[Cite as *Roemer v. Ohio Dept. of Natural Resources*, 2002-Ohio-5759.]

IN THE COURT OF CLAIMS OF OHIO

MARY ROEMER	:	
Plaintiff	:	CASE NO. 2000-12963
v.	:	DECISION
DEPARTMENT OF NATURAL RESOURCES, etc.	:	Judge J. Warren Bettis
Defendant	:	

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{¶1} This case was tried to the court on the issues of liability and damages, and the civil immunity of defendant's employee, Joel Udstuen.

{¶2} In 1992, plaintiff entered into a two-year lease with defendant to build and operate a camp commissary store at Hueston Woods State Park in Preble County, Ohio. At that time, plaintiff's husband, Robert Roemer, was the assistant manager of maintenance and grounds at the park. Plaintiff built the commissary and operated it for two years. After the initial construction, a wood compound and storage shed were added. In May 1994, plaintiff entered into a second lease with defendant to operate the commissary until December 31, 1997. Plaintiff's husband retired in 1996 after working for defendant for 31 years.

{¶3} In a letter to plaintiff dated October 20, 1997, Lois Heinlen, Concessions Section Manager, stated the following:

{¶4} "As you have discussed with Jason Wesley, this Division is agreeable to a 4-year extension of your lease to operate the Hueston Woods Camp Commissary. As discussed, the Department

reserves the right to terminate this lease with 90 days written notice of the Department's intent to terminate. This will allow the park to self-operate a retail operation out of the camp check-in station if and when the facility is renovated or replaced. ***"

{¶5} In December 1997, the parties modified the May 1994 lease by deleting Section 2 of the original lease which contained a termination date of December 31, 1997, and adding the following language:

{¶6} "The term of this Lease shall commence on May 26, 1994, and shall end at the close of business on December 31, 2001, unless sooner terminated under the provisions hereof or by the mutual written agreement of the Department and the Concessionaire. The Department reserves the right to terminate this Lease prior to December 31, 2001, and shall incur no liability for so doing, with 90 days written notice to the Concessionaire, provided such termination does not become effective during a season of operation."

{¶7} On July 27, 1998, plaintiff's husband suffered a massive stroke which resulted in left-sided paralysis. He was treated at the Drake Center in Cincinnati, Ohio for five months. Plaintiff stayed with her husband in Cincinnati during his hospitalization and another person operated the camp store in her absence.

{¶8} On January 22, 1999, Daniel West, Acting Chief for the Division of Parks and Recreation, sent plaintiff a letter outlining defendant's decision to terminate her lease and its need to have her property removed from the park. The letter stated:

{¶9} "As you probably have heard by now, Hueston Woods State Park will be self-operating its campground store for the 1999 season. We feel this store, which will be operated out of the

current camp check-in station building, will make efficient use of park staff, and will best serve the needs of the public. Therefore, per Section 2 of your Lease to operate the Hueston Woods Camp Commissary, this letter shall serve as your official notification of the termination of your lease, effective 90 days from your receipt of this letter."

{¶10} Plaintiff received the letter via certified mail on January 30, 1999. The letter also stated that "Section 13[1] of your lease requires that your personal property be removed from the park within 10 days of the termination of the lease. This would be 100 days from your receipt of this letter." Plaintiff acknowledged that 100 days from January 30 was May 10, 1999. The letter also mentioned that the June 1998 monthly receipts report and payment were the last that plaintiff had submitted. Defendant requested the receipt reports and payments for July, August and September 1998 within ten days of plaintiff's receipt of the letter.

{¶11} On February 3, 1999, plaintiff telephoned Heinlen about removal of plaintiff's building and property and the outstanding monthly receipts reports. Plaintiff told Heinlen that since she was caring for her husband it would be difficult to remove the property and she asked for an extension of time to submit her past due payments from the previous season. On February 3, 1999, West sent plaintiff a letter allowing an extension of time for the

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[1] Section 13 of the lease states, in relevant part:

"*** Property of the Concessionaire must be removed from the premises within ten days after any termination, provided all payments due from the Concessionaire to the Department have been paid in full, unless otherwise authorized by the Director. If any property of the Concessionaire is not removed within 10 days of termination, or payment is not made within 10 days, such property shall become and remain the property of the Department, or, at the election of the Department, such property shall be treated as abandoned and disposed of in any manner the Department sees fit. The Department is not required to offset the Concessionaire's debts to the Department, if any, by the estimated value of such property. ***"

monthly payments, with a due date of May 10, 1999. He also stated that defendant would return plaintiff's letter of credit that served as her performance bond upon the receipt of her reports and payments and the removal of her personal property from the park.

{¶12} On April 23, 1999, plaintiff sent a letter to Governor Taft stating her concerns about how defendant had been treating her regarding the camp store. She stated in the letter that she felt intimidated by the staff at Hueston Woods and that she did not have the resources to comply with the deadline for removing her property from the park.

{¶13} On May 6, 1999, West responded to plaintiff's letter to Governor Taft. West extended the deadline for payment to June 10, 1999, but added that her property must be removed as described in the previous correspondence. He further stated that defendant was working to prepare the park for the coming season and needed to have her building and equipment removed. He concluded the letter by stating that plaintiff could contact either Heinlen or himself if she had any questions.

{¶14} In a letter to defendant dated May 21, 1999, plaintiff stated that: she was in the process of trying to have her camp store buildings removed; she had given permission for Frank Keeler to remove the small shed and disassemble the wood shed; and that other people would be involved in the removal of the building and structures. She noted that she was overwhelmed with the responsibility of caring for her husband and her uncle who had cerebral palsy and she asked defendant to be patient a little longer so that she could remove her property from the park.

{¶15} On June 7, 1999, Assistant Chief John Dobney on behalf of West sent plaintiff a letter to inform her that in accordance with

Section 13 of her lease, defendant was removing the building and any other property used in connection with the camp concession operation. Dobney noted that the deadline of May 10, 1999, had passed and directed plaintiff to contact the department if she had any questions.

{¶16} Some time thereafter, defendant discovered that plaintiff had scheduled an auction to occur on June 26, 1999. One of the items plaintiff intended to sell at the auction was the camp store. Defendant opposed the auction because it feared that a new owner would insist that the store remain on defendant's premises. On June 18, 1999, defendant contacted plaintiff's auctioneer and stated that the store was defendant's property by virtue of abandonment and could not be sold at auction. Defendant placed signs on the store stating that it was the property of the state of Ohio. At some time prior to the scheduled auction, defendant dismantled the store, burned the scrap remains and took the treated lumber to the dump.

{¶17} Plaintiff alleges claims of conversion and destruction of property. Defendant argues that plaintiff forfeited any claim of ownership when she did not comply with the terms of the lease.

{¶18} Defendant further argues that as of May 10, 1999, the camp store building and its contents became its property pursuant to the lease.

{¶19} "Conversion is the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights." *State ex rel. Toma v. Corrigan* (2001), 92 Ohio St.3d 589, 592, quoting *Joyce v. General Motors Corp.* (1990), 49 Ohio St.3d 93, 96.

{¶20} The court finds that plaintiff had been making reasonable efforts to remove her property from the park after May 10, 1999; that defendant had allowed Frank Keeler to remove the small shed and disassemble the wood shed at some point after May 21, 1999; and that defendant had granted plaintiff an extension to make payments until June 10, 1999. The court is not persuaded that plaintiff's property was abandoned. The court finds that plaintiff's correspondence to the governor and to defendant demonstrates that she was taking steps to remove her property but that she was having difficulty with the deadline imposed by defendant. Furthermore, the court notes that defendant destroyed plaintiff's property only after plaintiff scheduled an auction. Therefore, the court finds that plaintiff has proven, by a preponderance of the evidence, that defendant converted her camp store and its contents.

{¶21} The court must also determine the issue of whether Joel Udstuen is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

{¶22} R.C. 2743.02(F) provides, in part:

{¶23} "A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. ***"

{¶24} R.C. 9.86 provides, in part:

{¶25} "*** no officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were *manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.* ***" (Emphasis added.)

{¶26} In *Thomson v. University of Cincinnati College of Medicine* (October 17, 1996), Franklin App. No. 96 API-02260, at pp. 10-11, the court noted that:

{¶27} "Under R.C. 9.86, an employee who acts in the performance of his duties is immune from liability. However, if the state employee acts manifestly outside the scope of his or her employment or acts with malicious purpose, in bad faith, or in a wanton or reckless manner, the employee will be liable in a court of general jurisdiction. 'It is only where the acts of state employees are motivated by actual malice or other such reasons giving rise to punitive damages that their conduct may be outside the scope of their state employment.' *James H. v. Dept. of Mental Health & Mental Retardation* (1980), 1 Ohio App.3d 60, 61. Even if an employee acts wrongfully, it does not automatically take the act outside the scope of the employee's employment even if the act is unnecessary, unjustified, excessive, or improper. *Thomas v. Ohio Dept. of Rehab. and Corr.* (1988), 48 Ohio App.3d 86. The act must be so divergent that its very character severs the relationship of employer and employee. *Wiebold Studio, Inc. v. Old World Restorations, Inc.* (1985), 19 Ohio App.3d 246."

{¶28} Udstuen testified that he was employed as the park manager at Hueston Woods; that he destroyed the camp store because he needed to prepare the park for the season; that he harbored no ill-will toward plaintiff; and that he thought that defendant rightfully owned the camp store at the time he disposed of it. Plaintiff has not brought forth any evidence, aside from her own opinion, that Udstuen acted maliciously or in bad faith toward her.

{¶29} Based upon the totality of the evidence presented, the court finds that Joel Udstuen acted within the scope of his employment with defendant at all times relevant hereto. The court further finds that he did not act with malicious purpose, in bad faith, or in a wanton or reckless manner toward plaintiff. Consequently, Joel Udstuen is entitled to civil immunity pursuant to R.C. 9.86 and R.C. 2743.02(F). Therefore, the courts of common pleas do not have jurisdiction over civil actions against him based upon the allegations in this case.

{¶30} Plaintiff testified that the camp store was worth $12,000. Plaintiff failed to provide documentation to support her value of the camp store. The court finds that a more reasonable value for the camp store is $6,000. Therefore, judgment shall be rendered in favor of plaintiff in the amount of $6,000.

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J. WARREN BETTIS
Judge

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