

FILED
Court of Appeals
Division II
State of Washington
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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.

REPLY BRIEF OF APPELLANTS

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I. REPLY INTRODUCTION

a. Unaddressed Assignments of Error

Respondent does not fully address Issue No. 1-2 set forth on page 2 of the Opening Brief of Appellants. BA 2. Respondent does not advance any argument in response to this issue and does not contradict the authority cited by Appellants at BA 10 regarding the requirement of evidence of reasonableness.

b. Respondent Brief Summary

In response to Issue 1-1 (failure to plead), Respondent argues for a liberal construction of his Complaint, which sought “compensatory and general damages” and “such other and further relief the Court deems proper and equitable.” BR 7. Respondent also refers to a request for “loss of use” damages and a block quote citation contained therein that refers to reasonable rental value.

In response to Issue 1-2 (lack of evidence of rental value), Respondent argues that the costs incurred by Respondent for various machines was proof of the excavator’s rental value.

In response to Issue 1-3 (election of remedies), Respondent seemingly argues that damages for lost profits and reasonable rental value are not inconsistent and so the doctrine's second element is not satisfied.

In response to Issue 2-1, Respondent argues that the denial of the request for a continuance was within the trial court's discretion.

While there is no direct argument by Respondent regarding the Motion for Reconsideration (Issue 1-4), the merits of the Motion for Reconsideration were discussed *sic passim*. For example, Respondent argues against the assignment of error regarding the denial of the request for the continuance. Presumably, Respondent would argue that because the motion was properly denied initially, the motion for reconsideration on that basis was properly denied as well.

II. ARGUMENT IN REPLY

Failure to Plead

It is conceded by Respondent that the Complaint does not have a specific claim for reasonable rental value associated with the conversion claim. BR 7. No such

claim was pleaded. CP 1-3. Respondent identifies language in the Complaint requesting “compensatory and general damages” and “such other and further relief the Court deems proper and equitable.” BR 7. Respondent cites no authority for the position that this language somehow put Appellants on notice that reasonable rental value would be sought at trial.

Next, Respondent argues that the reasonable rental value damages were requested in its trial brief, and that this should alleviate his failure to plead the claim in his Complaint. However, this position is specifically rebutted by one case cited by Respondent.

A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along.

Kirby v. City of Tacoma, 124 Wash. App. 454, 472, 98 P.3d 827, 837 (2004) (internal citations omitted). Here, the damages requested were due to the “significant business loss” allegedly caused by Appellants’ actions. CP 2. It was never pleaded or argued that Respondent was entitled to reasonable rental value due to his loss of use. His loss of

use damages were pursued as lost business profits. RP 2-51; Respondent's RP 2-5. It was error for the trial court to award reasonable rental value damages as they were never requested in the Complaint and were never an issue in the case. Appellants were never given an opportunity to offer any evidence it might have developed on the issue of reasonable rental value. The trial court's error requires reversal.

Lack of Evidence of Rental Value

Respondent does not argue or cite to any authority in response to Appellants' argument and authority that evidence of reasonableness is required to support an award of reasonable rental value. BA 10-11. The authority cited by Appellants make clear that evidence of payment is not evidence that the amounts paid were reasonable, which is required to support an award of damages. *W. L. Reid Co. v. M-B Contracting Co.*, 46 Wn.2d 784, 792, 285 P.2d 121, 126 (1955).

Instead, Respondent argues that the evidence supporting the rental value damages was a reasonable inference for the court to make from the testimony offered

by Respondent. BR 10-11. It must be conceded by Respondent that there was not any direct, specific evidence of the rental value of the excavator at issue because the record is devoid of any such testimony. RP 2-51. At no time did Mr. Rodius testify that the rental value of the excavator at issue was what the court ultimately ruled. At no time did Mr. Rodius testify that the figures adopted by the court were reasonable for the rental value of the excavator at issue. Any argument that the testimony in this case had anything to do with the reasonable rental value of the excavator at issue is unsustainable and frivolous.

Election of Remedies

Respondent does not discuss the application of the facts in the record to the three elements of the doctrine of election of remedies. Instead, Respondent argues that the doctrine has no applicability in this case because its purpose is to prevent double recovery. BR 9-10. At most, Respondent's brief argues that damages for lost profits and damages for reasonable rental value are not inconsistent. BR 12.

First, the doctrine of election of remedies exists to prevent double redress. *Lange v. Town of Woodway*, 79 Wash. 2d 45, 49, 483 P.2d 116, 119 (1971). Because of the *sua sponte* application of the reasonable rental value measure of damages, the issue of double redress is difficult to analyze. Had the court awarded no loss of profit damages and did not award reasonable rental value damages, Respondent would be foreclosed from pursuing a subsequent lawsuit for reasonable rental value. This is because he would be seeking a second redress. Here, it cannot be disputed that Respondent elected to pursue lost profits. Reasonable rental value was not the subject of the Complaint or of any evidence offered at trial. It also cannot be reasonably disputed that there is more than one remedy available for conversion. *Dennis v. Southworth*, 2 Wash. App. 115, 124, 467 P.2d 330, 337 (1970). However, the issue is whether the two identified remedies (reasonable rental value and loss of profit) are inconsistent. Respondent cites authority that fair market value and reasonable rental value are not inconsistent and a party may recover both under certain circumstances. BR

12. But there is no authority for recovering both reasonable rental value and lost profits. Indeed, *Southworth* characterizes these two measures of consequential damages as alternatives. “[T]he trial court is justified in allowing consequential damages represented by the loss of profits or the reasonable rental value of the equipment for a reasonable time. *Southworth* at 124–25, 337 (emphasis supplied).

In *Southworth*, the court was clear that both loss of profits and a claim for rental value must be pleaded separately. *Southworth* at 125, 227. There, the trial court allowed an amendment of the pleadings to specifically include the rental value damages. *Id.* That important procedural fact is not present in the case at issue because no amendment to include a rental value damages claim was ever requested or granted by the court.

Respondent elected to pursue lost profits. Respondent failed to meet its burden and no award of lost profit damages was included in the trial court’s judgment. Respondent should be bound by his election and this court

should reverse the award for reasonable rental value damages.

Denial of Motion for Continuance

Respondent opposes the error assigned to the trial court's denial of the motion to continue the trial due to the failure of a witness under subpoena to appear. BR 14. Respondent incompletely quotes *State ex rel. Nugent v. Lewis* in arguing that the unexcused absence of a witness under subpoena is not good cause to continue a trial. BR 14. However, the sentence in that case goes on to specify that it was interpreting a Juvenile Criminal Rule. *Lewis*, 93 Wash. 2d 80, 84, 605 P.2d 1265, 1267 (1980). Moreover, the witness that did not show up to the criminal trial was the arresting officer. *Id.* Thus, this case is not directly applicable.

The significant prejudice to Appellants from the denial of the motion far exceeded any prejudice to continue the case as Respondent had already obtained court approval for possession of the excavator at issue. RP 46.

Next, Respondent argues that the trial court was acting within its discretion when it denied the request for a

new trial for the same reason -- primarily that because Mr. Coker's testimony would be contradicted, it was not error to deny the request based on his unexplained absence. BR 14-15. Respondent relies on *Lindblom v. Johnston*, 92 Wash. 171, 158 P. 972 (1916). BR 14. That case was about a witness that was not under subpoena whose proffered testimony was rebutted by affidavits of several other persons that were present at the event that was the subject of the testimony. *Lindblom* at 179, 975-76. This is unlike this case where Mr. Coker was subpoenaed and was going to testify as to the authenticity of the written agreement that was the crux of the dispute between the parties. CP 20-22.

The court abused its discretion in denying the motion to continue the trial and again when it denied the motion for a new trial based on that issue.

III. CONCLUSION

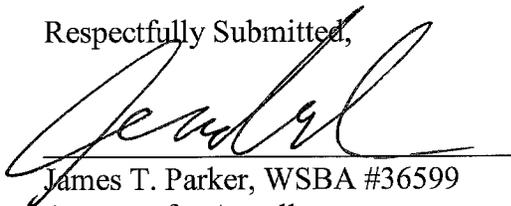
The trial court committed error when it awarded damages for reasonable rental value. This remedy was not pleaded and was not the subject of any testimony or argument. Moreover, Respondent elected not to pursue this

remedy and sought the more-lucrative lost profits remedy. In doing so, he is barred from seeking reasonable rental value as he proceeded to judgment on the issue of lost profits. The court should reverse and remand for entry of a judgment consistent with the remedy sought and ruled upon by the trial court.

In the alternative, this court should reverse and remand due to the abuse of discretion of the trial court when it denied the motion for a continuance and did not order a new trial as requested in the Motion for Reconsideration.

DATED: December 10, 2018.

Respectfully Submitted,

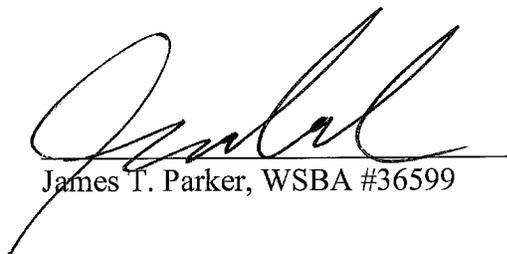
A handwritten signature in black ink, appearing to read 'James T. Parker', written over a horizontal line.

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CERTIFICATE OF MAILING

I certify that on December 10, 2018, I mailed a copy of the foregoing
Reply Brief of Appellants, by placing the same in the United States Postal
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