IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

American Family Insurance Co.,	:	
Plaintiff,	:	
vs.	:	Case No. 2013-CV-04-004005
	:	Judge Julie Lynch
Three-C Body Shop,	:	Magistrate Timothy McCarthy
Defendant.	:	

DEFENDANT THREE-C BODY SHOP'S MOTION FOR RECONSIDERATION

NOW COMES Defendant, Three-C Body Shop, by and through its counsel, and respectfully moves for reconsideration of the January 21, 2015 Magistrate's Decision Following Bench Trial. The reasons for said motion are more fully set forth in Defendant's memorandum in support is attached hereto and hereby incorporated in its entirety as if fully rewritten herein.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

Defendant, Three-C Body Shop, respectfully submits that a partial reconsideration of the Magistrate's Decision is warranted. Plaintiff filed a "Complaint for Replevin," seeking return of a motor vehicle, and additionally alleged a Consumer Sales Practices Act claim. Plaintiff did ***not*** allege any other claims in the Complaint and no other causes of action could conceivably be inferred from the Complaint.

If Plaintiff wished to allege a breach of contract action, Plaintiff should have filed a motion with the Court to amend the complaint. The Magistrate's Decision finding for the Plaintiff based on an implied-in-fact contract theory is inequitable and, based on the reasons outlined in the instant memorandum, the Defendant requests that the Magistrate's Decision be reconsidered, vacated and reversed.

I. Procedural History

Plaintiff, a casualty insurance company, filed suit against Defendant on April 10, 2013, which was styled "***Complaint in Replevin***." In the six-paragraph Complaint, Plaintiff alleged that Defendant, an automobile repair shop, wrongfully refused to return possession of a motor vehicle to Plaintiff. Paragraphs 5 and 6 of the Complaint state Plaintiff's claims as follows:

> 5. Defendant *wrongfully refused to return possession* of the Vehicle to Plaintiff *in order to coerce Plaintiff to pay unreasonable costs and charges* to which Defendant is not entitled. Such attempt to collect such costs and charges are further in direct violation of Defendant's own prior representations to Plaintiff and are *in violation of the Consumer Practices Act, R.C. § 1345.02*, governing "Unfair or Deceptive Acts or Practices[.]"
>
> 6. As a result of Defendant's wrongful refusal to return possession of Plaintiff's Vehicle, *Plaintiff has been forced to file this lawsuit in order to have the Vehicle returned to its lawful possession*. Plaintiff has also been damaged by Defendant's unlawful refusal to return the Vehicle.

(emphasis added).

Paragraphs 5 and 6 clearly allege ***two claims***: (1) ***violation of the Consumer Sales Practices Act*** by *wrongfully refusing to return possession of the Vehicle* for the purpose of coercing the payment of costs and charges; and (2) ***replevin*** based on a *refusal to return possession* of the vehicle. Based on these sole allegations, Plaintiff sought recovery of the vehicle and agreed to "submit to a damages hearing, once possession of the Vehicle [was] awarded." On the same date the Complaint was filed, Plaintiff filed a Motion for Order of Possession, requesting that Defendant return the vehicle.

On April 26, 2013, Defendant filed a Request for Hearing for the purpose of disputing the claim that Defendant was in possession of the vehicle. The Court granted Defendant's request and a hearing was scheduled. *On July 18, 2013, Plaintiff filed a Motion to Dismiss Prior Motion for Order of Possession, asserting that Defendant had turned over possession of the vehicle.* The Court granted the motion and vacated the hearing. The case was referred to Magistrate Timothy McCarthy for a bench trial, which was held on September 29, 2014.

The Magistrate issued his decision on January 21, 2015 finding that: (1) Plaintiff did not satisfy the "consumer" requirement for the purposes of a Consumer Sales Practices Act claim; and (2) based on an implied-in-fact contract theory, Plaintiff was entitled to $2,532.50 for the "reasonable value of services."

Defendant respectfully disagrees with the Magistrate's Decision ruling in favor of Plaintiff and awarding damages based on a contractual theory. In this motion, Defendant argues that based on Plaintiff's Complaint and subsequent dismissal of Plaintiff's Motion for Order of Possession, the only relief that could have been granted included: (1) damages flowing from wrongful withholding of the vehicle; and/or (2) damages arising out of the alleged violation of the Consumer Sales Practices Act. Because Plaintiff did not plead an implied contract claim and

did not request the Court to amend its Complaint to plead an implied contract claim and because Defendant did not consent to litigate such a claim at the bench trial, damages based on a contract claim were erroneously awarded.

II. The Bench Trial

At the beginning of the trial, prior to calling witnesses, Plaintiff summarized the case to the Magistrate as a dispute regarding an insufficient refund. Plaintiff represented that the amount that Plaintiff's insured originally paid to Defendant for the projected repairs to the vehicle was higher than the work subsequently performed and, thus, Plaintiff was entitled to a higher refund. In support of this claim, Plaintiff called Allen Brown, the Physical Damage Manager of Plaintiff's company, to testify about the prevailing hourly rates of repair shops in the area and to express the opinion that Defendant provided Plaintiff with an inflated invoice. This testimony was completely irrelevant to the two claims in Plaintiff's complaint and ultimately worked to confuse the Court. On its face, the Complaint alleged that Defendant refused to return possession of the vehicle in order to *coerce* the collection of extra charges and that the attempt to collect those extra charges was in violation of the Consumer Sales Practices Act.

For the purpose of directing the Court back to the real issues of this case, Defendant cross-examined Mr. Brown with inquiries relevant to the Consumer Sales Practices Act and replevin claims. Mr. Brown testified to the accuracy of a certified copy of the official title record for the vehicle at issue, which was admitted into evidence as Defendant's Exhibit 1. The title record reflected, and Mr. Brown agreed, that Plaintiff received legal title to the Vehicle on September 19, 2011; that Plaintiff transferred the vehicle out of county to another division of its company on October 10, 2011; that Plaintiff transferred title to Sardis Auto Parts Sales, Inc. on October 25, 2011; and that Sardis transferred title to a private owner on December 20, 2011. *Mr.*

Brown further testified that ***Plaintiff had actual possession of the vehicle on October 5, 2011*** *because that was the day IAA (Insurance Auto Auctions) picked up the vehicle from Defendant's lot on behalf of Plaintiff.*

During the bench trial, Defendant highlighted the fact that ***Plaintiff's Complaint for Replevin*** (i.e. claim for return of the vehicle) ***was filed on April 10, 2013***, which was over one year after Plaintiff had already sold the vehicle to Sardis. Thus, it was Defendant's position that Plaintiff filed a fraudulent complaint by alleging a cause of action that it knew was fabricated and that no damages could flow from the unwarranted replevin claim.

Additionally and notably, Mr. Brown explicitly testified that Plaintiff had ***no contractual relationship with Defendant***. The only reason that Defendant, during the bench trial, addressed all criticisms related to its estimates and hourly rates without objection was based on its assumption that Plaintiff was attempting to establish damages for the Consumer Practices Act claim and not a breach of contract claim. This assumption was reasonable because nowhere in the Complaint did Plaintiff allege that Defendant breached any sort of contract. Accordingly, at the close of the Plaintiff's case, Defendant motioned for a directed verdict, which Defendant renewed at the end of the trial. Defendant supported its motion for directed verdict as follows[1]:

> On the grounds [that] there has been *no wrongful withholding of the vehicle* and that American Family by law is not considered a consumer under the Ohio Consumer Sales Practices Act. The evidence showed that American Family had possession of the vehicle on September [2014]. The title was transferred September 19th [2011]. They . . . picked it up October 5th. We didn't charge for storage. There is no proof that we held, according to the certified title, that we held on to the vehicle at the time that Mr. Brown prepared his complaint or the time his complaint was even filed. The complaint for Replevin under 2737.14—the damages—they have to be proximately resulting from the taking, withholding, or detention of the vehicle. There was no detention of the vehicle by Three-C. I would also state that *without us withholding the vehicle, there cannot be a coercion to pay unreasonable costs or charges.*

[1] The quote is taken from the Court's video recording of the trial.

The Magistrate did not rule on the motion.

III. Argument

I. Plaintiff did not properly allege a contract claim, thereby limiting its remedies to those available under a successful replevin claim or a successful Consumer Practices Act claim.

Defendant respectfully submits that the Magistrate erred by finding in favor of Plaintiff based on principals of contract law. Plaintiff voluntarily chose to file a complaint for replevin and to allege a claim pursuant to the Consumer Sales Practices Act. As such, Plaintiff bound itself to the laws, burdens, defenses, ***and available remedies*** applicable to those two specific causes of actions.

As in any legal proceeding, if Plaintiff wanted to bring an additional claim for breach of contract, Plaintiff could have either filed such a claim in its original complaint or filed a motion with the Court to amend its complaint. Therefore, not only did Plaintiff deceptively file a Complaint for Replevin when it knew Defendant no longer possessed the vehicle (as established from Mr. Brown's aforementioned testimony and the certified title report), Plaintiff also inaccurately stated in its brief to the Magistrate, submitted subsequent to the bench trial, that "Plaintiff ha[d] a cause of action for damages . . . under a contract theory [.]"

Civil Rule 8 requires that a pleading contain a short and plain statement of the claim and a demand for judgment for the relief to which the party claims to be entitled. "Notice pleading" under Civ. R. 8(A) and 8(E) is based on the idea of providing "***fair notice*** of the nature of the action" and to allow the adverse party "an ***opportunity to respond***." *Deutsche Bank Natl. Trust Co. v. Moore*., 2012-Ohio-5549, ¶ 6 (6th Dist.) (emphasis added). Even though the Magistrate interpreted this action to be "based on the law of contract," it is not the court's job to rewrite a complaint for a litigant so that relief may be granted on a better or more advantageous claim. *See*

Johnson v. Warren Police Dep't, 2005-Ohio-6904, ¶ 2 (8th Dist.) ("[T]he court found that it had jurisdiction in the matter, [but] that a replevin action was not proper in this instance . . . the [court] granted leave for appellant to file an amended complaint[.]").

Nowhere in Plaintiff's complaint was there a breach of contract allegation and at no time during the bench trial was there discussion of an implied-in-fact contract. As Defendant stated during the trial, this was simply Plaintiff's attempt not to pay Defendant's rates. Also noteworthy, is the fact that Plaintiff's witness explicitly testified that Plaintiff had ***no contractual relationship with Defendant***.

Plaintiff's reference to "unreasonable costs and charges" in paragraph 5 of its Complaint was alleged within its claim pursuant to the Consumer Sales Practices Act and made no mention of any contractual obligation, express or implied, between the two parties. As Defendant noted to the Court at the beginning of the bench trial, it could not "coerce" Plaintiff into paying unreasonable costs because it had already been paid in full by the insured and Plaintiff was not a "consumer" within the meaning of the Act. Because Plaintiff could not meet all the elements of a Consumer Sales Practices Act claim, any damages allegedly flowing from such a claim fails.

As to the replevin claim, damages are awarded "to the extent the damages proximately resulted from the taking, withholding, or detention of the property by the other, and the costs of the action." R.C. 2737.14. If delivery of the property cannot be made, the action may proceed as a claim for conversion. *Id.* ***In this case there are no damages flowing from either replevin or conversion***. Defendant established at the bench trial that it did not unlawfully withhold the vehicle for there to be damages. Defendant also proved that the vehicle was not unlawfully transferred to a third-party, destroyed, or permanently withheld and, thus, Plaintiff did not have a claim for conversion. Any claim for damages regarding allegedly inflated hourly rates and/or

exaggerated invoices are not damages proximately resulting from "the taking, withholding, or detention of the property" and, thus, cannot be granted based on a replevin claim.

Defendant assures the Court that there is no case law or statutory authority that permits a replevin action to be converted into a breach of contract action. *See e.g. Long v. State*, 2012-Ohio-5724 (8th Dist.) (Court of Appeals affirmed trial court's holding that Plaintiff's "Replevin action wasn't the proper vehicle" to raise a separate, unrelated claim); *State ex rel. Gibbs v. Concord Twp. Trustees*, 152 Ohio App.3d 387, 2013-Ohio-1586, ¶ 37 (1st Dist.) (a court cannot grant relief that is not requested); *Gates v. Praul*, 2011-Ohio-6230 (10th Dist.) ("[C]ourts have historically viewed actions for breach of contract and conversion as alternate causes of action. An action for damages may be held in either one or the other."). The Plaintiff had the option to request the Court for permission to amend its pleadings prior to or during the trial, but did not. If such a request was granted, Defendant would have had the opportunity to "seek a continuance so as to offer [its] own evidence" regarding the new claim." *Coburn v. Grimshaw*, 1995 WL 404989 (4th Dist.) (copy attached hereto as Exhibit 1). Thus, Defendant was unfairly prejudiced by not having the opportunity to respond to an implied-in-fact contract claim.

II. Defendant did not consent to litigate a contract claim.

"Under Civ. R. 15(B),[2] implied consent [to litigate a claim not included in the complaint] is not established merely because evidence bearing directly on an unpleaded issue is introduced without objection. Rather, it must appear that the parties understood the evidence was aimed at the unpleaded issue." *State ex rel. Evans v. Bainbridge Tp. Trustees* (1983), 5 Ohio St.3d 41, 46. "Various factors to be considered in determining whether the parties impliedly consented to litigate an issue include: whether they recognized that an unpleaded issue entered the case;

[2] Civ. R. 15(B) provides: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been in the pleadings . . . .[]"

whether the opposing party had a fair opportunity to address the tendered issue or would offer additional evidence if the case were to be retried on a different theory; and whether the witnesses were subjected to extensive cross-examination on the issue." *Id.* at 45-46.

Plaintiff's Complaint requested that the "[v]ehicle be recovered and possession thereof be returned to the Plaintiff and for such other and further relief as may be appropriate[.]" As argued above, the only "further relief" that would have been appropriate was relief related to either a successful replevin claim or a successful Consumer Sales Practices Act claim. Thus without a request by Plaintiff to amend its Complaint, Defendant was under a reasonable impression during the bench trial that Plaintiff's testimony and evidence of allegedly inflated invoice charges and hourly rates was for the purpose of supporting its Consumer Sales Practices Act claim.

If Defendant knew that Plaintiff was presenting a potential claim based on an implied-in-fact contract theory, it would have undeniably subjected Mr. Brown to extensive cross-examination regarding the elements of such a theory. Implied-in-fact contracts require "the parties' meeting of the minds" which is "shown by surrounding circumstances, including the conduct and declarations of the parties, that make it inferable that the contract exists as a matter of tacit understanding." *Stepp v. Freeman* (2nd Dist. 1997), 119 Ohio App.3d 68. 74. Defendant had no opportunity to contradict the presence of any of these elements, which are undeniably fact-intensive.

Additionally, if Defendant was aware that it might be subjected to damages flowing from an implied-in-fact contract claim, Defendant would have prepared to present exhibits or offer expert testimony or affidavits regarding the reasonable worth of its services and would have taken the opportunity to provide more detailed evidence regarding the reasonableness of its repairs in order to prevent the Magistrate's conclusion that the final estimate seemed "contrived."

For instance, when Mr. Brown testified regarding Plaintiff's survey of reasonable car repair service rates in the Columbus area, Defendant was unprepared to offer any contradicting evidence to show that its rates were appropriate.

The Magistrate explicitly states in his Decision that in order for "plaintiff to recover in this action, it must be based upon the existence of a contract." Due to the fact that Plaintiff has not pled a breach of contract action; there was no contract in the first place (as acknowledged by Plaintiff's witness under oath); and Defendant did not consent to litigate a new claim at the bench trial, reconsideration of the Decision is appropriate.

III. Conclusion

Where a Defendant has returned the property to the rightful owner without delay and where the Plaintiff is not a consumer, neither a replevin action not a Consumer Sales Practices Act claim can stand. Accordingly, Defendant respectfully requests the Magistrate to reconsider its Decision in this matter, vacate and reverse.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/Jennifer B. Croghan
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1995 WL 404989
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fourth District, Scioto County.

Patricia L. COBURN, Plaintiff-Appellant,
v.
Lynn Alan GRIMSHAW, et al.
Defendants-Appellees.

No. 94CA2278. | June 27, 1995.

Attorneys and Law Firms

Margaret Apel-Miller, Portsmouth, and John W. Thatcher, Portsmouth, for appellant.

Lynn Alan Grimshaw, Scioto County Pros. Atty., and Robert J. Hill, Asst. Pros. Atty., Portsmouth, for appellees.

DECISION AND JUDGMENT ENTRY

HARSHA, Judge:

***1** Plaintiff Patricia L. Coburn appeals the judgment of the Scioto County Court of Common Pleas denying her the return of $10,000 in cash seized from her home. She alleges the following assignments of error:
ASSIGNMENT OF ERROR NO. 1:

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN HOLDING THAT THE ISSUE OF OWNERSHIP RIGHTS IN THE MONEY IN QUESTION WAS NEITHER ADMITTED NOR DENIED BECAUSE THE ISSUE WAS NOT SPECIFICALLY RAISED IN THE COMPLAINT."

ASSIGNMENT OF ERROR NO. 2:

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN HOLDING THAT IT SHOULD NOT CONSIDER THE PLEADINGS, BUT INSTEAD MUST CONSIDER THE EVIDENCE OFFERED AT TRIAL, BECAUSE THE APPELLANT FAILED TO MOVE FOR JUDGMENT ON THE PLEADINGS PURSUANT TO CIVIL RULE 12(C)."

ASSIGNMENT OF ERROR NO. 3:

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING EVIDENCE OF OWNERSHIP OF THE MONEY IN QUESTION, INASMUCH AS APPELLANT'S OWNERSHIP OF SAID MONEY HAD BEEN SUFFICIENTLY PLEAD AND PREVIOUSLY ADMITTED BY APPELLEES."

ASSIGNMENT OF ERROR NO. 4:

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING APPELLEES' MOTION TO AMEND APPELLEES' ANSWER TO CONFORM TO THE EVIDENCE FOR THE FOLLOWING REASONS: (1) THE ISSUE WAS PREVIOUSLY RAISED IN THE PLEADINGS AND ADMITTED BY APPELLEES, (2) THE ISSUE WAS NOT TRIED BY THE EXPRESS OR IMPLIED CONSENT OF APPELLANT, (3) THE MOTION WAS NOT TIMELY MADE."

ASSIGNMENT OF ERROR NO. 5:

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISMISSING APPELLANT'S COMPLAINT, INASMUCH AS SAID DISMISSAL WAS CONTRARY TO LAW AND AGAINST THE

MANIFEST WEIGHT OF THE EVIDENCE."

The facts giving rise to this appeal began in July of 1987, when the Scioto County Sheriff's Office conducted a drug raid at the residence of Howard and Patricia Coburn. As a result of the raid, the police seized approximately $11,500 in cash and a quantity of cocaine from the Coburn residence. Approximately $1,500 of the seized cash was discovered on the person of Howard Coburn and the remaining $10,000 was discovered in a locked metal box in the basement of the Coburn residence. As a result of the raid, Howard Coburn was eventually convicted of trafficking in cocaine.

In September of 1991, appellant filed her original complaint in replevin demanding the return of the $11,500 seized from her residence. The appellees, in their response to appellant's complaint, alleged that appellant's claim was barred by the statute of limitations. The trial court ruled in favor of the appellees and held that appellant's complaint was time-barred. However, we reversed and remanded holding that the statute of limitations did not begin to run until the appellant discovered that the seized money was not going to be used as evidence in any criminal prosecution. See *Coburn v. Grimshaw* (Dec. 28, 1993), Scioto App. No. 92CA2094, unreported.

On remand, appellant claimed an ownership interest in only the $10,000 found in the metal box. Appellant claimed that the $10,000 was the proceeds of legitimate real estate transactions, and that because the State of Ohio neither used the money as evidence of a crime nor alleged that the money was a result of criminal activity, the money had to be returned to her. The appellees agreed that the money was not used as evidence of crime and that the money was not a result of any drug transactions. However, they refused to return the money to appellant on the grounds that the money belonged to her husband and not to her.

***2** At a hearing held on June 2, 1994, the appellees sought to introduce evidence that the $10,000 at issue did not belong to appellant, but instead belonged to her husband. Appellant objected to the introduction of such evidence on the grounds that the appellees had admitted in the pleadings that the money belonged to appellant. The trial court overruled appellant's objection and allowed the introduction of evidence establishing Howard Coburn as the sole owner of the money. Appellant did not testify at the proceedings, and her attorney offered no evidence as to the issue of ownership, but instead continued to rely on the fact that appellees had admitted that Patricia Coburn owned the money in the pleadings.

On June 29, 1994, pursuant to Civ.R. 15(B), appellees filed a motion to amend the pleadings to deny that appellant was the proper owner of the $10,000. The trial court entered judgment on September 15, 1994, finding that because appellant's complaint was vague and ambiguous, the issue of the ownership of the $10,000 was neither admitted nor denied in the complaint and thus, appellees could properly amend pursuant to Civ.R. 15(B). The trial court then found in favor of the appellees, on the grounds that the $10,000 belonged only to her husband. It is from this judgment that appellant appeals.

Appellant's first four assignments of error all challenge the trial court's decisions as to whether the pleadings established appellant's ownership rights in the $10,000. Appellant contends that the trial court first erred by not finding that the issue of ownership had been decided by the pleadings, and then further erred by allowing the introduction of evidence on the issue of ownership and appellees' subsequent amendment of the pleadings. We disagree.

The third and fifth paragraphs of appellant's complaint read:
3. Plaintiff further says the defendants prosecuted her husband in case number 87-CR-000206 and did not use, or attempt to use, her cash as evidence of any crime. * * *

5. Plaintiff says that she has demanded the return of her property, but the defendants through the prosecuting attorney have refused to redeliver her property to her.

Appellees, in their answer, admitted both paragraphs three and five of appellant's complaint. Appellant argues that such admissions establish Patricia Coburn as the owner of the money, and that appellees were bound by such admissions. Appellees, on the other hand, argue that appellant's pleadings are too vague to actually establish an admission that the $10,000 in question was actually her money, and even if the pleadings do amount to such an admission, the trial court properly allowed them to amend their pleadings.

Civ.R. 8(B), which governs denials in pleadings, states in part:
A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. * * * Denials shall fairly meet the substance of the averments denied. *When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall*

deny the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make the denials as specific denials or designated averments or paragraphs, or the pleader may generally deny all the averments except the designated averments or paragraphs as the pleader expressly admits; * * *

***3** Civ.R. 8(B). (Emphasis added.)

Civ.R. 8(B) places a burden on the answering party to specifically set forth those portions of an averment that the defendant intends to deny. Civ.R. 8(D) then states that averments in pleadings are admitted when not denied. See Civ.R. 8(D).

However, Civ.R. 8 must be read in conjunction with Civ.R. 15 which allows for the amendment of pleadings. See *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1. Civ.R. 15(B), which allows for the amendment of pleadings to conform to evidence offered at trial, reads:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. *Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time,* even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues. *If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby* and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. *The court may grant a continuance to enable the objecting party to meet such evidence.*

Civ.R. 15(B). (Emphasis added.)

Decisions regarding the amendment of pleadings are within the sound discretion of the trial court, and will not be reversed unless the trial court abused such discretion. *Hoover, supra.* Further, Civ.R. 15 reflects a liberal amendment policy so that each claim may be decided on its merits rather than on procedural deficiencies. *Id.*

In this case, the trial court expressly found that the issue of the ownership of the $10,000 was not expressly raised by the "vague ambiguities" of the pleadings. The court then allowed the appellees to present evidence to show that the $10,000 in issue was actually Howard Coburn's and not his wife's. Appellant did not make any motion for a continuance, but instead simply chose to renew the argument that the issue of ownership was decided by the pleadings. We do not believe the trial court abused its discretion by allowing appellees to present evidence on this issue and to amend the pleadings to conform to this evidence.

None of the paragraphs in appellant's complaint specifically alleges that the $10,000 taken from the apartment belonged to her. Thus, the trial court could reasonably have found that the complaint did not specifically raise the issue of ownership in the pleadings. Further, although appellant did not give express or implied consent to try the issue of ownership, Civ.R. 15(B) specifically provides that the trial court should freely allow the amendment of the pleadings even if the evidence is objected to at the trial. Appellant's remedy in this situation was to seek a continuance so as to offer her own evidence regarding ownership of the $10,000.

***4** We do not find that the trial court abused its discretion by allowing appellees to present evidence on the issue of ownership at trial and then to amend their pleadings to conform to such evidence. As a result, we overrule appellant's first, second, third, and fourth assignments of error.

Appellant's fifth assignment of error alleges that the decision by the trial court was against the manifest weight of the evidence. The judgment of the trial court must be affirmed if supported by competent, credible evidence. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77.

R.C. 2933.41 governs the disposition of property that has been either lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited, and that it is in the custody of law enforcement officers. R.C. 2933.41(C) states:

A person loses any right he may have to the possession, or the possession and ownership, of property if any of the following applies:

(1) The property was the subject, or was used in a conspiracy or attempt to commit, or in the commission, of an offense other than a traffic offense, and such person is a conspirator, accomplice, or offender with respect to the offense.

(2) A court determines that the property should be forfeited because, in light of the nature of the property or the circumstances of such person, it is unlawful for the person to acquire or possess the property.

R.C. 2933.41 is a forfeiture statute and is therefore to be strictly construed against the state. See *State v. Lilliock* (1982), 70 Ohio St.2d 23; *Chagrin Falls v. Loveman* (1986), 34 Ohio App.3d 212. Therefore, before a person loses any right to possession of property held by a law enforcement agency, the state has the burden of showing that either R.C. 2933.41(C)(1) or (2) applies to revoke such ownership interest. See *Lilliock, supra; Loveman, supra.*

However, R.C. 2933.41 allows the return of confiscated evidence only to those persons who demonstrate they have a right to such possession. See *Eastlake v. Lorenzo* (1992), 82 Ohio App.3d 740. As a result, appellant had the initial burden of showing that she had a right to possess the $10,000 that was currently being held by the law enforcement officials. See *Lorenzo, supra; State v. Clark* (1989), 63 Ohio App.3d 52; *Loveman, supra.*

At trial, appellant presented no evidence on the issue of ownership. In fact, the prosecution presented evidence that showed that when appellant was initially confronted with the discovery of the $10,000, she stated that she had never seen the money before. Further, the state produced evidence that tended to show that the $10,000 in question was a result of land sale contracts in which appellant had no financial interest. As a result, we believe the trial court's determination that appellant did not have an ownership interest in the $10,000 was supported by competent, credible evidence. We therefore overrule appellant's fifth assignment of error.[1]

***5** JUDGMENT AFFIRMED.

PETER B. ABELE, P.J., concurs in judgment and opinion.

KLINE, J., concurs in judgment only.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that Appellees recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

NOTICE TO COUNSEL

Pursuant to Local Rule No. 12, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

Footnotes

[1] R.C. 2933.41(B) places a mandatory duty on law enforcement agencies to attempt to locate the persons entitled to possession of any property in their possession and to return such property to them at the earliest possible time. See R.C. 2933.41(B); *Lorenzo, supra; Weiler v. Dept. of Liquor Control* (May 26, 1994), Franklin App. No. 93AP109-1289, unreported. It is undisputed and conceded by the state that the $10,000 in issue was not used as evidence for any crime and was not the result of any criminal activity. Further, it has been conceded that the money in question rightfully belonged to Patricia Coburn's husband. It appears from the record that the law enforcement agencies in control of the $10,000 have not complied with the mandates of R.C. 2933.41(B) in relation to Howard Coburn. However, that issue is not presently before us.

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