

No. 1-15-1661 & 1-15-2684 (cons.)

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

YOLANDA CASTREJON,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	No. 12 M1 721773
ROY TIJERINA and EUSTOLIO DELGADO,)	
)	
Defendants-Appellants,)	The Honorable
)	Martin P. Moltz
)	Judge, presiding.

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Defendants-Appellees.)	The Honorable
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)	Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in finding defendant liable for compensatory damages on plaintiff's conversion claim for defendant's changing of the locks at the request of the property owner. In addition, the trial court erred in finding defendant liable for punitive damages and attorney fees.

¶ 2 This appeal arises from an initial complaint filed by plaintiff Yolanda Castrejon against defendants Roy Tijerina and Eustolio Delgado for wrongful eviction and damages. In response, defendants filed a counter-claim for unpaid rent. After a bench trial, Tijerina filed a notice of appeal and plaintiff filed a counter-notice of appeal, which have been consolidated here. On appeal, Tijerina contends that the trial court erred by finding him liable for conversion. Tijerina also contends that the trial court abused its discretion by finding him liable for punitive damages when there was no evidence to support a finding of willful and wanton conduct. In addition, Tijerina contends that the trial court erred in finding against him liable for attorney fees. We reverse.

¶ 3 BACKGROUND

¶ 4 We recite only those facts necessary to understand the issues raised on appeal. On September 1, 2011, plaintiff entered into an oral lease with Delgado, who is her cousin, to rent an apartment at 925 North Damen Avenue in Chicago, Illinois (the property). The property was an owner-occupied, 4-unit apartment building. Approximately a year later, plaintiff and her boyfriend Steven Puccini filed an initial complaint for possession and damages against defendants. In response, defendants, represented by the same attorney, jointly filed a counter-claim for nonpayment of rent against plaintiff and Puccini. Thereafter, Puccini moved to voluntarily dismiss his claims against defendants.

¶ 5 In early 2014, the trial court allowed plaintiff to secure new counsel and file a second-amended complaint¹ in which she alleged conversion (count I) and sought to recover at least \$10,370 as the fair market value of her personal property. She also sought actual and consequential damages for wrongful eviction (count III), trespass (count IV) and unfair and deceptive practices (count V). In addition, she sought damages and attorney fees under the Chicago Residential Landlord-Tenant Ordinance (RTLO) (counts VI, VII, VIII, IX) and for implied warranty of habitability (count XI). Further, plaintiff sought punitive damages for defendants' wrongful behavior (count X) as well as possession (count XII). In response, defendants filed a motion to dismiss. Tijerina specifically argued that since he was not the owner, landlord or agent of Delgado, he could not be liable to plaintiff under the RLTO or for any damages and fees. The trial court then dismissed several counts against Tijerina for wrongful eviction, unfair and deceptive practices and breach of implied habitability.

¶ 6 In March 2015, a bench trial commenced and the testimony revealed the following. Plaintiff testified that she lived at the property from August 2011 until August 2012 with her two children. During the initial walkthrough, plaintiff observed that the apartment was in need of repair as evidenced by an inoperable stove, peeling ceiling paint, a cracked bathroom window "fixed" by a piece of duct tape, coverless electrical outlets, a dented heater and a noticeable gap between the lock and the front door. She was concerned about her children's safety, but her cousin Delgado told her "[d]on't worry about it" because he would handle all of the repairs. She trusted Delgado because he was a relative, and thus, entered into an oral lease on a month-to-month basis for \$850 in cash on the first of every month.

¹ We note that plaintiff's second-amended complaint was incorrectly numbered, thus there is no Count II.

¶ 7 After occupying the apartment, plaintiff discovered other unpleasant conditions including roaches, a blocked bathtub drain, a leaky kitchen faucet, an inoperable carbon monoxide and smoke detector and bed bugs. The bed bugs brought plaintiff and her children to the hospital, while Delgado reassured plaintiff that it was the previous tenant who infested her apartment. She had her apartment fumigated, but the exterminator believed that since the entire building was infested the bed bugs would continue to crawl in through the walls. Each month she continuously voiced her concerns in vain to Delgado, who didn't seem interested in fixing the problems. Plaintiff stayed because "[i]t fit into her budget and she trusted" Delgado. Plaintiff continued to pay rent through August 2012, but then also rented a "temporary" apartment with Puccini, while denying that she had in any way abandoned the apartment or her property within.

¶ 8 On August 28, plaintiff stopped at the property to pick up a few personal items and discovered that she had been locked out. The following day, she returned with Puccini and observed the front building door open and encountered Tijerina. While plaintiff claimed that Tijerina identified himself as "the new owner," Tijerina denied making any such statement and there is no evidence in the record that title to the property was held by anybody but Delgado. In any event, a physical altercation allegedly ensued when Tijerina tried to physically restrain Puccini and plaintiff from entering the apartment. Upon gaining access, plaintiff observed that many of her belongings were gone and people were painting the apartment. Tijerina told plaintiff that her belongings had only been moved to the top of her bed. Plaintiff then called the police and filed a report because Tijerina was trespassing in her apartment and her belongings were missing, such as a 42-inch flat-screen TV, king-size bed, curtains, dresser, shoes, refrigerator, stove, microwave, and a glass top for the coffee table.

¶ 9 Puccini, who lived at the property part-time, testified that he was a development engineer, auctioneer and appraiser of wine. When he initially saw the apartment building he was disappointed because the front door lock was inoperable, the wood was rotting and "there was a mailbox that looked like it had seven years of mail stuffed in it." In order to be functional, the deadbolt was propped up by a broom handle. There was no actual lock and door knob to plaintiff's apartment and you could see into it from the building's hallway. Paint routinely fell from the ceiling. He had to buy a refrigerator and gas stove for the unit, along with other household items at an estimated cost of \$6,000. He also worried about the electrical wires jetting out from the old heater, missing window screens, roaches and bed bugs.

¶ 10 During the August incident, Puccini claimed that Tijerina came down the stairs and put his hands out to push him out of the property. In the process of the dispute, Puccini said he was forced up against the railing, injuring his hand. Puccini was trying to get into plaintiff's apartment because he thought that Tijerina was robbing it. Upon entering plaintiff's apartment, Puccini observed that some personal belongings were piled high on the bed, but he did not see many items such as the Ikea glass table, couch, carpets, chairs for the kitchen table, a large screen TV and stand, and the kids' mattresses. He then waited on the street with plaintiff for the police to arrive while Tijerina told plaintiff to "keep [Puccini] away from me or I'm going to kill him."

¶ 11 Delgado testified as an adverse witness that he lived in the United States for 35 years, but spoke only "a little" English and could not write in English or Spanish. He worked at a hospital kitchen for over 20 years and had a relative cosign the loan to purchase the property, which was in foreclosure at the time of trial. Over the years he charged dozens of tenants cheap rent in cash and never had anyone sign a written lease. It was unclear from his testimony, however, how

much rent he charged plaintiff. The whole time plaintiff lived at the property he never made any repairs to her apartment. Individuals from the City of Chicago came out three times citing violations for an unsafe exterior stairwell, defective window panes, and failure to file a building registration from 2005 to 2013. There were 4 rental units in the property, but he did not know how much revenue he made because he never kept any records. He hadn't paid property taxes in five or six years. He knew Tijerina as a neighborhood friend who was a capable handyman who did occasional work for him on his building. Delgado didn't recall testifying at his deposition that he had asked Tijerina to change the locks on plaintiff's apartment in late August. He specifically denied telling plaintiff that the locks were changed and claims to have told her to move because she was not paying rent. He did not believe Tijerina ever entered plaintiff's apartment and did not pay him for any repairs.

¶ 12 Tijerina testified that he lived and owned the building a few doors down from the property and occasionally assisted Delgado in making repairs, acting as a friend and without compensation. He did paint and change the locks in plaintiff's apartment at Delgado's request, but never told plaintiff or Puccini that he was the new owner of the property. He was only offering Delgado assistance because the city had filed a few violations against him. In plaintiff's apartment there was a bed and mattress, no sheets, a stove, refrigerator, an old stained couch and carpet, a table with mismatched chairs and a dresser drawer with no personal items. It did not strike Tijerina as odd that items were left behind because renters always left property behind. Plaintiff, however, did ask about her belongings and told Tijerina that she would be back for them.

¶ 13 After closing arguments (which were held without a court reporter present), the trial court issued its ruling in open court and on the record. Plaintiff's counsel made a brief statement

related to Tijerina's liability when he said that the lease in question was between plaintiff and Delgado and then "later subsumed defendant Tijerina by his conduct." Counsel also argued that "defendant Tijerina offered nothing of substance...prior to August of 2012," when the locks were changed. As it relates to Delgado, plaintiff's counsel reminded the court that defense counsel had referred to Delgado as a "simpleton" in an effort to convince the court that he could not be liable for his ignorance of the law. He then went on to list the various shortcomings of the defendant landlord and urged the court to remember that the fact that Delgado "is a simpleton in no way excuses his willful and wanton conduct." The court was then reminded of all of the various violations of the RLTO committed by Delgado, none of which in any way implicated Tijerina. In its ruling, the court specifically found that as the owner of the property, Delgado acted at all times as a "slumlord" in every aspect of his dealing with his tenant. Noticeably absent from these remarks was any argument that Tijerina's conduct was willful and wanton. The court determined that the RLTO did not apply, but that both defendants were liable for conversion because there was an illegal eviction and lockout with the furniture being illegally removed. As it relates to Delgado, the court found that he would be liable for \$2550 for three months of rent. He further found that the property loss would be reduced from "10,000 to \$5,000. I think a lot of this was not worth that much money at the time." The court also awarded "\$689 for medical bills" for Puccini who wasn't then a named plaintiff. The court then indicated that it would award punitive damages of "six times" the compensatory damages, "plus attorney's fees," and asked counsel to "calculate that because I'm not as good at addition and subtraction and multiplication as some people are."

¶ 14 This discussion then segued into the court's "ruling" on damages which we print verbatim from the transcript:

[Defense Counsel]: Your Honor, could you separate out what Mr. Tijerina is liable for?

The court: Mr. Tijerina is liable for conversion, and, basically, the rent would not have anything to do with it because I didn't find him to be a landlord. So he's not liable for the rent. He is liable for the property in the unit up to 5,000 and he would be liable for the medical bills. So that would be 5,000 plus the medical bills and then the punitive damages would be six times that amount, whatever that amount is."

[Defense counsel]: You are finding Mr. Tijerina guilty for punitives as well?

The court: Well, I guess...well, let's see, I can only find him for the conversion. That's probably correct.

[Plaintiff's counsel]: Parasitic damage, they latch on to the underlying tort claim. So their finding that the tort itself was willful and wanton, I want to state that for the record to be clear.

The court: The evidence on that was actually, you know, it was...obviously, there was really no way to reconcile the testimony of Mr. Tijerina with the testimony of the two major witnesses for the plaintiff.

[Defense counsel]: The punitives are stemming from the conduct of Mr. Delgado as the slumlord.

The court: Right. As the slumlord. So I think here it would just be the actual damages. Misspoke. I had this down here that the punitive would be against Mr. Delgado, and the actual damages and the conversion would be Tijerina only. Tijerina would only be liable for...

[Plaintiff's counsel]: I think he'd be liable for the \$5,000.

The court: Plus the medical bills.

[Plaintiff's counsel]: As well as the punitive on the \$5689.

The court: Yes, 5689, not for the rest of it, not for the rent because he wasn't a landlord, for the conversion of the property in the unit and the medical bills.

[Plaintiff's counsel]: So I can give the numbers to you now.

The court: Whatever they come out to.

[Plaintiff's counsel]: So if you add 5689, divided by 2 for Delgado and Tijerina, that would equal to each of them in compensatory damages \$2,844.50 for each defendant.

Then if you times that by six, that works out to \$17,067 for each defendant as well as...defendant Tijerina will be a judgment against him of \$17,067 plus attorney's fees and costs.

The court: Right.

[Plaintiff's counsel]: And then for defendant Delgado, it would be...

The court: You add 2550 to that.

[Plaintiff's counsel]: 2550 against defendant Delgado \$32,367 plus attorney's fees and costs.

The court: That's correct.

¶ 15 Thereafter, defendants, represented by their trial counsel, filed a joint notice of appeal (No.1-15-1661) and plaintiff filed a notice of cross-appeal (No. 1-15-2684). She also filed a petition seeking \$73,502.51 in attorney fees. Following a hearing, the trial court found Tijerina liable for \$11,625.49 and Delgado liable for \$65,877.77 in attorney fees. Plaintiff then filed a separate notice of appeal (consolidated with her cross-appeal, No. 1-15-2684), asking this court to find both defendants jointly liable for the full amount of attorney fees. In addition, Tijerina

retained new counsel and filed an amended notice of appeal to both judgments (No.1-15-1661). Delgado did not pursue his appeal. Thus, our analysis relates solely to Tijerina's appeal.

¶ 16

ANALYSIS

¶ 17 On appeal, Tijerina contends that the trial court erred by finding him liable for conversion because he was not the property's landlord. When reviewing a challenge to the trial court's ruling after a bench trial, we are to affirm the trial court unless its judgment is against the manifest weight of the evidence. *Judgment Services Corp. v. Sullivan*, 321 Ill. App. 3d 151, 154 (2001) ("[a] judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on the evidence"). A reviewing court may not reweigh the evidence or substitute its judgment for that of the trier of fact especially regarding credibility determinations. *Wal-Mart Stores, Inc. v. Human Rights Com'n*, 307 Ill. App. 3d 264, 267 (1999).

¶ 18 Conversion is the unauthorized deprivation of property from the person entitled to its possession. *In re Rosin*, 156 Ill. 2d 202, 206 (1993). To sustain a cause of action for conversion, the plaintiff must establish by a preponderance of the evidence: (1) the unauthorized and wrongful assumption of control, dominion, or ownership by defendant over the personal property of another; (2) the plaintiff's right in the property; (3) the plaintiff's absolute and unconditional right to immediate possession of the property; and (4) a demand for possession of the property. *Sandy Creek Condominium Association v. Stolt and Egner, Inc.*, 267 Ill. App. 3d 291, 295 (1994).

¶ 19 Here, it is undisputed that plaintiff had a right to her property and a right to immediate possession of her property. Thus, we must determine whether plaintiff established by a preponderance of the evidence that Tijerina had dominion and wrongful control over plaintiff's

property. Tijerina testified that he changed the locks to plaintiff's apartment and moved some of her belongings (but only within the unit itself), pursuant to the request of the landlord, Delgado. Testimony also revealed that when plaintiff and Puccini came to the property to retrieve their belongings, Tijerina physically restrained Puccini from entering the apartment and she testified that some of their belongings were missing. Furthermore, although Tijerina suggests that plaintiff had unequivocally moved out in July 2012, and in doing so, had abandoned her property, this is unsupported by the record. Plaintiff testified that she paid her rent through August 2012 and was slowly transitioning to another apartment, common practice for many individuals. Tijerina even testified that plaintiff told him she would be back for her belongings. Moreover, plaintiff reported her missing property to the police and was unable to contact Delgado, who did not have a working phone. The trial court concluded that plaintiff did not abandon her items, but they were either "illegally moved out" or "something was done" with them. As the reviewing court, it is not within our purview to substitute our judgment for that of the trier of fact regarding the credibility of witnesses and weight to be given to the evidence. See *In re D.F.*, 201 Ill. 2d 476, 499 (2002) ("we give deference to the trial court as the finder of fact because it is in the best position to observe the conduct and demeanor of the parties and the witnesses and has a degree of familiarity with the evidence that a reviewing court cannot possibly obtain"). That said, the proof as to the specific items that were missing and their value was vague at best. The court awarded \$5,000 for property loss, but plaintiff and Puccini submitted lists of property with estimated value amounts. The trial court redacted these figures, finding that they were hearsay. Puccini estimated the value of the property at \$6,000 but his unsubstantiated ballpark figure does not suffice as far as an adequate foundation for lost property. See *Kay v. Prolix Packaging, Inc.*, 2013 IL App (1st) 112455, ¶ 33 ("[s]peculation and

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conjecture are not proper bases for an award of damages"); *Dowd and Dowd, Ltd. v. Gleason*, 352 Ill. App. 3d 365, (2004) (where the damages award was based on the detailed testimony and exhibits provided by the plaintiff's expert witness). As a result, while we find that the trial court's finding of conversion was not against the manifest weight of the evidence, plaintiff failed to prove recoverable damages for the property allegedly lost or converted. See *Midwest Software, Ltd. v. Willie Washer Manufacturing Co.*, 258 Ill. App. 3d 1029, 1055 (1994) ("if a party proves that it has the right to damages but fails to provide a proper basis for computing those damages, only nominal damages may be awarded"); *Finance America Commercial Corp. v. Econo Coach, Inc.*, 118 Ill. App. 3d 385, 390 (1983) ("party seeking to recover has the burden not only to establish that he sustained damages but also to establish a reasonable basis for computation of those damages"). We therefore vacate the trial court's judgment for compensatory damages against Tijerina for conversion caused by his changing of the locks at the request of the property owner.

¶ 20 Tijerina next contends that the trial court erred in finding him liable for punitive damages. Punitive damages are not awarded as compensation but serve instead to punish the wrongdoer and to deter that party and others from committing similar acts of wrongdoing in the future. *Cruthis v. Firststar Bank, N.A.*, 354 Ill. App. 3d 1122, 1131 (2004). In reviewing a trial court's decision to award punitive damages, this court takes a three-step approach, considering: "(1) whether punitive damages are available for the particular cause of action, using a *de novo* standard; (2) whether, under a manifest weight of the evidence standard, the defendant or defendants acted fraudulently, maliciously or in a manner that warrants such damages; and (3) whether the trial court abused its discretion in imposing punitive damages." *Dubey v. Public Storage, Inc.*, 395 Ill. App. 3d 342, 355 (2009). "Because of their penal nature, punitive

damages are not favored in the law, and courts must be cautious in seeing that they are not improperly or unwisely awarded." *Id.* quoting *Deal v. Byford*, 127 Ill. 2d 192, 203-04 (1989).

¶ 21 It is undisputed that in Illinois the tort of conversion may under proper circumstances support an award of punitive damages. *Turner v. Firststar Bank, N.A.*, 363 Ill. App. 3d 1150, 1160 (2006). Therefore, we must determine whether the trial court's award of punitive damages on the conversion claim was against the manifest weight of the evidence. Punitive damages for the tort of conversion properly lie where the defendant acts willfully or with such gross negligence to indicate a wanton disregard of the rights of others. *Id.* The trier of fact may also consider "the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant." Restatement (Second) of Torts § 908(2) (1979).

¶ 22 Based on the record, the award of punitive damages as it pertains to Tijerina is clearly against the manifest weight of the evidence. Any fair reading of the trial court's ruling on punitive damages reveals that it was inclined only to assess punitive damages against Delgado, who was colloquially referred to as a "simpleton" and a "slumlord" throughout the trial. In its ruling, the trial court specifically noted that punitive damages were appropriate because Delgado "really did act as a slumlord" and the court wanted to "discourage people from owning property, if that's the way they are going to rent it out." After making a statement that Tijerina would be on the receiving end of a judgment for punitive damages, the trial court immediately retracted the statement, allowing that he had "misspoke[n]," and added that he had intended the "punitive would be against Mr. Delgado, and the actual damages and the conversion would be Tijerina only." The record contains no evidence or argument of how Tijerina's conduct could have warranted punitive damages. See *International Union of Operating Engineers, Local 150 v.*

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Lowe Excavating Co., 225 Ill. 2d 456, 493 (2006) citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) ("punitive damages have been described as 'private fines,' intended to deter future wrongdoing as well as punish a defendant"). Even though Tijerina did participate in the lockout and hinder plaintiff from accessing her property, that does not rise to the level of willful and wanton conduct. See *Cruthis v. Firststar Bank, N.A.*, 354 Ill. App. 3d 1122, 1133 (2004) ([p]unitive damages should not be awarded for mere inadvertence, mistake, errors of judgment, and the like, which constitute ordinary negligence"); *Loitz v. Remington Arms Co., Inc.*, 138 Ill. 2d 404, 415 (1990) citing Restatement (Second) of Torts § 908, comment b, at 464–65 (1979) ("[s]ince the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence, these damages can be awarded only for conduct for which this remedy is appropriate—which is to say, conduct involving some element of outrage similar to that usually found in crime"). Here, Tijerina was acting as an agent of Delgado and was merely changing the faulty door lock at his instruction. There simply is no evidence of his being involved in any willful and wanton conversion of plaintiff's property. Furthermore, there must be a reasonable relationship between the punitive damages and the compensatory damages awarded. See *International Union of Operating Engineers, Local 150*, 225 Ill. 2d at 484 (there must be a reasonable relationship between the punitive damages award and the actual damages). Therefore, since compensatory damages have been vacated against Tijerina, we cannot hold him liable for punitive damages. See *Mitchell v. Elrod*, 275 Ill. App. 3d 357, 365 (1995) (it was legally inconsistent to award punitive damages but no compensatory damages when a long line of Illinois case law "has held that punitive damages may not be recovered in the absence of compensatory damages"). To the extent that the trial court accepted the representations of plaintiff's counsel when calculating the respective judgments against the

two distinct defendants, the trial court abused its discretion when it appeared to award punitive damages against Tijerina.

¶ 23 Tijerina further contends that the trial court abused its discretion by finding him liable for attorney fees. In general, Illinois courts follow the "American Rule," which provides each party must bear its own attorney fees and costs, absent statutory authority or a contractual agreement. *Country Mutal Insurance Co. v. Styck's Body Shop, Inc.*, 396 Ill. App. 3d 241, 251 (2009). Even when there is an exception to this rule, parties that do not prevail on the underlying claim are not entitled to attorney fees. See *McGinley v. Madigan*, 366 Ill. App. 3d 974, 992 (2006) (the reviewing court determined that plaintiffs were "not entitled to attorney fees" when they "did not prevail" on the underlying claim). Accordingly, it would be unreasonable to find Tijerina liable for plaintiff's attorney fees when we have stricken the compensatory and punitive damages.

¶ 24 Finally, we find that plaintiff has forfeited any contentions pertaining to her appeal (No. 1-15-2684). Plaintiff filed no separate appellate brief and does not address her joint liability contentions in her opening-response brief, which effectively served as her appellate brief and argument. Illinois Supreme Court Rule 341 specifically states that "[p]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." See *Klesowitch v. Smith*, 2016 IL App (1st) 150414, ¶ 49 (where the plaintiff waived any claims on appeal by failing to file a brief as an appellant or failing to raise any arguments in his appellee's brief in support of any claims by plaintiff for appellate relief). Moreover, since we have vacated the judgment of damages and attorney fees against Tijerina, plaintiff's contention regarding the trial court's apportionment of attorney fees is moot.

¶ 25

CONCLUSION

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¶ 26 Based on the foregoing, we reverse the judgment of the trial court and vacate the orders finding Tijerina liable for damages and attorney fees.

¶ 27 Reversed and orders vacated.