value of the rolling papers than the \$40,000 loan obtained by BG, which was the trial court's starting point in

the initial order. We believe the trial court's use of BG's own tax return claiming the \$26,150 deduction for the involuntary conversion of its property was a reliable measure of the value of its entire lost inventory.<sup>1</sup> It follows that the \$26,150 figure minus the amount BG recovered for the value of the non-rolling paper inventory would yield the value of the rolling paper inventory. We would note that said amount, \$7,423.95, was close to the amount BG's 1996-1997 invoices reflected that BG spent on rolling papers that year (\$7,600) and was close to the lowest per case estimate testified to by Officer James (\$7,800). The lower court was not required to accept the valuation of Borowick who valued the rolling papers all at the price of premium papers. Nor could the court be compelled to use the testimony of Cardin when Cardin was not aware of BG's inventory at the time of the seizure.

BG's remaining argument is that it was entitled to prejudgment interest from January 8, 1998, the date of the seizure of the property. The lower court awarded interest on the award in the second judgment from the date of the original judgment, March 21, 2002. It has been held that prejudgment interest is to be awarded as a matter of right only when damages

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<sup>1</sup> BG's contention on appeal that the involuntary conversion listed on the 1995-1996 tax return was for a conversion occurring on March 1, 1996 is not well taken. There was no evidence in the record that said deduction was for anything other than the property seized by the City on March 27, 1996, and the tax return clearly states that it covers the period from July 1, 1995 to June 30, 1996.



are liquidated. Nucor Corp. v. General Electric Co., 812 S.W.2d 136 (Ky. 1991). Liquidated damages are damages which are “[m]ade certain or fixed by agreement of [the] parties or by operation of law.” Id. at 141 (quoting Black’s Law Dictionary 930 (6<sup>th</sup> ed. 1990)). Since the damages in the present case were not fixed by agreement of the parties or by law, they were unliquidated. Prejudgment interest on unliquidated damages is within the sound discretion of the trial court. Id. at 142-45. We cannot say that the trial court abused its discretion in not awarding prejudgment interest in this case.

For the reasons stated above, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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