

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001236-MR

KEVIN R. COLWELL

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 01-CI-00198

HOLLAND ROOFING OF CINCINNATI, INC.;
HOLLAND ROOFING OF INDIANAPOLIS, INC.;
HOLLAND ROOFING GROUP, LLC;
HOLLAND ROOFING RESIDENTIAL OF NORTHERN
KENTUCKY, LLC;
HOLLAND ROOFING OF ATLANTA, LLC;
HOLLAND ROOFING, INC.;
HOLLAND ROOFING OF LOUISVILLE, INC.;
HOLLAND ROOFING OF COLUMBUS, INC.;
HOLLAND ROOFING RRM, INC.; and
HOLLAND ROOFING OF NASHVILLE, INC.

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING AND REMANDING IN PART

** ** * * *

BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE: Kevin R. Colwell (Kevin) appeals the trial court's award of punitive damages and attorney's fees and costs upon issuing summary judgment in a civil action brought by his

former employer for conversion and breach of fiduciary duty. Two questions are presented in this appeal. Does a \$10,088.82 punitive damage award, which is three times the amount of the compensatory damages awarded, to an employer from which a management employee converted property exceed the constitutional limit? Did the trial court abuse its discretion in awarding attorney's fees to the employer? The first question concerning the constitutionality of the punitive damage award is not preserved for our review. As to the second question, we conclude that there was no statutory or contractual authority for the recovery of attorney's fees and the circumstances of the case did not compel such an award. Thus, the trial court abused its discretion in awarding attorney's fees in this case.

On February 16, 2001, the Appellees, Holland Roofing of Cincinnati, Inc., Holland Roofing of Indianapolis, Inc., Holland Roofing Group, LLC, Holland Roofing Residential of Northern Kentucky, LLC, Holland Roofing of Atlanta, LLC, Holland Roofing, Inc., Holland Roofing of Louisville, Inc., Holland Roofing of Columbus, Inc., Holland Roofing RRM, Inc., and Holland Roofing of Nashville, Inc. (Holland Roofing) filed a Complaint for Money Damages against their former employee, Kevin R. Colwell (Kevin). Holland Roofing alleged that while Kevin was employed by them as a foreman, he acted in concert with another employee and converted Holland Roofing's cash, credit

and property. In addition, Holland Roofing also alleged that in converting its property, Kevin breached his fiduciary duties of trust, loyalty, honesty, truthfulness and fair dealing. Holland Roofing sought compensatory and punitive damages and recovery of their costs and expenses including attorney's fees.

Holland Roofing's lawsuit stemmed from their discovery that Kevin had built a deck on his home using lumber and tools that Holland Roofing had unknowingly purchased by paying false purchase orders submitted by Kevin's co-worker. As a further consequence of Kevin's conduct, four months after Holland Roofing filed its civil suit, the Commonwealth's Attorney filed a felony criminal information charging Kevin with theft by deception over \$300 in Boone Circuit Court.

Three months after criminal charges were brought and while the civil suit was pending, Kevin entered a guilty plea to the single charge of theft by deception over \$300. Kevin made a motion for pretrial diversion. The trial court granted Kevin's motion for pretrial diversion and ordered Kevin to pay restitution in the amount of \$3,362.94 to Holland Roofing.

Almost one year after Kevin entered his guilty plea, Holland Roofing made a motion for summary judgment on all issues of Kevin's liability for conversion and breach of fiduciary duty. The trial court granted Holland Roofing's motion for summary judgment and entered a judgment for compensatory damages

in the sum of \$3,362.94, plus interest until paid, provided that the judgment amount shall be credited by \$1,200 -- the total amount of the two payments made by Kevin to Holland Roofing under the restitution ordered in the criminal action. See KRS 533.030(3)(d) ("An order of restitution shall not preclude the owner of property or the victim who suffered . . . out-of-pocket loss of earnings or . . . other damages from proceeding in a civil action to recover damages from the defendant. A civil verdict shall be reduced by the amount paid under the criminal restitution order.").

In its order granting summary judgment, the trial court scheduled an evidentiary hearing to determine the amount of Holland Roofing's attorney's fees and other costs, expenses and damages. In addition, the trial court's order found that Kevin's conduct toward Holland Roofing was unlawful, illegal, willful, wanton, malicious and in total disregard of Holland Roofing's right to their property. The court held that Kevin's conduct justified an award of punitive damages.

The trial court conducted the evidentiary hearing then requested memoranda from the parties. In his memorandum in opposition to punitive damages and attorney's fees and costs, Kevin argued that punitive damages were not appropriate in this matter because of the cooperation and assistance Kevin gave to the Boone County Sheriff's Department in investigating the full

extent of his co-worker's culpability. And Kevin argued that the trial court should not allow inflated attorney's fees and costs because (1) the investigative work was performed by the Boone County Sheriff's Department; and (2) the conversion and breach of fiduciary duty action was unnecessary because the court in the criminal matter ordered restitution.

Seven months later, the trial court entered its final judgment in the civil action awarding Holland Roofing the following money damages: compensatory damages of \$3,362.94; punitive damages of \$10,088.82 (three times the principal amount of the compensatory damages); and costs and attorney's fees of \$6,838.95 (which includes plaintiffs' counsel's investigator's fees of \$1,000.00). The judgment specified the rate at which interest accrued on the final judgment and reiterated that Kevin was entitled to a credit against the judgment of all payments of restitution made in the criminal action. Kevin did not file any post-judgment motions to set aside the judgment, but he did timely file his notice of appeal.

Kevin presents two arguments in this appeal. First, Kevin argues that the Due Process Clause of the Fourteenth Amendment renders the punitive damage award in this case constitutionally unacceptable because such an award in this case is grossly excessive and arbitrary. In support, Kevin cites the "three guideposts" mandated by the United States Supreme Court

for considering whether a punitive damage award exceeds the constitutional limit: (1) the degree of reprehensibility of Kevin's misconduct; (2) the disparity between the harm or potential harm suffered by Holland Roofing and its punitive damage award; and (3) the difference between the remedy of punitive damages and the civil penalties authorized or imposed in comparable cases. BMW of North America, Inc. v. Ira Gore, 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). Second, Kevin argues that the trial court abused its discretion in awarding attorney's fees in this case.

Kevin's first argument -- the constitutionality of the punitive damage award -- was not challenged at the trial court level. Thus, it was not preserved for our review. See Combs v. Knott County Fiscal Court, 141 S.W.2d 859, 860 (Ky.App. 1940) ("It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court."). Kevin has not acknowledged that he failed to preserve this argument and has not argued that this Court should review the question under the manifest injustice rule (Rule 61.02 of the Kentucky Rules of Civil Procedure). So, we will not consider the matter further.

We move to Kevin's second argument that the trial court abused its discretion in awarding attorney's fees and costs. In support, Kevin cites the well-settled rule that

"[u]nder our law, attorney's fees are not allowable as costs in absence of statute or contract expressly providing therefore." Kentucky State Bank v. AG Services, Inc., 663 S.W.2d 754, 755 (Ky.App. 1984). As there was no statutory or contractual authority for allowing the recovery of attorney's fees in this case, the trial court erred in awarding them.

Holland Roofing argues that while the rule above is well-settled, it does not "abolish the equitable rule that an award of counsel fees is within the discretion of the court depending on the circumstances of each particular case." Kentucky State Bank, 663 S.W.2d at 755. And this Court previously found no abuse of discretion in a trial court's award of attorney's fees in the absence of statutory or enforceable contractual authority based on evidence that a person owing fiduciary obligations acted in bad faith. See Batson v. Clark, 980 S.W.2d 566, 576-77 (Ky.App. 1998).

We do not believe that Batson announces a new equitable doctrine allowing the recovery of attorney's fees in cases succeeding on a wrongful conversion or breach of fiduciary duty claim. In Batson, the prevailing parties recovered attorney's fees totaling \$399.50. See id. at 577. Such fees were initially presented as part of their expectation of damages on the breach of contract claim. See id. at 576. They were not the attorney's fees incurred by the prevailing party in

prosecuting the action, as Holland Roofing was essentially awarded in this case. Recognizing the rule that attorney's fees are not allowable as costs in the absence of a statute or contract expressly providing therefore, the Batson court noted the equitable rule and found no abuse of discretion under the circumstances. See id. at 577.

Returning to the award of attorney's fees in this case, we do not believe that the circumstances of this case compel the award of attorney's fees. We conclude the trial court abused its discretion in awarding Holland Roofing its attorney's fees in the absence of a statute or enforceable contract. Thus, we reverse and remand to the trial court for the issuance of an order revising the damages award consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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