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No. 51953-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JON CARVILLE, et ux., et al.,

Appellants,

v.

JOHN RODIUS,

Respondent.

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

Appellant Jon Carville (hereinafter “Carville”) appeals the judgment against him for entered by the trial court as an unreasonable award of damages unsupported by the evidence offered at trial and as an award of damages that was not sought in the Complaint. Because the award of damages was not sought and was unsupported by the evidence offered at trial, this court must reverse and vacate.

Appellant also appeals the denial of its Motion for Reconsideration and to Alter or Amend Judgment or for a New Trial (hereinafter “Motion for Reconsideration”).

Carville also appeals the trial court’s denial of a motion for a continuance due to the unavailability of a material witness to the ultimate issue of the trial. Because the trial court abused its discretion in this regard, the judgment must be vacated and a new trial ordered by this court.

II. ASSIGNMENTS OF ERROR AND RELATED ISSUES

Assignment of Error 1

The trial court erred in awarding damages for reasonable rental value of the equipment that was allegedly converted by Carville. The judgment should be reversed and vacated.

Issue No. 1-1

Did the trial court err by awarding damages for reasonable rental value when no such relief was sought in the Complaint or arguments of Respondent?

Issue No. 1-2

Did the trial court err by awarding damages for reasonable rental value when no testimony was offered as to the rental value of the property at issue and no testimony was offered as to the reasonableness of any such rental value?

Issue No. 1-3

Did Plaintiff's election to pursue only lost profits bar any recovery for reasonable rental value?

Issue No. 1-4

Was the surprise application of the reasonable rental value measure of recovery a ground for reconsideration or amendment of the judgment pursuant to CR 59?

Assignment of Error 2

The trial court erred in denying the motion for continuance that was made when a witness under subpoena failed to appear at trial. The judgment should be reversed and a new trial ordered.

Issue No. 2-1

Did the trial court abuse its discretion when it denied a continuance of any length requested by Carville after a material witness under subpoena failed to appear and when no prejudice was to result to Plaintiff?

III. STATEMENT OF THE CASE

Claim of Respondent

Appellant was the defendant at trial. Respondent John Rodius was the Plaintiff at trial. In his Complaint, Respondent sought damages for lost profits associated with the conversion of an excavator he claimed to own. CP 2. The Complaint stated that “Plaintiff has suffered significant business loss due to the purposeful actions of Defendants.” CP 2. The Complaint is silent as to any claim for reasonable rental value associated with the deprivation allegedly caused by Appellant. CP 1-3.

Trial

At trial, Respondent testified in support of his claim for damages. RP 2-51. No other witness testified as to Respondent’s damages. Respondent did not offer any testimony as to the rental value of the excavator at issue. Nor did he offer any evidence or testimony as to the reasonableness of any such rental value. RP 2-51. The only

specific testimony offered by Respondent regarding rental cost was what he testified to in the context of the profit he claims to have lost. In that testimony, Respondent claimed to have rented various machines for \$50,000 during the time he did not have the use of the excavator. RP 32.

After Respondent's case-in-chief was presented, Appellant discovered that a subpoenaed witness was not present and requested a continuance of the proceedings. CP 4-7, RP 51-53. The witness was to offer testimony about the authenticity of a document that transferred ownership of the excavator and, thus, was of high importance to the ultimate issue in the case. CP 20-22. This request was denied. A previous order allowing Respondent to possess the excavator at issue pending trial was entered months before trial, but Respondent did not avail himself of this order. RP 46. That order was still in effect at the time Appellant requested the continuance. RP 46.

In closing, counsel for Respondent focused solely on the claim for lost profits – the only measure of damages that was pleaded and on which any evidence was presented. CP 11. The court concluded that Respondent failed to meet his burden of proof on that issue and no damages were awarded for lost profits. CP 11-12. That decision was not appealed by Respondent. The court awarded damages for the

reasonable rental value of the excavator and entered judgment for \$229,200 plus interest. CP 8-9.

Motion for Reconsideration

After entry of judgment, a timely Motion for Reconsideration was filed.¹ CP 10-16. The motion sought, pursuant to Civil Rule 59, reconsideration and elimination of the award of damages. CP 10-14. The motion also requested a new trial based upon the absence of the witness under subpoena and the court's failure to continue the proceedings to secure his presence and testimony. CP 15. This motion was denied in total without explanation by the court. CP 17.

I. ARGUMENT

A. Standard of Review

Determinations of the applicable measure of damages are questions of law. "Generally the appropriate measure of damages for a given cause of action is a question of law, reviewed de novo." *Womack v. Von Radon*, 133 Wn.App 254, 263, 135 P.3d 542, 546 (2006) (internal citation omitted).

A challenge to the sufficiency of evidence supporting a trial court's award of damages is reviewed to see if it is supported by substantial evidence. *Keever & Assocs. v. Randall*, 129 Wash.App. 733, 737, 119

¹ The Motion for Reconsideration was erroneously labeled as "MOTION FOR SUMMARY JUDGMENT" in the footer of the document.

P.3d 926 (2005). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. *Hegwine v. Longview Fibre Co.*, 132 Wash. App. 546, 555–56, 132 P.3d 789, 793 (2006), *aff'd*, 162 Wash. 2d 340, 172 P.3d 688 (2007)

A trial court's denial of a motion for a continuance is reviewed for an abuse of discretion.

In re Estate of Fitzgerald, 172 Wash. App. 437, 448, 294 P.3d 720, 726 (2012).

A trial court's denial of a motion for reconsideration is reviewed for an abuse of discretion. *Wilcox v. Lexington Eye Inst.*, 130 Wash.App. 234, 241, 122 P.3d 729 (2005). An abuse of discretion exists if no reasonable person would have taken the view the trial court adopted, the trial court applied the wrong legal standard, or it relied on unsupported facts. *Fishburn v. Pierce Cty. Planning & Land Servs. Dep't*, 161 Wash. App. 452, 472, 250 P.3d 146, 157 (2011)

B. The Trial Court's Application of the Reasonable Rental Value Measure of Damages was Inappropriate as it was Not Pleaded, Not Addressed by Any Evidence, and Not Argued

The Complaint filed by Respondent identified only one category of damages due to the alleged conversion of the excavator. CP 2. It states “Plaintiff has suffered significant business loss due to the purposeful actions of Defendants. CP 2. There is nothing in the record documenting any request for relief pertaining to the reasonable rental value of the excavator. Neither was reasonable rental value discussed during the testimony of Respondent, which is the only testimony offered in support of any specification of damages. RP 2-51.

Civil Rule 8 identifies the general rules of pleading, and it requires a “short and plain statement of the claim showing that the pleader is entitled to relief.” CR 8(a)(1).

Although inexpert pleading has been allowed under the civil rule, insufficient pleading has not. A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests.

Lewis v. Bell, 45 Wash. App. 192, 197, 724 P.2d 425, 428 (1986). Here, any claim for damages associated with the excavator’s reasonable rental value were not made at all and thus are insufficient. Appellant was not given any notice that the claim was going to be pursued. Indeed, it was not pursued; it was only raised *sua sponte* by the trial court in its oral decision. Because the claim for reasonable rental value was never pleaded, it cannot serve as the basis for any judgment entered after trial.

In addition, Respondent's unpleaded claim for reasonable rental value is barred by the doctrine of Election of Remedies. By proceeding only on a claim for lost profits as a remedy for the alleged conversion, Defendant made an election.

One is bound by an election of remedies when all of the three essential conditions are present: (1) the existence of two or more remedies at the time of the election; (2) inconsistency between such remedies; and (3) a choice of one of them....The prosecution to final judgment of any of one of the remedies constitutes a bar to the others.

McKown v. Driver, 54 Wn.2d 46, 55, 337 P.2d 1068, 1073 (1959)(internal citations omitted).

On the first condition, a party claiming conversion has available to it the remedy for reasonable rental value or lost profits. *Dennis v. Southworth*, 2 Wash. App. 115, 124–25, 467 P.2d 330, 337 (1970). These remedies are inconsistent in that the court could not award both reasonable rental value and lost profits. Had Respondent not been deprived of the excavator, he would not have obtained business profit and rental value for the equipment. According to *Southworth*, consequential damages like lost profits and reasonable rental value may be awarded in conjunction with the fair market value of the converted property. *Id.* This result would likely lie in a case where the converted property was not returned to the

party seeking damages. But there is no authority for allowing both lost profits and reasonable rental value as the remedies are inconsistent.

Last, Respondent's election to pursue the lost profits remedy was prosecuted to judgment. The court concluded that Respondent had failed to meet its burden of proof on the issue, and no award was allowed. CP 8-9, CP 13-14.

C. The Trial Court's Decision is Not Supported by Substantial Evidence and Must be Reversed

Alternatively, in the event the damages claim that was not pleaded may be considered and adjudicated by the court, it would still have to be supported by evidence to be sustainable on appeal. *Keever & Assocs. v. Randall*, 129 Wash.App. 733, 737, 119 P.3d 926 (2005). Here, there was no evidence offered or admitted on the issue of reasonable rental value. RP 2-51, and so that portion of the judgment cannot be sustained.

It may be argued that the portions of the testimony of Respondent regarding the replacement equipment he had to procure supports the award of reasonable rental value damages. This testimony is in the record at RP 32. There, Respondent testified that he spent \$50,000 in rental expense to replace the excavator. RP 32. He also testified that "sometimes they will rent a 200 size machine for \$12,000 a month..." RP 32. This testimony was in the context of damages that Respondent claimed to have suffered as

business losses. It was not testimony about his excavator but about other pieces of equipment that he was seeking reimbursement for as an element of his lost profits. RP 31-32. Because no evidence was offered as to the Respondent's excavator's reasonable rental value, the damages award in that regard is unsupported by any evidence.

Notwithstanding the fact that Respondent claimed to have replaced his excavator during the time he was deprived of its use for \$50,000, the court used the \$12,000 per month rate, inferred its reasonableness, and awarded \$229,200 in reasonable rental value damages for the 19.1-month period. CP 14. This is error as there was no testimony as to the reasonableness of either the \$50,000 rental expense or the \$12,000 rental expense rate. It has been held that evidence of payment for services is not evidence of the reasonableness of the amounts paid. *W. L. Reid Co. v. M-B Contracting Co.*, 46 Wn.2d 784, 792, 285 P.2d 121, 126 (1955). That court stated:

We have held that proof of indebtedness incurred or paid for medical services, in the absence of evidence of reasonable value therefor, is insufficient to support a verdict or a judgment.

Id. (internal citations omitted). Therefore, even allowing the trial court's inference that the replacement cost Respondent incurred is substantial evidence of the rental value of the excavator at issue, there is no evidence

of the reasonableness of those charges. Therefore, the award of damages was inappropriate and must be reversed.

D. The Trial Court Abused its Discretion by Denying the
Motion for Reconsideration

The trial court's denial of Appellant's Motion for Reconsideration and to Alter and Amend Judgment or For New Trial ("Motion for Reconsideration") was an abuse of discretion. Appellant sought reconsideration on several grounds that included "surprise which ordinary prudence could not have guarded against" under CR 59(a)(3). This request was based on the court's award of reasonable rental value when that measure of damages was not pleaded and was not argued. Appellant had no opportunity to present evidence on this issue and thus was unable to argue the issue after the parties had rested.

Court's review the pleadings to determine if there has been surprise that could not have been guarded against by reasonable prudence. *E.g., Smith v. Rich*, 47 Wn.2d 178, 183, 286 P.2d 1034, 1037 (1955). Respondent's Complaint only makes issue out of the profits he claimed his business lost due to Appellant's conversion of the excavator. CP 2. It could not have been anticipated that reasonable rental value was going to be an issue in the case – especially because it was never discussed during any testimony nor made the subject of any argument of Respondent. CP

11. No reasonable person could conclude, as the trial court apparently concluded in its Order Denying Motion for Reconsideration at CP 17, that Appellant was not surprised by this issue being the basis for the court's award of damages. Thus, under the applicable standard of review, the court abused its discretion in denying the Motion for Reconsideration under CR 59(a)(3).

The Motion for Reconsideration also sought relief under CR 59(a)(6), (7), and (9). The arguments for relief under this subsection mirror the arguments set forth previously in this brief's Argument, Sections (B) and (C).

E. The Trial Court's Denial of Appellant's Motion for
Continuance was Error as Appellant Showed Good Cause
and No Prejudice Would Have Resulted

Appellant moved for a continuance after it was discovered a material witness under subpoena was not present to testify. RP 52-53. The request was denied by the court, and the court justified its decision by stating that counsel for Appellant was given the lunch break to determine why the witness was two and a half hours late. RP 53. No prejudice was identified. The only potential prejudice would be a delay to Plaintiff denying him further possession of the excavator at issue. However, a pretrial order allowing him possession had been in place for some time.

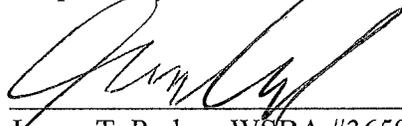
RP 46. Therefore, there would have been no prejudice to Respondent had the court granted the continuance. A new trial is warranted under CR 59(a)(1) and (9) as argued in the Motion for Reconsideration, the denial of which was an abuse of discretion.

II. CONCLUSION

Appellant was given no chance to challenge reasonable rental value. Any such evidence would not be admissible because it would not be relevant to any pleaded claim and would be outside the scope of any evidence offered by Respondent. Appellant, even if allowed, would be proving Plaintiff's case had it offered evidence of reasonable rental value. But, again, Appellant was not given any notice whatsoever that reasonable rental value damages were sought.

DATED: October 16, 2018.

Respectfully Submitted,

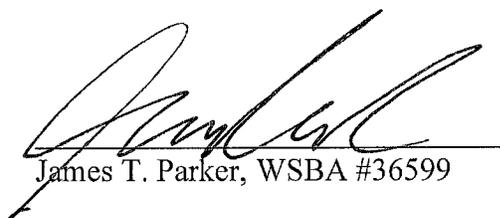


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CERTIFICATE OF MAILING

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