

[Cite as *Short v. Short*, 2014-Ohio-5864.]

STATE OF OHIO, PIKE COUNTY

IN THE COURT OF APPEALS

FOURTH DISTRICT

CARLOS WAYNE SHORT)
DECEASED,)
CYNTHIA ANN PEARCE, et al.,)
PLAINTIFFS-APPELLANTS,)
- VS -)
TAMMY SHORT, FIDUCIARY OF THE)
ESTATE OF CARLOS WAYNE SHORT,)
et al.,)
DEFENDANTS-APPELLEES.)

CASE NO. 12 CA 834

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from Common Pleas
Court, Probate Division, Pike
County, Case No. 20111101.

JUDGMENT:

Affirmed in Part; Reversed and
Modified in Part; Remanded in Part.

APPEARANCES:

For Plaintiffs-Appellants:

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Portsmouth, OH 45662

For Defendants-Appellees:

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For the Estate

Attorney Paul F. Price
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For Ricer Equipment, Inc.

JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: December 23, 2014

DeGenaro, P.J.

{¶1} Plaintiffs-Appellants, Cynthia Ann Pearce and John Short, appeal an October 2, 2012 Pike County Probate Court Judgment Entry which found that Carlos Wayne Short, Decedent herein, owned several items of personal property and that the sale of said items was in the best interest of the estate. Appellants allege that these items did not belong to Decedent and as such were not property of the estate. Tammy Short, Fiduciary of the estate, argues in response that Decedent owned the personal property at issue and it was properly included in the estate. All judges from the Fourth District recused from this matter, as such, it has been assigned to the present panel. Pursuant to the analysis below, Appellants' assignment of error is meritorious in part. The judgment of the trial court is reversed and modified in part, and remanded in part for further proceedings.

Facts and Procedural History

{¶2} Decedent passed away from pancreatic cancer on May 20, 2011. He left behind several survivors; those relevant to the present case include his long time live-in companion, Cynthia Ann Pearce, and his brother and roommate John Short. Others relevant to this appeal include Decedent's brother Frank, his daughter Tammy, his son Carlos Lee, and his son John Ray.

{¶3} Prior to his death, Decedent, Frank, John, and Decedent's best friend, Jason Mercer, decided to begin a business. Frank gave Decedent \$14,000 to purchase a 1979 D3 CAT Dozer and \$16,000 for a Case backhoe to be used in the business. Frank's name was solely listed on the receipt for the bulldozer; a receipt for the backhoe could not be located, but Mercer testified that the backhoe was also in Frank's name. The business was not started due to Decedent's illness and eventual death.

{¶4} Frank paid the entire cost of Decedent's funeral which resulted in his own financial hardship. In an effort to help Frank, John purchased the bulldozer and backhoe

from him for an undisclosed amount. As the business was never started, the equipment had primarily been used to tend to property on Young Street, which was owned by Frank. John lived two miles away from the Young Street property with Decedent and Cynthia and has continued to maintain his residence there with Cynthia, who has since obtained sole ownership.

{¶5} After Decedent passed intestate, his family attempted to resolve his affairs. In December of 2011, Tammy sold the bulldozer and backhoe to Ricer Equipment, Inc., for \$18,000. At the time of the sale, the equipment was located on Frank's property and was transported by Ricer to its place of business. Upon observing Ricer drive by her house with the equipment, Cynthia notified John who in turn notified Ricer that the equipment belonged to him. Upon request, Tammy returned the \$18,000 check to Ricer, who continued to hold the equipment.

{¶6} On December 30, 2011, Tammy filed several documents to open Decedent's estate, and on January 23, 2012 she was named executrix of the estate.

{¶7} On January 27, 2012, Tammy brought an appraiser to Decedent's property to inventory the assets, and was initially denied access to a locked garage on the premises and ordered to leave, but eventually was allowed access for purposes of appraising the property. On February 28, 2012, Tammy filed a Schedule of Assets which listed all property belonging to the estate.

{¶8} After the parties failed to resolve the issues among themselves, Appellants filed a complaint against the estate and Ricer alleging conversion and replevin. After multiple motions and responses were exchanged, the matter finally proceeded to trial.

{¶9} Prior to trial, Appellants reached a settlement with Ricer, who continued to maintain possession of the equipment. Appellants agreed to release and dismiss Ricer as a party to the lawsuit and in exchange Ricer agreed to abide by the probate court's decision as to its determination of ownership regarding the bulldozer and backhoe. The estate did not object to the dismissal of Ricer. At the start of the trial the settlement was entered into the record, and the probate court released Ricer as a party to the lawsuit.

{¶10} At trial, Frank produced a receipt for the bulldozer that listed him as the purchaser. According to the salesman, Sammy Travis, the receipt is the only evidence of the sale and there was no title, no bill of sale, and no installation agreement. Travis testified that when the bulldozer was paid for he asked Decedent if he wanted the receipt in his name and Decedent replied "[n]o, it was for Frank."

{¶11} Tammy claimed Decedent paid \$14,000 for the bulldozer from money in a coffee can buried in the backyard, although she did not have any personal knowledge of this. Conversely, Carlos Lee testified that the receipt was in Frank's name and showed "that he [Frank] may own the equipment." Tammy admitted that the relationship between Decedent and his brothers was one where they would often loan each other money and trade back and forth until everything was even and fair at the end. Further, she testified that Decedent hid most of his money, including some in her bank account.

{¶12} In addition to Decedent allegedly hiding money in Tammy's account, Carlos Lee testified that Decedent asked him to hide \$90,000 in his bank account. Carlos Lee stated that Decedent didn't want to own things as he was "frauding [sic] the government." According to Carlos Lee, Decedent worried that if he owned things in his name it would affect his ability to receive social security disability. Carlos Lee also testified that Decedent did not file taxes, but Frank paid taxes. The court made several findings in its October 2, 2012 Judgment Entry:

- (1) "The only evidence presented to establish ownership in Plaintiffs [sic] was uncontroverted evidence that the decedent was the owner of all the subject property prior to his death; and the unsubstantiated assertion that the decedent orally gave all the assets to his brother, Plaintiff, John Short. There was no evidence that decedent relinquished control or possession, nor made nor attempted to make delivery of any assets to Plaintiff, nor anyone. There was no evidence that decedent filed any gift tax returns nor executed any document acknowledging the gift."

- (2) "The Court further finds, based on the testimony of the decedent's son, Carlos Lee Short, the decedent had led a life of fraud and deceit whereby he would conceal assets from creditors, state and federal tax authorities, state and federal entitlement programs, etc."
- (3) "This Court further finds that it is highly likely that the decedent, Carlos Wayne Short, had he fully disclosed his assets and income to State and Federal tax authorities and entitlement programs, he would have owed State and Federal taxes which he did not pay, and he would not have qualified for State and Federal benefits which he received."
- (4) "The Court further finds that it is highly likely that the decedent was the true "owner" of the property on Young Road, Pike County, Ohio in the name of Franklin Lee Short; and that he likely gave \$50-60,000 cash to Plaintiff, Cynthia Ann Pearce, just prior to his death which money he had not disclosed to State and Federal authorities."
- (5) "The Court further finds, that at the time of the attempted sale of 2 of the major assets of decedent, the 1979 D-3 Caterpillar dozer and the Case back hoe, to Defendant, Ricer Equipment, Inc., that the Defendant, Tammy Short, did not have authority to make such sale; however, based on facts disclosed at trial, the Court finds said sale to be in the best interests of the estate."

{¶13} The probate court also found that Ricer was entitled to reasonable storage fees for holding the equipment since removing it from Frank's land. *Id.*

Motion to Strike Appellee's Brief

{¶14} As an initial matter, two appellee briefs have been filed in this appeal – one by Ricer and a separate brief titled "Stipulation of Tammy Short to the Brief of Ricer Equipment and Additional Statement of Facts" was filed by the estate. In response, Appellants filed a motion to strike the brief of Ricer and the estate's stipulation. Appellants argue that Ricer was dismissed from the lawsuit prior to trial, thus Ricer was

not a party to the lawsuit and lacks standing to file an appellee brief, nor can we consider the estate's stipulation to Ricer's brief and additional statement of facts.

{¶15} "[B]eing a "party" to the action below is required to establish standing on appeal." *Hokes v. Ford Motor Co.*, 9th Dist. No. 22602, 2005-Ohio-5182, ¶6. We grant Appellants' motion to strike Ricer's brief and the estate's stipulation to Ricer's brief. As demonstrated by the record, Ricer was dismissed as a party to the lawsuit at the onset of the trial. At no point after being dismissed did Ricer attempt to rejoin the lawsuit nor did either party attempt to rejoin Ricer as a party. Similarly, Ricer did not attempt to file a post-judgment motion to intervene in this appeal.

Manifest Weight of the Evidence

{¶16} Appellants' sole assignment of error asserts:

{¶17} "The trial court's decision was against the manifest weight of the evidence."

{¶18} Appellants' assignment of error can be divided into three subparts: (1) whether the probate court's decision that Appellants did not establish ownership of the equipment, tractors, or property contained in Decedent's garage is against the manifest weight of the evidence, (2) whether the probate court's decision to permit the sale of the equipment was against the manifest weight of the evidence after it had decided that Tammy was without authority to make such sale, and (3) whether the probate court's decision that Ricer was entitled to storage fees is against the manifest weight of the evidence.

{¶19} "A trial court's judgment is not against the manifest weight of the evidence if some competent and credible evidence supports it." *Khayyam Publishing Co. v. Marzvaan*, 4th Dist. No. 12CA29, 2013-Ohio-5332, ¶24. "In determining whether a trial court's judgment is against the manifest weight of the evidence, a reviewing court must not re-weigh the evidence. Under this highly deferential standard of review, we do not decide whether we would have come to the same conclusion as the trial court." *Id.*, citing *Amsbary v. Brumfield*, 177 Ohio App.3d 121, 2008–Ohio–3183, 894 N.E.2d 71, ¶11 (4th Dist.). The reviewing court must "presume the trial court's findings are correct because the trial court is best able to view the witnesses and observe their demeanor, gestures,

and voice inflections and to use those observations in weighing the credibility of the testimony." *Id.* When reviewing a trial court's judgment, "an appellate court should not substitute its judgment for that of the trial court when the record contains competent, credible evidence going to all of the essential elements of the case. However, to the extent that the judgment involves a question of law, we review the question of law independently and without deference." *Id.*, citing *Woody v. Woody*, 4th Dist. No.09CA34, 2010-Ohio-6049, ¶17.

{¶20} Conversion is defined as the wrongful exercise of control or dominion over property belonging to another which is inconsistent with the owner's rights. *Smith v. Stacy*, 4th Dist. No. 00CA648, 2001 WL 812800, *6 (June 19, 2001). A plaintiff need not prove a defendant's wrongful purpose or intent, as a person who has acted under misapprehension or mistake may be guilty of conversion. *Id.* In order to prevail on a conversion claim, "a plaintiff must show: (1) ownership or right to possession of the property at the time of the conversion; (2) defendant's conversion by a wrongful act or disposition of the plaintiff's property right, and (3) damages." *Pepin v. Hansing*, 4th Dist. No. 13CA3552, 2013-Ohio-4182, ¶17 (internal citations omitted)

{¶21} As the personal property in dispute was largely treated as three separate categories at trial, they will be treated as such herein. The first category of property includes equipment – the 1979 D3 CAT Bulldozer and the Case Backhoe. The second category includes two tractors – a Ford Diesel tractor with front-end loader and a Ford 64 tractor. The third and final category includes the various items of personal property found in the garage.

CAT Bulldozer and Case Backhoe

{¶22} Appellants argue that they produced evidence proving that they own the equipment while the estate failed to present any evidence suggesting that Decedent owned the equipment. Appellants highlight the fact that they have produced a writing (the receipt) which they contend proves their ownership of the equipment. Appellants urge that both parties agree that the receipt is the only writing in existence as to the equipment. Further, Appellants assert that the testimony of several witnesses establish the fact that

Frank owned the equipment before signing his rights over to John. Appellants also argue that the salesman testified that it was his understanding that the equipment belonged to Frank. As such, Appellants contend that the probate court's ruling that Decedent owned the equipment is against the manifest weight of the evidence.

{¶23} The probate court's ruling that Decedent owned the equipment is against the manifest weight of the evidence. The probate court centered its decision largely on the testimony of Carlos Lee who elaborated on Decedent's alleged fraudulent activities. However, his testimony that Decedent hid money and attempted to defraud the government by keeping things out of his name is not connected to the purchase of the equipment and does not prove or disprove who owned the equipment. As such, Carlos Lee's testimony does not constitute relevant, competent, and credible evidence of Decedent's ownership.

{¶24} Further, the testimony of the estate's witnesses was contradictory. For instance, Carlos Lee and Tammy both stated that Decedent refused to own things in his name, yet they acknowledge that Decedent's Owl Creek property was held jointly in his and Cynthia's names. Further, Tammy stated that Decedent had used his money to purchase the equipment and Jason Mercer testified that Decedent borrowed the money from John. Whether Tammy or Mercer is more credible is irrelevant as neither was present at the time the equipment was purchased, thus they have no personal knowledge as to who purchased the equipment. Importantly, Tammy's belief that Decedent used his money to purchase the equipment could not be confirmed at trial as none of the estate's witnesses had actual, personal knowledge of the sale, nor did the estate present any evidence suggesting why Decedent's equipment would have been located on Frank's property, which is where Ricer found it.

{¶25} Appellants produced the salesman who was present at the time of the sale and he was able to authenticate the receipt. He further supported his understanding that the CAT bulldozer was purchased for Frank with testimony that when he asked whether he should put the receipt in Decedent's name, Decedent responded "[n]o, it was for Frank." In addition to providing testimony from the only person with actual knowledge of

the sale, Appellants produced a writing that suggests ownership of the equipment. The Estate has not produced any evidence to rebut the receipt. Although a receipt for the backhoe could not be produced, Mercer testified that the backhoe was listed in Frank's name. Conversely, there is no testimony or physical evidence suggesting that Decedent purchased the backhoe. The facts of this case indicate that although the bulldozer and backhoe were purchased separately, they were purchased by the same person for purposes of the business. As there is no competent and credible evidence supporting the probate court's ruling that Decedent owned the equipment, this court finds that the probate court's ruling is against the manifest weight of the evidence.

{¶26} However, as the probate court's ruling solely determined that Appellants did not prove ownership of the equipment and did not address the other two elements of conversion, we reverse the probate court's ruling that Appellants did not prove ownership of the equipment and remand for a determination by the probate court as to whether the remaining elements of conversion have been met.

{¶27} Further, regarding the second subpart of Appellants' assignment of error, we hold the probate court erred by authorizing the sale of the equipment as it was not property of the estate based upon the reasoning above.

Tractors

{¶28} There are two tractors involved in this dispute – a Ford Diesel tractor with front-end loader and a Ford 64 tractor. Regarding the Ford Diesel, Frank signed his ownership rights in the tractor, along with several other pieces of equipment, to John. Accordingly, John claimed ownership of the tractor at trial. However, Frank testified that although he originally helped Decedent pay for the Ford Diesel tractor, Decedent subsequently paid him back in full, thus he was not asserting an ownership interest in the Ford Diesel tractor. Although it is not clear from the record whether Frank mistakenly gave John rights to this tractor or if there is some other explanation for the discrepancy, when asked if he had an interest in the Ford Diesel tractor to give to John he replied "[n]o, I do not." While John may have believed that this tractor belonged to Frank when the rights were signed over, Frank did not have an ownership right to transfer. Accordingly,

there is competent, credible evidence that the Ford Diesel tractor is properly included in the estate and as a result, the probate court's ruling as to this tractor is not against the manifest weight of the evidence and is affirmed.

{¶29} None of the other witnesses claim an ownership interest in the Ford 64 tractor except for Cynthia. Further, this tractor is not included in Decedent's Schedule of Assets. Therefore, ownership of this tractor is not actually in dispute and belongs to Cynthia; therefore, the probate court's decision that the Ford 64 tractor is an asset of the estate is against the manifest weight of the evidence and is reversed and modified. Cynthia is declared the owner of the Ford 64 tractor.

Items in the Garage

{¶30} The complaint alleged that Appellants are the owners of property listed in Decedent's Schedule of Assets, which includes personal property stored in Decedent's garage. Appellants argue that although Decedent originally owned this property, Decedent gave it to John prior to his death.

{¶31} The probate court found that Decedent did not gift the property to John before his death. The probate court did not explain its finding and only stated that Appellants had not proven "the essential elements of an inter vivos gift of the subject property." As Appellants have filed a conversion claim, the probate court's finding that Appellants had not proven a gift suggests that Appellants had not proven the ownership element of conversion.

{¶32} The probate court analyzed the alleged gift under an inter vivos theory; however, since the gift was allegedly made as Decedent was contemplating death from leukemia, a causa mortis analysis is more appropriate. In any event, the elements of a gift inter vivos and a gift causa mortis are essentially the same.

{¶33} "The essentials of a gift inter vivos are the purpose of the donor to make the gift and a delivery of the thing given, which delivery may be actual, constructive, or symbolical; it is immaterial which, so long as it divests the donor of all dominion and invests the donee with dominion." *Bobo v. Stansberry*, 162 Ohio App.3d 565, 2005-Ohio-3928, 834 N.E.2d 373, ¶27, (4th Dist.), citing *O'Brien v. O'Brien*, 112 Ohio St. 202, 147

N.E. 4 (1925). A gift inter vivos and a gift causa mortis are treated similarly, except that "[a] gift causa mortis is a gift made by a person in expectation of death, and upon condition that the donor dies as anticipated. The essentials of the gift are the same, the distinguishing features being that a gift causa mortis is revocable during the life of the donor and a gift inter vivos is irrevocable." *Id.* Further, a "gift causa mortis vests only a conditional title in the donee, subject to be divested by the express revocation of the donor or by his recovery from an impending illness." *Van Pelt v. King*, 22 Ohio App. 295, 299, 154 N.E. 163 (4th Dist.1926).

{¶34} Testimony presented at trial regarding a possible gift is limited. Frank offered testimony that cannot be considered on appeal as the probate court ruled it was inadmissible hearsay, which was not challenged on appeal. John testified that Decedent did own the property in the garage at one point, "[b]ut whenever he became uh, [sic] with leukemia and things he gave the stuff to me."

{¶35} One of the distinguishing factors of a gift causa mortis is that the gift is automatically revoked if the donor does not die from the cause they had expected to die from when they made the gift. *Bobo v. Stansberry*, 162 Ohio App.3d 565 at ¶27; *Van Pelt v. King*, 22 Ohio App. at 299. Decedent ultimately passed away from pancreatic cancer, which he developed sometime after he recovered from leukemia. The gift would have been automatically revoked when Decedent recovered from leukemia and there is no indication that Decedent revived the gift after being diagnosed with pancreatic cancer. Therefore, even if a gift causa mortis had been made, there is competent, credible evidence that it was revoked upon Decedent's successful recovery from leukemia.

{¶36} Alternatively, an inter vivos gift has not been demonstrated, because delivery of the property, whether the delivery is actual, constructive, or symbolic, must be proven. *Bobo v. Stansberry*, 162 Ohio App.3d 565 at ¶27. In this case there is no evidence that actual, constructive, or symbolic delivery had been made, nor is there evidence that Decedent divested himself of all dominion and invested John with dominion of the disputed assets. Without any admissible evidence suggesting that a gift had been made coupled with John's admission that Decedent owned the property in the

garage before his death, competent, credible evidence supports the probate court's ruling that the property in the garage belongs to the Estate, thus the ruling was not against the manifest weight of the evidence.

Storage Fees

{¶37} On August 13, 2012, Ricer filed a Statement of Claim asserting that the estate was indebted to Ricer for storage fees totaling \$13,000.50. As previously discussed, Ricer was released as a party to the lawsuit on August 30, 2012. However, the probate court's October 2, 2012 Judgment Entry granted Ricer storage fees.

{¶38} The probate court stated that Ricer Equipment, Inc. was entitled to a reasonable credit for storage and expenses not to exceed \$1500.00. Appellants argue that they are not responsible as Ricer was not a party to the lawsuit after dismissal and did not request storage fees through an appropriate legal mechanism. The estate contends that Appellants are responsible for paying the storage fees. Based on the specific and unambiguous language of the probate court, it cannot follow that anyone other than the estate is responsible for the storage fees.

Conclusion

{¶39} For the reasoning stated above, the judgment of the probate court is reversed and remanded as to the 1979 D3 CAT Bulldozer and the Case backhoe for consideration of the remaining elements of Appellants' conversion claim relative to these two items; is reversed and modified as to the Ford 64 tractor and Cynthia is declared the owner; and finally, is affirmed as to the Ford Diesel tractor with front-end loader and the property in Decedent's garage, as these are items properly included in the Estate. Finally, the Estate is responsible for the storage fees and expenses payable to Ricer as ordered by the probate court

Donofrio, J., concurs.

Vukovich, J., concurs.