

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

VIRGINIA L. APERGIS, et al.,	:	OPINION
Plaintiffs-Appellees,	:	
- vs -	:	CASE NO. 2009-T-0079
RICHARD A. BOCCIA,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Probate Division, Case No. 2007 CVA 0025.

Judgment: Affirmed.

Douglas J. Neuman, Westenfield, Neuman & Parry, 761 North Cedar Street, #1, Niles, OH 44446-2566 (For Plaintiffs-Appellees).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Richard A. Boccia, appeals the Judgment Entry of the Trumbull County Court of Common Pleas, Probate Division, awarding damages and attorney fees to plaintiffs-appellees, Virginia L. Apergis and Patricia L. Rickard, and ordering that the supersedeas bond, posted in *Estate of Boccia*, 11th Dist. No. 2007-T-

0060, 2008-Ohio-4764, be applied to the judgment. For the following reasons, we affirm the decision of the court below.

{¶2} Louis T. Boccia was the owner of L.T. Boccia Construction Company, founded in 1956. Louis' son, Richard, was an employee of the company until 1998. The following year, Richard established his own construction/demolition company in competition with L.T. Boccia Construction.

{¶3} Louis died on April 9, 2006. Pursuant to his Last Will and Testament, Rickard and Apergis were nominated co-executrices of the estate. A dispute arose between Rickard/Apergis and Richard regarding the ownership of certain construction/demolition equipment located on property that Richard owns at 1700 and 1710 North State Street (U.S. 422), in Girard, Ohio.

{¶4} On January 5, 2007, the disputed equipment on Richard's property was appraised by auctioneer/appraiser David Dangerfield. Dangerfield's report identified and appraised 53 pieces of equipment and/or scrap on the North State Street property at a value of \$51,860.

{¶5} On January 19, 2007, the co-executrices filed a First Amended Inventory and Appraisal, to which Richard filed Exceptions.

{¶6} Between April and May 2007, Richard sold a number of the disputed items located on his property for scrap.

{¶7} On May 9, 2007, the probate court entered a Judgment Entry variously sustaining, and rejecting Richard's Exceptions to the Inventory.

{¶8} On May 21, 2007, Apergis and Rickard filed a Complaint (Concealment of Assets) in the probate court, being Case No. 07-CVA-0025. The Complaint alleged that

Richard “has concealed, embezzled or conveyed away or has been or is in possession of *** chattels and equipment” belonging to the Estate of Louis T. Boccia, and “has defrauded the Estate of Louis T. Boccia by liquidating and/or hiding away the Estate’s assets *** during the pendency of the Estate.”

{¶9} On May 29, 2007, Richard filed a Notice of Appeal (App. No. 2007-T-0060) with respect to the Inventory approved by the probate court in Case No. 2006-EST-0391.

{¶10} On July 30, 2007, the probate court issued a Judgment Entry in the Estate Case (2006-EST-0391) regarding the posting of a supersedeas bond, pending the appeal of the order relating to the exceptions to the Inventory. The court found that Richard “dismantled and scrapped part of the assets awarded to the estate and that the remaining items of tangible personal property are in a physical condition similar to that which existed at the time that the order was issued.” Accordingly, the court set the bond at \$48,000, “based upon the appraised value of the items awarded to the estate that were dismantled and scrapped plus a reasonable rate of interest thereon pending the appeal and costs to pursue the appeal.”

{¶11} On September 6, 2007, Richard entered a plea of guilty in the Concealment Case pursuant to R.C. 2109.50.

{¶12} On September 7, 2007, the probate court entered a Judgment Entry staying proceedings in the Concealment Case pending disposition of Richard’s appeal of the Inventory in the Estate Case (App. No. 2007-T-0060). The court stated that, “in the event [Richard] does not prevail in said appeal, then this Court will schedule a

hearing *** to determine damages, and any statutory penalties, with the court costs of this action assessed to [Richard].”

{¶13} On September 19, 2008, this court issued its decision in *Estate of Boccia*, 11th Dist. No. 2007-T-0060, 2008-Ohio-4764, affirming the probate court’s Judgment on Richard’s Exceptions to the Inventory.

{¶14} On May 19, 2009, the probate court held a hearing on damages in the Concealment Case. Apergis and Rickard introduced evidence that, between April and May 2007, Richard received \$61,014.43 from Atlas Recycling, Inc. for scrap material, and \$5,724.08 from the Mercer Company for scrap material. Rickard testified that she repeatedly observed Richard on his property between April and May 2007, disassembling equipment and machinery. She also observed scrap being delivered to Atlas Recycling and a Mercer loader box on Richard’s property.

{¶15} Richard testified that, during the time in question, he was demolishing the Parkman Road Plaza for the City of Warren, and that most of the scrap delivered came from this job. Richard testified, from memory, that he only received \$14,000 for scrapping items belonging to the estate and that nothing belonging to the estate was scrapped at Mercer.

{¶16} On May 21, 2009, the probate court entered a Judgment Entry, identifying certain pieces of equipment, identified on the Estate Inventory, that were still located at Richard’s North State Street property. The court ordered these items returned to the estate. The court also ordered further briefing on the issue of damages and the applicability of the supersedeas bond posted in the Estate Case to the present proceedings.

{¶17} On June 8, 2009, Apergis and Rickard filed a Motion for Allowance of Attorney Fees in the sum of \$8,309.50, as evidenced by an attached itemized statement of hours and out-of-pocket expenses.

{¶18} On July 13, 2009, the probate court entered a Judgment Entry. The court found “from the evidence presented that the inventory value of the property concealed, conveyed away, and scrapped by [Richard] is \$44,275.00,” and awarded that amount to Apergis and Rickard as co-executrices of the Estate of Louis T. Boccia, plus interest and costs. The court further ordered Richard to pay attorney fees in the amount of \$8,309.50, for services that “were fair, reasonable, and beneficial to the estate.” Finally, the court held that, “pursuant to the terms of the supersedeas bond and to R.C. 2505.09 and R.C. 2505.14, the supersedeas bond is applicable to this proceeding to the extent that an award of money, costs, and damages is available on the bond in the estate proceeding.”

{¶19} On August 10, 2009, Richard filed a Notice of Appeal. On appeal, Richard raises the following assignments of error:

{¶20} “[1.] The trial court erred by ordering appellant to pay damages to the estate where no specific amount of damages was proven.”

{¶21} “[2.] The trial court erred and abused its discretion by ordering that appellant pay appellee’s unfair and unreasonable attorney’s fees.”

{¶22} “[3.] The trial court erred by applying the supersedeas bond to the award of damages.”

{¶23} In the first assignment of error, Richard argues that, based on the evidence presented at the hearing on damages, it is impossible to determine the value

of the scrap from the estate's property. Although Apergis and Rickard presented evidence of scrap sold to Atlas and Mercer between April and May 2007, there was no competent or credible evidence that any of this material belonged to the estate.

{¶24} “Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.” *C.E. Morris Co. v. Foley Const. Co.* (1978), 54 Ohio St.2d 279, at syllabus. The “reviewing court *may* reverse a damage award if it is manifestly against the weight of the evidence.” *Windsor v. Riback*, 11th Dist. Nos. 2007-G-2775 and 2007-G-2781, 2008-Ohio-2005, at ¶60 (citations omitted) (emphasis sic). “In order to set aside a damage award as *** against the manifest weight of the evidence, a reviewing court must determine that the verdict is so gross as to shock the sense of justice and fairness, [and] cannot be reconciled with the undisputed evidence in the case ***.” *Id.* (citation omitted).

{¶25} The probate court's award of \$44,275 in damages is supported by the competent, credible evidence of appraiser Dangerfield's report, as determined in the Estate Case and affirmed in a prior appeal to this court. *Cf. Bolles v. Toledo Trust Co.* (1940), 136 Ohio St. 517, at syllabus (holding that *res judicata* applies to “[a] final adjudication, that certain inventoried personal property is assets of a decedent's estate and lawfully included in the inventory thereof in a proceeding instituted in Probate Court by filing exceptions to the inventory”). According to this report, the appraised value of the disputed property held by Richard was \$56,760 as of January 2007. The court determined the damage award in the Concealment Case by deducting from this sum the value of the property awarded to Richard and the value of property returned to the

estate. The resulting figure of \$44,275 is a fair determination of the value of the estate property sold by Richard between April and May 2007. Moreover, the court's award of damages is more realistic than Richard's claim that he only received \$14,000 for all of the items scrapped, or Apergis and Rickard's claim that they are entitled to \$66,738.51, representing all material scrapped by Richard between April and May 2007.

{¶26} The first assignment of error is without merit.

{¶27} In the second assignment of error, Richard argues the probate court abused its discretion by awarding attorney fees for legal services provided prior to March 17, 2009, when the court set a hearing date for the trial on damages. According to Richard, prior to March 17, 2009, a legitimate dispute existed regarding the ownership of certain property. Awarding fees for services performed during this period would contravene "public policy," as parties would "be loathe to dispute a claim of ownership by an estate, regardless of the merit of the claim, for fear of the penalty of attorney's fees if he or she should be unsuccessful."

{¶28} In a concealment action, "the probate court shall *** render judgment *** for the amount of the moneys or the value of the chattels or choses in action concealed, embezzled, conveyed away, or held in possession, together with ten per cent penalty and all costs of such proceedings or complaint ***." R.C. 2109.52.

{¶29} "It is well-settled that attorney fees are not recoverable except when there is a specific statutory provision allowing such or where 'the losing party has acted in bad faith, vexatiously, wantonly, obdurately or for oppressive reasons.'" *In re Estate of Brate*, 12th Dist. No. CA2007-08-103, 2008-Ohio-3517, at ¶8 (citations omitted); *Sturm v. Sturm* (1992), 63 Ohio St.3d 671, 675, citing *Sorin v. Bd. of Edn.* (1976), 46 Ohio

St.2d 177, 183 (recognizing “a bad-faith exception to the American Rule that a prevailing party may not recover attorney fees as part of the costs of the litigation absent statutory authority for doing so”).

{¶30} It has been held that “the probate court’s finding that [a defendant] was ‘guilty of concealment of estate assets’ is tantamount to a finding that [the defendant] acted in bad faith and/or for oppressive reasons in concealing the assets,” so that such a finding gives “the probate court the authority to order him to pay the attorney fees associated with prosecution of the case.” *In re Estate of Toth*, 5th Dist. No. CA-9312, 1993 Ohio App. LEXIS 5790, at *3; accord *Brate*, 2008-Ohio-3517, at ¶9 (citations omitted); *Hoover v. Wherry*, 10th Dist. No. 98AP-890, 1999 Ohio App. LEXIS 2371, at *12; *Sexton v. Jude*, 2nd Dist. No. 14227, 1994 Ohio App. LEXIS 3961, at *13 (citations omitted).

{¶31} “An award for attorney fees will not be overturned on appeal absent an abuse of discretion.” *Hikmet v. Turkoglu*, 10th Dist. No. 08AP-1021, 2009-Ohio-6477, at ¶82 (citation omitted).

{¶32} In the present case, Richard pled guilty to concealing assets of the estate on September 6, 2007, and the probate court found his actions “willful, wanton, and intentional.” The court’s finding is supported by the record. Richard was aware that the equipment in question was claimed by the estate, at the latest, by February 2007, when he filed Exceptions to the Inventory in the Estate Case. *Boccia*, 2008-Ohio-4764, at ¶9. Despite his knowledge that the items were claimed by the estate, Richard disposed the property while the court was considering his Exceptions to the Inventory. While the dispute between Richard and the estate over the property may have been legitimate,

Richard's disposition of the disputed property was not in good faith and constituted a violation of R.C. 2109.50. Had Richard not willfully disposed of assets he knew were claimed by the estate, he would not have been liable under R.C. 2109.50 and, thus, liable to the estate for attorney fees. *Longworth v. Childers*, 180 Ohio App.3d 162, 2008-Ohio-4927, at ¶21 (“mere possession [of estate assets], by itself, is an insufficient basis on which to make a finding of guilt under R.C. 2109.52”). Thus, the argument that the imposition of attorney fees would discourage parties from litigating legitimate claims to assets claimed by a decedent's estate is not convincing. The court did not abuse its discretion by awarding attorney fees covering the whole period of the Concealment Action.

{¶33} The second assignment of error is without merit.

{¶34} In the third and final assignment of error, Richard argues the probate court abused its discretion by applying the supersedeas bond from the appeal of the Estate Case to the award of damages in the Concealment Case.

{¶35} “A supersedeas bond shall be payable to the appellee or otherwise, as may be directed by the court, when the conflicting interests of the parties require it, and shall be subject to the condition that the appellant shall abide and perform the order, judgment, or decree of the appellate court and pay all money, costs, and damages which may be required of or awarded against him upon the final determination of the appeal and subject to any other conditions that the court provides. When the final order, judgment, or decree appealed is for the payment of money, the bond may provide that, if the final order, judgment, or decree is not paid upon final affirmance, it may be entered against the sureties on the bond.” R.C. 2505.14.

{¶36} Richard maintains “there were no conditions in the bond [posted in the appeal of the Estate Case] that it would be applicable to any and all disputes between [Richard] and the estate in perpetuity.” Contrary to Richard’s position, the conditions of the bond did not render it applicable to any future disputes between Richard and the estate, but did render it applicable against the value of the concealed assets.

{¶37} The probate court’s Judgment Entry establishing the supersedeas bond in the appeal of the Estate Case based the amount of the bond “upon the appraised value of the items awarded to the estate that were dismantled and scrapped.” The bond itself was filed on August 29, 2007, and bound Richard to the Estate of Louis T. Boccia for “the penal sum of \$48,000,” as a guarantee that he would “pay all money, costs, and damages which may be required of or awarded against [him] upon the final determination of the appeal.” The subject matter of the Concealment Case is the same subject matter on which the bond in the Estate Case was based. In a real sense, the two cases are part of the same proceeding, not separate cases as suggested by Richard. Richard’s liability for the equipment was determined in the Estate Case, and the amount of damages was determined in the Concealment Case, but was based on evidence produced in the Estate Case. Given this situation, we find no error in the application of the supersedeas bond to the judgment rendered in the concealment action.

{¶38} The third assignment of error is without merit.

{¶39} For the foregoing reasons, the Judgment of the Trumbull County Court of Common Pleas, Probate Division, awarding damages and attorney fees to Apergis and

Rickard and ordering that the supersedeas bond posted in the Estate Case be applied to the judgment, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion.

{¶40} Although I concur with the majority regarding appellant's first and second assignments of error, I disagree with the majority's contention with respect to appellant's third assignment of error that the trial court did not err by applying the supersedeas bond from the appeal of the Estate Case to the award of damages in the Concealment Case.

{¶41} R.C. 2505.14 provides: "[a] supersedeas bond shall be payable to the appellee or otherwise, as may be directed by the court, when the conflicting interests of the parties require it, and shall be subject to the condition that the appellant shall abide and perform the order, judgment, or decree of the appellate court and pay all money, costs, and damages which may be required of or awarded against him upon the final determination of the appeal and subject to any other conditions that the court provides. When the final order, judgment, or decree appealed is for the payment of money, the

bond may provide that, if the final order, judgment, or decree is not paid upon final affirmance, it may be entered against the sureties on the bond.”

{¶42} In the instant case, the bond in question was posted for the appeal of the Estate Case, Case No. 2006 EST 0391. On September 19, 2008, this court affirmed the judgment of the trial court. *Estate of Boccia*, 11th Dist. No. 2007-T-0060, 2008-Ohio-4764. On February 18, 2009, the Supreme Court of Ohio did not accept the appeal for review. *In re Estate of Boccia*, 120 Ohio St.3d 1526, 2009-Ohio-614. At that point, the holding in the Estate Case was final and the matter was closed. Thus, because the bond was an appeal bond for an appeal that was finalized, it should have been released. This writer believes that the trial court erred by applying an expired supersedeas bond from a separate case to this matter.

{¶43} For the foregoing reasons, I respectfully concur in part and dissent in part.