

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

MARY A. FISHER, d.b.a. FK CONSTRUCTION,	:	<b>OPINION</b>
	:	
Plaintiff-Appellant,	:	<b>CASE NO. 2011-T-0031</b>
	:	
- vs -	:	
	:	
JOE CLAY,	:	
	:	
Defendant,	:	
	:	
PAMELA KUHN,	:	
	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2007 CV 1038.

Judgment: Affirmed.

*Michael D. Rossi, Guarnieri & Secrest, P.L.L.*, 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Plaintiff-Appellant).

*Robert C. Kokor*, 394 State Route 7, S.E., P.O. Box 236, Brookfield, OH 44403 (For Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Mary Fisher, doing business as FK Construction, appeals from the Judgment Entry of the Trumbull County Court of Common Pleas, dismissing her claim after a trial to the bench. The issue to be decided in this case is whether a defendant commits conversion of personal property when the defendant

made attempts to return such property. For the following reasons, we affirm the decision of the court below.

{¶2} On April 20, 2007, Fisher filed a Complaint in the Trumbull County Court of Common Pleas against Joe Clay and Pamela Kuhn for conversion of Fisher's personal property. Fisher alleged that she owned personal property located on Clay's business premises and Clay failed to return such property. She also alleged that additional personal property was moved by an employee of FK Construction, Frank Kuhn, and was taken to Pamela Kuhn's premises for storage. Fisher alleged that this property had not been returned by Pamela. Fisher requested a sum of \$2,500 from Clay and \$25,000 from Pamela for value of her personal property. Attached to the Complaint were photographs of the personal property, including various items of construction equipment, allegedly located on Pamela's premises.

{¶3} On March 11, 2008, Fisher filed a Motion for Partial Summary Judgment, asserting that, pursuant to Pamela's admissions in her responses to the interrogatories, summary judgment should be granted as to some of the items of personal property. As to these items, Pamela conceded that she had no ownership, while Fisher attached an affidavit, swearing that she was the owner of the listed personal property.

{¶4} On June 25, 2008, the magistrate granted Fisher's Motion for Partial Summary Judgment and ordered that the personal property be delivered to or retrieved by Fisher.

{¶5} On January 15, 2009, Fisher filed a Supplemental Complaint, adding a bailment claim, and asserting that Pamela failed to exercise care over her personal property and it had therefore been lost, stolen, or dissipated.

{¶6} On November 17, 2009, Clay was dismissed as a defendant, without prejudice.

{¶7} A trial in this matter was held and testimony was presented, but such testimony was not transcribed or filed with the court. The exhibits presented at trial, which are before this court, included several letters between Frank and Pamela's attorneys. In a faxed letter to Frank's attorney, dated October 30, 2006, Pamela's attorney stated that Frank had been to Pamela's premises on two occasions, with the second time lasting "for nearly 12 hours," to retrieve personal items. The letter stated that Frank could not go onto Pamela's premises again or he would be arrested for violating a protection order. On October 31, Frank's counsel wrote a letter stating that "Mary/Frank propose to return to the building, for personal property retrieval" on November 4, 2006. An additional letter from Frank's counsel, written on November 3, stated that Frank and/or Mary would appear at Pamela's property on November 4 to retrieve additional personal property. A Domestic Violence Protection Order, dated January 9, 2009, was also presented. In the Order, the magistrate made findings of fact, including a finding that Pamela had previously received a Protection Order against Frank in 2006. An October 26, 2006 Journal Entry of the Trumbull County Court of Common Pleas, Domestic Relations Division, was presented and stated that Frank could go to Pamela's premises to retrieve personal property, with a law enforcement escort. The exhibits also included a list and pictures of items allegedly on Pamela's premises, as well as certificates of title for a few items of construction equipment.

{¶8} The magistrate found, in its December 28, 2010 Magistrate's Decision, that, based on the testimony, Frank Kuhn, Pamela's former husband, was an employee

of FK Construction and ran the company for Fisher. According to the Magistrate's Decision, the testimony demonstrated that Frank had been living with Pamela, frequently brought home construction equipment, and stored it on Pamela's premises. The magistrate also found that the testimony demonstrated that a Domestic Violence Protection Order was issued in 2006 and prevented Frank from being on Pamela's premises.

{¶9} The magistrate found that on two separate occasions, Pamela "gave access of her property to Frank with anyone (including Mary Fisher) to secure any equipment or property he claimed to be his", and some property was removed on these occasions. The magistrate found that Fisher was present during the retrieval of property on at least two occasions and that she did remove "many pieces of equipment and property." The magistrate stated that Fisher had relied on Frank's access to the property, but had never petitioned the court for additional access to Pamela's premises. The magistrate noted that although Partial Summary Judgment was granted on certain items, "the record is silent as to any attempts by [Fisher] to retrieve the subject equipment and personal property." The magistrate found that the testimony presented at trial showed that Fisher's personal property was "no longer on [Pamela's] property."

{¶10} The magistrate found that although no items of Fisher's property remained on Pamela's premises, there was "nothing in the evidence to suggest that it is 'more probable than not' that [Pamela] converted the subject equipment and property." The magistrate held that Fisher failed to meet her burden of proof that Pamela exerted unauthorized control or dominion over Fisher's personal property and dismissed Fisher's case.

{¶11} On January 7, 2011, Fisher filed Objections to the Magistrate’s Decision, asserting that Pamela exerted dominion and control over the property at issue, Fisher demanded the return of the property, Pamela refused to return the property, and, therefore, conversion occurred.

{¶12} In a March 10, 2011 Judgment Entry, the trial court overruled the Objections and adopted the Magistrate’s Decision.

{¶13} Fisher, dba FK Construction, timely appeals and asserts the following assignment of error:

{¶14} “The trial court erred in adopting and entering judgment on the Magistrate’s Decision over timely objections, dismissing the action for Appellant’s failure to prove that Appellee converted the former’s personal property.”

{¶15} In her sole assignment of error, Fisher essentially asserts that the trial court’s decision was against the manifest weight of the evidence. Under the civil manifest weight of the evidence standard, “[j]udgments 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, at the syllabus. This presumption arises because the trier of fact has had the 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.” *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶16} At the outset, we note that Fisher did not file a transcript or a Rule 9(C) or (D) statement. In her notice of appeal, she checked the notation stating that “a partial

transcript has been completed and made part of the record.” However, a review of the record reveals no request to have a trial transcript prepared and no request to file a transcript with the record. Only the trial exhibits were filed with the record on appeal and no partial copy of a transcript is in the record.

{¶17} “Upon appeal of an adverse judgment, it is the duty of the appellant to ensure that the record, or whatever portions thereof are necessary for the determination of the appeal, are filed with the court in which he seeks review. App.R. 9(B) and 10(A); Section (1) of Rule IV of the Supreme Court Rules of Practice. It follows that where a transcript of any proceeding is necessary for disposition of any question on appeal, the appellant bears the burden of taking the steps required to have the transcript prepared for inclusion in the record. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197 \*\*\*. Any lack of diligence on the part of an appellant to secure a portion of the record necessary to his appeal should inure to appellant’s disadvantage rather than to the disadvantage of appellee.” *Rose Chevrolet, Inc. v. Adams* (1998), 36 Ohio St.3d 17, 19.

{¶18} As Fisher failed to produce a transcript, we are compelled to rely on the facts found by the trial court, as they relate to the testimony presented at trial. See *Johnson v. Drum*, 11th Dist. No. 2009-T-0038, 2009-Ohio-6147, at ¶18. Therefore, our review is limited to those factual findings and the pertinent parts of the record before us.

{¶19} Fisher asserts that each of the elements of a conversion claim were met and that Pamela failed to return Fisher’s personal property. Therefore, the trial court erred by dismissing Fisher’s conversion claim.

{¶20} Pamela argues that Fisher failed to prove Pamela converted her property, as Fisher was given at least two opportunities to retrieve the property.

{¶21} “A claimant attempting to establish the tort of conversion must demonstrate the defendant wrongfully exerted control over the claimant’s personal property inconsistent with or in denial of his or her rights.” *Smith v. Evaline’s Bridal*, 11th Dist. No. 2009-T-0014, 2009-Ohio-6520, at ¶17 (citation omitted).

{¶22} “Where conversion is premised on the unlawful retention of property, the plaintiff must establish: ‘(1) he or she demanded the return of the property from the possessor after the possessor exerted dominion or control over the property, and (2) that the possessor refused to deliver the property to its rightful owner.’” *Dice v. White Family Cos., Inc.*, 173 Ohio App.3d 472, 2007-Ohio-5755, at ¶17, citing *Tabar v. Charlie’s Towing Serv.* (1994), 97 Ohio App.3d 423, 427-428.

{¶23} The trial court found, based on the testimony and other evidence presented at trial, that Fisher did not present adequate evidence to support a finding that it is more probable than not that conversion occurred or that Pamela exerted control over Fisher’s property. As we do not have such testimony before us, we must accept the court’s finding as to the lack of testimonial evidence presented at trial. *Johnson*, 2009-Ohio-6147, at ¶18.

{¶24} As the trial court found, questions existed as to whether Pamela refused to return Fisher’s personal property, since both Frank and Fisher were allowed on Pamela’s premises on two separate occasions to retrieve property. In addition, the record does not reflect any occasion during which Pamela denied Fisher access to her personal property.

{¶25} “A demand and refusal in a conversion action are usually required to prove the conversion of property otherwise legally held.” *Ohio Tel. Equip. & Sales, Inc.*

*v. Hadler Realty Co.* (1985), 24 Ohio App.3d 91, 94. In this case, the parties do not dispute that Frank was legally storing certain FK Construction equipment on Pamela's premises. When considering the record before this court, there is little evidence that Fisher herself actually demanded and was refused access to Pamela's premises. The evidence shows that Fisher merely relied on Frank's access to Pamela's premises to retrieve her personal property. Although the October 30, 2006 letter from Pamela's attorney states that Frank could not return to Pamela's premises, due to the Domestic Violence Protection Order, the letter does not address Fisher's ability to enter the property. Nothing else in the record, aside from the Complaint, evidences a refusal to Fisher by Pamela. A refusal to Frank does not constitute a refusal to Fisher.

{¶26} In addition to the lack of evidence of a demand and refusal, we note that, based on the exhibits in the record, it appears that Fisher was also given the opportunity, through Frank's access, to retrieve her personal property. The letters introduced support a finding that Fisher had been allowed to go to Pamela's property on at least two occasions to retrieve her items. This court has found that the failure to retrieve personal property when given permission to do so is a factor that undermines a party's conversion claim. *Abbe Family Found. & Trust v. Portage Cty. Sheriff's Dept.*, 11th Dist. No. 2005-P-0060, 2006-Ohio-2497, at ¶23 and ¶29 (where the plaintiffs had the opportunity to return to the premises where they previously lived, through a court order, to retrieve personal property, and failed to do so, this undermined their claim and supported the trial court's award of summary judgment to the defendant).

{¶27} On the two occasions that Fisher was allowed on Pamela's premises, one of which allegedly lasted 12 hours, Fisher was able to retrieve any of her personal

property. Since Fisher had the opportunity to retrieve her personal property, we cannot find that the trial court erred in holding that Fisher failed to prove Pamela “refused to deliver the property to its rightful owner,” as is required to succeed on a conversion claim. *Dice*, 2007-Ohio-5755, at ¶17.

{¶28} Based on the lack of evidence that Pamela refused Fisher entry to her premises to retrieve her property, this court finds that the trial court did not err in dismissing Fisher’s Complaint. The evidence in the record demonstrates that the trial court’s decision was supported by competent, credible evidence and was not against the manifest weight of the evidence

{¶29} The sole assignment of error is without merit.

{¶30} Based on the foregoing, the Judgment Entry of the Trumbull County Court of Common Pleas, dismissing Fisher’s claim after a trial to the bench, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.