[Cite as *Abdow v. Adams*, 2018-Ohio-2195.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106073

ROBERT P. ABDOW

PLAINTIFF-APPELLANT

vs.

BRIAN G. ADAMS

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Garfield Heights Municipal Court
Case No. CVFI 700087

BEFORE: Laster Mays, J., E.T. Gallagher, P.J., and Jones, J.

RELEASED AND JOURNALIZED: June 7, 2018

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ANITA LASTER MAYS, J.:

{¶1} Plaintiff-appellant Robert P. Abdow ("Abdow") is appealing the trial court's decision that ruled the defendant-appellee Brian G. Adams ("Adams") had not committed civil theft. Abdow is also appealing the trial court's decision to not award him attorney fees. We affirm.

I. Facts

{¶2} Abdow testified that in 2005, he purchased a plastic rock cover from Home Depot to cover an electrical transformer located on both Abdow's and Adams's residential properties. In his testimony, Abdow stated that he asked Adams for permission to place the rock cover over the transformer. Adams agreed.

{¶3} In November of 2016, Abdow went out of town, and upon his return he discovered the rock cover missing. On December 31, 2016, Abdow discovered the missing rock cover at the back of Adams's house tucked between the garbage and corner of the house. Abdow sent a

text message to Adams saying, "Hope you're enjoying the rock [cover]. If you don't return it or pay me for it, I'm going to call the police." (Tr. 36.) Adams did not return the rock cover. Abdow called the police and was told that he could only solve this matter in civil court. Abdow testified that he did not want the rock cover back and would rather be paid for it.

{¶4} After Abdow's testimony, Adams testified that he removed the rock cover from the transformer because a representative from First Energy, the electric company, told him that if the rock cover remained on the transmitter, it would overheat. Both Abdow and Adams testified that they had been previously warned about the transmitter overheating with the rock cover covering it. Adams and his wife testified that they gave Abdow $250 in cash, when Abdow initially purchased the rock cover, since it was placed on both of their properties. Abdow disputed this claim. Timothy J. Denzler ("Denzler"), an engineer for First Energy, testified that company policy dictates that residents do not cover the transmitters.

{¶5} At the conclusion of the trial, the trial court ordered Adams to pay Abdow $250, plus interest at the rate of 4% per year plus court costs. The trial court also found that neither party was entitled to attorney fees. The trial court stated,

> As far as the [a]mended [c]omplaint on the [f]irst [c]ause of [a]ction, which is basically alleging civil theft, I don't see this as being a theft. I agree with the [p]laintiff that it is a conversion, and I'm finding for the [p]laintiff on the [s]econd [c]ause in the amount of $250 plus interest at the rate of [four] percent per year plus court costs. Why am I saying it's $250? I find the testimony of Mrs. Adams to be credible that they paid for half the rock [cover].

(Tr. 164.)

{¶6} Abdow filed this appeal assigning two errors for our review:

> I. The trial court committed an abuse of discretion in failing to award the plaintiff's attorney fees after determining the

Defendant converted plaintiff's property; and

II. The trial court committed reversible error in not finding the defendant had committed civil theft and in not awarding attorney fees pursuant to the statute.

II. Attorney Fees

{¶7} Accordingly,

> [a]n award of attorney fees is a matter within the sound discretion of the trial court. *Layne v. Layne*, 83 Ohio App.3d 559, 568, 615 N.E.2d 332 (1992). Thus, an award for attorneys fees will not be overturned on appeal absent an abuse of discretion. *Motorists Mutual Ins. Co. v. Brandenburg*, 72 Ohio St.3d 157, 160, 648 N.E.2d 488 (1995). A reviewing court will not disturb the judgment unless it reflects an arbitrary, unreasonable or unconscionable attitude. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

Szitasi v. Sobe, 8th Dist. Cuyahoga No. 75632, 2000 Ohio App. LEXIS 1847 (Apr. 27, 2000).

{¶8} In Abdow's first assignment of error, he argues that the trial court committed an abuse of discretion for failing to award him attorney fees.

> "Ohio has long adhered to the 'American rule' with respect to recovery of attorney fees: a prevailing party in a civil action may not recover fees as part of the cost of litigation." *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 7. An exception to this rule exists where punitive damages are awarded in tort cases involving fraud, insult, or malice. *Columbus Fin., Inc. v. Howard*, 42 Ohio St.2d 178, 183, 327 N.E.2d 654 (1975), citing *Roberts v. Mason*, 10 Ohio St. 277, 1859 Ohio LEXIS 159 (1859). If punitive damages are proper, reasonable attorney fees may be awarded as an element of compensatory damages. *Galmish v. Cicchini*, 90 Ohio St.3d 22, 35, 734 N.E.2d 782 (2000). An award of attorney fees may stem from an award of punitive damages, but "the attorney-fee award itself is not an element of the punitive-damages award." *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 2010-Ohio-1829, 928 N.E.2d 421, ¶ 16.

Cruz v. English Nanny & Governess School, Inc., 2017-Ohio-4176, 92 N.E.3d 143, ¶ 96 (8th Dist.).

{¶9} Abdow was not awarded punitive damages, therefore, the trial court did not abuse its discretion in not awarding attorney fees.

> The Ohio Supreme Court has held that a trial court may not award attorney fees to the prevailing party in a lawsuit, if no statute authorizes the payment of such fees, unless the party against whom the fees are taxed was found to have acted in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons. *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 314, 649 N.E.2d 1219 (1995). There is no statute authorizing the payment of attorney fees in this case.

Harper v. Dog Town, Inc., 7th Dist. Noble No. 08 NO 348, 2008-Ohio-6921, ¶ 12.

Abdow has not demonstrated that Adams acted in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons. So, the trial court simply awarded Abdow the value of the rock cover at the time of conversion, or when Adams removed the rock cover from the transmitter. *See*, *e.g.*, *Tabar v. Charlie's Towing Serv.*, 97 Ohio App.3d 423, 646 N.E.2d 1132 (8th Dist.1994) ("The measure of damages in a conversion action is the value of the converted property at the time it was converted").

{¶10} Abdow's first assignment of error is overruled.

III. Civil Theft

{¶11} Consequently,

> [w]hen reviewing a civil appeal from a bench trial, we apply a manifest weight standard of review. *Revilo Tyluka, L.L.C. v. Simon Roofing & Sheet Metal Corp.*, 193 Ohio App.3d 535, 2011-Ohio-1922, 952 N.E.2d 1181, ¶ 5 (8th Dist.), citing App.R. 12(C) and *Seasons Coal v. Cleveland*, 10 Ohio St.3d 77, 10 Ohio B. 408, 461 N.E.2d 1273 (1984). A verdict supported by some competent, credible evidence going to all the essential elements of the case must not be reversed as being against the manifest weight of the evidence. *Domaradzki v. Sliwinski*, 8th Dist. Cuyahoga No. 94975, 2011-Ohio-2259, ¶ 6; *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

Sonis v. Rasner, 2015-Ohio-3028, 39 N.E.3d 871, ¶ 52 (8th Dist.).

{¶12} In Abdow's second assignment of error, he contends that the trial court committed reversible error in not finding the defendant had committed civil theft and in not awarding attorney fees pursuant to the statute. We have already addressed the awarding of attorney fees in the previous assignment of error. Civil theft occurs "[w]hen a civil recovery is sought from a

person who has committed a theft offense * * *." *Cuyahoga Hts. Local School Dist. v. Palazzo*, 2016-Ohio-5137, 69 N.E.3d 162, ¶ 13 (8th Dist.). The record reflects that the trial court ruled that Adams did not commit a theft offense, but rather conversion of property.

> "Conversion is the wrongful control or exercise of dominion over property belonging to another inconsistent with or in denial of the rights of the owner. In order to prove the conversion of property, the owner must demonstrate (1) he or she demanded the return of the property from the possessor after the possessor exerted dominion or control over the property, and (2) that the possessor refused to deliver the property to its rightful owner. The measure of damages in a conversion action is the value of the converted property at the time it was converted." (Internal citations omitted.)

Pappas v. Ippolito, 177 Ohio App.3d 625, 2008-Ohio-3976, 895 N.E.2d 610, ¶ 48 (8th Dist.), citing *Tabar v. Charlie's Towing Serv., Inc.*, 97 Ohio App.3d 423, 427-428, 646 N.E.2d 1132 (8th Dist.1994).

{¶13} Reviewing the record, Adams and his wife testified that they gave Abdow $250 representing half the cost of the rock cover. Therefore, Adams's testimony claims an ownership interest in the rock cover. Abdow testified that he bore the entire cost of the rock cover, requested its return and Adams refused to return it. Abdow later testified that he did not want the rock cover returned to him at this juncture of the proceedings.

> The weight to be given the evidence and the credibility of the witnesses are matters primarily for the trier of fact. *State v. Patterson*, 8th Dist. Cuyahoga No. 98127, 2012-Ohio-5511, ¶ 13, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact has the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964). "The choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986).

State v. Marshall, 8th Dist. Cuyahoga No. 100736, 2015-Ohio-2511, ¶ 55.

{¶14} The trial court found that Adams gave $250 to Abdow towards the purchase of the rock cover, resulting in joint ownership of the rock cover. Adams could not have committed a theft of jointly owned property, but rather he converted the property for his sole use when he refused to allow both himself and Abdow use of the rock cover. *See, e.g.*, *Winland v. Winland*, 7th Dist. Belmont No. 04 BE 20, 2005-Ohio-1339, ¶ 22 (a claim for conversion is premised on joint ownership of property). Therefore, Abdow's second assignment of error is overruled.

{¶15} The trial court's judgment is affirmed.

It is ordered that the appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing Garfield Heights Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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ANITA LASTER MAYS, JUDGE

EILEEN T. GALLAGHER, P.J., and
LARRY A. JONES, SR., J., CONCUR