[Cite as *Peirce v. Szymanski*, 2013-Ohio-205.]

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

Cherry Peirce	Court of Appeals No. L-11-1298
Appellant	Trial Court No. CI0201101117
v.	
Edward E. Szymanski, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: January 25, 2013

* * * * *

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

Richard F. Ellenberger, for appellees.

* * * * *

SINGER, P.J.

{¶ 1} This is an appeal from a judgment issued by the Lucas County Court of Common Pleas, granting summary judgment to appellees as to appellant's conversion, civil conspiracy, and Ohio Corrupt Practices Act ("OCPA") claims. Because we conclude that appellant failed to establish evidence for the requisite elements for all three claims, we affirm.

{¶ 2} Appellant, Cherry Peirce, sued appellees, Edward F. Szymanski, owner of Estate Jewelry Buyers, and his employee, Myles Szymanski, claiming conversion, civil conspiracy, and corrupt activity in violation of the Ohio Corrupt Practices Act ("OCPA"). The claims stemmed from appellees' purchase of appellant's allegedly stolen jewelry from third parties. Appellees filed a motion for summary judgment; appellant opposed the motion. The following undisputed facts were revealed in deposition testimony and other evidence submitted by the parties.

{¶ 3} On Friday, August 29, 2008, appellant hired Klearly Klean to clean the windows of her residence located in Ottawa County, Ohio. Dale Velliquette, Klearly Klean's owner, and another worker, Tonya Johnson, came to the house and cleaned both the outside and inside of appellant's windows. Appellant said that Velliquette cleaned the outside and then came back the next morning, Saturday, August 30, 2008, and cleaned the inside. Appellant paid Velliquette $106.75 for the services by a check dated August 30, 2008. She recalled paying him the same day that he cleaned the windows.

{¶ 4} A week later, September 5, 2008, appellant discovered that jewelry was missing from her home. In deposition testimony, she stated that she was going to wear her "David Yurman" watch for a social event that Friday evening and found that it was gone. She then opened other boxes containing jewelry hidden in drawers of a vanity dresser, within her bedroom closet, and discovered that all the boxes were empty. The vanity in the closet was located right under a small window. She also noticed that some coins and cash kept in the dresser were also missing. Appellant called the police, who

came to her residence, and reported everything that was missing. Among the items listed were one four-karat diamond ring, a lady's watch, a Tiffany's floating heart necklace, a pearl necklace, and a silver and turquoise squash blossom necklace.

{¶ 5} Appellant stated that workers from other companies had been in her house prior to the time that Velliquette had been at her home. She also acknowledged that she would often leave her garage door unlocked to allow access to different people hired to work in her home. She noted, however, that she was on the property while they were there, but would often be in her art studio located above the garage. Although the police immediately suspected Velliquette, there was no police investigation of him or Johnson.

{¶ 6} Appellant's daughter checked several pawn shops, but police only questioned another cleaning service that had been at appellant's home previously. Appellant then hired her own detective in Toledo, Ohio, to surveil appellee's jewelry store. Appellant stated that all she wanted to do was get back her jewelry. Sometime after that, appellant, her daughter, the detective, and a Toledo Police Department officer went to Estate Jewelers to try to trace her jewelry.

{¶ 7} Appellant said that, based on the private detective's information provided to police, the Ottawa County prosecutor brought charges against Velliquette. Later in her testimony, however, she stated that she had never pressed charges against Velliquette or Johnson because she just wanted to have her jewelry returned. Appellant also said she paid $1,000 to a bounty hunter to bring Velliquette back from Tennessee.

{¶ 8} Soon after she discovered the theft, appellant estimated the value of the stolen jewelry to be $127,000 and submitted a claim to her homeowner's insurance. During her deposition, she acknowledged that some of the estimates were just her own guesses, and that later appraisals were less on some items verified by the jeweler who had originally sold the items to her husband. On September 17, 2008, appellant was paid a total of $17,000 for the claim because many of the items were not separately insured on the insurance policy.

{¶ 9} Dale Velliquette, by affidavit and deposition, provided the following evidence. He stated that on the last Friday in August 2008, just before the Labor Day holiday, he had gone to appellant's home, under contract, to clean her house and windows. He and his girlfriend, Tonya Johnson, drove in from Toledo, Ohio, and arrived mid-morning. After they cleaned the inside of the home, they cleaned the windows, inside and out. They finished the job between 1:30 and 3:00 p.m. Appellant paid him before they left, but he could not recall whether it was with cash or by check. He then acknowledged that a check written to him on August 30, 2008, for $400 was probably her payment to him for the work that day.

{¶ 10} After Velliquette and Johnson finished, they left and drove back to Toledo. Shortly after leaving, Johnson pulled out a handful of jewelry, gold coins, and some cash which she said she had taken from appellant's residence. Although he thought most of the jewelry was fake or costume, he drove immediately to Estate Jewelers on Monroe Street, Sylvania, Ohio. Velliquette acknowledged that at the time of this incident, he had

a drug abuse problem, as did Johnson. He stated that he intended to use any proceeds from the sale of the jewelry to Estate Jewelers to buy drugs.

{¶ 11} Velliquette stated that at Estate Jewelers, he talked with the wife of the owner, Ed Szymanski. Velliquette said Ed was in the back room of the shop while his wife appraised the jewelry and then told him how much she could give him for it. Velliquette said he was in the shop 10 or 15 minutes and took in necklaces, rings, and coins. He did not inventory the jewelry, but noted that they took in "a lot of jewelry." Velliquette was certain that he sold a large diamond ring to Estate Jewelry because he thought it was fake. The amount he was paid for the jewelry added to the cash Johnson took totaled $1,800. He did not dispute that he may have received a check from Estate Jewelers for $900 on August 30, 2008. Velliquette also did not dispute evidence that he went back to Estate Jewelers on September 17, 2008, with a gold diamond ring for which he was paid $29. On November 24 or 25, 2008, Velliquette said he again received payment from Estate Jewelers of $302 for a 14 carat gold watch (which allegedly belonged to his mother), and a platinum ring.

{¶ 12} Toledo Police Department Officer David S. Swantek testified in deposition that he became involved in the investigation concerning appellant's stolen jewelry in October following the theft. He was a family friend of appellant, having gone to high school with one of her daughters who told him about the local investigation and asked for his help to find the jewelry. Officer Swantek stated that he was familiar with Velliquette's North Summit Street, Toledo address that the private investigator had

found. Upon further inquiry, Officer Swantek discovered that both Velliquette and Johnson had outstanding arrest warrants. Toledo Police Department officers located Johnson at the North Summit Street address and took her into custody. Johnson admitted taking the jewelry and showed the officers where she and Velliquette had taken it to sell it, i.e., Estate Jewelers.

{¶ 13} In November 2008, just before Thanksgiving, Officer Swantek accompanied appellant's daughter, JoEllen, to Estate Jewelers with photos of the stolen jewelry in an effort to retrieve any that might still be at the store. The owner, Ed Szymanski, looked at the photos, did not recall seeing the jewelry, but said he would do what he could to help locate items on the list of the property. Szymanski acknowledged previously purchasing items from Velliquette, but was unsure if he had purchased any of the items on the list. The officer noticed a plastic bag with a purchase slip with Velliquette's name on it on Szymanski's desk. Szymanski said Velliquette had recently brought in the watch.

{¶ 14} Officer Swantek said that Velliquette was arrested shortly thereafter on unrelated warrants issued by various Ohio localities, including Toledo, Oregon, and Maumee. The officer questioned Velliquette who eventually admitted that Johnson and he had taken a bag of appellant's jewelry to Estate Jewelers. Velliquette was released on bail but failed to appear for these unrelated cases. In August 2009, Velliquette was found in Kansas and was extradited to Toledo on the outstanding charges. At that point,

according to Officer Swantek, Velliquette agreed to assist in the recovery of appellant's jewelry.

{¶ 15} After considering all the evidence submitted, the trial court granted summary judgment, ruling that appellant had failed to establish the elements for conversion, civil conspiracy, or an OCPA violation.

{¶ 16} Appellant now appeals from that judgment, arguing the following sole assignment of error:

> The Court failed to properly consider the inferences drawn from the evidence before it and accordingly erred in granting summary judgment to appellees.

{¶ 17} The standard of review of a grant or denial of summary judgment is the same for both a trial court and an appellate court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of facts, if any, * * * show that there is no genuine issue as to any material fact" and, construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 18} A motion for summary judgment first compels the moving party to inform the court of the basis of the motion and to identify portions in the record which demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio

St.3d 280, 293, 662 N.E.2d 264 (1996). If the moving party *satisfies* that burden, the nonmoving party must then produce evidence as to any issue for which that party bears the burden of production at trial. *See id.*; *Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus. Finally, an appellate court reviews summary judgments de novo, i.e., independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993); *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41, 654 N.E.2d 1327 (9th Dist.1995).

Conversion Claim

{¶ 19} Conversion is the wrongful exercise of dominion or control over property in exclusion of the owner's right, or the withholding of property from the owner's possession under a claim inconsistent with the owner's rights. *Zacchini v. Scripps Howard Broadcasting Co.*, 47 Ohio St.2d 224, 226, 351 N.E.2d 454 (1976), *rev'd on other grounds*, 433 U.S. 562, 92 S.Ct. 2849, 53 L.Ed.2d 965 (1977); *Eysoldt v. Proscan Imaging*, 194 Ohio App.3d 630, 2011-Ohio-2359, 957 N.E.2d 780, ¶ 26 (1st Dist.). To prevail on a conversion claim, a plaintiff must demonstrate: (1) the plaintiff's 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. *Miller v. Cass*, 3d Dist. No. 3-09-15, 2010-Ohio-1930, ¶ 32; *Dice v. White Family Cos., Inc.*, 173 Ohio App.3d 472, 2007-Ohio-5755, 878 N.E.2d 1105, ¶ 17 (2d Dist.). If the defendant came into possession of the property lawfully, the plaintiff must

prove two additional elements to establish conversion: (1) that the plaintiff demanded the return of the property after the defendant exercised dominion or control over the property; and (2) that the defendant refused to deliver the property to the plaintiff. *R & S Distrib., Inc. v. Hartge Smith Nonwovens, LLC*, 1st Dist. No. C-090100, 2010-Ohio-3992, ¶ 23.

{¶ 20} In this case, no evidence was offered from which a reasonable inference could be drawn that the owner or employees of Estate Jewelers knew or should have known that Velliquette had stolen appellant's jewelry when he brought it to the store on August 30, 2008. In addition, no evidence was submitted to show that Estate Jewelers, Edward Szymanski, or any of his employees were later still in possession of any of appellant's property, that she demanded the return of the property, and that appellees refused to deliver the property to appellant. Therefore, appellant failed to establish the elements required for a conversion claim.

Civil Conspiracy Claim

{¶ 21} The elements of a civil conspiracy claim are: "(1) a malicious combination, (2) involving two or more persons, (3) causing injury to person or property, and (4) the existence of an unlawful act independent from the conspiracy itself." *State ex rel. Fatur v. Eastlake*, 11th Dist. No. 2009-L-037, 2010-Ohio-1448, ¶ 45, quoting *Gibson v. City Yellow Cab Co.*, 9th Dist. No. 20167, 2001 WL 123467 (Feb. 14, 2001). "An underlying unlawful act is required before a civil conspiracy claim can succeed." *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 700 N.E.2d 859 (1998). "The malice involved in the tort is

'that state of mind under which a person does a wrongful act purposely, without a reasonable or lawful excuse, to the injury of another.'" *Id.*, quoting *Pickle v. Swinehart*, 170 Ohio St. 441, 443, 166 N.E.2d 227 (1960). "Civil conspiracy is considered an intentional tort." *Equicredit Corp. of Am. v. Jackson*, 7th Dist. No. 03 MA 191, 2004-Ohio-6376, ¶ 74, quoting *USX Corp. v. Penn Cent. Corp.*, 137 Ohio App.3d 19, 26, 738 N.E.2d 13 (8th Dist.2000).

{¶ 22} In this case, appellant failed to establish that appellees committed any unlawful action or tort. Since there is no viable underlying unlawful action, summary judgment was appropriately granted on the civil conspiracy claim.

Corrupt Activity Claim

{¶ 23} R.C. 2923.32 prohibits engaging in a pattern of corrupt activity. To allege a violation of that section, a complaint must plead that (1) the conduct of the defendant involves the commission of two or more specifically prohibited state or federal criminal offenses, (2) the prohibited criminal conduct of the defendant constitutes a pattern of corrupt activity, and (3) the defendant has participated in the affairs of an enterprise or has acquired or maintained an interest in or control of an enterprise through which the defendant engaged in the criminal conduct. *Gustavus L.L.C. v. Eagle Invests.*, 7th Dist. No. 24899, 2012-Ohio-1433, ¶ 22, citing *Kondrat v. Morris*, 118 Ohio App.3d 198, 692 N.E.2d 246 (8th Dist.1997).

{¶ 24} R.C. 2923.34 permits the assertion of a civil action by persons injured by violations of R.C. 2923.31. The relief made available by R.C. 2923.34 includes treble

damages, divestiture of the offender's interests in the enterprise or in any real property, reasonable restrictions on future activities or investments, and attorney fees. R.C. 2923.34(B)(1), (2), (E) and (F). To prevail on a claim under the Ohio Corrupt Practices Act for engaging in a pattern in corrupt activity, as defined under R.C. 2923.32(A)(1), a plaintiff must establish that the defendant was employed by or associated with an enterprise and that the defendant directed or participated in the enterprise's affairs through a pattern of corrupt activity. *Morrow v. Reminger & Reminger Co., L.P.A.*, 183 Ohio App.3d 40, 2009-Ohio-2665, 915 N.E.2d 696, ¶ 36 (10th Dist.). "Corrupt activity" means "engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in" certain criminal offenses. R.C. 2923.31(I).

{¶ 25} In this case, even presuming that appellees purchased appellant's jewelry on the date alleged, there is no evidence presented as to appellant's claim that appellees engaged in a pattern of corrupt activity in violation of R.C. 2923.34. Therefore, the trial court properly granted summary judgment as to that claim.

{¶ 26} Accordingly, appellant's sole assignment of error is not well-taken.

{¶ 27} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the 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. _______________________________
JUDGE

Arlene Singer, P.J.

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Stephen A. Yarbrough, J. JUDGE
CONCUR.

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JUDGE

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