

[Cite as *Wills v. Kolis*, 2010-Ohio-4351.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93900

JOAN WILLS

PLAINTIFF-APPELLANT

VS.

RAYMOND A. KOLIS, ETC., ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART
AND REMANDED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-598075

BEFORE: Boyle, J., Blackmon, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: September 16, 2010

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MARY J. BOYLE, J.:

{¶ 1} Plaintiff-appellant, Joan Wills, appeals from a Cuyahoga County Common Pleas Court judgment in her favor on five of the seven claims she brought against her brother and his wife, defendants-appellees, Raymond and Esther Kolis. Nonetheless, Wills appeals the judgment and assigns the following five errors:

{¶ 2} “[1.] The trial court erred by failing to reach a determination of the trust real property’s fair market value despite being presented with uncontroverted evidence as to the property’s value and to apportion compensatory damages to plaintiff using said valuation.

{¶ 3} “[2.] The trial court erred against the manifest weight of the evidence by failing to determine that Raymond Kolis engaged in fraudulent or bad faith conduct as trustee to the prejudice of Wills.

{¶ 4} “[3.] The trial court erred by failing to award plaintiff punitive damages as a result of Kolis [sic] willful misconduct.

{¶ 5} “[4.] The trial court erred in failing to award plaintiff attorney fees even though it found the defendant successor trustee to have engaged in breach of fiduciary duty and self-dealing.

{¶ 6} “[5.] The trial court erred by permitting defendant Raymond Kolis to petition for trustees fees even though it found that he had breached his fiduciary duty by engaging in self-dealing and other breaches of trust.”

{¶ 7} Finding merit to Wills’s fourth assignment of error, we reverse the judgment of the trial court in part and remand solely for the trial court to determine whether Wills is entitled to reasonable attorney fees.

Procedural History and Factual Background

{¶ 8} Anna Kolis, mother of Wills and Raymond, died in December 2003. During her life, she created a living trust, “The Anna Kolis Family Trust,” into which she transferred real property she owned, located at 7250 Dunham Road, Walton Hills, Ohio. The property consisted of a residential home and 22.63 acres.

{¶ 9} Pursuant to the trust, Raymond became successor trustee when Anna Kolis died. Also pursuant to the trust, the property was to be sold at fair market value, and the remaining beneficiaries, Wills and Raymond, had a right of first refusal to purchase the property at fair market value. If neither chose to purchase the property, then the proceeds from the sale were to be paid in equal shares to them.

{¶ 10} In October 2005, Raymond, acting as trustee, entered the trust into a purchase agreement to sell the property to his wife, Esther Kolis, for \$190,000. Raymond subsequently executed a deed transferring the property from the trust to Esther. Raymond did not notify Wills about the sale, nor did he offer her the right of first refusal. Instead, Raymond's attorney sent Wills a letter informing her that the property had been sold, and that before she would receive her share of the proceeds, she had to execute a quitclaim deed to clear the title. Joan refused to execute the quitclaim deed.

{¶ 11} The sale of the property to Raymond's wife closed in January 2006. After fees and costs were paid, the remaining proceeds from the sale, \$144,041, went into escrow. Esther immediately deeded the property to herself and Raymond, and they transferred it into their own family trust.

{¶ 12} In August 2006, Wills filed a complaint in the common pleas court against Raymond, individually and as trustee of The Anna Kolis Family Trust, and Esther. Wills alleged, inter alia, that Raymond breached his fiduciary duties

as trustee by self-dealing, reimbursing himself for excessive trustee expenses, failing to notify her of her right of first refusal, and failing to sell the property at fair market value. Wills further alleged that Raymond and Esther committed fraud and civil conspiracy to commit fraud. She requested the court rescind the transfer, order the property be sold, award her compensatory damages, attorney fees, and punitive damages, and that costs be assessed to defendants.

{¶ 13} The case proceeded to a bench trial where the trial court ultimately found that Raymond, as trustee, breached his fiduciary duties and breached the trust agreement. Specifically, the trial court found that Raymond breached his fiduciary duties by self-dealing, overcharging the trust for administration, failing to notify Wills of her right of first refusal, and selling the property for insufficient consideration. The trial court further found that Raymond breached the trust agreement by selling the property for lack of consideration. But the court did not find Raymond or Esther liable for fraud or civil conspiracy to commit fraud.

{¶ 14} The trial court ordered the sale of the property be rescinded, title to the property be placed back in The Anna Kolis Family Trust, and ordered that a special fiduciary be appointed to sell the property at fair market value. The court further ordered that the parties pay their own attorney fees, but that defendants pay costs. Finally, the court ordered that once the fair market value of the property was determined, Raymond could submit his request to the court

for approval or disapproval of trustee's fees. The court maintained jurisdiction to ensure compliance with its order.

Damages for Breach of Trust

{¶ 15} In her first assignment of error, Wills argues that the trial court erred by not awarding her compensatory damages. Specifically, she maintains that the trial court erred “by ignoring [her] expert evidence on value of the real property,” which was \$680,000, and then not using that value to “determine the amount of compensatory damages” she should get. We disagree.

{¶ 16} The decision of a trial court as to a determination of damages is not to be disturbed absent an abuse of discretion. *Roberts v. U.S. Fid. & Guar. Co.*, 75 Ohio St.3d 630, 634, 1996-Ohio-101, 665 N.E.2d 664. “The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an abuse of that choice, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias.” *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 256-257, 1996-Ohio-159, 662 N.E.2d 1.

{¶ 17} As a preliminary matter, we agree with Wills that the Ohio Trust Code, set forth in R.C. Chapter 5801, applies. Although it was not effective until January 1, 2007, it explicitly states that it applies “to all trusts created before, on,

or after” its effective date. R.C. 5811.03(A)(1). It further makes clear that it applies “to all judicial proceedings concerning trusts commenced on or after” its effective date. R.C. 5811.03(A)(2). Here, Anna Kolis created the trust in 2001 and Wills brought this action in August 2006. Thus, the “judicial proceeding” concerning the trust at issue was pending when the Ohio Trust Code went into effect. Further, we find no evidence in the record, nor does Raymond argue such, that the retroactive application of the Ohio Trust Code “would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties,” such that “the superseded law” should apply. R.C. 5811.03(A)(3).

{¶ 18} Wills contends that the trial court erred by not awarding her compensatory damages because under R.C. 5810.02, “a trustee who commits a breach of trust is liable to the beneficiaries” for “damages for breach of trust.” She cites to the Official Comments of this section, which explain how courts should calculate damages as set forth in Restatement of the Law 3d, Trusts: Prudent Investor Rule (1992), Section 205. Relying on these calculation rules, she therefore maintains that she is entitled to the difference between \$340,000, which is “the amount [she] would have received had [Raymond] Kolis sold the property to an arms length purchaser at fair market value on January 25, 2006,” and the amount she would receive “as distribution at the post rescission sale.”

{¶ 19} Wills makes a good argument. But she left out one important distinction. She is correct that under R.C. 5810.02, “a trustee who commits a breach of trust is liable to the beneficiaries” for “damages for breach of trust,” and that the Official Comments explain how courts should calculate those damages. But this provision makes clear that damages and the corresponding calculation of damages apply only *if* the trial court *chooses* to remedy the breach of trust by payment of money under R.C. 5810.01(B)(3).

{¶ 20} R.C. 5810.01(B), sets forth remedies (derived from Restatement of the Law 2d, Trusts (1959), Section 199) that a trial court *may* order when it finds a breach of trust, i.e., the trial court “*may do any of the following*”:

{¶ 21} “(1) Compel the trustee to perform the trustee’s duties;

{¶ 22} “(2) Enjoin the trustee from committing a breach of trust;

{¶ 23} “(3) *Compel the trustee to redress a breach of trust by paying money, restoring property, or other means*;

{¶ 24} “(4) Order a trustee to account;

{¶ 25} “(5) Appoint a special fiduciary to take possession of the trust property and administer the trust;

{¶ 26} “(6) Suspend the trustee;

{¶ 27} “(7) Remove the trustee as provided in section 5807.06 of the Revised Code;

{¶ 28} “(8) Reduce or deny compensation to the trustee;

{¶ 29} “(9) Subject to section 5810.12 of the Revised Code, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds;

{¶ 30} “(10) Order any other appropriate relief.” (Emphasis added.)

{¶ 31} Thus, under R.C. 5810.01(B)(3), a trial court may “[c]ompel the trustee to redress a breach of trust by paying money, restoring property, or other means.” The Official Comments under this section explain that “[t]he *reference to payment of money* in subsection (b)(3) includes liability that might be characterized as *damages*, restitution, or surcharge.” (Emphasis added.) Thus, if a trial court *chooses* to remedy a breach of trust by compelling the trustee to pay money, then the court must look to R.C. 5810.02, “damages for breach of trust,” to calculate the damages.

{¶ 32} Here, the trial court did not remedy the breach by compelling the trustee to pay money (i.e., compensatory damages), but rather through several other appropriate means. It voided an act of the trustee — the sale of the property — and restored the property by placing it back in The Anna Kolis Family Trust. R.C. 5810.01(B)(3) and (9). It further appointed a special fiduciary to take possession of the trust property and sell it at fair market value. R.C. 5810.01(B)(5).

{¶ 33} The Official Comments for this section further explain that “[t]he availability of a remedy in a particular circumstance will be determined not only

by this Code but also by the common law of trusts and principles of equity.” Based upon the record before us, we cannot say that the trial court’s decision to rescind the sale was an abuse of discretion.

{¶ 34} Wills’s expert, Kathleen McGee, testified that she used two appraisal methods to value the property at its “highest and best use”: vacant land sale comparables and subdivision development. She opined that the land’s “highest and best use” involved raising the single-family home on the property and selling the vacant land to a developer, who could divide it into 16 parcels based upon zoning requirements in Walton Hills. She ultimately appraised the land at \$680,000 (\$30,000 per acre), concluding that the subdivision development approach was more speculative.

{¶ 35} Raymond testified that after his mother passed away, he contacted two realtors, one from Northfield and one from Garfield Heights. Raymond explained that both realtors walked the property and determined that they would place the property on the market for \$189,000. Raymond then had the property appraised; the value was \$190,000.¹ Wills and her daughter both testified that they believed the property was worth more than \$190,000, and that they had disagreed with Raymond over the value since Anna Kolis died. Raymond said that he told Wills and her daughter that if they had someone to buy the property

¹Raymond attempted to enter his appraiser’s report into evidence, but since the appraiser was not present to testify, the trial court granted Wills’s motion in limine regarding the report.

for more money, then “go ahead.” But months went by and he did not receive an offer to buy the property. Raymond further testified that for the tax year of 2006, the county assessed the value of the home at \$72,630, which was 35 percent of the auditor’s estimate of the market value of the home, \$207,500.

{¶ 36} The trial court found that it was “not convinced” that McGee’s appraisal of the property was “a best estimate” of the fair market value of the home. The trial court determined that it would be more equitable to rescind the sale, restore the right of first refusal, and sell the property through a special fiduciary. After reviewing the record as a whole, we cannot say that the trial court’s decision was unsound or that its attitude was arbitrary or unconscionable.

{¶ 37} Accordingly, Wills’s first assignment of error is overruled.

Fraudulent or Bad Faith Conduct

{¶ 38} In her second assignment of error, Wills contends the trial court’s finding that Kolis did not act fraudulently or in bad faith was against the manifest weight of the evidence.

{¶ 39} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶24, the Ohio Supreme Court set forth our standard of review:

{¶ 40} “[T]he civil manifest-weight-of-the-evidence standard was explained in *C.E. Morris Co. v. Foley Constr. Co.* [1978], 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus (‘Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing

court as being against the manifest weight of the evidence’). We have also recognized when reviewing a judgment under a manifest-weight-of-the-evidence standard, a court has an obligation to presume that the findings of the trier of fact are correct. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81, 10 OBR 408, 461 N.E.2d 1273. This presumption arises because the trial judge had an opportunity ‘to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.’ *Id.* at 80 ***.”

{¶ 41} After reviewing the record here, we conclude that the trial court’s decision was not against the manifest weight of the evidence. Although Wills attempts to paint a picture of Raymond as some evil person who “demonstrated a complete disregard for his sister’s rights to the property,” and who “knowingly undervalu[ed] the property so that he could obtain an interest in it for a steep discount,” the record belies her contention.

{¶ 42} As we explained previously, Raymond contacted realtors to find out what price they would place on the property if he put it up for sale. He told Wills and his niece the price given to him by the realtors. When they disagreed with that value, he told them to go ahead and find a buyer. But he said he never received any offers to purchase the property.

{¶ 43} He testified that at the time his wife purchased the property, it had been over a year and a half since his mother had died. He explained that the

property was “land poor,” the house was deteriorating, and he had to pay the bills. After ongoing arguments with his sister and niece did not resolve, Raymond told his niece, “I’m going to go and start the proceedings to buy the place.” His niece wanted “a couple more weeks,” but according to Raymond, they had more than enough time, and “there [was] no sense in [him] talking anymore.” That is when he contacted a lawyer to handle the sale.

{¶ 44} Raymond clearly violated his fiduciary duty and violated the trust provisions. But the trial court found that Wills did not prove by clear and convincing evidence that Raymond acted to intentionally defraud Wills. After reviewing the record, we cannot say the trial court abused its discretion in making that determination.

{¶ 45} Wills’s second assignment of error is overruled.

Punitive Damages

{¶ 46} In her third assignment of error, Wills argues that the trial court erred by not awarding her punitive damages. We disagree.

{¶ 47} The decision whether to award punitive damages is within the trial court’s discretion and, absent an abuse of discretion, the court’s ruling will be upheld. *Kemp v. Kemp*, 161 Ohio App.3d 671, 2005-Ohio-3120, 831 N.E.2d 1038, ¶73.

{¶ 48} Ohio law provides that an award of punitive damages is available only upon a finding of actual malice. *Berge v. Columbus Community Cable*

Access (1999), 136 Ohio App.3d 281, 316, 736 N.E.2d 517. The “actual malice” necessary for purposes of an award of punitive damages has been defined as ““(1) that state of mind under which a person’s conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.”” Id., quoting *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174, syllabus.

{¶ 49} Since the trial court found that Raymond did not commit fraud or conspiracy to commit fraud, a finding that we are upholding, and there was absolutely no evidence of “actual malice,” the trial court did not err by denying an award of punitive damages to Wills.

{¶ 50} Wills’s third assignment of error is overruled.

Attorney Fees

{¶ 51} In her fourth assignment of error, Wills argues that the trial court “erroneously states that the American Rule does not entitle Wills to an award of attorney fees.” We agree.

{¶ 52} We also review the trial court’s determination regarding attorney fees for an abuse of discretion. *Bittner v. TriCounty Toyota, Inc.* (1991), 58 Ohio St.3d 143, 146, 569 N.E.2d 464.

{¶ 53} With respect to attorney fees, the trial court stated: “Ohio follows the American Rule, which requires each party involved in litigation to pay its own

attorney fees in most circumstances,” unless “(1) a statute creates a duty to pay fees, (2) the losing party acted in bad faith, or (3) the parties contract to shift fees.” The trial court cited *Pegan v. Crawmer* (1997), 79 Ohio St.3d 155, 156, 679 N.E.2d 1129, for this statement of law, and then concluded, “[a]s the requirements of *Pegan* have not been met, each party shall bear their own attorney fees.”

{¶ 54} *Pegan*, however, does not require that “a statute create a duty to pay fees.” Under *Pegan* and Ohio law, attorney fees are not available “in the absence of statutory authorization.” See, also, *Granger v. Granger*, 8th Dist. No. 83909, 2004-Ohio-5601, citing *Sorin v. Bd. of Edn. of Warrensville Hts. School Dist.* (1976), 46 Ohio St.2d 177, 179, 347 N.E.2d 527 (“a prevailing party is not entitled to recover attorney fees in the absence of a statutory provision”).

{¶ 55} Here, R.C. 5810.04 *authorized* the court to award attorney fees. It provides:

{¶ 56} “In a judicial proceeding involving the administration of a trust, including a trust that contains a spendthrift provision, the court, as justice and equity may require, may award costs, expenses, and reasonable attorney’s fees to any party, to be paid by another party, from the trust that is the subject of the controversy, or from a party’s interest in the trust that is the subject of the controversy.”

{¶ 57} Accordingly, we sustain Wills’s fourth assignment of error and remand the matter to the trial court with instructions for it to determine if reasonable attorney fees are warranted in this case.

Trustee’s Fees

{¶ 58} In her fifth assignment of error, Wills contends that the trial court erred by “permitting” Raymond to petition the court for trustee’s fees. We disagree.

{¶ 59} The trial court stated, “[a] court may reduce or deny compensation to the trustee for his breach of trust duties. R.C. 5810.01[B]8. In this case, the fair market value of the trust res must be determined so that the proper fees may be computed and submitted to the court for approval or disapproval.”

{¶ 60} The Official Comments of R.C. 5810.01 explain that “subsection (B)(8), which allows the court to reduce or deny compensation, is in accord with Restatement (Second) of Trusts § 243 (1959). *** In deciding whether to reduce or deny a trustee compensation, the court may wish to consider (1) whether the trustee acted in good faith; (2) whether the breach of trust was intentional; (3) the nature of the breach and the extent of the loss; (4) whether the trustee has restored the loss; and (5) the value of the trustee’s services to the trust. See Restatement (Second) of Trusts § 243 cmt. c (1959).”

{¶ 61} Restatement of the Law 2d, Trusts, Section 243 states, “If the trustee commits a breach of trust, the court may in its discretion deny him all

compensation or allow him a reduced compensation or allow him full compensation.” It further explains, “When the compensation of the trustee is reduced or denied, the reduction or denial is not in the nature of an additional penalty for the breach of trust but is based upon the fact that the trustee has not rendered or has not properly rendered the services for which compensation is given.” The Reporter’s Notes indicate “[t]here are numerous cases in which the trustee was allowed full compensation.”

{¶ 62} Thus, the Ohio Trust Code explicitly “permits” a court to allow, reduce, or deny trustee’s fees upon finding a breach of trust. Thus, we find no error and Wills’s fifth assignment of error is overruled.

{¶ 63} Judgment affirmed in part and reversed in part. This case is remanded to the trial court with instructions for the trial court to determine whether reasonable attorney fees should be awarded to Wills, and if so, what amount is reasonable.

It is ordered that appellees and appellant share costs.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

PATRICIA A. BLACKMON, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR