

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

ARCH J. McCARTNEY

Appellee/Cross-Appellant

v.

UNIVERSAL ELECTRIC POWER CORPORATION, et al.

Appellants/Cross-Appellees
C.A. No. 21643 and 21644

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2002 02 0841

DECISION AND JOURNAL ENTRY

Dated: March 3, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

SLABY, Judge.

{¶1} Appellants/Cross-Appellees, Universal Electric Power Corp. (“UEPC”) and UEP Holdings, Inc. (“UEPH”), appeal from the judgment of the

Summit County Court of Common Pleas which determined that the corporations were jointly and severally liable for the fraud and conversion of the investment funds of Appellee/Cross-Appellant, Arch J. McCartney. Appellee filed a cross-appeal contesting not only the dismissal of his claim of personal liability against Bruce Feltenberger (“Feltenberger”), president of UEPC and UEPH, but also the failure of the trial court to include interest, attorney fees, and costs when entering judgment. We affirm in part and reverse and remand in part.

{¶2} On February 11, 2002, Appellee filed a complaint against UEPC and Feltenberger for breach of contract. Appellee alleged that UEPC and Feltenberger failed to comply with the rescission offer entitling Appellee to a full purchase refund for the stock he held in the corporation. Thereafter, Appellee amended his complaint to add UEPH as a party and asserted a new cause of action for conversion. Appellee maintained that UEPC, Feltenberger, and UEPH converted his investment monies for improper uses.

{¶3} A bench trial was held on March 1, 2003. At the start of trial, Appellee’s counsel made an oral motion to amend the complaint with an additional charge. Appellee sought to hold Feltenberger personally liable, by not only piercing the corporate veil but also through alleged violations of R.C. 1707, et seq. Appellants’ counsel objected and the motion was denied. Appellee did not attempt to assert a claim of fraud or R.C. 1707 violations against UEPC or UEPH at this time. At the close of trial, both parties agreed to submit proposed findings of fact and conclusions of law in lieu of closing arguments. Additionally,

Appellee filed another motion to amend the pleadings to conform to the evidence presented at trial.

{¶4} On June 17, 2003, the court issued its order, which denied Appellee’s motion to amend, dismissed the remaining claim as to the personally liability of Feltenberger for conversion, and determined that UEPC and UEPH were jointly and severally liable for fraud and the conversion of Appellee’s funds in the amount of \$520,000. Appellant timely appealed, asserting four assignments of error for review and Appellee filed a cross-appeal asserting three cross-assignments of error for review. The assignments and cross-assignments of error have been rearranged and consolidated to facilitate review.

ASSIGNMENT OF ERROR I

“The trial court erred as a matter of law in determining that Appellants acted in fraud when fraud was neither plead nor proven.”

ASSIGNMENT OF ERROR IV

“The trial court erred as a matter of law in holding that [UEPH] was liable under [R.C. 1707.34], when such claim was neither plead nor proven.”

CROSS-ASSIGNMENT OF ERROR I

“The trial court erred as a matter of law when it found that [Feltenberger] could not be liable for torts committed while acting within his capacity as President and CEO of [UEPC and UEPH].”

{¶5} In their first and fourth assignments of error, Appellants maintain that the trial court erred when it found that R.C. 1707.43 was applicable and they were liable for fraud as these claims were allegedly neither plead nor proven.

Additionally, in his first cross-assignment of error, Appellee argues that the court erred as a matter of law when it failed to hold Feltenberger personally liable for the actions of UEPC and UEPH. We agree in part.

{¶6} “It is axiomatic that cases are to be decided on the issues actually litigated at trial.” *State ex rel. Evans v. Bainbridge Twp. Trustees* (1983), 5 Ohio St.3d 41, 44. The issues are to be set forth in the pleadings so that the adverse party may have notice of any potential liability. *Brown v. Learman* (Nov. 3, 2000), 2nd Dist. No. 00 CA 30. Although Civ.R. 8(E)(1) provides that “[e]ach averment of a pleading shall be simple, concise and direct[,]” certain averments, including that of fraud, have heightened pleading requirements. Civ.R. 9(B). The circumstances constituting fraud are to be stated with particularity and generally include the time, place and content of the false representation, the fact misrepresented, and the nature of what was obtained or given as a consequence. *F & J Roofing Co. v. McGinley & Sons, Inc.* (1987), 35 Ohio App.3d 16, 17; Civ.R. 9(B).

{¶7} However, Civ.R. 9(B) should be read in conjunction with Civ.R. 15(B). *Stormont v. Tenn-River Trading Co., Inc.* (Apr. 27, 1995), 10th Dist. No. 94APG08-1272, citing *Canty v. Vandegrift* (Mar. 23, 1993), 10th Dist No. 92AP-1317. Civ.R. 15(B) treats issues that were not raised in the pleadings as if they were so raised, as long as they were tried with the express or implied consent of the parties and substantial prejudice will not arise as a result. *Evans*, 5 Ohio St.3d

41, at paragraph one of the syllabus. Various factors considered in determining whether an issue was tried by implied consent include:

“whether they recognized that an unpleaded issue entered the case; whether the opposing party had a fair opportunity to address the tendered issue or would offer additional evidence if the case were to be tried on a different theory; and, whether the witnesses were subjected to extensive cross-examination on the issue.” *Id.*

We note that “implied consent is not established merely because evidence bearing directly on an unpleaded issue was introduced without objection; it must appear that the parties understood the evidence was aimed at the unpleaded issue.” *Id.* at paragraph two of the syllabus.

{¶8} Whether an unpleaded issue was tried via the implied consent of the parties is a determination to be made by the trial court that will not be reversed on appeal absent an abuse of discretion. *Id.* at paragraph three of the syllabus. An abuse of discretion is more than an error of law or judgment and implies that the court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Furthermore, when applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122.

{¶9} Upon review of the record we find that not only did Appellee fail to raise the issues of fraud, alter ego, and various R.C. 1707 violations in his complaint and amended complaint, but they were also not tried with the implied consent of the parties. The original complaint asserted a breach of contract claim

against UEPC and Feltenberger while the amended complaint, in Appellee's counsel's own words, was "limited *** to one obvious theory *** and that was conversion." Although Appellee's counsel attempted to raise the issues of alter ego and R.C. 1707 as to Feltenberger at the commencement of trial, Appellants' counsel objected and the trial court denied Appellee's requests.

{¶10} A later attempt by Appellee to amend the pleadings after trial also failed as the court denied the motion. Appellee made no mention whatsoever of claims for fraud and R.C. 1707 violations in relation to UEPC and UEPH until he filed his proposed findings of fact and conclusions of law with the trial court. Thus, there is no indication that Appellants were made aware of these theories until after the completion of the trial.

{¶11} As implied consent does not exist unless the parties understood the evidence presented was aimed at the unpleaded issues, a trial court may not fashion relief that included remedies relating to the unpleaded issues. See *Franklin Cty. Dist. Bd. of Health v. Shree Gunatit Corp.*, 10th Dist. No. 01AP-1264, 2002-Ohio-3247, at ¶21. Accordingly, we conclude that because the issues relating to fraud, alter ego, and R.C. 1707 violations were not plead nor tried with the express or implied consent of Appellants, Appellants were not afforded an adequate opportunity to prepare defenses against these claims and therefore suffered prejudice. The trial court abused its discretion in fashioning a judgment that included remedies relating to fraud and the R.C. 1707 violations. Likewise, as Appellee's various motions to amend the complaint to include an alter ego theory

of liability were denied, the court did not err in failing to find Feltenberger personally liable. Consequently, Appellants' first and fourth assignments of error are sustained. Appellee's first cross-assignment of error is overruled.

ASSIGNMENT OF ERROR II

"The trial court erred as matter of law in determining that Appellants were guilty of conversion."

ASSIGNMENT OF ERROR III

"The judgment was against the manifest weight of the evidence."

{¶12} In their second and third assignments of error, Appellants contend that the judgment was against the manifest weight of the evidence. More specifically, Appellants allege that the evidence did not support a finding that corporations were guilty of conversion. We agree in part.

{¶13} The appellate court applies the same standard of review when determining whether a criminal or civil judgment is against the manifest weight of the evidence. *Frederick v. Born* (Aug. 21, 1996), 9th Dist. No. 95CA006286, at 14. "[A]n appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340. This power is to be invoked only in extraordinary circumstances where the evidence presented at trial weighs heavily in favor of the appellant. *Id.*

{¶14} Conversion is the wrongful exercise of dominion or control wrongfully exerted over the personal property of another in denial of, or inconsistent with, his rights. *Tabar v. Charlie's Towing Serv., Inc.* (1994), 97 Ohio App.3d 423, 427-428; *Ohio Tel. Equip. & Sales, Inc. v. Hadler Realty Co.* (1985), 24 Ohio App.3d 91, 93. A plaintiff in a conversion action must show title or rightful ownership interests to the property, including money, at the time of the alleged conversion. *Levens Corp. v. Aberth* (Feb. 10, 1993), 9th Dist. No. 15661, at 6, citing *Fayette Invest. Corp. v. Jack Johnson Chevrolet Co.* (1963), 119 Ohio App. 111, 113 and *Pennington v. First Discount Corp.* (1952), 89 Ohio App. 384, 387. "Although money is property which is often difficult to identify, it is well settled that an action will lie for its conversion when identification is possible and there is an obligation to deliver the specific money in question." *Hinkle v. Cornwell Quality Tool Co.* (1987), 40 Ohio App.3d 162, 166, quoting 18 Ohio Jurisprudence 3d (1980) 484, Conversion and Replevin, Section 5. Generally, a demand and refusal to return the personal property are required to prove conversion. *Kiss v. Dick Baker Dodge* (Dec. 31, 1998), 6th Dist. No. E-98-027, citing *Ohio Tel. Equip. & Sales*, 24 Ohio App.3d at 93-94. However, acts which are inconsistent with the plaintiff's rights are sufficient to satisfy this requirement. *Kiss*, supra, citing *Ohio Tel. Equip. & Sales*, 24 Ohio App.3d at 93-94. It is not necessary that the property be wrongfully obtained. *Kiss*, supra.

{¶15} In the present matter, the trial court determined that UEPC converted \$320,000 and UEPH converted \$200,000 of Appellee's funds. The evidence

introduced at trial demonstrated that Appellee wrote several checks, totaling \$520,000, to UEPC, in exchange for an investment interest in the company. Appellee presented the checks to UEPC via its president, Feltenberger. Feltenberger, acting in his capacity as the president of UEPC, then deposited \$320,000 into the account of UEPC and \$200,000 into the account of UEPH. During this time period, on October 10, 2000, the Ohio Department of Commerce, Securities Division, determined that UEPC had engaged in the sale of unregistered securities and ordered UEPC to notify all investors that they had the right to rescind their investment agreements. Thereafter, in July of 2001, Appellee received a rescission offer acceptance form from UEPC, which he executed and promptly returned. Pursuant to the agreement, Appellee elected to have all \$520,000 of the funds he invested in UEPC to be returned. The parties agree that the investment funds have not been returned.

{¶16} Upon review, we find that although there was evidence presented indicating that UEPC's actions may have constituted conversion, the record is devoid of evidence suggesting that UEPH was a party to the rescission offer and thus also responsible for the return of Appellee's investment funds. As "[t]he acceptance and nonreturn of [a] plaintiff[']s monies could be found to be a wrongful exercise of dominion and thereby constitute conversion[,]” we are unable to conclude that the trier of fact committed a manifest miscarriage of justice when finding UEPC liable for the conversion of Appellee's investment funds. See *St. Clair v. Structured Shelters, Inc.* (Apr. 29, 1987), 1st Dist. No. C-

860410 (finding that where investor notified the corporation of their desire for rescission, the acceptance and nonreturn of the investors funds could constitute conversion), citing *Fulks v. Fulks* (1953), 95 Ohio App. 515. However, in light of the above analysis, the judgment against UEPH is against the manifest weight of the evidence. Accordingly, Appellants' second and third assignments of error are sustained in part and overruled in part.

CROSS-ASSIGNMENT OF ERROR II

“The trial court erred when it failed to include interest, attorneys fees and costs when entering judgment for the return of [Appellee’s] \$520,000 investment.”

CROSS-ASSIGNMENT OF ERROR III

“The trial court erred when it gave no opportunity for [Appellee] to present evidence and an argument that attorneys fees and costs should be awarded based on the court’s findings of fraud and conversion.”

{¶17} In his second and third cross-assignments of error, Appellee asserts that the trial court erred when it did not present him the opportunity to offer evidence relating to an award of attorney fees, and failed to award interest, attorney fees, and costs when entering judgment. We disagree.

{¶18} We note that an appellate court will not consider any error which a party could have brought to the trial court’s attention at a time when such error could have been corrected or avoided by the court. *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St.3d 121, 123. In the present matter, Appellee only requested an award of attorney fees in his complaint. He did not present any

evidence regarding attorney fees, nor did he request a separate hearing on the matter or otherwise raise the issue in the trial court until after a final, appealable order was entered and both Appellee and Appellant had filed notices of appeal. See *Reynolds v. Morris* (Sept. 30, 1997), 10th Dist. Nos. 97APE02-227 and 97APE02-252. As Appellee failed to properly raise these issues at the trial court level, his second and third cross-assignments of error are overruled. See *id.*

{¶19} Appellants' first and fourth assignments of error are sustained. Their second and third assignments of error are sustained in part and overruled in part. Appellee's cross-assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and cause remanded for proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

LYNN C. SLABY
FOR THE COURT

BAIRD, P.J.
CONCURS

BATCHELDER, J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

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