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IN THE SUPREME COURT

OF THE STATE OF UTAH

MARJORIE WINTERS,)

Plaintiff-Respondent,)

vs.) Case No. 15523

CHARLES ANTHONY, INC., a Utah corporation,)

Defendant-Appellant.)

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY HONORABLE MARCELLUS K. SNOW, JUDGE

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARJORIE WINTERS, Plaintiff-Respondent, vs. CHARLES ANTHONY, INC., a Utah corporation, Defendant-Appellant.	Case No. 15523

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

This is an action to recover the value of jewelry bailed to the defendant-appellant for the purpose of alteration. After the alterations were completed the jewelry was either lost or stolen through the negligence of the appellant and has not been delivered to the respondent.

DISPOSITION IN LOWER COURT

The action was tried on September 29, 1977 before the Honorable Marcellus K. Snow, sitting without a jury. On October 18, 1977, judgment was entered in favor of respondent in the amount of eight thousand one hundred and eighty dollars ($8,180.00), together with interest and costs.

RELIEF SOUGHT ON APPEAL

Appellant does not dispute the conclusion of the trial court

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that appellant is liable to the respondent for the value of the jewelry under a contract of bailment. Appellant claims only that the trial court's damage award was excessive.

STATEMENT OF FACTS

On March 23, 1976, respondent delivered to appellant's jewelry store in Trolley Square a bracelet given to her by her brother-in-law following her sister's death. The bracelet was of gold manufacture and was set with 63 emeralds and 54 pearls. Respondent requested appellant to convert the bracelet into a cross to be worn as a pendant or pin.

On about April 15, 1976, after the alterations had been completed, appellant delivered the cross to H. J. Vander Veer, a well known Salt Lake City jewelry appraiser, to be appraised. Vander Veer, who had also seen the jewelry prior to the alterations, examined the cross and rendered an appraisal concluding that the cross contained 63 emeralds weighing a total of 18.9 carats and 54 half pearls which, together with the setting, had a total retail market value of $8,180.00.

When respondent returned to appellant's store in June, 1976 to pick up the cross and complete payment for the alterations, she was informed that the cross had been returned by Vander Veer, but was missing. The pendant was stolen or lost through the negligence of the appellant and has not been delivered to the respondent.

The trial court held that the market value of the cross at the time of the loss was $8,180.00 and entered judgment in favor of the respondent in that amount, plus interest and costs. Appellant now

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appeals claiming that the trial court's damage award is excessive.

ARGUMENT POINT I

THE TRIAL COURT CORRECTLY HELD THAT THE APPROPRIATE MEASURE OF DAMAGES IS THE MARKET, OR REPLACEMENT, VALUE OF THE JEWELRY AT THE TIME IT WAS LOST AND AWARDED THAT AMOUNT TO RESPONDENT.

Respondent does not dispute, and the trial court held, that the correct measure of damages in this case is the market, or replacement, value of the jewelry at the time it was lost through the negligence of the appellant. Clack-Nomah Flying Club v. Sterling Aircraft, Inc., 17 U.2d 245, 408 P.2d 904 (1965); Park v. Moorman Manufacturing Company, 121 U. 339, 241 P.2d, 914 (1952).

The principle issue before this court is not whether the trial court should have adopted market value as the measure of damages, but whether the damage award was in excess of market value. In reviewing the award this court is governed by the following well-established principles set forth in Brown v. Board of Education of the Morgan County School District, 560 P.2d, 1129, 1131 (Utah 1977), quoting from Hardy v. Hendrickson, 27 U.2d 251, 495 P.2d 28, 29 (1972):

> On appeal the evidence is viewed in the light most favorable to sustain the lower court, and the findings will not be disturbed unless they are clearly against the weight of the evidence or it manifestly appears that the court misapplied the law to the established facts.

Likewise, this court held in Hanover Ltd. v. Fields, 568 P.2d 751, 753 (Utah 1977), that the trial court's findings shall not be disturbed ". . . unless the evidence is such that all reasonable minds would be persuaded to the contrary." Furthermore, it was held in Barlow Upholstery Furniture Company v. Emmel, 533 P.2d 900, 902 (Utah 1975) that where a finding of fact . . .finds any reasonable support in the evidence it will not be disturbed on appeal. See also,

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Ewell and Son, Inc. v. Salt Lake City Corporation, 27 U.2d 188, 1283 (1972).

There is ample evidence in the record in this case to suppo the trial court's finding that the market value and replacement va of the jewelry at the time it was lost was $8,180.00. H. J. Vandc the professional appraiser to whom appellant elected to take the bracelet for appraisal following its reconstruction into a cross a customarily appraised jewelry for the appellant, testified that he rendered a formal appraisal involving, inter alia, the measurement of the weight, dimensions, specific gravity and indices of refracti of the stones mounted on the cross (T. 20-23). The appraisal conc that the cross contained 63 gem-quality Muzo emeralds having a tot weight of 18.9 carats and valued on the retail market at $400.00 p carat (T. 12,19-21) and 54 half-pearls valued on the retail market at $5.00 each. Vander Veer testified that the retail market value the whole piece was $8,180.00 (T.11) with a standard margin of erro of between 20 and 25 per cent (T.10). Vander Veer acknowledged tha the wholesale price for the individual emeralds in the piece was approximately $200.00, and reaffirmed that his appraisal "is characterized as retail price" (T. 12). Vander Veer explained why he appraised the cross at retail value, rather than wholesale valu as follows at pages 12-13 of the trial transcript:

> Because an appraisal, when it is prepared, is, usually, for an insurance company or for the party that wants to know what their item is worth. If it is used for the insurance purposes the insurance company would pay them as to their replacement value of the item, which would be the normal retail value; not the wholesale price."

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Vander Veer testified that the purpose of an appraisal is to place a retail value on an item (T.18); that he never appraises jewelry as to its wholesale value, but only as to its retail value; and that the retail value of the cross, as well as other jewelry he appraises, is arrived at by "keystoning", or doubling, the wholesale price (T. 13-14). He stated that in his opinion the keystone figure, or marked-up value, represents the retail value of the cross (T. 17). He also stated that his appraisal did not take into account any so-called esthetic value or appearance (T.19) and that his appraisal reflected the average wholesale price of dealers throughout the country (T. 21). Vander Veer testified that there is no more certain way of establishing the value of a piece of jewelry than by appraisal by a competent appraiser (T. 23) and that although a dealer might sell an item above or below market value, appraised value means market value (T. 25-26). In fact, dealers differ so much in their approach to marketing that it is "almost impossible" to arrive at a retail value except by an appraisal which takes into account wholesale prices across the country (T. 17). Vander Veer also said he would insure the cross at the figure in his appraisal if he were insuring it for his wife or valuing it as part of an estate (T. 24).

The conclusions of the expert appraiser were disputed by the appellant only through the testimony of Barry Nash, an employee of the appellant, who said that he "probably" could buy similar stones and compose a similar piece for between three and four thousand dollars and "probably" would be willing to sell it for approximately five thousand dollars (T. 36). However, Nash admitted that he was not qualified to appraise precious stones (T. 38-39); that he did not

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attempt to appraise the jewelry in question, either before or aft it had been altered (T. 39); that it was he who selected Vander V to appraise the jewelry so that the appellant would know what it was worth ("[I] had it done because of some interest in the value the piece" (T. 37); and that it is an appraiser's job to perform tests on stones to determine their quality and, based on experien and knowledge of the market, establish a fair retail selling price (T. 43-44). And, although Nash testified that he would not keyst the jewelry in question and that he thought it would be difficult to get more than $5,000.00 for it in Salt Lake City, he could not that another jeweler in Salt Lake City would not keystone it or th it wouldn't bring more than $5,000.00 elsewhere (T. 45). When ask whether he meant to represent that O. C. Tanner, another Salt Lak Jeweler, is not keystoning $4,000.00 items, Nash replied:

> "I didn't say that. I said, I would guess he, probably, is not." (T. 47)

Nash's testimony was equivocal, self-serving and lacking in foundation as to expertise. The testimony of Vander Veer, appella own choice as appraiser, was, by comparison, unequivocal, credibl based upon unquestioned professional expertise and provided the t court ample reasonable evidence in support of the award of $8,180. the market, or replacement, value. Surely it cannot be said that viewing the evidence in the light most favorable to the lower co findings the damage award is "clearly against the weight of the evidence." Brown v. Board of Education of Morgan County School D supra at 1131. Nor can it be said that "the evidence is such tha all reasonable minds would be persuaded to the contrary." Hanow Ltd., v. Fields supra at 753.

Appellant seems to infer error in the replacement value, which

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purposes of this appeal both parties agree is synonymous with market value, means the cost to the appellant of purchasing stones at less than wholesale prices, manufacturing a similar piece of jewelry and marking it up by an amount arbitrarily fixed by the appellant. However, it is clear that replacement value means the amount it would cost respondent to replace the property. Furthermore, appellant's argument ignores the testimony of appellant's own witness, Mr. Nash, who testified that most jewelers determine for themselves what kind of profit margin they need on the sale of a piece and that "that margin would vary, tremendously" (T. 29,34). That variation is the very reason why an appraisal is performed. In the words of Mr. Nash, "The objective of an appraisal would be to reflect what the value of an item would be, if it was to be sold in a jewelry store, or replaced for insurance purposes. . . an appraisal [is] done to establish a retail price. . ." (T. 34). As Nash stated, the value assigned by the appraiser" . . .should represent the average of what it would cost to replace the piece" (T. 33). This is precisely what the expert appraiser, H. J. Vander Veer, did in this case (T. 16). And this is why insurance companies rely upon appraisals to fix the replacement value of an item on which compensation is to be made (T. 12). Thus the testimony of appellant's own witness helped to demonstrate that in this case the appraisal value is the replacement value, which is the market value.

Indeed, rather than excessive, Vander Veer's appraisal was probably on the short side. He testified that his appraisal did not take into account the jeweler's ". . .overhead, his personnel, his fixed costs, his profit margin, and all that. . ." (T. 18).

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Appellant has also made the bald assertion that "recovery be limited to the Salt Lake City retail jewelry market" without providing any authority for that proposition. The law is contrary. Stoll v. Almon C. Judd Co., 106 Conn. 551, 138A. 479, 483 (1927), cited by appellant at page 9 of its brief, makes it clear that the value to be recovered is the ". . .value in the market open to the plaintiff at the time of loss." There is nothing in the law or in the record to limit the market open to respondent in this case to Salt Lake City alone. Such a limitation would be inappropriate in the case of jewelry, which can be easily moved from place to place for sale (T. 45,46). The market open to respondent extended at least to cities elsewhere around the country. Vander Veer was familiar with prices elsewhere (T. 16,21), whereas there is no indication in the record that Nash possessed such knowledge (T. 2[illegible], 45). Vander Veer stated that his appraisal reflected wholesale value in Salt Lake City or elsewhere (T.12).

The trier of fact has wide discretion as to the amount of damages awarded and an award will not be set aside as a matter of unless grossly and manifestly excessive. Amoss v. Broadbent, 514 2d 1284, 1287 (Utah 1973); Ward v. Enevold, 504 P. 2d 1111,1114 (Ut 1972). In the instant case the trial court's award had substantial support in the record and was not excessive.

THE APPRAISER'S TESTIMONY ON THE MARKET VALUE OF THE JEWELRY HAD SUFFICIENT FOUNDATION.

Appellant has challenged the qualifications of its own appraiser claiming that Mr. Vander Veer's testimony as to the value of the jewelry was received without proper foundation regarding

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his expertise in the Salt Lake City retail jewelry market.

It should be noted that no objection was made by appellant at trial regarding the expert's qualifications as an appraiser. Indeed, it was appellant who selected this expert and submitted the jewelry to him in order to, in the words of appellant's employee and witness Nash,". . .establish a retail price. . ." Vander Veer's testimony had a sufficient foundation. He testified that as of the time of the trial he had been appraising jewelry for ". . .quite a few stores in the [Salt Lake City] area. . .for six or seven years" (T. 9). He testified in detail concerning the method which he followed in appraising the stones in question (T. 11-12, 19-23), and stated repeatedly that all of his appraisals are rendered in terms of retail market values (T. 12,15,25). Vander Veer stated that he is himself a dealer in emeralds (T. 12) and in rendering appraisals takes into account ". . .the value which is placed on stones by the Retail Jewelers Association, and groups at the Gemological Institute, in the material which they put out, which more or less, grades stones as to the color, the clarity, and the cut" (T. 16).

Mr. Vander Veer was qualified as an expert appraiser with substantial knowledge and expertise in appraising the retail market value of precious stones in the Salt Lake City area or any area.

POINT III

THE TRIAL COURT AWARDED RESPONDENT THE AMOUNT REQUIRED TO RESTORE HER TO HER POSITION AT THE TIME OF THE LOSS.

At Point IV of the appellant's brief appellant seems to argue that since the jewelry in question was a gift to the respondent, an award of any damages to her for the loss of the jewelry would

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constitute a windfall. It is well settled that the fundamental principle of damages for the loss of bailed property ". . .is to r the injured party to the position he would have been in had it not been for the wrong of the other party." Park v. Moorman Manufact Company, supra at 920. Regardless of how respondent acquired the jewelry, she unquestionably was the owner at the time of the loss was damaged in the full amount of the market value of the jewelry at that time. The trial court's award was consistent with the pro of market value and in no respect is a windfall profit to the respondent.

CONCLUSION

The weight of the evidence supported the trial court's findi that the market value of the jewelry at the time of this loss was $8,180.00. The trial court properly awarded respondent that amoun in order to restore her to the position she would have been in ha it not been for the wrongful loss of the jewelry by the appellant.

SENIOR & SENIOR

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CERTIFICATE OF DELIVERY

I hereby certify that two true and correct copies of the foregoing brief of plaintiff-respondent were delivered to Richard C. Landerman of the firm of Landerman & Rodgers, 6653 South 2475 East, Salt Lake City, Utah 84121, this 17th day of March, 1978.

Pat Regan

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