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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 15-165

Filed: 17 November 2015

Guilford County, No. 13 CVD 1506

ROGER PAYKERT, Plaintiff,

v.

BOBBY CHARLES COLEMAN, Defendant.

Appeal by Defendant from Judgment entered 4 September 2014 by Judge H. Thomas Jarrell in Guilford County District Court and Order entered 24 February 2014 by Judge Jan H. Samet in Guilford County District Court. Heard in the Court of Appeals 27 August 2015.

*Morgan, Herring, Morgan, Green, & Rosenblutt, L.L.P., by Tiffany A. Sain for Plaintiff-Appellee.*

*David E. Shives, PLLC, by David E. Shives for Defendant-Appellant.*

HUNTER, JR., Robert N., Judge.

Bobby Charles Coleman, (“Coleman”) appeals an order granting summary judgment to Roger Paykert (“Paykert”) for conversion and a judgment awarding \$69,197 in compensatory damages and \$60,000 in punitive damages together with costs and attorney fees. For the reasons stated hereinafter, we affirm the trial court’s

order granting summary judgment but vacate and remand its judgment so that the trial court can reconsider damages, costs, and attorney fees.

### **I. Factual and Procedural History**

On 13 September 2013, Paykert filed a verified complaint against Coleman seeking damages for wrongful possession of personal property and conversion. The complaint alleges the following narrative.

Paykert, a resident of Illinois, solely owns Red Tail Transporters, Inc., an Illinois-based freight shipping and trucking business. In connection with this freight business, Paykert individually owns a tractor-trailer together with equipment associated with its operation.<sup>1</sup> Pursuant to a written agreement between the parties, Paykert allowed Coleman to use his tractor-trailer equipment to further Paykert's freight business. Subsequently, "[Coleman] began to neglect his responsibilities to the business." Specifically, Coleman refused to account for and supply necessary information to the accountant in order for Red Tail Transporters, Inc. to complete a 2012 tax return. Additionally, Coleman has continuously failed to produce a bill of sale for another trailer that was purchased with Red Tail Transporters, Inc. funds. Paykert made a demand on Coleman for return of his equipment and arranged for its repossession with Clark's Towing & Tire, LLC. However, when the towing company

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<sup>1</sup> According to the Complaint, the "tractor and trailer" included the following: (1) 1997 FLD 120 Single Axle Orange Freightliner; (2) 1995 Gray Tara Step Deck; (3) Associated equipment including but not limited to: spare tires, two aluminum ramps, tarps, straps, chains, binders, hand tools, Garmin GPS, CB radio, keys, paperwork, books, copies of cab card, and insurance.

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arrived, Coleman refused to return Paykert's property. Paykert asked the court to award him immediate possession of the tractor-trailer or its equivalent market value (\$21,500), damages for loss of use, and punitive damages together with costs and attorney fees.

Coleman was served on 5 September 2013. After having been granted an extension of time to answer, on 5 November 2013 Coleman timely filed a *pro se* unsworn answer requesting dismissal under Rule 12(b)(6) as well as a counterclaim for the dissolution of an alleged partnership between the parties on the grounds of lack of performance. Paykert timely replied denying the allegations of the counterclaim.

On 3 January 2014, Paykert sought summary judgment on his complaint and Coleman's counterclaim. In support of his motion, Paykert filed with the court a verified complaint with pictures of the tractor-trailer, certificates of title, a copy of the parties' written agreement, and a letter to Coleman requesting delivery of the tractor-trailer attached. The trial court held a hearing on Paykert's motion for summary judgment on 24 February 2014. At the hearing Coleman represented himself, *pro se*.

At the summary judgement hearing, Paykert introduced his filed, verified complaint to the court which contained his sworn complaint and six attachments showing two pictures of the property, certificates of title, a copy of the parties' written

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agreement, and a letter to Coleman requesting delivery of the tractor-trailer. In response, Coleman argued he had documents to show the tractor-trailer belonged to the partnership. Coleman failed to provide the trial court with any sworn statements.

The court reasoned: “. . . [Coleman has not] put any of this information into an affidavit of any form, nor [has he] put it into a verified answer.” The Court found “no contradictory evidence in the file” and therefore granted Paykert’s motion for summary judgment.

Following the grant of summary judgment, on 17 July 2014, the matter was set peremptorily for a damages hearing. On 21 August 2014, Judge H. Thomas Jarrell held a hearing to assess damages.

Coleman retained an attorney the day before the damages hearing. Coleman’s attorney attended the hearing only to make “a limited appearance just to do the Motion to Continue.” The attorney explained Coleman was absent because he had just started a new job as a truck driver, and was out of the state. The court denied Coleman’s Motion to Continue because he was given adequate notice of the hearing and provided no “real reason” to continue the hearing. After the motion to continue was denied, Coleman’s attorney left the hearing and the hearing proceeded before the trial court without a jury.

Paykert testified at the damages hearing and described the tractor-trailer then explained, “It’s not in my possession. It’s with Clark’s Towing here in High Point,

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North Carolina, which they've had it since they retrieved it . . ." The court asked how much the storage bill was for the tractor-trailer to which Paykert responded, "I don't know yet exactly." Introducing Exhibit 1, Paykert explained the document as a list he created of broken or missing equipment installed on the tractor-trailer. Paykert does not say where or how he got the price for items. Paykert explained how he came to the figure for loss of earnings: "It was based on while he was actively driving the tractor, what he would perform or do on a weekly basis and then broken down to the month." Paykert's attorney also submitted an affidavit to the court stating her compensation rate, that the rate is standard for this area of practice, and that she spent twelve hours preparing for the case.

At the conclusion of the damages hearing, the court issued a judgment with the following relevant findings of fact and conclusions of law.

19. In March of 2014, pursuant to the Court's February 24, 2014 Order granting Plaintiff immediate repossession of the property, Defendant informed Plaintiff that the subject property had been left in an empty parking lot since November of 2013. Additionally, the Defendant made the Plaintiff aware that the property had been vandalized back in November of 2013.

20. Plaintiff's personal property was damaged or stolen in the amount of Twenty Nine Thousand, One Hundred and Ninety Seven Dollars (\$29,197.00).

21. Plaintiff also had a loss of earnings in the amount of Forty Thousand Dollars (\$40,000.00) for the Eleven (11) months that Defendant unlawful[ly] withheld possession of

his property.

22. Defendant had no rightful claim to ownership or possession of the property and despite repeated requests from Plaintiff to return the property, the Defendant converted the Plaintiff's property to his own use.

23. Defendant acted with actual malice and personal ill will towards the Plaintiff in order to cause injury to the Plaintiff and the Plaintiff's business.

24. Defendant willfully engaged in acts to harm and conceal the condition of the Plaintiff's property, and there was an unwarranted refusal by Defendant to fully resolve the matter which constituted the basis of this suit.

25. The Affidavit of Tiffany S. Sain identifies the nature of legal services performed by the attorney and provides a total of Twelve (12) hours of time were expended at a usual rate of compensation in the amount of Two Hundred Dollars (\$200.00) per hour.

Based upon the above findings of fact, the Court made the following conclusions of law.

3. Defendant wrongfully converted Plaintiff's personal property, and Plaintiff is entitled to compensatory damages in an amount of Sixty Nine Thousand, One Hundred and Ninety Seven Dollars (\$69,197.00), for damages and loss of use.

4. Defendant acted with actual malice and personal ill will towards that Plaintiff, such that, in the discretion of the Court, an award of punitive damages in the amount of Sixty Thousand Dollars (\$60,000.00) is warranted. In determining the amount of punitive damages, the Court has considered the purpose of punitive damages set forth in N.C. Gen. Stat. §1D-1. The Defendant's conduct and motives in this case were reprehensible, and the Defendant either was or should have been aware of the likelihood of

serious harm to the Plaintiff as a result of his actions.

5. Plaintiff is also entitled to recover reasonable attorney fees.

Coleman filed a notice of appeal with this Court on 6 October 2014. Subsequently, Coleman timely submitted the record on appeal.

## **II. Statement of Jurisdiction**

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2013), which provides for an appeal of right to the Court of Appeals from any final judgment of a district court in a civil action.

## **III. Standard of Review**

This appeal requires this Court to review three issues under three different standards of review. Below, we discuss the standards of review.

“Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that ‘there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

An appeal from a bench trial on damages is reviewed under the competent evidence standard. On appeal, this Court is “strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Williams*,

362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)).

An appeal from a judgement awarding attorney fees is reviewed for abuse of discretion. At the trial level, the “decision whether to award attorneys’ fees is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion.” *Egelhof ex rel. Red Hat, Inc. v. Szulik*, 193 N.C. App. 612, 620, 668 S.E.2d 367, 373 (2008) (citation omitted). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988); *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

#### **IV. Analysis**

##### **A. Motion for Summary Judgment**

Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *Forbis v. Neal*, 361 N.C. 519, 523–524, 649 S.E.2d 382, 385 (2007). The evidence is viewed in the light most favorable to the non-moving party. *Id.*, 649 S.E.2d at 385. Because we review an appeal from summary judgment *de novo*, we must examine the evidence anew.



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“When a motion for summary judgment is made . . . an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.” N.C. Gen. Stat. §1A-1, Rule 56(e) (2013). A pleading verified under Rule 11(b) may be considered as an affidavit for purposes of summary judgment. *Schoolfield v. Collins*, 281 N.C. 604, 612, 189 S.E.2d 208, 213 (1972). “[T]he trial court may not consider an unverified pleading when ruling on a motion for summary judgment.” *Rankin v. Food Lion*, 210 N.C. App. 213, 220, 706 S.E.2d 310, 315–316 (2011) (quoting *Tew v. Brown*, 135 N.C. App. 763, 767, 522 S.E.2d 127, 130 (1999)).

Here, Coleman argues that summary judgment was erroneously granted for Paykert in awarding compensatory and punitive damages. Coleman contends the record at summary judgment contained no competent evidence of the existence of any aggravating factor which would support punitive damages. While we agree that the summary judgment order contains no finding with regard to an aggravating factor, the judgment at the damages hearing does contain a finding of malice.

“Punitive damages may be awarded, in an appropriate case . . . to punish a Defendant for egregiously wrongful acts and to deter the Defendant and others from committing similar wrongful acts.” N.C. Gen. Stat. § 1D-1 (2013). Punitive damages

may be awarded if one of the following aggravating factors is present and is related to the injury for which compensatory damages were awarded: (1) Fraud; (2) Malice; or (3) Willful or wanton conduct. N.C. Gen. Stat. § 1D-15 (2013). Uncontroverted evidence discloses that Coleman refused to return the tractor-trailer and refused to allow Paykert access to his property on numerous occasions during their dispute. These facts show a sense of “personal ill will” towards Paykert which motivated Coleman to act in a way that harmed Paykert. The foregoing evidence supports the trial court’s factual finding of malice under a competent evidence standard. In turn, malice is an aggravating factor which supports the trial court’s decision to award punitive damages.

Defendant also argues that the trial court refused to address his evidence raised in his unverified complaint at the summary judgment hearing. Defendant, in this matter was appearing *pro se*, and miscomprehends that summary judgment hearings are conducted on affidavits, depositions, and other written discovery and not necessarily on testimony from live witnesses.

As a result, upon our *de novo* review based upon the facts established by the verified complaint, we conclude, as did the trial court, that Coleman has not presented any evidence to show there is a genuine issue of fact. For the foregoing reasons, we find the trial court properly granted summary judgment for Paykert.

**B. Amount of Compensatory Damages**

By way of compensatory damages, Paykert is entitled to receive monetary compensation for nominal or actual damages arising from the conversion of his property and for possession of his personal property. “In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or for the value thereof in case a delivery cannot be had, and damages for the detention.” N.C. Gen. Stat. § 1-230 (2013). In this case, Paykert obtained return of the tractor-trailer in a damaged condition without the equipment which was delivered with the truck to Coleman. The measure of compensatory damages which he was entitled to includes the following: costs for the missing equipment, repair costs, and damages for loss of use of the tractor-trailer.

1. Damaged or Missing Equipment

In a conversion claim, damages are determined by the “fair market value” of the property at the time of the conversion, plus interest. *Heaton-Sides v. Snipes*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 755 S.E.2d 648, 651 (2014). The party that brings the conversion claim must “present evidence that will provide a basis for determining damages.” *Id.*, 755 S.E.2d at 651.

In his verified complaint, Paykert alleged the tractor-trailer and accompanying equipment “had a combined value of \$21,500.00.” Subsequently at the damages hearing, Paykert submitted an exhibit to the court containing a list of missing equipment with values assigned to each piece of equipment “stolen, removed or

damaged” from him showing a value of \$14,547. However, in his trial testimony, Paykert is never asked how he obtained the values assigned to the equipment, just that he made the list and assigned a value to the equipment. His trial testimony does not reveal whether he had an opinion of value of the lost equipment or how he arrived at these figures. In addition, Paykert failed to testify or document the towing fees used in the damages chart. There is no evidence Paykert provided the fair market value of the individual items at the time of the conversion instead of their replacement value. Coleman points out the numbers used to support the compensatory damage award have “no explanation” and Paykert “did not testify that any of those numbers was the fair market value of the property.” We agree.

On appeal, we review the evidence to insure that the court based its opinion on evidence that a reasonable mind might accept as adequate. *See Stealth Properties, LLC v. Pinebluff Bd. of Adjustment*, 183 N.C. App. 461, 463–464, 645 S.E.2d 144, 146 (2007). We agree with the Defendant that the evidence presented at the damages hearing was not adequate for Paykert to meet his burden of proof.

## 2. Loss of Use

The courts award of compensatory damages was not limited to the fair market value for conversion but also included damages for loss of use of his personal property. “Damages for loss of use may be recovered only for that period reasonably necessary

to acquire another vehicle.” *Amerson v. Willis*, 109 N.C. App. 297, 298–299, 426 S.E.2d 428, 429 (1993). These damages were not so limited by the trial court.

Paykert’s complaint did not establish a specific dollar amount for loss of use and simply pled an amount in excess of \$10,000. At the damages trial, Paykert testified that he and his accountant estimated that he had lost earnings of approximately \$40,000. We conclude from the transcript that this evidence is so vague that it is also not competent evidence upon which the court’s finding can be based and that the award was not proven with “reasonable certainty.” *See Reliable Trucking Co. v. Payne*, 233 N.C. 637, 639, 65 S.E.2d 132, 133 (1951).

To support the award of compensatory damages, this Court would need more information on the fair market value of the equipment associated with the tractor-trailer and a reasonable time and cost for Paykert to obtain another vehicle. As explained above, Paykert needed to provide evidence of a reasonable effort to continue to operate his business despite the loss of the tractor-trailer.

Plaintiff did not provide sufficient competent evidence at trial for this Court to uphold the compensatory damages award. Therefore, we must reverse and remand the judgement on the issue of compensatory damages.

### **C. Amount of Punitive Damages**

“Punitive damages may be awarded, in an appropriate case . . . to punish a Defendant for egregiously wrongful acts and to deter the Defendant and others from

committing similar wrongful acts.” N.C. Gen. Stat. § 1D-1 (2013). Constitutionally, punitive damages are constrained by “general concerns of reasonableness.” *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18, 111 S.Ct. 1032, 1043 (1991). In other words, the amount of punitive damages must bear a rational relationship to the amount needed to punish the defendant and deter similar future conduct. *See Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 683–684, 562 S.E.2d 82, 91 (2002).

Coleman argues N.C. Gen. Stat. § 1D-35 requires the trial court to consider the actual damages suffered by Coleman when determining a punitive damage award. Since the compensatory damage award is incorrect, Coleman contends a punitive damage award that took the compensatory award into consideration is also incorrect.

Our case law does not support this grand proposition. *See Mace v Pyatt*, 203 N.C. App. 245, 691 S.E.2d 81 (2010). The relationship between compensatory damages and punitive damages is one of several factors the trial court might consider.

In determining punitive damages, if any, to be awarded, the trier of fact *may* consider only that evidence that relates to the following:

- a. The reprehensibility of the defendant’s motives and conduct.
- b. The likelihood, at the relevant time, of serious harm.
- c. The degree of the defendant’s awareness of the probable consequences of its conduct.
- d. The duration of the defendant’s conduct.
- e. The actual damages suffered by the claimant.
- f. Any concealment by the defendant of the facts or consequences of its conduct.
- g. The existence and frequency of any similar past conduct

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by the defendant.

h. Whether the defendant profited from the conduct.

i. The defendant's ability to pay punitive damages, as evidenced by its revenues or net worth.

N.C. Gen. Stat. § 1D-35(2) (2013) (emphasis added). Nevertheless, we hold the punitive damage calculation under these facts be vacated in light of our decision on compensatory damages.

In *Mace*, the plaintiff brought a conversion claim against the defendant after a third party forged a deed to purportedly give defendant plaintiff's land. *Mace*, 203 N.C. App. at 249, 691 S.E.2d at 86. The plaintiff, upon returning to her land after a long illness, found her trailer had been moved from its foundation as well as its contents strewn about, damaged, and left in the elements. *Id.* at 247, 691 S.E.2d at 85. The trial court awarded plaintiff \$50,000 in compensatory damages and \$500,000 in punitive damages. *Id.* at 250, 691 S.E.2d at 87.

On appeal, this Court found no evidence to support the amount of compensatory damages awarded at trial. *Id.* at 253, 691 S.E.2d at 88. Thus, we vacated the judgment on the issue of compensatory damages and granted a partial new trial. *Id.* at 254–255, 691 S.E.2d at 89. In our discretion, we reasoned:

[O]ur reversal on the issue of compensatory damages does not require us to disturb the punitive damages award. It is well established that merely 'nominal damages may support a substantial award of punitive damages.' . . . [T]he jury found that plaintiff had proven her causes of action against defendant. Nominal damages were thus recoverable for the loss of her personal property as a matter

of law, and plaintiff's punitive damages award can be properly supported by an award of nominal damages standing alone.

*Id.* at 255, 691 S.E.2d at 89–90 (quoting *Zubaidi v. Earl L. Pickett Enters, Inc.*, 164 N.C. App. 107, 118, 595 S.E.2d 190, 196 (2004).

Although it is in our discretion to uphold the award of punitive damages, in this case we find a closer relationship between the amount of compensatory damages and the amount of punitive damages than in *Mace*. We hold the punitive damage calculation under these facts be vacated and remanded in light of our decision on compensatory damages.

#### **D. Attorney Fees**

In North Carolina, the general rule is that “attorney fees are not allowed as part of the costs in civil actions or special proceedings, unless there is express statutory authority for fixing and awarding the attorney fees.” *Alston v. Federal Express*, 200 N.C. App. 420, 424, 684 S.E.2d 705, 707 (2009). Attorney fees may be awarded under N.C. Gen. Stat. §1D-45 when a punitive damages claim is frivolous or malicious. N.C. Gen. Stat. §1D-45 (2013). Attorney fees may be awarded under N.C. Gen. Stat. § 75-16.1 when the defendant “willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit.” N.C. Gen. Stat. § 75-16.1 (2013).



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On appeal, Coleman reasons that Paykert is not entitled to an award of attorney fees because N.C. Gen. Stat. § 1D-45 does not support an award of attorney fees in this case. Chapter 1D, which governs punitive damages, states in relevant part: “The court shall award reasonable attorneys’ fees, resulting from the defense against the punitive damages claim, against a claimant who files a claim for punitive damages that the claimant knows or should have known to be frivolous or malicious.” N.C. Gen. Stat. § 1D-45 (2013). We are not persuaded.

Coleman’s argument does not show the trial court abused its discretion in awarding attorney fees. Coleman challenges the award of attorney fees under N.C. Gen. Stat. § 1D-45. However, the trial court did not award Paykert attorney fees under that statute, thus making Coleman’s argument inapplicable.

At trial, the court awarded Paykert attorney fees under N.C. Gen. Stat. §75-16.1. Under N.C. Gen. Stat. §75-16.1, the trial court found that Coleman’s acts were “willful” and “there was an unwarranted refusal by Defendant to fully resolve the matter.” The record contains evidence that supports the trial court’s finding that Coleman’s acts were willful and Coleman refused to solve the matter. Among other acts, there is evidence that Coleman repeatedly refused to return the tractor-trailer to Paykert, refused to allow a towing company on his property to retrieve the tractor-trailer, and kept the tractor-trailer approximately a year after Paykert demanded its

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return. As a result, the trial court did not abuse its discretion in awarding Paykert attorney fees.

**IV. Conclusion**

For the foregoing reasons, the final judgment of the trial court is affirmed in part, vacated in part, and remanded for a new hearing on damages.

**AFFIRMED IN PART, VACATED IN PART, AND REMANDED.**

Judges DILLON and DIETZ concur.

Report per Rule 30(e).