

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

WILLIAM S. MARCULAITIS,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-A-0045
DENNIS PISEGNA,	:	8-12-11
Defendant-Appellant.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2007 CV 1487.

Judgment: Affirmed.

Gerald R. Walker, Redmond, Walker & Murray, 174 North St. Clair Street, Painesville, OH 44077-4091 (For Plaintiff-Appellee).

David A. Schroeder, 1612 East Prospect Road, Ashtabula, OH 44004 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Dennis Pisegna appeals from the judgment of the Court of Common Pleas of Ashtabula County, finding him to be a bailee who breached his duty of care in safeguarding the bailed property, William Marculaitis' boat, and returning it undamaged. His negligent operation of the craft caused the boat to capsize in Lake Erie. Thus, the court found that Mr. Pisegna, as a bailee, was liable in tort for the value of the property loss and awarded Mr. Marculaitis \$10,136 in compensatory damages for the loss of the

boat's electronic equipment, fishing gear, and related items, together with the amount Mr. Marculaitis paid to replace the steering two weeks before the incident.

{¶2} Mr. Pisegna raises three assignments of error on appeal, arguing that the evidence was insufficient to establish negligence, that the trial court erred in arbitrarily setting damages, and that the trial court erred in finding the plaintiff credible and giving weight to his testimony. Mr. Pisegna asks that this court set aside the trial court judgment against him. We decline to set aside the trial court's judgment regarding liability or damages, finding all three assignments of error without merit.

{¶3} **Statement of Facts and Procedural History**

{¶4} Mr. Marculaitis, a resident of Pennsylvania, was the owner of a 1979 Grady White, 20-foot fishing boat. He had purchased the boat in the mid 1990s, and the boat was outfitted with a 175 hp outboard motor and a 20 hp auxiliary motor, known as a "kicker". Just prior to the incident giving rise to the lawsuit and this appeal, Mr. Marculaitis had the larger of the two motors completely overhauled at a cost of \$4,000 and replaced the steering at a cost of \$672. Mr. Marculaitis used his boat for fishing on various lakes throughout Pennsylvania and Ohio, including the Great Lakes.

{¶5} In 1995, Mr. Marculaitis met Mr. Pisegna on a fishing trip in Maine. Both residents of Pennsylvania, they returned home from Maine and forged a friendship based on boating and fishing. Mr. Marculaitis and Mr. Pisegna fished together numerous times between 1995 and the date of the capsizing on August 12, 2007. At one point, Mr. Marculaitis stored the boat at Mr. Pisegna's home. The two made an informal agreement that in return for storing the boat on his property, Mr. Pisegna could use the boat when he wished, without first asking Mr. Marculaitis.

{¶6} In early to mid-2007, Mr. Marculaitis relocated the boat to Evergreen Campground (“Evergreen”), in Conneaut, Ohio, with Mr. Pisegna’s assistance. He moved the boat in order to locate it closer to Lake Erie and intended for the boat to remain in storage at Evergreen for at least the remainder of the year. In late July 2007, Mr. Marculaitis took the boat to Beaver Park Marina in Amherst, Ohio, in order to have the steering wheel and steering cables repaired. Upon completion of the repairs, Mr. Marculaitis returned the boat to its storage berth at Evergreen.

{¶7} On August 9, 2007, Mr. Marculaitis and Mr. Pisegna took the boat to Lake Erie and fished for approximately six hours together. Mr. Marculaitis captained the boat that day and operated the boat at low RPMs because he had just had the 175 hp main motor overhauled and it was still going through a “break in” period. During this “break in” period, Mr. Marculaitis also used a greater concentration of oil in the oil/gas mixture used to fuel the motor. While trolling at very low speed, the 175 hp motor stalled; Mr. Marculaitis, however, was able to restart it immediately. The rest of the pair’s fishing trip was uneventful. Upon completion of their day on Lake Erie, Mr. Marculaitis and Mr. Pisegna returned the boat to its storage berth at Evergreen.

{¶8} On August 12, 2007, Mr. Pisegna returned to Evergreen without Mr. Marculaitis and removed the boat from storage. Along with Vicki DiCristofaro, Robert Byerly, and James McCrillis, Mr. Pisegna trailered the boat to the Conneaut Municipal Dock, on Lake Erie, and set off to go fishing. Mr. Pisegna acted on the belief that he had permission to use the boat without asking Mr. Marculaitis, because of their prior arrangement when the boat was housed on Mr. Pisegna’s property.

{¶9} When Mr. Pisegna and his three guests were about six miles off shore, the 175 hp motor they had been running quit and would not start. They attempted to start

the “kicker” motor, and this would not start either. Within minutes, the boat took on substantial amounts of water and eventually capsized. All four occupants ended up in the water with life preservers on, were rescued, and were returned to the Conneaut Municipal Dock.

{¶10} The Conneaut Police, the U.S. Coast Guard, and the Ohio Department of Natural Resources, Watercraft Division (“ODNR”), all responded to and investigated the incident. Mr. Marculaitis was first informed of the incident when he received a call from the U.S. Coast Guard inquiring if he knew the location of his boat. The Coast Guard officer informed Mr. Marculaitis that his boat was capsized off the Ohio shore of Lake Erie and Mr. Marculaitis immediately drove to Conneaut to investigate. Upon arrival, Mr. Marculaitis was questioned by the authorities as to whether Mr. Pisegna had been given permission to take the boat out. At that time, Mr. Marculaitis told the authorities that Mr. Pisegna did have permission because he was fearful Mr. Pisegna would be arrested otherwise.

{¶11} The Coast Guard told Mr. Marculaitis that he had 48 hours to retrieve the boat or it would be retrieved for him. On August 14, 2007, Mr. Marculaitis returned to Ohio and contacted the Coast Guard, who informed him that the boat was no longer in Ohio waters and had drifted into Pennsylvania waters. Mr. Marculaitis then arranged for a salvage company out of Pennsylvania to retrieve the boat. The boat was towed to Lampe’s Marina in Presque Isle, Pennsylvania, where it was righted, drained, and inspected by the Pennsylvania Fish and Boat Commission in Mr. Marculaitis’ presence.

{¶12} During the initial inspection process, Mr. Marculaitis noticed that the sea or drain plug, used to prevent water from entering through the rear drain hole, was still hanging in its storage location rather than secured in the drain hole as it should have

been. Investigating further, Mr. Marculaitis found a different drain plug had been inserted into the drain hole and was still resting within it. Mr. Marculaitis went to remove that drain plug, which came out with no resistance and no turning required. The lack of resistance indicated that the drain plug had not been inserted properly. Mr. Marculaitis concluded that this was the cause of the boat taking on water.

{¶13} A few days later, Mr. Marculaitis and Mr. Pisegna returned to Lampe's Marina, picked up the boat and brought it back to Mr. Pisegna's home. Mr. Marculaitis asked Mr. Pisegna to repair the boat, replace it or compensate him for his loss. Mr. Pisegna did not take action to remedy the situation, and Mr. Marculaitis removed the boat from Mr. Pisegna's property. Mr. Marculaitis then brought suit against Mr. Pisegna in the Court of Common Pleas of Ashtabula County. Mr. Marculaitis sought damages in the amount of \$16,064, for the loss of the boat, the two motors, and his electronic equipment and personal fishing gear present on the boat at the time of incident.

{¶14} A one-day bench trial was held on August 25, 2010. Mr. Marculaitis was his only witness. He testified regarding both liability and damages, presenting his opinion as to the cause of the capsizing and the value of his losses. Mr. Pisegna, along with DeCristofaro, Byerly, McCrillis, and William Schaefer, owner of the Beaver Park Marina, testified for the defense. The trial court entered judgment in favor of Mr. Marculaitis in the amount of \$10,136 on August 31, 2010. Mr. Pisegna filed a timely notice of appeal and raises three assignments of error:

{¶15} “[1.] The trial court committed error in disregarding the plaintiff's own exhibit 1-A, the investigative report of the ODNR which conclusively established the causes of the occurrence, and instead accepting the testimony of the plaintiff as to

causation and negligence. The evidence failed to establish any negligence on the part of the defendant.

{¶16} “[2.] The court erred in accepting a handwritten statement of value without any proof or receipts of purchase cost and arbitrarily set a damage award.

{¶17} “[3.] The court abused its discretion by accepting the testimony of the plaintiff who admittedly lied to investigators while at the same time rejecting without any explanation the testimony of the defendant’s four (4) witnesses.”

{¶18} Assignments of error one and three are very similar claims, going to the weight and credibility of evidence at trial and challenging the trial court’s ultimate judgment. Therefore, they will be considered together.

{¶19} **Standard of Review-Weight and Credibility of the Evidence**

{¶20} Mr. Pisegna argues in assignments of error one and three that the trial court erred in accepting testimony presented by Mr. Marculaitis over the testimony and evidence presented on behalf of Mr. Pisegna. In assignment of error one, Mr. Pisegna suggests that the ONDR report should have been given more weight. In assignment of error three, Mr. Pisegna asserts that the court erred in accepting Mr. Marculaitis’ testimony over that of the four defense witnesses. Neither of these arguments is well taken.

{¶21} A court of appeals, in reviewing a trial court’s judgment, will give considerable deference to a trial court’s findings of fact and conclusions of law. “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.” *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. Deference is extended to the trial court’s determination because

“the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.” *Seasons Coal Co., Inc., et al. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80. Thus, we defer to the trier of fact matters of witness credibility. *Hvamb v. Mishne*, 11th Dist. No. 2002-G-2418, 2003-Ohio-921, ¶18, citing *Babka v. Babka* (1992), 83 Ohio App.3d 428. “In the event that the evidence is susceptible to more than one interpretation, a reviewing court must construe it consistently with the trial court’s judgment.” *Hvamb* at ¶18, citing *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, 226. Therefore, “an appellate court should not substitute its judgment for that of the trial court when there exists *** competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial judge.” *Seasons Coal* at 80.

{¶22} In the case *sub judice*, the trier of fact was the trial judge. The trial judge was tasked with evaluating both the facts presented via witness testimony and documentary evidence, and applying those facts to applicable law. The trial judge was entitled to weigh the evidence and assess its credibility as he saw fit. One party’s presentation of more witnesses or more voluminous evidence than the other party does not guarantee that the evidence will be weighed in his favor. See *Cross v. Ledford* (1954), 161 Ohio St. 469, 477, citing *Rice v. City of Cleveland* (1944), 144 Ohio St. 299, 301. In entering a judgment on behalf of Mr. Marculaitis, the trial court considered the evidence presented by both sides, but chose to give greater weight to Mr. Marculaitis’ testimony.

{¶23} **What Caused the Boat to Take on Water and Capsize?**

{¶24} We find trial court’s judgment was supported by some competent and credible evidence. Mr. Marculaitis testified that he found the standard drain plug

hanging when it should have been in the drain hole. He further stated that when he went to remove the alternative drain plug that was in the drain hole, it released without any force or twisting. In Mr. Marculaitis's opinion, the drain plug had not been properly inserted, causing water to enter the boat.

{¶25} To counter Mr. Marculaitis' contention, the defense submitted an incident and investigation report from the ODNR. The report, in one section, states that the causes of the incident were (1) engine malfunction, (2) hull design, and (3) modifications. Further, all four witnesses for the defense, including Mr. Pisegna himself, testified that they could not find the original drain plug, that the backup plug in the glove compartment was not functional, and that they purchased a new drain plug from the bait and tackle store at the Conneaut Municipal Dock. Mr. McCrillis testified that he put in the new drain plug, and Mr. Pisegna and the other passengers all testified that they saw him install the plug.

{¶26} The trial judge examined both the regular drain plug and "new" drain plug and expressed skepticism, finding that the new plug "does not resemble a new drain plug; it has a couple of nicks on the washer, which itself appears to be somewhat corroded. It looks older than [the regular plug]. If anything, it should look newer *** but yet it looks older."

{¶27} Despite all of the testimony presented on behalf of Mr. Pisegna, the trial court gave more weight and credibility to Mr. Marculaitis. The trial court was permitted to consider and give due weight to Mr. Marculaitis' opinion as to the cause of the capsizing. Evid.R. 701 states that "[i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2)

helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." See, also, *The Steamboat Clipper v. Logan* (1849), 18 Ohio 375, 396; Staff Note to Evid.R. 701. Mr. Marculaitis observed the boat first hand, just after the incident, and was entitled to make an inference as to what occurred based on his own rational perceptions.

{¶28} We will not speculate as to the demeanor of the witnesses. The trial court as the trier of fact in this case evaluated all of the evidence before it, including the weight and credibility of each party's witnesses and documentary evidence. The trial court found for Mr. Marculaitis, despite the ODNR report and the testimony of the four defense witnesses.

{¶29} It must be noted that the ODNR report was not conclusive, as Mr. Pisegna suggests, but was merely probative. The narrative portion of the report specifically says "[i]t is indeterminate whether these repairs and/or modifications failed and caused the boat to capsize." The trial court was entitled to weigh the report along with and against all other evidence submitted, and was in no way bound to the "conclusions" contained in either portion of the report.

{¶30} The Court's Application of the Law of Bailments

{¶31} Furthermore, the trial court was correct in applying the law of bailments to this case. "A bailment has been defined as the delivery of goods or personal property by one person to another in trust for a particular purpose, with a contract, express or implied, that the property shall be returned once the purpose has been faithfully executed." *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 830.

{¶32} Originally, Mr. Marculaitis entrusted his boat to Mr. Pisegna for the particular purpose of boating and fishing in exchange for storage; in other words, a

bailment for mutual benefit. Although no formal contract was signed between the two parties, an implied contract existed that Mr. Pisegna would return the boat to Mr. Marculaitis in the same condition as when he took possession.

{¶33} Upon moving the boat to Evergreen, the relationship morphed from a mutual benefit bailment to a gratuitous bailment for the sole benefit of Mr. Pisegna, the bailee. See *Tomas v. Nationwide Mut. Ins. Co.* (1992), 79 Ohio App. 3d 624, 629 (identifies a bailment as either for the benefit of the bailor, the bailee, or for the mutual benefit of both). Mr. Pisegna received the benefit of using the boat, but Mr. Marculaitis received no consideration in return.

{¶34} A bailee has the duty of care for safekeeping the bailed property. In the instance of a mutual benefit bailment, this duty has been defined as that degree of care which an ordinary, prudent person would exercise under similar circumstances with regard to similar property. *Hotels Statler Co. v. Safier* (1921), 103 Ohio St. 638. However, the degree of care required of the bailee is directly proportional to the benefit he accrues as a result of the bailment. See *United States Fire Ins. Co., v. Paramount Fur Service, Inc.* (1959), 168 Ohio St. 431, 437 citing Dobie on Bailments and Carriers, 34 Section 16. Therefore, when a bailment exists for the sole benefit of the bailee, the standard of care required of him increases.

{¶35} In failing to return the boat in the same condition as when he removed it from Evergreen, Mr. Pisegna breached his duty of care for safekeeping, which was greater than the ordinary care standard of a mutual benefit bailment. An inference of negligence can be drawn from proof that the boat was not returned to Mr. Marculaitis in the same condition as before, whether the action is on contract or negligence. See *Click Camera* at 831, citing *Aetna Cas. & Sur. Co. v. Woody Sander Ford, Inc.* (1969),

21 Ohio App.2d 62; *David v. Lose* (1966), 7 Ohio St.2d 97. Once the plaintiff made a prima facie case, the burden of going forward shifted to the defendant-bailee to present sufficient evidence “to at least counterbalance the inference of negligence.” *Aetna* at 66.

{¶36} Because there is competent, credible evidence going to all the essential elements of the case in the trial record, we decline to disturb the trial court’s well-reasoned and legally supported judgment. Assignments of error one and three are without merit.

{¶37} Damage Calculation

{¶38} In his second assignment of error, Mr. Pisegna argues that the trial court erred in its determination of damages. Mr. Pisegna contests the trial court’s acceptance of Mr. Marculaitis’ own valuation of damages and presentation of those damages in a handwritten exhibit, because Mr. Marculaitis did not present any receipts or expert testimony as to the market value of the boat and equipment lost.

{¶39} Standard of Review

{¶40} “[A] reviewing court will not disturb a trial court’s decision regarding its determination of damages absent an abuse of discretion.” *Williams v. Kondziela*, 11th Dist. No. 2002-L-190, 2004-Ohio-2077, ¶19, citing *Roberts v. United States Fid. & Guar. Co.* (1996), 75 Ohio St.3d 630, 634. “The term discretion itself involves the idea of choice, of an exercise of will, of a determination made between competing considerations.” *Kondziela* at ¶19, quoting *Roth v. Habansky*, 8th Dist. No. 82027, 2003-Ohio-5378, ¶18. This court has recently stated that the term “abuse of discretion” is one of art, connoting judgment exercised by a court that does not comport with reason or the record. *Gaul v. Gaul*, 11th Dist. No. 2009-A-0011, 2010-Ohio-2156,

¶24, citing *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. The Second Appellate District recently adopted this definition of the abuse-of-discretion standard in *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶65, citing Black's Law Dictionary (4 Ed.Rev.1968), 25 (“[a] discretion exercised to an end or purpose not justified by and clearly against reason and evidence”).

{¶41} Measuring Damages

{¶42} In calculating damages, generally, “[m]arket value is the standard which the courts insist on as a measure of direct property loss, where it is available, but that is a standard, not a shackle.” *Bishop v. East Ohio Gas Co.* (1944), 143 Ohio St. 541, 546. Market value is defined as the price an owner, who is not obliged to sell, will receive for the property when offered to and bought by a purchaser who is not under an obligation to buy. See *Kohnle v. Carey* (1946), 80 Ohio App. 23; *Otte v. American Airlines, Inc.* (1957), 104 Ohio App. 517.

{¶43} When personal property is merely damaged, courts have awarded either the difference between the market value of the property just prior to the damage and just after, known as the diminution value, or the cost of making the item of personal property whole again. See *Wooster Feed Mfg. Co. v. Village of Tallmadge* (1948), 82 Ohio App. 499. Where personal property is completely destroyed, the measure of damages is the reasonable market value of the property immediately prior to the destruction. *Id.* “Ohio law has long recognized that an owner of either real or personal property is, by virtue of such ownership, competent to testify as to the market value of the property.” *Smith v. Padgett* (1987), 32 Ohio St.3d 344, 347.

{¶44} Further, if “the market value cannot be feasibly obtained, a more elastic standard is resorted to, sometimes called the standard of value to the owner.” *Bishop* at

546. This doctrine recognizes that certain “property may have value to the owner in exceptional circumstances which is the basis of a better standard than what the article would bring in the open market.” *Id.* The courts have resorted to this type of standard in connection with the loss of scientific cultures, an Amish quilt used for aesthetic purposes, and articles of clothing. See *Bishop*, *supra*; *Himmelsbach-Preston v. Royal Custom Cleaners*, 136 Ohio Misc.2d 34, 2005-Ohio-7145; *Groves v. Gray* (1942), 74 Ohio App. 384. This court has previously recognized the validity of the “owner opinion” rule in cases regarding the value of a truck, bulldozing equipment and a boat. See *Urso v. Compact Cars, Inc.*, 11th Dist. No. 2006-T-0062, 2007-Ohio-4375; *State v. Pesec*, 11th Dist. No. 2006-P-0084, 2007-Ohio-3846; *Erie Ins. Co. v. Mentor Marinas, Inc.* (Mar. 23, 1984), 11th Dist. No. 9-231, 1984 Ohio App. LEXIS 9672.

{¶45} In the case *sub judice*, the trial court heard testimony from Mr. Marculaitis regarding the valuation of his boat and equipment. Mr. Marculaitis laid an adequate foundation for his testimony by stating that he had been a boater and fisherman for more than 40 years. In those 40 years, Mr. Marculaitis testified that he had bought and sold substantial amounts of fishing and boating equipment. It is quite clear that Mr. Marculaitis had personal knowledge of the market values of the equipment for which he sought compensation. The trial court also accepted into evidence a handwritten list prepared by Mr. Marculaitis of items that were lost or deemed not repairable when his boat capsized and their estimated values. Mr. Marculaitis stated that he came up with the values based on his experience of buying and selling fishing and boating equipment over the 40-plus year period.

{¶46} The trial court awarded Mr. Marculaitis \$10,136, declining to extend the award to include the towing expense, the two motors on the boat, or the boat itself. The

court also declined to award damages to replace the clutch on his truck. Mr. Marculaitis admitted that he allowed the motors to “seize up”; thus, the trial court found he had failed to mitigate his damages as to the motors. The trial court also found that the damage to his truck’s clutch, caused when he attempted to pull the boat out of the water, was not foreseeable.

{¶47} As to the boat, Mr. Marculaitis listed the damage value as \$2,300. What was not clear from the record was whether this number referred to the market value or the cost to repair/replace the boat. At trial, however, he stated at one point that the boat could be repaired but it would take “a lot of work and a lot of money” and that his intention was to dispose of it through a donation to Goodwill or Salvation Army. When pressed for a salvage value, he was unable to provide one. Otherwise, the trial court directed Mr. Pisegna to compensate Mr. Marculaitis for the remainder of his reported losses.

{¶48} In the handwritten, itemized list of damages, Mr. Marculaitis recorded total damages of \$21,536. When the \$6,500 for the motors, the \$2,300 for the boat, the \$1,200 for the towing, and the \$1,400 for the truck clutch are subtracted from the total claimed losses, the amount equals exactly \$10,136. The trial court’s process for calculating Mr. Marculaitis’ damages is quite evident.

{¶49} Because counsel laid a proper foundation for Mr. Marculaitis’ opinion and Ohio law permits the owner of personal property to testify regarding its value, we find that the trial court did not abuse its discretion in allowing the testimony and subsequently relying on it when awarding damages. Mr. Pisegna’s second assignment of error is without merit.

{¶50} The judgment of the Court of Common Pleas of Ashtabula County is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.