

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

AUDREY WARD, AS ADMINISTRATOR OF THE ESTATE OF RICHARD SHINE,	:	OPINION
Plaintiff-Appellee,	:	CASE NO. 2010-G-2994
- vs -	:	
LINDA PATRIZI,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 10 PC 000152.

Judgment: Affirmed.

David M. King and John P. Thomas, Schraff & King Co., L.P.A., 2802 S.O.M. Center Road, Suite 200, Willoughby Hills, OH 44094 (For Plaintiff-Appellee).

Spiros E. Gonakis, 20050 Lakeshore Boulevard, Euclid, OH 44123 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} This appeal is submitted to this court on the record and the briefs of the parties. Appellant, Linda Patrizi, appeals the judgment entered by the Probate Division of the Geauga County Court of Common Pleas. After a bench trial, the trial court entered judgment in favor of appellee, Audrey Ward, as Administrator of the Estate of Richard Shine. The trial court ordered Patrizi to pay \$700 as a penalty for being found

guilty of concealment; pay \$3,959.50 in attorney fees incurred by the estate; and return two items of personal property to the estate.

{¶2} Patrizi is Richard Shine's ("Richard") niece. Patrizi was designated as Richard's power of attorney and served in that capacity. Patrizi paid Richard's bills from his checking account, signing the checks as the power of attorney.

{¶3} Richard died intestate on October 8, 2009. Patrizi drafted a check from his account, made payable to cash, in the amount of \$7,000. The check was dated October 8, 2009, and Patrizi signed the check using her power of attorney designation. Within hours of Richard's death, Patrizi went to the bank and cashed the check.

{¶4} In the days following Richard's death, Patrizi took several items of personal property from his residence. She claimed she had permission to take these items from Robert Shine ("Robert"), who is Richard's son. Patrizi admitted taking a frying pan, a table stand, a microwave, and a lock box containing paperwork from Richard's home. In addition, the estate alleged that Patrizi took additional items from the home such as a soup tureen, diamond earrings, a mantle clock, and a Bose radio.

{¶5} Upon his death, the real estate that included Richard's residence transferred to Patrizi and Robert as a non-probate asset. Also, Patrizi and Robert were designated as beneficiaries, in equal shares, on Richard's IRA account held at Fidelity, which was also a non-probate asset.

{¶6} Audrey Ward was appointed administrator of Richard's estate. Robert is the only beneficiary of the estate.

{¶7} On April 12, 2010, the administrator filed a "complaint for concealment, embezzlement, and conversion of assets" against Patrizi. The complaint alleged that

Patrizi took the \$7,000 from the proceeds of the cashed check. Also, it alleged that she took items of personal property, including diamond earrings, a mantle clock, and a microwave oven. The complaint sought a return of the \$7,000 and personal items, imposition of a ten percent penalty pursuant to R.C. 2109.52, and an order that Patrizi pay the estate's attorney fees for the concealment action.

{¶8} Patrizi filed an answer to the complaint, wherein she denied the substantive allegations of the complaint. Also, in the same pleading, Patrizi filed a counterclaim against the estate. Therein, Patrizi claimed she had paid \$3,149.62 in funeral expenses for Richard. In addition, Patrizi asserted that she paid \$750 in real estate taxes for Richard's property in January 2010, for the taxes accrued for the first half of 2009.

{¶9} In May 2010, the estate filed a motion to dismiss Patrizi's counterclaim. The estate argued the counterclaim should be dismissed for several reasons, one of which being that Patrizi did not follow the proper procedure pursuant to R.C. 2117.06 for presenting claims to the administrator of an estate. Patrizi responded to this motion. She argued that she was required to advance any compulsory counterclaims pursuant to Civ.R. 13.

{¶10} A pretrial conference occurred on August 17, 2010. During the conference, the estate acknowledged that Patrizi gave the estate \$7,000 and returned the microwave oven, the mantel clock, and the safety deposit box and its contents.

{¶11} A hearing on the merits was held before the trial court on September 21, 2010. Patrizi returned the frying pan to the estate that day. Several witnesses testified at the hearing, including Patrizi, Robert, and Administrator Ward. In addition, Attorney

John Thomas, who represented Administrator Ward and the estate, testified regarding the attorney fees he billed the estate as a result of the concealment action against Patrizi.

{¶12} Following the hearing, the trial court issued a judgment entry finding Patrizi guilty of concealment of assets. The court found Patrizi “conveyed away” multiple items belonging to the estate, including \$7,000 cash, a table stand, a frying pan, a Bose radio, and a safety deposit box and its contents. The trial court noted that the \$7,000, the frying pan, and the safety deposit box and its contents were returned to the estate after the complaint was filed. The trial court found that the estate did not present sufficient evidence on its claim that Patrizi concealed the diamond earrings and soup tureen. The trial court ordered Patrizi pay \$3,959.50 in attorney fees to the estate. Also, the court imposed a \$700 penalty on Patrizi, representing ten percent of the \$7,000 she had taken from the estate. Finally, the trial court ordered Patrizi to pay the costs of the proceeding.

{¶13} Patrizi timely appealed the trial court’s judgment entry to this court. On appeal, Patrizi raises three assignments of error. Her first assignment of error is:

{¶14} “The trial court erred in dismissing appellant’s compulsory counterclaims thereby compelling appellant to unnecessarily incur future additional time and expense in prosecuting her claims against the estate.”

{¶15} At the September 2010 hearing, the trial court ruled on the estate’s motion to dismiss Patrizi’s counterclaims as follows:

{¶16} “These are claims that should be presented to the administrator and the administrator needs to accept them or reject them. And if they are rejected, then they

need to be pursued in the manner as required by statute. It's not something that will be addressed in the concealment action.

{¶17} “So the counterclaims are dismissed without prejudice to pursue them in the manner that’s authorized by law.”

{¶18} The trial court correctly noted there is a specific statutory process for the presentation of claims to an estate. Pursuant to R.C. 2117.06(B), Patrizi was required to present her claims to the administrator within six months of Richard’s death. Thereafter, the administrator was required to decide whether to allow or reject Patrizi’s claims within 30 days of when they were presented. R.C. 2117.06(D). If the claims were rejected, Patrizi had the opportunity to contest that decision by “commencing an action on the claim.” R.C. 2117.12. While R.C. 2117.12 does not specify what court an action to contest the rejection of a claim is to be filed, Ohio courts have held that such actions should be filed in the general division of the court of common pleas, rather than the probate court. *Kraus v. Hanna*, 11th Dist. No. 2002-P-0093, 2004-Ohio-3928, at ¶19. (Citations omitted.)

{¶19} Moreover, this court has held that “[a] probate court lacks subject matter jurisdiction to enter an order adjudicating a claim against an estate where that claim has been rejected by the estate. The only remedy for the claimant in such a case is an action in a court of general jurisdiction.” *Kraus v. Hanna*, 2004-Ohio-3928, at ¶18, quoting *In re Estate of Vitelli* (1996), 110 Ohio App.3d 181, 183-184. (Secondary citations omitted.) The Sixth Appellate District has also held that a probate court is without jurisdiction to hear such cases. *In re Estate of Liggons*, 187 Ohio App.3d 750, 2010-Ohio-1624, at ¶32. (Citations omitted.)

{¶20} In this matter, since the probate court lacked jurisdiction to hear the subject matter of Patrizi's counterclaim, it did not err by dismissing the counterclaim without prejudice.

{¶21} Patrizi's first assignment of error is without merit.

{¶22} Patrizi's second assignment of error is:

{¶23} "The trial court erred in failing to admit appellant's exhibit #2 thereby prejudicing appellant's defense regarding the payment of a 10% statutory penalty and appellee's attorney fees."

{¶24} Patrizi argues the trial court erred by not admitting a letter from her attorney to the estate's attorney, dated May 12, 2010. In this letter, Patrizi's attorney indicates that Patrizi will repay the \$7,000 if the state dismisses the concealment action.

{¶25} The admission of evidence lies within the discretion of the trial court. *Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St.3d 296, 299. (Citations omitted.) Thus, this court will not disturb the trial court's evidentiary rulings unless it is demonstrated that the trial court abused its discretion. *Id.* An abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶26} Generally, offers of compromise are inadmissible. See Evid.R. 408. Patrizi contends the May 12, 2010 letter was admissible because it went to issues such as attorney fees and the ten percent penalty.

{¶27} The trial court ruled the May 12, 2010 letter was a settlement offer and thus inadmissible. This letter contained the following conditional language: "I would

want your assurance that the Complaint would be voluntarily dismissed with prejudice[.]” At the time of the letter, there were allegedly concealed items of personal property that were still in dispute. Also, the estate was seeking attorney fees for the work done in this matter, as well as the statutory ten percent penalty. Accordingly, the trial court was correct that this letter amounted to a settlement offer, rather than an unconditional offer to repay the \$7,000.

{¶28} Further, Patrizi has not demonstrated that she was prejudiced by this perceived error. The letter the trial court ruled inadmissible was dated May 12, 2010. However, the trial court admitted Patrizi’s exhibit #1, which was a March 10, 2010 letter from her attorney stating that Patrizi was offering to repay the \$7,000 from her portion of the proceeds from the sale of the real property. Also, the trial court admitted another letter, dated May 26, 2010, wherein Patrizi’s attorney indicated Patrizi intended to pay the estate \$7,000 out of her portion of the Fidelity proceeds. Accordingly, there was evidence before the court that Patrizi intended to repay the \$7,000 in March and May 2010. Finally, the trial court was aware that Patrizi actually repaid the \$7,000 in August 2010. Accordingly, Patrizi was not prejudiced by the trial court’s ruling denying the admission of the May 12, 2010 letter.

{¶29} The trial court did not abuse its discretion in failing to admit Patrizi’s exhibit #2.

{¶30} Patrizi’s second assignment of error is without merit.

{¶31} Patrizi’s third assignment of error is:

{¶32} “Where the plaintiff fails to establish the value of estate assets allegedly unlawfully taken by the defendant, the trial court cannot remedy plaintiff’s failure to

sustain her burden of proof by ordering the parties to conduct a post-trial evidentiary hearing to establish the value of such assets.”

{¶33} Patrizi argues that the estate failed to meet its burden of proof on the issue of damages by failing to offer evidence of the value of the Bose radio and table stand. The estate was seeking return of the specific items at issue; it was not seeking the monetary value of such items.

{¶34} As the estate notes, upon a finding of guilty in a concealment action, the trial court “may order the return of the specific thing concealed ***.” R.C. 2109.52. In this matter, the trial court ordered Patrizi to return the Bose radio and the table stand.

{¶35} The trial court anticipated that Patrizi would comply with its order and return the items in question. Alternatively, if those items could not be returned, the trial court ordered the parties to determine a value for them and, then, for Patrizi to pay the estate the agreed-upon value of those items. Finally, as a last resort, the trial court ruled that if the items could not be returned and the parties could not agree on a value, the parties could request an additional hearing to determine the value of the Bose radio and table stand.

{¶36} In this matter, it appears the table stand was no longer in dispute. Patrizi testified that she had the table stand in her possession and that she was willing to return the item. Thus, the only contested item was the Bose radio.

{¶37} Pursuant to Evid.R. 611(A), a trial court “shall exercise reasonable control over the mode and order of interrogating witnesses and presentation of evidence so as to *** avoid needless consumption of time[.]” Alleged errors based on violations of

Evid.R. 611 are reviewed under the abuse of discretion standard. See, e.g., *Marshall v. Scalf*, 8th Dist. No. 88708, 2007-Ohio-3667, at ¶¶28-29.

{¶38} In this matter, evidence regarding the value of the table stand and Bose radio was not necessary unless and until (1) Patrizi did not return the items and (2) the parties could not independently agree on their value. Thus, the trial court did not abuse its discretion when it ordered that, if necessary, the parties could request a subsequent hearing to determine the value of the items in question.

{¶39} Patrizi's third assignment of error is without merit.

{¶40} Patrizi's fourth assignment of error is:

{¶41} "The trial court's assessment of the 10% statutory penalty and the award of attorney fees was contrary to law." (Sic.)

{¶42} Patrizi contends the trial court's imposition of the ten percent penalty was contrary to law. For the following reasons, we disagree.

{¶43} R.C. 2109.52 provides, in part:

{¶44} "In all cases, except when the person found guilty is the fiduciary, the probate court shall forthwith 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 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; except that such judgment shall be reduced to the extent of the value of any thing specifically restored or returned in kind as provided in this section."

{¶45} In this matter, the trial court imposed the ten percent penalty, and then reduced the judgment by \$7,000 as a result of Patrizi's payment to the estate. Patrizi is arguing that the judgment should have been reduced prior to the imposition of the ten percent penalty. Under this position, she would not have been assessed any penalty, as the ten percent penalty would have been calculated based on a judgment of \$0.

{¶46} Courts have held that "R.C. 2109.50 is a quasi-criminal statute. It requires a finding of guilty or not guilty and mandates that certain sanctions be imposed on a guilty defendant, including assessment of a ten percent penalty. See R.C. 2109.52." *Longworth v. Childers*, 180 Ohio App.3d 162, 2008-Ohio-4927, at ¶19, quoting *Ukrainiec v. Batz* (1982), 24 Ohio App.3d 200, 202.

{¶47} In this matter, Patrizi took \$7,000 from the estate in October 2009. She spent this money on a home-improvement project at her own home and to pay her personal bills. The complaint for concealment was filed April 12, 2010. She did not return the money until August 2010, when she used her portion of the proceeds of the Fidelity account to repay the estate. It is important to note that the trial court found Patrizi "conveyed away" the \$7,000. The \$700 penalty was imposed for Patrizi's improper conduct, as the trial court specifically found that she "acted in bad faith."

{¶48} The trial court did not err in imposing a \$700 penalty on Patrizi.

{¶49} Next, we address Patrizi's argument that the trial court erred by ordering her to pay the estate's attorney fees. A trial court has discretion in determining whether an award of attorney fees is appropriate. *Dilley v. Dilley*, 11th Dist. No. 2009-G-2957, 2011-Ohio-2093, at ¶86, citing *Rand v. Rand* (1986), 18 Ohio St.3d 356, 359.

{¶50} In support of its order that Patrizi pay the estate's attorney fees, the trial court cited to this court's decision in *Apergis v. Boccia*, 11th Dist. No. 2009-T-0079, 2010-Ohio-2954. In *Apergis v. Boccia*, this court upheld an award of attorney fees where the defendant pled guilty to concealment of assets from an estate. Id. at ¶32. This court noted:

{¶51} “[T]he 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 the prosecution of the case.’” Id. at ¶30. (Citations omitted.)

{¶52} In this matter, the trial court found Patrizi guilty of concealment and specifically found that she acted in bad faith. Accordingly, the trial court did not abuse its discretion by ordering Patrizi to pay the attorney fees incurred by the estate.

{¶53} Patrizi claims the trial court erred by awarding attorney fees that were disproportionate to the amount recovered by the estate.

{¶54} “It is well established that the payment of reasonable attorneys fees rests within the probate court’s sound discretion.” *In re Estate of Keytack*, 2008-T-0039, 2008-Ohio-6563, at ¶28, citing *In re Estate of Fugate* (1993), 86 Ohio App.3d 293, 298.

{¶55} Patrizi argues that the award of attorney fees in the amount of \$3,959.50 was unreasonable because the estate “proceeded to trial” and secured a judgment only for a “Bose radio and a nightstand.” Patrizi’s argument greatly oversimplifies the issues. When the complaint was filed, Patrizi contested the allegations that she concealed \$7,000 and many of the personal items at issue. Through the concealment action, the

estate ultimately secured the return of \$7,000 and several items of personal property. Finally, we note the trial court admitted an itemized billing of the hours the attorneys for the estate spent on the concealment action. The exhibit shows that the vast majority of the total bill, \$3,494.50 out of \$3,959.50, represented billed hours for legal work performed prior to the September 2010 hearing.

{¶56} We conclude the award of attorney fees was reasonable and the trial court did not abuse its discretion by ordering it.

{¶57} Patrizi's fourth assignment of error is without merit.

{¶58} The judgment of the Probate Division of the Geauga County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.