

**IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY**

DANIEL HEMME,

Plaintiff-Appellee,

- vs -

MARK HAKLI, et al.,

Defendants-Appellants.

CASE NO. 2023-L-003

Civil Appeal from the
Court of Common Pleas

Trial Court No. 2020 CV 000239

OPINION

Decided: August 7, 2023

Judgment: Affirmed

Grant J. Keating and Richard N. Selby, II, Dworken & Bernstein Co., LPA, 60 South Park Place, Painesville, OH 44077 (For Plaintiff-Appellee).

Frank R. Brancatelli, 7318 Gallant Way, Painesville, OH 44077 (For Defendants-Appellants).

JOHN J. EKLUND, P.J.

{¶1} Appellants, Mark and Dina Hakli, appeal the order of the Lake County Court of Common Pleas adopting the magistrate's decision ordering appellants to pay appellee, Daniel Hemme, compensatory damages of \$367,563.16, attorney's fees of \$51,864.84, and punitive damages of \$100,000.00 after a three-day hearing on damages.

{¶2} Appellants assigns three errors, arguing the trial court erred by adopting the magistrate's recommendation on damages. Specifically, appellants argue the record does not support the trial court's adopting the magistrate's recommendations of

compensatory damages of \$367,563.16, attorney's fees of \$51,864.84, and punitive damages of \$100,000.00.

{¶3} Having reviewed the record and the applicable caselaw, we affirm the judgment of the trial court. First, the magistrate's recommendations were based on the evidence adduced at a damages hearing. The trial court independently reviewed the transcript of that hearing and the magistrate's analysis and found no error of law or fact. The trial court did not abuse its discretion in determining the magistrate correctly ordered compensatory damages of \$367,563.16. Second, all of appellee's attorney's fees, not just discovery sanctions, were properly before the magistrate as relief plaintiff sought on his claims. The trial court did not abuse its discretion by adopting the magistrate's recommendation in relation to the attorney's fees for the entire prosecution of the case because the underlying default judgment included fraud claims and the court imposed punitive damages. Third, appellants' argument that punitive damages cannot be imposed in a breach of contract case is inapposite since appellee's claims sounded in tort as well as contract.

{¶4} Therefore, we affirm the judgment of the Lake County Court of Common Pleas.

Substantive and Procedural History

{¶5} Appellee and non-party Justin Portik formed the landscaping company Portik & Hemme, Inc. Mark joined the company in 2015 as a third owner and Dina became secretary and treasurer of the company. In December 2015, appellee and Mark bought out Portik's share and the two became equal owners of the company. In 2016, the company began doing business under the name Atlas Landscaping & Construction.

{¶6} In March 2019, Mark informed appellee that he wanted to dissolve the company and came to an agreement with appellee that Mark would use the company's outstanding receivables to pay off the remaining company debts, including tax obligations.

{¶7} However, appellee believed appellants were using company funds for personal expenses. Further, appellee believed Dina was receiving a company salary for work she had not actually performed.

{¶8} Unable to resolve these outstanding issues, appellee filed a complaint against appellants on February 6, 2020, with claims for accounting, breach of fiduciary duty, breach of contract, fraud, unjust enrichment, contribution and indemnification, embezzlement and conversion, civil conspiracy, fraudulent conveyance, prejudgment attachment, and injunctive relief.

{¶9} Appellee served discovery requests seeking financial records relating to his claims to which appellants did not respond.

{¶10} On May 15, 2020, appellants filed an answer and counterclaim. Their counterclaim alleged fraud in the inducement, malfeasance, and sought an accounting. Appellants also filed a third party complaint against Portik & Hemme, Inc, Justin Portik, and Dan Hemme, Inc.

{¶11} Appellee filed a motion to compel discovery. Appellants did not respond to the motion to compel, and the trial court granted the motion on June 4, ordering appellants to respond to the discovery requests no later than June 22, 2020.

{¶12} On September 8, 2020, appellee filed a second motion to compel, alleging that appellants' discovery responses were incomplete. Appellants did not respond to this

motion and the trial court granted it, ordering full discovery responses no later than October 12, 2020. Appellants did not comply with the order.

{¶13} Appellee filed a motion for sanctions on November 19, 2020, which the trial court granted on January 8, 2021. The trial court determined that appellants “have repeatedly failed or refused to participate in discovery, even though they have been directly ordered to do so twice. The court acknowledges that default judgment is a harsh remedy, but at this point it can only conclude that the defendants willfully disobeyed its direct orders and are acting in bad faith.” Therefore, the court entered judgment against appellants on their counterclaim and granted default judgment in favor of appellee on his complaint. The court set a damages hearing to determine the appropriate amount of damages and to “*also address any other claims for relief on the plaintiff’s complaint and the plaintiff’s request for attorney fees related to his motions to compel which have been held in abeyance.*” (Emphasis added).

{¶14} The hearing on damages took place over three days on March 15, 2021, March 31, 2021, and April 7, 2021.

{¶15} At the hearing, appellee testified that when he and Mark agreed to dissolve the company, the two determined Mark would take 90% of the company’s remaining equipment and customers. The company bank account would remain open to deposit outstanding receivables of approximately \$100,000.00-130,000.00. He said the money was to be used to pay the company’s current debt, which included payables to suppliers, nurseries, landscape yards, and outstanding state sales tax. Appellee did not have complete access to the company books and was only able to estimate the financials.

{¶16} Appellee introduced spreadsheet exhibits which detailed transactions appellants made using the company bank account for personal expenses. These were compiled using bank statements, card usage, and check images. Appellee described appellants using company funds for personal expenses such as animal hospital bills, medical bills, personal utility bills, home repairs and services, personal credit card payments, personal vehicle payments, dining expenses, gym memberships, paying two traffic tickets, and cash withdrawals. These expenses totaled \$30,132.40 for 2017-2018; \$26,630.00 for January through March 2019; and \$58,631.62 for April through October 2019.

{¶17} In addition, a company vehicle was totaled and appellants received \$30,764.00 as an insurance payout which they did not remit to the company. After the company closed, appellee became aware that Mark was attempting to sell a company trailer for \$18,500.00. Appellee did not know if Mark sold the trailer but believed he did and was unable to obtain information on the sale of the trailer through discovery. Appellee believes Mark retained the funds from the sale of the trailer.

{¶18} Appellee also explained that Dina rented a storefront through the company to run her personal clothing shop. Although Dina paid the rent initially, appellee was not able to obtain records in discovery which would have indicated she continued to pay the \$750.00 rent for approximately two years, resulting in a total of \$18,000.00 of unpaid rent. Further, Dina was supposed to be functioning as secretary and keep the company books. However, appellee eventually learned Dina was not performing her duties. Her salary totaled \$28,319.67, however, appellee only sought to recover \$24,000.00.

{¶19} The total for personal expenses, cash withdrawal, and sale of company equipment was \$153,827.68. Further, appellants did not pay the outstanding state sales tax of \$125,295.09. The State of Ohio began attempting to collect the balance from appellee personally and he incurred additional costs for penalties, tax preparation fees, and attorney's fees to defend himself against the state.

{¶20} The compensatory damages set forth in appellee's testimony and exhibits totaled \$367,565.16.

{¶21} Attorney Grant Keating testified as to attorney's fees during the hearing. He said the total fees incurred prior to the damages hearing were \$33,143.59 and believed those fees were reasonable given the nature of the litigation. Appellee filed a post-hearing brief which detailed the total attorney's fees incurred after holding the damages hearing was \$51,864.84.

{¶22} Mark testified and attempted to justify various expenditures as company expenses. However, on cross-examination, Mark admitted he took more than a 50/50 distribution from the company and that he used company funds for personal expenses including his mortgage, utilities, pets, traffic tickets, credit cards, car payments, and doctor bills. He also acknowledged Dina did not perform her duties as bookkeeper and treasurer, although he believed she did perform secretarial duties. He further acknowledged the company did not receive rent payments for Dina's storefront and that the company spent money to refurbish the storefront for her use.

{¶23} Appellee requested punitive damages and in his post-hearing brief argued appellants acted in bad faith in conscious disregard for appellee's rights and caused him substantial harm. Appellee said that although a higher award was "justified, even the

award of \$1.00 in punitive damages will send the message that Defendants' conduct is immoral, illegal and cannot be tolerated."

{¶24} On October 12, 2022, the magistrate issued a decision on damages. The magistrate found appellee had continued to withhold discovery even after the court imposed sanctions, that the documents appellee sought were solely accessible to appellants, and that the documents were necessary to evaluate the complaint and counterclaim. The magistrate determined appellee had been damaged in the "base amount" of \$367,563.16, plus attorney's fees of \$51,864.84, and awarded punitive damages of \$100,000.00 together with interest on the base amount from the date of the decision, along with costs.

{¶25} On October 25, 2022, appellants timely filed objections to the magistrate's decision. Their motion raised three objections: (1) "That the Magistrate failed to comply with the Order of the Court to determine plaintiff Hemme's damages in accordance with the evidence presented;" (2) "That the magistrate failed to comply with the order of the court to determine plaintiff's Hemmes attorney fees related to his motions to compel which were held in abeyance;" and (3) "That the magistrate awarded punitive damages without any substantiation."

{¶26} Appellants' objections argued the magistrate's decision did not comply with the trial court's order granting judgment in favor of appellants "in an amount to be determined at a damages hearing * * *. The hearing will also address any other claims for relief on the plaintiff's complaint and the plaintiff's request for attorney's fees related to his motion to compel which have been held in abeyance." Appellant argued the magistrate "totally ignored the testimony of the parties as to the winding down and dissolution of the

corporate entity” and that the damages award was not substantiated “from the testimony and/or exhibits.” Appellee filed an opposition to the objections and appellants replied. On December 8, 2022, the trial court, “conducted an independent review” of the transcript and adopted the magistrate’s decision “finding no errors of law or other defects on the face of the decision.”¹

{¶27} After the trial court adopted the magistrate’s decision of law, appellants filed the instant appeal raising three assignments of error.

Standard of Review

{¶28} Each of appellants’ assignments of error asserts that the trial court erred in adopting the magistrate’s decision. “When reviewing an appeal from a trial court’s adoption of a magistrate’s decision, an appellate court must determine whether the trial court abused its discretion in adopting the decision.” *Huntington Natl. Bank v. Betteley*, 11th Dist. Lake No. 2015-L057, 2015-Ohio-5067, ¶ 17. “Further, any claimed error on appeal must be based on the trial court’s actions, and not on the magistrate’s decision.” *Betteley* at ¶ 17, citing *Bobel Elec., Inc. v. Friedman*, 9th Dist. Lorain No. 03CA008217, 2003-Ohio-4530, ¶ 7-8.

{¶29} “The term “abuse of discretion” is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record.’ *State v. Underwood*, 11th Dist. Lake No. 2008-L-113, 2009-Ohio-208, ¶ 30, citing *State v. Ferranto*, 112 Ohio St.

1. Although not raised by the parties, for clarity we address the trial court’s incorporation of the magistrate’s decision into its judgment entry. Civ.R. 54(A) was amended in 2019 to eliminate the language that “[a] judgment shall not contain the magistrate’s decision in a referred matter.” Based on the removal of that language, we conclude the “where a trial court has entered judgment in the same document as the magistrate’s decision, and where, as here, no objections are filed to that document, this court will have jurisdiction to review it if it otherwise meets the standards for a final order * * *.” *Waxman v. Link*, 2nd Dist. Montgomery No. 28415, 2020-Ohio-47, ¶ 23.

667, 676-678, [148 N.E. 362] (1925).” *State v. Raia*, 11th Dist. Portage No. 2013-P-0020, 2014-Ohio-2707, ¶ 9. Stated differently, an abuse of discretion is “the trial court’s ‘failure to exercise sound, reasonable, and legal decision-making.’” *Id.*, quoting *State v. Beechler*, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, ¶ 62, quoting Black’s Law Dictionary 11 (8th Ed.Rev.2004). “When an appellate court is reviewing a pure issue of law, ‘the mere fact that the reviewing court would decide the issue differently is enough to find error[.]’”

“By contrast, where the issue on review has been confined to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error.” *Id.*, quoting *Beechler* at ¶ 67.

{¶30} Civ.R. 53(D)(3)(a)(ii) provides that a magistrate “shall prepare a magistrate’s decision” and that “a magistrate’s decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law.” “Findings of fact and conclusions of law aid in the prosecution of an appeal and provide for effective appellate review.” *Donlon v. Lineback*, 12th Dist. No. CA2016-03-015, 2016-Ohio-7739, 73 N.E.3d 1096, ¶ 26. Where a party does not file a request for findings of fact and conclusions of law, the trial court’s review of the objections is limited to the magistrate’s decision. *Rosett v. Holmes*, 8th Dist. Cuyahoga No. 111511, 2023-Ohio-606, ¶ 21 fn. 3.

{¶31} “It is difficult, if not impossible, to determine the basis of the trial court’s ruling without findings of fact and conclusions of law * * *. Absent such a request for findings and conclusions, this court has no choice but to presume the regularity of the proceedings in the court below.” *Leikin Oldsmobile, Inc. v. Spofford Auto Sales*, 11th Dist. Lake No. 2000-L-202, 2002-Ohio-2441, ¶ 17. In such a circumstance, “[w]e must presume

that the trial court heard the evidence, that the proper legal standard in evaluating the evidence was utilized, and that sufficient evidence was presented to support the trial court's judgment. See *Underwood v. Abrahamson* (Sept. 29, 1995), 11th Dist. No. 95-T-5220, 1995 Ohio App, LEXIS 4346, at 10." *Id.*

Assignments of Error and Analysis

{¶32} Appellants' first assignment of error states:

{¶33} "[1.] The trial court committed prejudicial error when the court adopted, in total, the magistrate's unsubstantiated findings of fact and conclusions of law based solely on defendants-appellants failure to comply with discovery responses, in contradiction to the Journal Entry filed by the Court on January 8, 2021 which required the Magistrate determine plaintiff's damages in an amount to be determined at the damage hearing to be held on March 15, 2021 at 1:30 pm."

{¶34} Appellant contends the court's adoption of the magistrate's compensatory damages recommendation was based on appellants failure "to comply with discovery requests and not by establishing the truth of any averment by evidence or to make an investigation off any other matter which is the basis of a damage hearing required pursuant to Civ.R. 55(A)."

{¶35} Appellants did not request separate findings of fact or conclusions of law for the magistrate's decision. Absent a request for findings and conclusions, we presume the trial court applied the proper legal standard and appropriately evaluated the evidence. See *Leikin Oldsmobile, Inc*, 2002-Ohio-2441, ¶ 17. Further, the trier of fact is free to believe all, part or none of a witness's testimony and must resolve the weight to be given

to the evidence. *Morrison v. Morrison*, 11th Dist. Geauga No. 2019-G-0233, 2020-Ohio-4358, ¶ 13.

{¶36} The magistrate's decision stated that it's compensatory damages recommendation was based on the "damages hearing * * * conducted over three separate days" and a "review of the extensive testimony and the exhibits admitted into evidence * * *." The trial court then considered the magistrate's decision, the objections to the decision, brief in opposition to objections, the reply brief, and the transcript of proceedings. The trial court "conducted an independent review" of the magistrate's decision and found "no errors of law or other defects on the face of the decision[.]" On the record before us, we cannot say that the trial court abused its discretion in adopting the magistrate's decision when the trial court's entry states it independently reviewed the transcript and objections to the magistrate's decision and found the decision to be without error or defect.

{¶37} Accordingly, appellants' first assignment of error is without merit.

{¶38} Appellants' second assignment of error states:

{¶39} "[2.] The trial court committed prejudicial error when the court adopted the magistrate's award for the total amount of attorney's fees sought, in contradiction to the Journal Entry filed by the Court on January 8, 2021 which required the Magistrate determine plaintiff's attorney's fees in an amount related to his motions to compel which have been held in abeyance without first determining how much of the total fee submitted was related to failure to comply with the discovery."

{¶40} Appellants argue the magistrate's decision did not comply with the trial court's January 8, 2021 judgment entry because, they say, it ordered consideration of

only attorney's fees solely related to appellee's motions to compel. Appellants assert that the court's adopting the magistrate's recommendation to award attorney's fees for appellee's entire case, rather than just as sanctions under Civ.R. 37(A)(5) was error.

{¶41} Appellant misapprehends the trial court's January 8, 2021 order regarding sanctions. It was *not* limited to a hearing on attorney's fees as discovery sanctions. It also ordered a damages hearing to determine damages arising from appellant's claims and "any other claims for relief on the plaintiff's complaint[.]"

{¶42} "In an action to recover damages for a tort which involves the ingredients of fraud, malice, or insult, a jury may go beyond the rule of mere compensation to the party aggrieved, and award exemplary or punitive damages * * *. In such a case, the [fact finder] may, in [its] estimate of *compensatory* damages, take into consideration and include reasonable fees of counsel employed by the plaintiff in the prosecution of his action." *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 2010-Ohio-1829, 928 N.E.2d 421, quoting *Roberts v. Mason*, 10 Ohio St. 277, (1859), paragraphs one and two of the syllabus. When punitive damages are awarded, the appropriate compensatory damages award may also include attorney's fees. *Zappitelli v. Miller*, 114 Ohio St.3d 102, 2007-Ohio-3251, 868 N.E.2d 968, ¶ 6.

{¶43} Here, the default judgment against appellants included fraud, embezzlement and conversion, and fraudulent conveyance. The trial court awarded punitive damages and it was within the court's discretion to award reasonable attorney's fees for the entire prosecution of the case under these circumstances. Appellee supported the attorney's fees award and provided evidence of their reasonableness at the damages hearing and in his post-hearing brief. Appellants did not rebut that evidence. The trial

court did not abuse its discretion by adopting the magistrate's decision to grant attorney's fees in the amount of \$51,864.84.

{¶44} Accordingly, appellants' second assignment of error is without merit.

{¶45} Appellants' third assignment of error states:

{¶46} "[3.] The trial court committed prejudicial error when the court adopted the magistrate's award of punitive damages in the sum of \$100,000 without any substantiation and solely based on defendant appellants failure to comply with discovery requests."

{¶47} Appellants argue the magistrate's recommendation, and the trial court's adoption of it, improperly awarded punitive damages as an extension of their failure to comply with discovery. They argue this must be the case because punitive damages are not recoverable in an action for breach of contract.

{¶48} First, appellants miscomprehend, again, the court's January 28, 2021 order. It ordered a damages hearing on the award of all relief appellee sought, not just the discovery sanction amount. Since neither the magistrate's recommendation, nor the court's order adopting it, parses the punitive damages awards so finely, we could only guess whether all, or only part of, the punitive damages award was awarded as a discovery sanction or as damages on appellee's underlying claims.

{¶49} As referenced above, punitive damages can be appropriate in tort actions involving fraud. To be awarded punitive damages, a party "must establish not only the elements of the tort itself but, in addition, must either show that the fraud is aggravated by the existence of malice or ill will, or must demonstrate that the wrongdoing is particularly gross or egregious." *Mentor Marinas, Inc. v. Phoenix Internatl. Cuisine, Inc.*,

11th Dist. Lake No. 6-187, 1978 WL 216027, *3 (Sept. 25, 1978); *Navistar, Inc. v. Dutchmaid Logistics, Inc.*, 5th Dist. No. 2020 CA 00003, 2021-Ohio-1425, 171 N.E.3d 851, ¶ 63.

{¶50} The actual malice required for awarding punitive damages is “(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.” *Navistar* at ¶ 64, citing *Berge v. Columbus Community Cable Access*, 136 Ohio App.3d 281, 316, 736 N.E.2d 517 (10th Dist.1999). Whether actual malice exists is a question for the trier of fact. *Id.* at ¶ 65. We will not overturn factual determinations if they are supported by some competent credible evidence going to the essential elements of the case. *Id.* Of this, there was ample proof. See paragraphs 16-19, and 23, above.

{¶51} Finally, appellants did not request findings of fact and conclusions of law. Therefore, we presume the trial court conducted an independent review of the magistrate’s decision and considered the proper legal standard in support of punitive damages. It is also important to note that appellee did not make a request for a specific punitive damages award and that the trial court arrived at the \$100,000.00 figure on its own discretion rather than at the request of the parties. This would indicate the trial court did not merely “rubber stamp” appellee’s request without consideration of the appropriate facts and legal standard.

{¶52} Accordingly, appellants’ third assignment of error is without merit.

{¶53} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas is affirmed.

MARY JANE TRAPP, J.,

MATT LYNCH, J.,

concur.