[Cite as *Dodson v. Maines*, 2012-Ohio-2548.]

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

Elizabeth Dodson	Court of Appeals No. S-11-012
Appellee/Cross-Appellant	Trial Court No. 07-CV-1154
v.	
Arthur L. Maines	**DECISION AND JUDGMENT**
Appellant/Cross-Appellee	Decided: June 8, 2012

* * * * *

John A. Coble and Joseph F. Albrechta, for appellee/cross-appellant.

Corey Speweik and Nathan Oswald, for appellant/cross-appellee.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the judgment of the Sandusky County Court of Common Pleas which, following a trial to the court on January 27, 2011,[1] awarded appellee, Elizabeth Dodson, the sum of $87,514.17 against appellant,

[1] The trial court's judgment entry was journalized on February 7, 2011.

Arthur L. Maines, appearing pro se, on the theory of unjust enrichment, and awarded $1,000 in punitive damages and $17,194.58 in attorney fees. For the reasons that follow, we affirm the decision of the trial court, in part, and reverse, in part.

{¶ 2} This matter involves a dispute between a father and daughter concerning a house located in Sandusky County. Based on the testimony presented and the findings of the trial court, we find that appellee was living in a rented duplex with her two daughters in 2002. Appellant and his wife, appellee's mother, were concerned about the well-being of their grandchildren. They wanted a suitable and stable home for them. Because appellant was able to secure credit and appellee was not, he purchased a home at 412 S. Main Street, Clyde, Ohio. The property was deeded in appellant's name and he secured a mortgage with Wells Fargo. There was no written agreement between the parties.

{¶ 3} The trial court found that, based upon the testimony presented and the credibility of the witnesses, the parties "orally agreed that [appellee] would pay all necessary expenses for purchase of the house, and would pay all mortgage payments, taxes, insurance, utilities, maintenance, and any other expenses of the house." The trial court found that, in exchange, appellant and his wife "agreed that [appellee] should treat the house as her own; that [appellant] and his wife would have no liability or obligation with regard to the house; that [appellee] would do nothing that would impair or damage [appellant's] credit rating; and that as soon as possible [appellee] would refinance the mortgage in her name and become the owner of the house." The trial court found that

appellee "fully complied with this agreement" and "invested substantial sums of money in improving the house, all with the full knowledge of [appellant]."

{¶ 4} Based on the testimony, this court additionally finds that, after the first few months, appellee directly paid the mortgage payments to Wells Fargo. With appellant's permission, appellee included on her income tax returns the interest and property taxes she paid for the house. Often with appellant's assistance, appellee made numerous improvements to the home, including, painting, installing a new roof, windows, doors, and hot water heater, renovating the bathroom, updating the electrical system, and repairing the foundation of the crawl space. Appellee had insurance in her name that covered the contents of the house, but, as part of their agreement, appellee also paid the premium on the insurance in appellant's name that covered the structure itself. In fact, at one point, appellee and her husband had appellant switch insurance companies so that appellee could get a better rate on the premium.

{¶ 5} In January 2006, a fire totally destroyed the house. Appellee received her settlement check for the contents of the house and used that money to pay (1) $5,500 to appellee for reimbursement of the cost to demolish the structure, (2) $500 for new house plans and a survey of the property, (3) $1,391.07 for installation of a stone driveway to be used during construction of the new house, and (4) $8,700 as a down payment on the new house. Appellee also secured approval for financing of the new house, in her name, from Fremont Federal Credit Union.

{¶ 6} In the meantime, appellant received $141,423.10 from the insurance coverage on the structure of the house, for which appellee had made the premium payments. At this juncture, appellant informed appellee that he would not allow her to re-build, but instead, he and his wife would finish building the new house and live in it themselves. Appellant paid the balance on the original mortgage with Wells Fargo and put the remaining proceeds, totaling $71,423.10, toward the purchase of the re-build. Appellant and his wife sold their former residence and put the equity from the sale of that home into the new house. Upon completion, they moved into the new house at 412 S. Main Street. During trial, appellant testified that he would not allow appellee to have the new house because he thought she demonstrated poor moral character.

{¶ 7} The trial court found that appellant had been unjustly enriched in the amount of $87,514.17, consisting of (1) $71,423.10 in insurance proceeds which appellant kept, despite never investing any of his money in the original house and never paying any insurance premiums, and (2) $16,091.07 representing the total investments appellee made in the real property after the fire, in anticipation of re-building, which improved the value of the property to appellant's benefit. The trial court also awarded appellee punitive damages and reasonable attorney fees, finding that appellee "was told she should treat the house as her own; and she thus invested her time and money in the house, and it became 'her home,'" and finding that "[t]here was no justification whatsoever for [appellant's] action in this case; and the Court can therefore only

conclude that he acted out of malice and/or in bad faith." The trial court did not address or award judgment on appellee's claims of breach of fiduciary duty, fraud, or conversion.

{¶ 8} On appeal, appellant raises the following assignments of error:

I. The trial court erred as a matter of law by awarding Ms. Dodson recovery upon an unjust enrichment theory while finding an oral contract between her and Mr. Maines.

II. The trial court erred as a matter of law by failing to find the parties' oral agreement unenforceable pursuant to the statute of frauds.

III. The trial court erred by not adjudicating the nature of the agreement between Mr. Maines and Ms. Dodson.

IV. The trial court erred against the manifest weight of the evidence in finding that Mr. Maines was unjustly enriched by the amount of the insurance proceeds.

V. The trial court erred against the weight of the evidence by ordering Mr. Maines to pay punitive damages and attorney fees without making the required findings.

VI. The trial court deprived Mr. Maines due process of law by denying him an opportunity to respond to attorney Albrechta's claimed attorney fees.

{¶ 9} In her cross-appeal, appellee raised the following assignment of error,

> The trial court erred by not granting judgment to the appellee on her claims of breach of fiduciary duty, fraud, and conversion in addition to unjust enrichment.

{¶ 10} In appellant's first and second assignments of error, he argues that the trial court erred as a matter of law concerning its interpretation and application of the parties' agreement. To the extent we find these assignments of error are interrelated, we will consider them together. Specifically, appellant argues that the trial court erred by (1) applying the doctrine of unjust enrichment, when an express contract existed between the parties, and (2) failing to find the parties' agreement unenforceable pursuant to the statute of frauds.

{¶ 11} We note that the construction and interpretation of contracts are matters of law to which this court applies a de novo standard of review. *Latina v. Woodpath Dev. Co.*, 57 Ohio St.3d 212, 214, 567 N.E.2d 262 (1991), and *Matrix Technologies, Inc. v. Kuss Corp.*, 6th Dist. No. L-07-1301, 2008-Ohio-1301, ¶ 11. De novo review requires us to conduct an independent review of the record without deference to the trial court's decision. *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993). Additionally, we note that the weight to be given the evidence and credibility of witnesses are issues left to the sound discretion of the trier of fact. *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). "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.*, 54 Ohio St.2d 279, 280, 376 N.E.2d 578 (1978).

{¶ 12} In this case, the trial court awarded judgment on the basis of unjust enrichment. A recovery pursuant to unjust enrichment, or quasi-contract, requires a plaintiff to prove by a preponderance of the evidence that "(1) the plaintiff conferred a benefit upon the defendant, (2) the defendant had knowledge of such benefit, and (3) the defendant retained the benefit under circumstances where it would be unjust for him to retain that benefit without payment." *Ross-Co Redi Mix Co., Inc. v. Steveco, Inc.*, 4th Dist. No. 95CA3, 1996 WL 54174, *3 (Feb. 6, 1996), citing *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984). *Accord Saraf v. Maronda Homes, Inc. of Ohio*, 10th Dist. No. 02AP-461, 2002-Ohio-6741, ¶ 10. In unjust enrichment cases, damages are conferred in the amount the defendant benefitted, as opposed to quantum meruit cases, where damages are the measure of the value of the plaintiff's services. *Loyer v. Loyer*, 6th Dist. No. H-95-068, 1996 WL 463728, *3 (Aug. 16, 1996).

{¶ 13} When reviewing the trial court's exercise of its equity jurisdiction, we determine whether the trial court's decision was an abuse of discretion. *KeyBank, N.A. v. MRN Ltd. Partnership*, 193 Ohio App.3d 424, 2011-Ohio-1934, 952 N.E.2d 532, ¶ 44 (8th Dist.), citing *Sandusky Properties v. Aveni*, 15 Ohio St.3d 273, 274-275, 473 N.E.2d

798 (1984). The trial court's decision will not constitute an abuse of discretion unless it was arbitrary, unreasonable, or unconscionable. *Aveni*.

{¶ 14} Generally, "a party may not recover for unjust enrichment when an express contract is involved." *Loop v. Hall*, 4th Dist. No. 05CA3041, 2006-Ohio-4363, ¶ 23, citing *Shannon v. Lutz*, 2d Dist. No. 98CA21, 1998 WL 853053 (Dec. 11, 1998). In the absence of fraud, illegality or bad faith, where a contract describes the nature of services to be rendered and the compensation to be paid, plaintiffs are entitled to compensation only in accordance with the terms of the agreement, and an equitable doctrine is inapplicable. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 55, 544 N.E.2d 920 (1989), citing *Ullman v. May*, 147 Ohio St. 468, 72 N.E.2d 63 (1947), paragraph three of the syllabus.

{¶ 15} However, pursuant to Ohio law, no action shall be brought concerning a claim to real property unless the agreement upon which such action is brought is in writing and signed by the party charged with assigning or granting the interest. R.C. 1335.05. This prohibition against assigning or granting an interest in real property without a writing is known as the statute of frauds. R.C. 1335.04. In this case, there was no written agreement regarding the ownership interests of the parties.

{¶ 16} Nevertheless, "'[e]quity will, in proper cases, grant specific performance of an oral contract within the statute [of frauds] if by successfully invoking the defense of the statute one of the parties to the contract would thus be enabled to defraud the other party, or to unjustly enrich himself at the other's expense.'" *KeyBank* at ¶ 63, citing

Wallace v. Wallace, 7th Dist. Nos. 82-C-7 and 82-C-8, 1983 WL 6672, *2 (June 3, 1983), quoting 25 Ohio Jurisprudence 2d, Statute of Frauds, Section 239 (1961). Equitable relief should not be denied where the lessee has made valuable improvements to the property. *Ward v. Washington Distribs., Inc.*, 67 Ohio App.2d 49, 54, 425 N.E.2d 420 (6th Dist.1980). *See also KeyBank* and *Brown v. Brown*, 5th Dist. No. 04CA000018, 2005-Ohio-1838, ¶ 28-29.

{¶ 17} The statute of frauds may be waived by failing to plead the defense or by failing to object to the admission of the oral contract in evidence at trial. Civ.R. 8(C); *McSweeney v. Jackson*, 117 Ohio App.3d 623, 629, 691 N.E.2d 303 (4th Dist.1996), citing *Houser v. Ohio Historical Soc.*, 62 Ohio St.2d 77, 79, 403 N.E.2d 965 (1980), and *Lovely v. Percy*, 160 Ohio App.3d 269, 2005-Ohio-1591, 826 N.E.2d 909 (2d Dist.). If the statute of frauds is waived, the defense is inapplicable and the oral contract may be enforced as though it had satisfied the requirements of the statute. *See Rottman v. Wernsing*, 26 Ohio App. 383, 386, 160 N.E. 491 (1st Dist.1927). *See also Wade v. De Hart*, 26 Ohio App. 177, 180, 159 N.E. 838 (1st Dist.1927). Appellant pled the statute of frauds as an affirmative defense in his original answer to appellee's complaint, but never raised it again, either in response to appellee's amended complaint or during the admission of evidence concerning the oral contract at trial.

{¶ 18} In this case, we concur with the trial court that the parties agreed appellant would secure the house in his name on appellee's behalf. In exchange, appellee could treat the house as her own by living there and ensuring that she paid all necessary

expenses for the purchase of the house, including, the mortgage, taxes, insurance, utilities, maintenance, and any other expenses of the house. When she could obtain financing in her own name for the balance due on the mortgage, appellant would deed the property to appellee.

{¶ 19} After the fire, appellee obtained financing in her own name and made improvements to the property in anticipation of re-building; however, appellant refused to transfer the property to appellee. Appellee and her mother believed appellant would give appellee the balance of the insurance proceeds, after the mortgage was paid, and apply those funds toward the re-building of the property, but there was no evidence presented that appellant agreed to this. Ultimately, the trial court found that there was no justification for appellant's refusal to honor the parties' agreement and held that appellant's actions amounted to malice and/or bad faith.

{¶ 20} However, rather than finding that appellant breached the parties' agreement or a fiduciary duty, or committed fraud, the trial court awarded appellee damages based upon the equitable doctrine of unjust enrichment. Thus, instead of ordering appellant to transfer the property to appellee, or reimburse her for the amount she expended toward the purchase of the home and improvements, the trial court held that appellant was unjustly enriched by the value of the expenditures appellee made in anticipation of building a new house and by the amount of insurance proceeds appellant received that exceeded the balance due on the mortgage. In determining appellee's recovery, the trial court reasoned that appellee made investments in the new house and paid all expenses

associated with purchasing the original house, including paying the insurance premiums, and that appellant invested nothing in the property, paid nothing for the property, and paid nothing for the insurance premiums.

{¶ 21} Appellant argues that the trial court erred as a matter of law when it awarded judgment on the basis of unjust enrichment because an express contract existed between the parties and no fraud, illegality or bad faith was found. Appellant also argues that, to the extent the trial court enforced the parties' express agreement, the trial court erred because the statute of frauds prohibits its enforcement.

{¶ 22} We disagree with appellant's arguments for several reasons. First, although the parties' agreed that appellee would pay all insurance premiums, there was no express agreement between the parties concerning the distribution of insurance proceeds in the event of a loss. Similarly, we concur that the parties agreed that appellee would pay all expenses associated with purchasing the original house; however, we find that there was no agreement between the parties obligating appellee to expend funds toward reconstruction of the house, particularly, for appellant's benefit and use. As such, we hold that the trial court was at liberty to make an equitable award concerning the insurance proceeds and the funds spent toward construction of a new house.

{¶ 23} Second, even if there was a contract describing the nature of services to be rendered and the compensation to be paid, because the trial court held that appellant acted

with malice and/or in bad faith,[2] the trial court was allowed to disregard the terms of the contract and apply the equitable doctrine. Third, appellant waived the defense of the statute of frauds by failing to raise it at trial. Fourth, even if appellant preserved the defense, we find that the statute of frauds is inapplicable in this case because there was no express agreement between the parties regarding their obligations, rights, or interests in the property in the event that the original house was destroyed.

{¶ 24} Accordingly, we find that the trial court did not abuse its discretion by applying an equitable recovery because no applicable express agreement existed and, even if one existed, equity applies to prevent appellant from unjustly enriching himself at appellant's expense. The trial court's judgment for appellee against appellant in the amount of $87,514.17 is, therefore, affirmed. Appellant's first and second assignments of error are found not well-taken.

{¶ 25} Appellant argues in his third assignment of error that the trial court erred by not adjudicating the nature of the agreement between him and appellee, i.e., whether the agreement constituted a land installment contract, tenancy, option contract, etc. Appellant argues that the nature and character of the agreement was critical to the trial court's ultimate conclusions of law, to the equities upon which they turned, and to this court's ability to review the same.

[2] We will address appellant's argument that there was insufficient evidence presented to support a finding of bad faith when we consider appellant's fifth assignment of error with respect to the trial court's award of attorney fees.

{¶ 26} Appellant asserts that the parties' agreement did not constitute a land installment contract because it failed to satisfy all the requirements set forth in R.C. 5313.02. Since there was no writing, appellant asserts that the agreement violated the statute of frauds and, therefore, could not be a lease, but, instead became a tenancy at will. Upon payment and acceptance of the rent payments, the agreement converted into a periodic tenancy. Finally, appellant asserts that the agreement was not an option contract because it violated the statute of frauds, there was no meeting of the minds that appellee would become owner of the house, and, even if the periodic tenancy was coupled with an option to acquire, appellee never exercised that option.

{¶ 27} It is evident that the parties erroneously attempted to form an agreement to assign or grant an interest in real property without a writing. Since the trial court did not enforce this agreement, however, we have already held that the statute of frauds does not apply to the facts in this case. Even if the trial court considered the parties' oral agreement in determining appellee's entitlement to an equitable award, such consideration was not erroneous because the trial court did not consider the parties' agreement for the purpose of proving ownership of the property. *See KeyBank*, 193 Ohio App.3d 424, 2011-Ohio-1934, 952 N.E.2d 532, at ¶ 62.

{¶ 28} Because the trial court applied an equitable remedy, rather than awarding appellee ownership in the property, we find that it was unnecessary for the trial court to define the precise nature of the parties' attempted contract. We further find that the parties' relationship was irrelevant to the trial court's determination of the amount of

benefit appellant retained, without consideration, from appellee. Appellant's third assignment of error, therefore, is found not well-taken.

{¶ 29} Appellant argues in his fourth assignment of error that the trial court's decision that appellant was unjustly enriched by the amount of the insurance proceeds was against the manifest weight of the evidence. Appellant asserts that the casualty insurance policy was a personal indemnity contract that inured to appellant's benefit, as title owner of the property. According to appellant, appellee was a tenant and the payments she made represented rent and did not entitle her to any insurance proceeds for the structure. Appellant also asserts that the parties had no agreement concerning distribution of the insurance proceeds and, therefore, appellee failed to protect her interest by having her name added to appellant's insurance policy or obtaining a policy of her own on the structure.

{¶ 30} Appellant relies, in part, on *Gilbert v. Port*, 28 Ohio St. 276, 1876 WL 8 (1876), paragraph seven of the syllabus, wherein the Ohio Supreme Court held that

> The contract of insurance does not attach to the property insured, nor, in case of sale, either before or after loss, does it pass to the purchaser by operation of law, in the absence of a stipulation to that effect. It is a contract of indemnity against the loss covered by the policy, and inures to the benefit of the person with whom it is made or those falling within its terms. As soon as the interests of such persons cease, it is at an end.

{¶ 31} We agree that the insurance policy on the structure was in appellant's name; however, we find that the trial court's equitable judgment was not contrary to the holding in *Gilbert.* Unlike this case, in *Gilbert*, there was a written lease which granted the tenant an option to purchase the property. The tenant was required by the terms of the lease to pay the premium on the insurance for the property, which listed the owner trustee as the insured. After the building burned down, the tenant attempted to purchase the property pursuant to his option and collect the insurance proceeds. In determining the dispute, the Ohio Supreme Court held that the insurance proceeds, which far exceeded the amount owed on the property, had to be applied to the outstanding mortgage, which benefitted both the owner trustee and the tenant, who had exercised his option to purchase the property. The court also made the following holdings which have relevance to this case:

> Insurance of a building against fire is a personal contract. It is a contract of indemnity with the person whose interest in the building is insured, to indemnify him against any loss which he may sustain in case the building is destroyed or damaged by fire. It does not pass to a purchaser of the building insured.
>
> * * *
>
> But where, as here, the premiums have been paid by the vendee, a different rule prevails. In such cases, the underwriter is denied the benefit of any subrogation, and this for this reason, among others, that the payment

of premiums by the vendee is sufficient notice to the underwriter that the policy is for his benefit.

* * *

[I]f the vendee paid the premium, the vendee is entitled to the benefit of that compensation for the loss which his premium purchased.

(Citations omitted.) *Id.*, 28 Ohio St. at 284-287.

{¶ 32} In this case, no specific performance, such as the sale of the property to appellee was awarded. Nevertheless, the trial court determined that equity demanded that appellee was entitled to the insurance proceeds that exceeded the amount due on the mortgage. We find that the trial court's award is supported by competent credible evidence and is not against the manifest weight of the evidence.

{¶ 33} For approximately three years, appellee made the premium payments for insurance on a house she believed she was purchasing and made substantial, permanent improvements to the house, increasing its market value. Whereas, appellant had nothing invested in the property except for the outstanding mortgage, which was satisfied in whole by the insurance proceeds appellee paid for, and his credit-worthiness, which appellee never tarnished. When the house burned down, however, appellee did not receive the benefit of her work, investment, or improvements by receiving the excess insurance proceeds paid beyond the balance due on the mortgage. Rather, appellant received that benefit—a benefit for which he did not pay. Under these circumstances, we

find that appellee, as purchaser of the insurance, was entitled to benefit from the compensation for the loss which her premium purchased. *See Gilbert.*

{¶ 34} Appellant, however, additionally asserts that appellee was a mere tenant and that any payment made by her amounted to rent. We find that this assertion is contrary to appellant's testimony wherein he stated that the amount appellee paid each month, in the form of a mortgage and other associated payments, far exceeded the rental value for a property of that nature. Accordingly, we find appellee's payments were akin to those made by a property owner. Although appellee was not a property owner, given the parties' familial relationship, appellee's reliance on appellant's representations, the money and time appellee invested in the property, and the fact that appellee never jeopardized appellant's credit or exposed him to liability, we find that the trial court did not abuse its discretion in finding that equity mandated a recovery for appellee. We find that it would be unjust for appellant to retain the excess insurance proceeds for his own benefit as such a recovery would result in a windfall for appellant at appellee's expense. Similarly, with respect to the $16,091.07 appellee paid in anticipation of re-building her home, we find that appellant kept and/or made use of those expenditures when he ultimately built the house for himself. Equity requires appellant to reimburse appellee the amount of those expenditures, as well. Appellant's fourth assignment of error is found not well-taken.

{¶ 35} Appellant argues in his fifth assignment of error that the trial court's award of punitive damages and attorney fees lacked required findings and was against the

manifest weight of the evidence. Specifically, appellant argues that the trial court's conclusion that appellant acted without "justification" does not equate to conscious wrongdoing and, therefore, as a legal matter, does not support a finding that appellant "acted out of malice and/or in bad faith," as the trial court found. Without a finding of malice or bad faith, appellant asserts that the trial court's award of punitive damages was against the manifest weight of the evidence and its basis for awarding attorney fees was insufficient.

{¶ 36} We review the determination of damages under an abuse of discretion standard. *See Roberts v. U.S. Fid. & Guar. Co.*, 75 Ohio St.3d 630, 634, 1996-Ohio-101, 665 N.E.2d 664. We find appellant's assignment of error well-taken with respect to punitive damages, albeit for reasons other than those raised in appellant's brief, and not well-taken regarding attorney fees.

{¶ 37} Under Ohio law, the general rule is that punitive damages may only be recovered in actions involving intentional torts. *See Mabry-Wright v. Zlotnik*, 165 Ohio App.3d 1, 2005-Ohio-5619, 844 N.E.2d 858, ¶ 18 (3d Dist.) ("[P]unitive damages are generally not recoverable in an action for breach of contract."), citing *Digital & Analog Design Corp. v. N. Supply Co.*, 44 Ohio St.3d 36, 45-46, 540 N.E.2d 1358 (1989). However, where the breach of contract action is accompanied by a connected tort that is fraudulent, wanton, reckless, malicious, or oppressive, punitive damages may be appropriate. *Zlotnik* at ¶ 19. *See also Hofner v. Davis*, 111 Ohio App.3d 255, 259, 675

N.E.2d 1339 (6th Dist.1996), and *Burns v. Prudential Secs., Inc.*, 167 Ohio App.3d 809, 2006-Ohio-3550, 857 N.E.2d 621 (3d Dist.).

{¶ 38} "[I]t is well-settled that claims for unjust enrichment sound in contract rather than tort." *Complete Gen. Constr. Co. v. Koker Drilling Co.*, 10th Dist. No. 02AP-63, 2002-Ohio-4778, ¶ 28, fn. 1. In this case, the trial court awarded damages on the basis of unjust enrichment and made no finding that any intentional tort was committed. Accordingly, because no compensatory or actual damages were awarded to appellee for an intentional tort, we find that appellee is not entitled to punitive damages. *See Nelson v. Motorists Mut. Ins. Co.*, 1st Dist. No. C-850841, 1986 WL 9782, *1 (Sept. 10, 1986). The trial court's award of $1,000 in punitive damages was an abuse of discretion and contrary to law. Appellant's fifth assignment of error is found well-taken in this regard.

{¶ 39} Appellant additionally argues that the trial court erred in awarding appellee attorney fees when (1) there was no applicable statute authorizing an award of attorney fees, (2) punitive damages were not awardable, and (3) the trial court's finding of bad faith was an inappropriate extension of its finding that appellant acted without justification. Appellant is correct that, generally, a prevailing party in a civil action may not recover attorney fees as part of the cost of litigation. *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 7. Exceptions to the general rule exist where a statutory provision allows for an award of attorney fees, an enforceable contract specifically provides for them, where punitive damages are awarded in tort cases

involving fraud, insult, or malice, or where the party against whom the fees are taxed was found to have acted in bad faith. *Nottingdale Homeowners' Assn., Inc. v. Darby*, 33 Ohio St.3d 32, 33-34, 514 N.E.2d 702 (1987); *Pegan v. Crawmer*, 79 Ohio St.3d 155, 156, 1997-Ohio-176, 679 N.E.2d 1129; *Columbus Fin., Inc. v. Howard*, 42 Ohio St.2d 178, 183, 327 N.E.2d 654 (1975); and *Crockett v. Robinson*, 67 Ohio St.2d 363, 369, 423 N.E.2d 1099 (1981).

{¶ 40} In this case, there is no applicable statutory provision, no contract providing for attorney fees, and no allowable punitive damages award. Therefore, we must consider whether the trial court's finding that there was no "justification" for appellant's decision to keep the excess insurance proceeds, the expenditures made in anticipation of the re-build, and the new house, was sufficient to make a finding that appellant acted in "bad faith." "Justify" means "to prove or show to be just, right, or reasonable" or "to show to have had a sufficient legal reason." *Merriam-Webster's Collegiate Dictionary* 680 (11th Ed.2003).

{¶ 41} "Bad faith" is defined under Ohio law as "* * * a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another." *Kalain v. Smith*, 25 Ohio St.3d 157, 159, 495 N.E.2d 572 (1986), fn. 1.

Moral obliquity means a deviation in one's behavior from the principles of right and wrong or from moral integrity and righteousness.[3]

{¶ 42} Appellant's actions demonstrated that he led his daughter, appellee, to believe that he would deed her the house once she obtained financing to pay the balance due on the mortgage. Appellee paid all expenses associated with purchasing the house and paid for insurance to protect the amount of appellant's liability in the house. According to appellant, appellee's monthly payments exceeded the amount of rent that would typically be paid for a house of that type. When the house was lost by fire, the insurance paid off appellant's liability, i.e., the balance due on the mortgage. Assuming the proceeds from insurance would be invested into the new house, appellee arranged for financing to re-build the house. Appellant, however, refused to deed appellee the property. Instead, appellant kept all the insurance proceeds from the house that he had promised to his daughter, made use of the expenditures she made in order to re-build, and moved into the new house appellee had planned. Appellant's own words best describe his state of mind at the time he decided to unjustly enrich himself at appellee's expense:

> Q. [by appellee's counsel] [W]hat happened to the fact that you wanted to provide a house for your daughter and your grandchildren?
>
> A. [by appellant] Because when she started doing things I didn't approve of –

[3] Derived from the definitions for "Moral" and "Obliquity" as set forth in *Merriam-Webster's* at 807 and 856.

Q. Well, she had been doing things you didn't approve of for a long time?

A. For a long time, and I got tired of it.

Q. So for some reason you changed your tune?

A. Yeah, we had an agreement, she didn't live up to it, end of story.

Q. Well, what did she not live up to?

A. She should not have men. I have two granddaughters there and she treated that bedroom like it had a revolving door on it. And that was inappropriate behavior for her. And then when she had that abortion and killed that baby,[4] that was the straw that broke the camel's back and no way in God's green earth would I let her near that house or anything else.

Q. [S]o when the check came, you decided to just take the money yourself?

A. I did not take the money myself.

Q. And the punishment that you're looking upon your daughter for what you consider moral wrongs –

A. That's right.

Q. – you decide to cash in on that?

A. I did not decide to cash in on anything.

[4] Appellee testified that her body was unable to sustain the pregnancy and she lost a baby daughter in her fifth month.

Q. You took the money, right?

A. I took the money that was due to me.

Q. And you sold your own house?

A. I sold my house.

Q. And you moved into a brand new house –

A. Brand new.

Q. – and left your daughter without a house?

A. She – yeah.

Q. Yes. Okay.

{¶ 43} Appellant testified that appellee kept moving and he desired his grandchildren to have a stable home. He, therefore, arranged for appellee to have a house she could buy and have as her own by using his credit-worthiness to obtain financing. But, appellant's moral indignation caused him to want to punish his daughter for her behavior. We find that appellant was vengeful in his decision to keep the excess insurance proceeds and appellee's expenditures for the new home. Accordingly, we find that the trial court's finding of bad faith, i.e., that appellant acted with "a dishonest purpose, moral obliquity, [and/or] conscious wrongdoing," *see Kalain* at 159, fn. 1, was supported by competent, credible evidence and within the manifest weight of the evidence. We, therefore, find that the trial court's award of attorney fees was not an abuse of discretion. Appellant's fifth assignment of error is found not well-taken with respect to the trial court's decision to award attorney fees.

{¶ 44} Appellant argues in his sixth assignment of error that he was denied procedural due process by the trial court's award of attorney fees in the amount of $17,194.58 without giving appellant 14 days to respond and be given "an opportunity to be heard as to whether such amount was 'reasonable and necessary.'" During trial, the trial court admitted into evidence appellee's exhibit No. 16 that set forth the amount of attorney fees incurred by appellee. Appellant did not object. Appellee testified that the $17,194.58 was both reasonable and necessary expenses incurred during the four years' of litigation. Appellant made no objection and did not question appellee concerning the itemized attorney fees.

{¶ 45} During closing arguments, appellee's counsel indicated he would be filing a brief on the matter of attorney fees, which was filed that day. At the conclusion of appellee's counsel's closing arguments, the trial court asked appellant for his response, to which he replied, "Biggest line of BS I ever heard, sir. That's all I got to say. I owe her nothing. I never told her that was her home and it never will be." The trial court then adjourned and stated, "we'll come back next Thursday [February 3, 2011] at 3:00." There is no indication whether the parties reconvened on February 3, 2011; however, the trial court's judgment entry was file-stamped on February 4, 2011.

{¶ 46} Loc.R. 6(C)(1) of the Court of Common Pleas of Sandusky County, General Division, states that

> C. All motions, except in domestic relations cases, shall be accompanied by a memorandum setting forth the grounds therefore, and citing the authorities relied upon. * * *
>
> 1. *Unless the Court directs otherwise,* upon the filing of a motion, any party opposing the motion shall file a Response by the 14th day after receipt of the motion, and the moving party may file a Reply by the 7th day after receipt of the Response. The motion shall thereupon be deemed submitted, and shall be decided by the Court, without oral argument, unless counsel has requested oral argument in conjunction with the filing of the Response or /Reply. (sic)

(Emphasis added.)

{¶ 47} It is well-settled that a trial court has the discretion to control its own docket and the progress of the proceedings in its court. *Paramount Parks, Inc. v. Admiral Ins. Co.*, 12 Dist. No. CA2007-05-066, 2008-Ohio-1351, ¶ 37. "Likewise, courts are given great latitude in following their own local rules." *Id.* "'[L]ocal rules are of the court's own making, procedural in nature, and not substantive principles of law. Accordingly, it has been held that there is no error when, in its sound discretion, the court decides that the peculiar circumstances of a case require deviation from its own rules.'" (Citations omitted.) *Yanik v. Yanik*, 9th Dist. No. 21406, 2003-Ohio-4155, ¶ 9, quoting *Lorain Cty. Bank v. Berg*, 9th Dist. No. 91CA005183, 1992 WL 174633, *2 (July 22, 1992).

{¶ 48} Under the facts and circumstances of this case, we find that appellant was not denied his right to due process. The matter was discussed during trial, yet appellant made no objection and did not indicate to the trial court that he intended to respond further to appellee's claim for attorney fees. Also, although appellant was given notice by the trial court that the parties would reconvene on February 3, appellant did not request that the trial court delay its ruling to afford him 14 days to respond to appellee's request. Accordingly, we find that the trial court's decision to expedite its ruling on appellant's complaint and motion for attorney fees was not arbitrary, unreasonable, or unconscionable. Appellant's sixth assignment of error is found not well-taken.

{¶ 49} Appellee raises a single assignment of error in her cross-appeal. Appellee argues that the trial court erred by not granting her judgment on her claims of breach of fiduciary duty, fraud, and conversion. The trial court never ruled on appellee's claims in this regard and we deem them to be denied. However, we note that had the trial court awarded appellee judgment on any of these tort claims, she would have been precluded from receiving an equitable award on the basis of unjust enrichment. *See Saraf v. Maronda Homes, Inc.*, 10th Dist. No. 02AP-461, 2002-Ohio-6741, ¶ 12 ("[W]here damages are available for breach of contract or in tort, the party cannot also invoke the equitable remedy for unjust enrichment."), citing *Banks v. Nationwide Mut. Fire Ins. Co.*, 10th Dist. No. 99AP-1413, 2000 WL 1742064, * 5 (Nov. 28, 2000). *See also RFC Capital Corp. v. EarthLink, Inc.*, 10th Dist. No. 03AP-735, 2004-Ohio-7046, ¶ 80. Insofar as we have already found that appellee is entitled to the $87,514.17 award against

appellant and attorney fees in the amount of $17,194.58, we find that appellee's cross-assignment of error is not well-taken.

{¶ 50} On consideration whereof, the court finds substantial justice has been done the party complaining and the judgment of the Sandusky County Court of Common Pleas is affirmed with respect to the award of $87,514.17 award for unjust enrichment entered against appellant, Arthur L. Maines, and for attorney fees in the amount of $17,194.58, but is reversed with respect to the $1,000 award of punitive damages. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE