

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

Cherry Peirce

Court of Appeals No. L-12-1164

Appellee

Trial Court No. CI0201101117

v.

Edward E. Szymanski, et al.

**DECISION AND JUDGMENT**

Appellants

Decided: May 10, 2013

\* \* \* \* \*

Richard M. Kerger and Khary L. Hanible, for appellee.

Richard F. Ellenberger, for appellants.

\* \* \* \* \*

**SINGER, P.J.**

{¶ 1} Appellants appeal the order of the Lucas County Court of Common Pleas, denying them a statutory award of costs and fees after prevailing on summary judgment in a civil Ohio RICO claim. Because we conclude that the trial court acted within its discretion in denying appellants' application for fees and costs, we affirm.

{¶ 2} The facts of this matter are more fully explained in our consideration of the appeal from the award of summary judgment to appellants, Edward F. and Myles Szymanski. *Peirce v. Szymanski*, 6th Dist. No. L-11-1298, 2013-Ohio-205.

{¶ 3} Appellee, Cherry Peirce, was the victim of a jewelry theft from her home. When the thieves were caught several months later, they told police that they had sold the stolen items to Estate Jewelry, a store owned by appellant Edward Szymanski. Appellee sued appellants, claiming conversion, civil conspiracy and corrupt activity in violation of the Ohio Corrupt Practices Act, R.C. 2923.31 et seq. When, in response to appellants' motion for summary judgment, appellee was unable to produce evidence in support of her claims, the court granted appellants' motion. That judgment was affirmed on appeal. *Id.* at ¶ 27.

{¶ 4} After the trial court's decision, appellants applied for an award of costs and attorney fees pursuant to R.C. 2923.34(G). When the trial court denied appellants' request, this appeal followed. Appellants set forth the following three assignments of error:

I. The trial court erred when it improperly interpreted appellants' application for an award of costs and fees pursuant to O.R.C. §2923.34(G) as a motion for sanctions as opposed to a statutorily provided award of costs and fees.

II. The trial court abused its discretion when it arbitrarily denied appellants' application for an award of costs and fees as prevailing

defendants pursuant to O.R.C. §2923.34(G) by failing to consider and base its ruling upon the evidence presented or not presented by plaintiff/appellee as required by statute.

III. The trial court erred when it denied appellants' application for an award of costs and fees pursuant to O.R.C. §2923.34(G) without providing any analysis of justification for denial of such an award by way of special circumstances as required by the statute.

{¶ 5} R.C. 2923.32 is a state RICO statute that makes criminal engaging in a pattern of corrupt activity; meaning engaging in, attempting to engage in, conspiring to engage in a series of defined offenses, including theft and receiving stolen property. R.C. 2823.31(E) and (I)(2)(c). R.C. 2924.34 provides a civil remedy for persons injured or threatened with injury by a violation of R.C. 2923.32. A successful plaintiff in such an action may be awarded treble damages, R.C. 2923.34(E), and "shall recover reasonable attorney fees in the trial and appellate courts \* \* \*." R.C. 2923.34(F).

{¶ 6} Alternatively, if the plaintiff fails to prevail, the defendant may be entitled to a certain award.

Upon application, based on the evidence presented in the case by the plaintiff, as the interests of justice may require, the trial court may grant a defendant who prevails in a civil action brought pursuant to this section all or part of the defendant's costs, including the costs of investigation and litigation reasonably incurred, and all or part of the defendant's reasonable

attorney fees, unless the court finds that special circumstances, including the relative economic position of the parties, make an award unjust. R.C. 2923.34(G), designated subsection (H) prior to July 1, 2007.

### **I. Sanctions v. Award**

{¶ 7} In two instances in the trial court’s order denying appellants an R.C. 2923.34(G) award, the court uses the word “sanctions” when discussing its consideration.<sup>1</sup> The use of this word, appellants argue, represents a fundamental mistake in the court’s understanding of the statute. Appellants insist that the function of the statute is to shift fees to the prevailing party, without resort to consideration of fault or bad faith. A sanction is a punishment, a penalty levied against an attorney or a party for bad behavior. Its purpose is to deter future bad behavior, according to appellants. An R.C. 2923.34(G) award is not a penalty, but a discretionary means to reimburse a prevailing defendant in consideration of the necessity of defending, appellants maintain.

{¶ 8} Appellants’ attempt to split a semantic hair is unavailing. A fair reading of the trial court’s judgment demonstrates that the court was using the word “sanction” in a general sense, meaning a “mechanism of enforcement used to provide incentives for obedience with the law.” Black’s Law Dictionary 1341 (6th Ed.1990). Moreover, the distinction between such a mechanism and consideration for defending the suit is so fine as to evade distinction. There is nothing in the trial court’s decision that would suggest

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<sup>1</sup> “The Court must determine whether sanctions are appropriate based on the circumstances \* \* \*.” “[T]he ends of justice do not require the sanctions that Defendants seek.”

that the court mistook R.C. 2923.34(G) for any other method of obtaining an award of costs and fees. Accordingly, appellants' first assignment of error is not well-taken.

## **II. Arbitrary**

{¶ 9} Citing exclusively federal decisions, appellants assert that R.C. 2923.34(G) creates a presumption that some or all of a prevailing defendant's costs and attorney fees should be borne by the unsuccessful plaintiff in the suit. According to appellants, this is the natural state of things which should not be disturbed unless, based on the plaintiff's evidence, the trial court, in its discretion, concludes that such an award is unjust. Absent consideration of the evidence and an express finding that there are special circumstances that render an award unjust, to deny such an award is arbitrary, appellants insist.

{¶ 10} Ohio follows the "American rule:" a prevailing party in a civil action may not recover attorney fees as a part of the costs of litigation. *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 7. There are exceptions to the rule. Attorney fees may be awarded when a prevailing party shows bad faith on the part of an unsuccessful litigant, when an enforceable contract expressly provides for such an award or when specifically permitted or required by statute. *Id.*

{¶ 11} R.C. 2923.34(G) does not require an award of attorney fees or costs. The statute permits such an award. The decision to award attorney fees and costs rests within the sound discretion of the trial court. *Wilson v. Marino*, 6th Dist. No. L-06-1027, 2007-Ohio-1048, ¶ 73, *Patton v. Wilson*, 8th Dist. No. 82079, 2003-Ohio-3379, ¶ 31, *Sheets v. Carmel Farms, Inc.*, 10th Dist. Nos. 96APE09-1224, 96APE09-1225, 1997 WL 303760

(June 5, 1997), *Schweisberger v. Weiner*, 5th Dist. Nos. 1994 CA 00291, 1995 CA 00367, 1995 WL 808866 (Dec. 12, 1995), *Copper & Brass Sales, Inc. v. Plating Resources, Inc.*, 9th Dist. No. 15563, 1992 WL 368497 (Dec. 9, 1992). Matters within the discretion of the court will not reversed on appeal absent an abuse of that discretion. An abuse of discretion is more than an error of law or a lapse of judgment, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 12} Appellants maintain that the trial court's decision denying an award of attorney fees and costs is devoid of any discussion of the evidence. They argue appellee failed to present evidence of appellants' wrongdoing to sustain her claim against a motion for summary judgment, and as a result, the court abused its discretion when it denied appellants' motion.

{¶ 13} The trial court issued a detailed summary judgment decision, considering at length the facts established and not established. The trial court thereby seems well acquainted with the evidence presented in this case. In its judgment on appellants' motion for fees and costs, the trial court stated that it had carefully considered the circumstances of the case and could not find that such an award would be just. We cannot say that this conclusion was arbitrary, unreasonable or unconscionable. Accordingly, appellants' second assignment of error is not well-taken.

### III. Failure of Analysis

{¶ 14} In their final assignment of error, appellants assert that it was error for the trial court to deny their application for attorney fees and costs without providing any analysis or justification for such denial “as required by the statute.”

{¶ 15} We find nothing in the statute that requires the court to justify its inherently discretionary decision to award or not to award R.C. 2923.34(G) costs and fees. The court’s order explains at length the applicable law and the court’s conclusion. Appellants fail to direct our attention to any authority that more is required. Accordingly, appellants’ third assignment of error is not well-taken.

{¶ 16} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellants pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, P.J.

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JUDGE

Thomas J. Osowik, J.  
CONCUR.

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JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
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