

Not Reported in N.E.2d

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

Court of Appeals of Ohio, Second District, Montgomery
County.

Dale LEDBETTER, et al., Plaintiffs-Appellees,

v.

CITY OF DAYTON, Defendant-Appellant.

No. CA 12249.

March 22, 1991.

Konrad Kuczak, Dayton, for plaintiffs-appellees.

J. Anthony Sawyer, Kenneth E. Barden, Paula V. Durden,
for defendant-appellant.

OPINION

WOLFF, Judge:

*I The City of Dayton appeals from two judgments of the Dayton Municipal Court. The first judgment declared Valerie Ledbetter to be the title owner of a car which had been detained by the City of Dayton Police Department, and ordered the City to return the car to Ledbetter. The second judgment awarded damages on account of the City's detention of the car.

Dale, Valerie and Sarah Ledbetter are the appellees herein. On April 11, 1988, Dale Ledbetter was arrested by City police officers while driving a Chevrolet Malibu. The car was towed to a towing garage. The following day Detective Philip West noticed the car at the garage. He observed through the windshield that the vehicle identification number plate ("VIN") was not affixed to the car by the factory installed rivets. As a result of this observation, West seized the car and had it transferred to the city garage with an order that it not be released. He did so on the authority of R.C. 4549.62 and R.C. 4549.63, which together authorize a police officer to seize and take possession of any vehicle which has a VIN plate which has been tampered with. Detective West concluded that since the VIN plate did not appear to be affixed with the original factory installed rivets, the VIN plate had been removed from one car and then had been installed in the car he observed. This was evidence of a possible violation of 4549.62. The City withheld the car from the Ledbetters from April 11, 1988 to January 16, 1990.

At the time it was seized, the car in question was assembled

from parts from three different cars: the transmission and driver's door belonged to a 1978 Chevrolet Malibu, the frame belonged to a 1979 four door Chevrolet Malibu, and the license plate and VIN plate were registered to a 1979 two door Chevrolet Malibu.

The Ledbetters collectively filed an action in the municipal court on July 11, 1988, seeking damages for loss of use, storage, and towing, as well as the return of the car to which they claimed ownership.

The matter was referred to the municipal court referee. The referee heard the Ledbetters' motion for return of property on August 11, 1988, and determined that there was no evidence that the car was either stolen or had come into the Ledbetters' possession by illegal means. The referee further determined that Valerie Ledbetter was the title owner of the car as she held title to the car and the vehicle bore the same serial number as appeared on the certificate of title. For these reasons, the referee concluded that the City had no right to retain possession of the car. The referee ordered the City to return the car to Valerie Ledbetter. The hearing did not encompass the Ledbetters' claim for damages arising from the loss of use of the car. The decision and entry, incorporating the above findings, was filed on October 19, 1988, pursuant to Civ.R. 53(E)(7).

The City appealed that judgment to this court without first filing objections to the referee's report, or otherwise seeking relief from the immediate effect of the trial court's order that it return the car to Ledbetter. The City retained possession of the car. On July 10, 1989, we dismissed the appeal for lack of a final appealable order since the issue of damages had not been resolved. We remanded the matter to the municipal court for a determination of damages.

*2 On July 17, 1989, the Ledbetters moved for an order requiring the City to show cause why it had not returned the car. They contended that the City's premature appeal was a contemptuous effort to divest the municipal court of jurisdiction, and asked for damages and attorney fees incurred as a result of the City's contempt. On July 28, 1989, the City moved to stay the October 19, 1988, order that it return the car to Valerie Ledbetter. The record reflects no formal action on the motion for stay of execution. An entry of January 11, 1990, reflects an agreement by the parties that the car be returned by the City to the Ledbetters and ordered same.

The municipal court determined by judgment entered May 8, 1990, that the Ledbetters were entitled to damages of \$10,647.00. The Ledbetters had introduced expert

evidence that established that \$15.00 per day was the reasonable cost of alternate means of transportation. The municipal court awarded \$9,675.00 for loss of use. The municipal court had determined that the City had wrongfully detained the car for 645 days. It reasoned that the wrongful detention, entitling plaintiffs to damages for loss of use of the car, began on April 11, 1988, the date on which the car was first seized, and continued until the car was returned January 16, 1990. The damage calculation also included \$999 for parts which were lost or missing from the car at the time it was returned to the Ledbetters. Judgment was entered in the amount of \$10,000, plus interest, due to the court's jurisdictional limit.

On appeal, the City advances the following four assignments of error:

THE LOWER COURT COMMITTED PREJUDICIAL REVERSIBLE ERROR IN ORDERING THE APPELLANT TO RELEASE THE VEHICLE.

THE LOWER COURT COMMITTED PREJUDICIAL REVERSIBLE ERROR IN DETERMINING THAT APPELLEE VALERIE LEDBETTER IS THE OWNER OF THE VEHICLE.

THE LOWER COURT COMMITTED PREJUDICIAL REVERSIBLE ERROR IN AWARDING APPELLEE \$10,000 IN DAMAGES FOR THE ALLEGED LOSS OF USE OF THE VEHICLE.

THE LOWER COURT COMMITTED PREJUDICIAL REVERSIBLE ERROR IN NOT FINDING THAT THE DEFENDANTS WERE STATUTORILY IMMUNE FROM ANY LIABILITY FOR THE SEIZURE OF THE VEHICLE.

The first two assignments of error will be discussed collectively inasmuch as both seek to challenge the referee's factual findings pertaining to the ownership of the car.

The City had argued before the referee that the car should not be returned to the Ledbetters because the Dayton Police Department was conducting an ongoing investigation to discover the identity of the person who had tampered with the VIN plate. The City also claimed that the ownership of the car had not been established since none of the three Ledbetters could produce a title for the car in the City's possession.

The referee found that these arguments were insufficient justification for the City to retain possession of the car. The referee held that:

While the Court certainly agrees that items subject to an ongoing police investigation should not be released *carte blanche*, there is no evidence before the Court that the

subject vehicle was stolen or placed in Plaintiff's hands by any illegal means. Further, Plaintiff Valerie Ledbetter possesses title to the subject vehicle, and said vehicle bears the same serial number as that on the Certificate of Title.

*3 Lacking any evidence that the vehicle has been stolen from another person, or that Plaintiff Valerie Ledbetter is not the titled owner of the subject vehicle, the Court cannot conclude that the Defendant has the right to retain possession of said vehicle.

The City advances arguments pertaining to the issue of the ownership of the car under both assignments. In the first assignment, the City claims that since the VIN plate had obviously come from another vehicle, the police were justified in detaining the car pursuant to R.C. 4549.63(B). Moreover, the City also claims that the car should not have been released until the ownership of the car had been established and it had been determined that the car was not needed as evidence or subject to forfeiture. See R.C. 4549.63. In the second assignment, the City argues that none of the Ledbetters established ownership to the entire car. Individually, they could only establish ownership to component parts of the car. For example, the evidence tended to establish that "Howard's Auto Parts" was the owner of the transmission, motor, and left door of the vehicle in question; Sarah Ledbetter was the owner of the frame underneath the chassis of the vehicle; and Valerie Ledbetter possessed ownership of the VIN plate which was improperly affixed to the seized vehicle. Thus, the referee's determination that Valerie Ledbetter was, in fact, the title owner of the seized car is at the heart of the first two assignments.

However, we need not reach the merits of these two assignments of error. The City did not file any written objections to the referee's report. Pursuant to Civ.R. 53(E)(6), such an omission is fatal to the City's first two assignments.

Civ.R. 53(E)(2) provides that a party may file written objections to a referee's report. However, Civ.R. 53(E)(6) states that:

A party may not assign as error the court's adoption of a referee's finding of fact unless an objection to that finding is contained in that party's written objections to the referee's report. The court may adopt any finding of fact in the referee's report without further consideration unless the party who objects to that finding supports that objection with a copy of all relevant portions of the transcript from the referee's hearing or an affidavit about evidence submitted to the referee if no transcript is available. In deciding whether to adopt a referee's finding of fact, the court may disregard any evidence which was not submitted to the referee unless the complaining party demonstrates that with reasonable diligence he or she could not have discovered and produced that evidence for the referee's consideration. (Emphasis added.)

Therefore, a party who takes issue with the referee's findings must file written objections to the referee's report in order to assign as error on appeal the trial court's adoption of factual findings in the report.

The City's first two assignments both challenge the referee's factual findings. Since the City failed to file written objections to the referee's report as required by Civ.R. 53(E)(6), the City is precluded from attacking these findings on appeal.

*4 Although the City does not raise the argument that it could not have filed written objections since the referee's report was adopted immediately by the municipal court, we note that Civ.R. 56(E)(7) provides that if a trial court enters judgment without waiting for timely written objections, the subsequent filing of the objections operates as an automatic stay of execution of the trial court's judgment pending the disposition of the objections. Thus, the City did have the opportunity to file written objections to the referee's report even though the municipal court immediately adopted the referee's report, as authorized by Civ.R. 53(E)(7).

Accordingly, the first two assignments are overruled.

In the third assignment, the City argues that the municipal court erred by awarding damages in any amount to the Ledbetters. This claim is premised on the argument that none of the Ledbetters had a certificate of title to the car at issue, and thus could not recover \$9,675 in damages for the loss of use since they had no lawful right to operate the car. The City also claims that the Ledbetters could not recover \$999 for lost or missing parts because the Ledbetters could not prove ownership to those parts. Moreover, those component parts to which the Ledbetters could prove ownership had been returned on January 16, 1990.

On appeal, the City does not contest the measure of damages awarded. It contests the fact that damages in any amount were awarded to the Ledbetters. However, since the City's arguments in support of this assignment are based on its claim that the referee erred in its determination as to ownership of the car, we likewise overrule the third assignment. We disposed of this contention in our discussion of the first two assignments. Since the City did not object to the referee's findings as to ownership, it cannot now raise these objections as a means of disputing the damage award.

The third assignment is overruled.

In the final assignment, the City claims that it is statutorily immune from liability for damages which arose in connection with the seizure and detention of the Ledbetters' car. The City relies on R.C. 2744.02 which provides:

(A)(I) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental

functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

On May 8, 1988, the City filed a Motion to Dismiss the Ledbetters' complaint, asserting that it was immune from liability under R.C. 2744.02. From our review of the record, it does not appear that the municipal court or the referee ever ruled on the motion. The City did not reassert its immunity claim during the August 11, 1988 hearing at which time the referee determined the issue of title ownership of the car. We do not have a transcript of the damages hearing subsequently held before the municipal court judge. No doubt, the City reasserted its claim of governmental immunity at the damages hearing since the immunity defense was directed to the damages portion of the Ledbetters' complaint. The Ledbetters do not contend that the City did not do so.

*5 Under R.C. 2744.01, one such governmental function is the "enforcement or nonperformance (sic) of any law." R.C. 2744.01(C)(2)(i). On appeal, the City claims that the acts of Officer West in seizing the car, and the subsequent detention of the car at the City garage for twenty-one months, qualified as a legitimate exercise of the City's governmental, i.e. law enforcement, function. The City thus argues that since its actions were within the scope of this governmental function, it was immune under R.C. 2744.02 and could not have been held liable for any damages the Ledbetters sustained as a result of the City's withholding of the car.

We agree that the seizure and detention of the Ledbetters' car did qualify, up to a certain point in time, as a legitimate exercise of the City's law enforcement function which was protected by governmental immunity. Officer West seized the car because he observed that the VIN plate appeared to have been taken from another car in violation of R.C. 4549.62. R.C. 4549.63 authorizes a police officer to seize and take possession of a vehicle when the officer has probable cause to believe a VIN plate has been tampered with. The car was subsequently held by the police as part of its ongoing investigation to discover who had tampered with the VIN plate. Thus, the acts of seizure and detention of the car were initially protected by the governmental immunity conferred under R.C. 2744.02.

It was not until the decision and entry of October 19, 1989, was filed that the City was told that it had wrongfully withheld Valerie Ledbetter's car. Prior to this determination, there was no need for the City to return the car since the City could have reasonably assumed that its actions in detaining the car as part of its ongoing investigation qualified as a legitimate exercise of its law enforcement function. See also R.C. 4549.63(D), that

puts the burden on the owner to submit satisfactory proof of ownership to reclaim the car.

However, once the court ordered the City to return the car, and there was no stay of that order, further retention of the car by the City could no longer be considered to be for the purpose of "enforcement ... of any law" as it had been judicially determined that the City's possession of the vehicle was not required for that purpose. Therefore, further detention of the car by the City ceased to be an "act or omission ... in connection with a governmental ... function" within the contemplation of R.C. 2744.02(A)(1), and ceased to be protected by the immunity afforded under R.C. 2744.02(A)(1). Governmental immunity did not, in this case, extend protection to the City's deliberate violation of the court order, even though its actions prior to the court order were protected by governmental immunity. We conclude that the governmental immunity extended under R.C. 2744.02 did not insulate the City from liability for damages which accrued after the decision and entry of October 19, 1988.

Since the detention of the car after the October 19, 1988, decision and entry was not protected by governmental immunity, we conclude that the damages should have been calculated from October 19, 1988 to January 16, 1990, the date the car was returned to the Ledbetters. This covers a period of 454 days. Expert testimony established that a reasonable rate for alternate means of transportation was \$15.00 per day. The City did not refute this testimony. The Ledbetters were thus entitled to recover \$6,810.00 for the loss of use of the car. The trial court properly included \$999 for parts which were lost or missing at the time the car was returned.

*6 The fourth assignment is sustained in part and overruled in part. Since damages may be calculated with certainty, we will reduce the damages award to \$7809, which sum represents the loss of use for 454 days at \$15.00 per day plus \$999.00 for parts which were lost or missing at the time the car was returned to the Ledbetters.

As modified, the judgment of the trial court will be affirmed.

BROGAN and GRADY, JJ., concur.

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