COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

MATTHEW BURTON	:	
Plaintiff	:	**CASE NO. 2015 CVH 00899**
vs.	:	**Judge McBride**
TOMMY DEAN JENT	:	**DECISION/ENTRY**
Defendant	:	

T. David Burgess, counsel for the plaintiff Matthew Burton, 110 N. Third Street, Williamsburg, Ohio 45176

Aaron J. Manter, counsel for the defendant Tommy Dean Jent, 6124 Corbly Road, Cincinnati, Ohio 45230

This matter came on for hearing on the 18th day of March, 2016 on the plaintiff Matthew Burton's motion for default judgment pursuant to Civ.R. 55 regarding his damages claim.

Upon consideration of the motion, the written and oral arguments of counsel, the evidence presented for the court's consideration, and the applicable law, the court renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On July 8, 2015 the plaintiff Matthew Burton filed a complaint for injunctive relief and damages against the defendant Tommy Dean Jent. After being properly served with a summons and a copy of the complaint, the defendant failed to answer or otherwise respond to the complaint.

The complaint stemmed from a dispute involving an easement that grants the parties use of a shared driveway which in turn allows the parties to enter and exit their properties. In the complaint, it was alleged that the defendant restricted the plaintiff's use of the shared driveway and that the defendant damaged parts of the plaintiff's property. The plaintiff sought injunctive relief prohibiting the defendant from restricting his use of the easement and monetary relief for the damaged property.

After the defendant failed to answer the complaint, on January 14, 2016 the plaintiff moved for default judgment against the defendant. The court held a hearing on the injunctive relief component of the plaintiff's complaint on February 12th. Following the hearing, the court on March 21st granted default judgment as to the injunctive relief part of the case and enjoined the defendant from a number of actions, including interfering with the plaintiff's use of the property.

On March 18th, the court held a hearing on the portion of the motion for default judgment concerning damages. At the hearing, the plaintiff requested damages in the amount of $5,508.75. The requested damages are itemized as follows:

- $895 to repair damage to the plaintiff's damaged trees, flag pole, and fence,[1]
- $500 for a survey of the parties' property boundaries,[2]
- $65 for the process server,[3] and
- $4,048.75 in attorney fees.[4]

The plaintiff presented evidence to support damages in this amount.[5] Regarding the property damage, the plaintiff testified that he came home from work to discover that his trees, flag pole pole, and fence that were present on his side of the easement were destroyed. He further averred that they could have been removed rather than destroyed. Based upon the ongoing dispute that the plaintiff had with the defendant over the easement, he believed that the defendant was responsible for the destruction of his property. The plaintiff also submitted surveillance video footage showing the defendant and his guests repeatedly driving on the plaintiff's property and, at times, restricting the plaintiff's access to the driveway.

The defendant testified that he did not destroy any of these items, nor did he have a third party destroy them at his behest. The defendant claimed he had no knowledge as to how the property was destroyed. He did, however, admit that he had a third party spray paint the plaintiff's rock, which had displayed the plaintiff's address. The defendant was under the incorrect impression that, based on an aerial photograph he had of the properties, the entire easement was on his property.[6] He therefore

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[1] Pls. Ex. 1.
[2] Pls. Ex. 2.
[3] Pls. Ex. 3.
[4] Pls. Ex. 4.
[5] *See* Pls. Exs. 1-4.
[6] *See* Defs. Ex. D (mistakenly showing that the entire driveway was within the defendant's property boundary).

believed that the rock had been on his property, and he had it spray painted with his address.

The plaintiff argued that the cost for the survey was necessary so that the parties correctly understood that the driveway and easement were on both parties' property. Indeed, the defendant testified that once he received a copy of the survey, he had the rock re-painted to once again display the plaintiff's home address.

As to the fee for the process server, the plaintiff argued that the cost was necessary because service by mail, which was addressed to the defendant's correct home address, failed. Finally, the plaintiff's counsel testified as to the cost of his services and their necessity. At the end of the hearing, the court took the damages issue under advisement.

Following the hearing, the defendant filed a supplemental memorandum and affidavit on March 29, 2016. The defendant argued that an award of attorney fees would be improper. The court then set a schedule for the parties to brief the issue of damages.

The plaintiff filed a brief in support of awarding attorney fees on May 13th. The defendant filed his response in opposition on May 24th. The plaintiff then filed his reply in support of attorney fees on June 1st.

STANDARD OF REVIEW

Civ.R. 55 governs default judgments. Pursuant to Civ.R. 55(A): "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise

defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefor * * *."[7]

Civ.R. 55 also permits the court to hold a hearing to determine the proper amount of damages:

> "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper * * *."[8]

LEGAL ANALYSIS

The court finds that default judgment against the defendant is warranted on the issue of damages because the defendant has never filed an answer to the plaintiff's complaint, nor has he asked for leave to file an answer out of time. Having reviewed the evidence regarding damages, the court finds that the defendant has destroyed the plaintiff's property, including a fence, a flagpole, and decorative trees. The defendant shall pay the plaintiff $895 to repair and replace this property.

As to court costs, Civ.R. 54(D) empowers the court to award costs to the prevailing party.[9] "Costs are generally defined as being the statutory fees to which officers, witnesses, jurors and others are entitled for their services in an action, and which the statutes authorize to be taxed and included in the judgment."[10] The court

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[7] Civ.R. 55(A).
[8] Id.
[9] *See* Civ.R. 54(D) ("Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs.").
[10] *Nithianantha v. Toirac*, 12th Dist. Warren Nos. CA2014-02-021, CA2014-02-028, CA2014-08-114, 2015-Ohio-1416, ¶ 89, citing *Vance v. Roederscheimer*, 64 Ohio St.3d 552, 555, 597

does not have authority to tax items as costs if they "do not fall within the general rubric of 'costs' * * *."[11] Whether an item is a taxable cost is "entirely of statutory authority and control."[12]

The court finds it reasonable to award the plaintiff the cost of the process server, which is a cost permitted by statute, in the amount of $65.[13] However, regarding the cost of the survey, which was $500, courts have held that the cost of surveys are not taxable as court costs, as there exists no statutory authority for treating surveys as costs.[14] Accordingly, the court will not award the cost of the survey as a taxable cost against the defendant.

Finally, the parties disagree as to whether the plaintiff, as the prevailing party, can receive attorney fees from the defendant. Ohio follows the American Rule with respect to attorney fees, which dictates that each party pays its own attorney fees in most circumstances.[15] There are, however, multiple exceptions to the American Rule.[16] These exceptions include contractual provisions between the parties that shift costs,

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N.E.2d 153 (1992). *See Adkins v. Rumpke Waste System*, 12th Dist. Clermont No. CA92-07-075, 1993 WL 29061, *4 (Feb. 8, 1993) ("A taxable cost is a necessary litigation expense.").

[11] *Howard v. Wills*, 77 Ohio App.3d 133, 137, 601 N.E.2d 515 (4th Dist. 1991).

[12] Id., citing *Muze v. Mayfield*, 61 Ohio St.3d 173, 175, 573 N.E.2d 1070 (1991).

[13] *See Winnestaffer v. Smith*, 10th Dist. Franklin No. 07AP-440, 2007-Ohio-7002, ¶11 (finding statutory support for award of costs of court ordered process server).

[14] *Howard*, 177 Ohio App.3d at 139. *See Lisath v. Cochran*, 4th Dist. Lawrence No. 93CA18, 1994 WL 11411, *2 (Jan. 12, 1994) ("The general consensus is that the expense of surveying real property cannot be taxed against a losing party without specific authority to do so," and there "is no such authority under Ohio law * * *.").

[15] *Krasny-Kaplan Corp. v. Flo-Tork, Inc.*, 66 Ohio St.3d 75, 77, 609 N.E.2d 152 (1993), citing *Sorin v. Bd. of Edn.*, 46 Ohio St.2d 177, 170, 347 N.E.2d 527 (1976).

[16] *Krasny-Kaplan Corp.*, 66 Ohio St.3d at 77. *See Fogel v. Lyonhil Reserve Homeowners' Assn.*, 12th Dist. Butler No. CA2007-06-151, 2008-Ohio-6065, ¶ 31, quoting *Hagans v. Habitat Condominium Owners Assn.*, 166 Ohio App.3d 508, 851 N.E.2d 544, 2006-Ohio-1970 (explaining that Ohio follows the American Rule with respect to attorney fees, which can't be awarded unless "(a) a statute creates a duty, (2) an enforceable contract provision provides for an award of attorney fees, or (3) the losing party has acted in bad faith.").

statutory provisions that specifically provide that the prevailing party may recover attorney fees, and a finding that the losing party acted in bad faith.[17]

It is this last exception that the plaintiff contends applies in the case at bar. The plaintiff argues that attorney fees should be awarded because the defendant acted in bad faith and with malice. Indeed, "[a]ttorney fees may be awarded as an element of compensatory damages where the jury finds that punitive damages are warranted."[18] However, when there is "no award of punitive damages," then the prevailing party is "not entitled to attorney fees."[19]

In *Formica v. Dehner*, 12th Dist. Warren No. CA2015-03-016, 2016-Ohio-75, the appellants appealed on the basis that it was error for the trial court to grant summary judgment on their claim for attorney fees.[20] The appellants had sought attorney fees and punitive damages in their complaint.[21] However, the appellants were unsuccessful in obtaining punitive damages.[22] The Twelfth District Court of Appeals reflected that "[a]bsent a statutory basis for attorney fees, there is no separate tort action for the recovery of attorney fees absent an award of punitive damages and a finding of actual

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[17] *Krasny-Kaplan Corp.*, 66 Ohio St.3d at 77-78.
[18] *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 558, 644 N.E.2d 397 (1994), citing *Columbus Finance, Inc. v. Howard*, 42 Ohio St.2d 178, 183, 327 N.E.2d 654, 658 (1975).
[19] *Formica v. Dehner*, 12th Dist. Warren No. CA2015-03-016, 2016-Ohio-75, ¶ 29. *See Roberts v. Mike's Trucking, Ltd.*, 9 N.E.3d 483, 2014-Ohio-766, ¶ 28 (holding that attorney fees cannot be awarded under the punitive damages exception unless there is a finding of malice *and* an award of punitive damages); *Fogel*, 2008-Ohio-6065 at ¶ 32, quoting *Digital & Analog Design Corp. v. N. Supply Co.*, 63 Ohio St.3d 657, 662, 590 N.E.2d 737 (1992) ("Without a finding of malice and an award of punitive damages, plaintiff cannot justify the award of attorney fees, unless there is a basis under Civ.R. 11.").
[20] *Formica*, 2016-Ohio-75 at ¶ 21.
[21] Id. at ¶ 21.
[22] Id. at ¶ 19.

malice."[23] Because the appellants had not received an award for punitive damages, they could not, therefore, receive attorney fees.[24]

In the instant case the plaintiff maintains that he should be awarded attorney fees because the defendant acted with actual malice in the destruction of his property and in his restriction of the plaintiff's use of the easement. However, as the plaintiff notes, he "did not specifically ask for punitive damages as a punishment for the Defendant."[25] Because the plaintiff will not be awarded punitive damages, he may not be awarded attorney fees under the punitive damages exception to the American Rule.[26] Accordingly, the court does not find an award of attorney fees proper.

In sum, the court finds proper an award to the plaintiff for the damage that the defendant inflicted on the plaintiff's property in the amount of $895, as well as the cost of the process server in the amount of $65. The court finds that the plaintiff is not entitled to the cost of the survey, which was $500, nor is he entitled to attorney fees, which totaled $4,048.75.

CONCLUSION

For the foregoing reasons, the court finds the plaintiffs' motion for default pursuant to Civ.R. 55 well-taken and hereby grants it. The court orders the defendant to pay $960. Of the $960, $895 is awarded for the repair of the plaintiff's damaged trees,

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[23] Id. at ¶ 22, citing *Digital & Analog Design Corp.*, 63 Ohio St.3d at 662.
[24] *Formica*, 2016-Ohio-75 at ¶ 22.
[25] Pls. Brief, pg. 1.
[26] *Formica*, 2016-Ohio-75 at ¶ 29. *See Roberts*, 2014-Ohio-766 at ¶ 28; *Fogel*, 2008-Ohio-6065 at ¶ 32.

fence, and flag pole. The remaining $65 of the $895 is awarded as a taxable cost for the process server.

IT IS SO ORDERED.

DATED: 9-1-16

Judge Jerry R. McBride