FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 290697

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MIKE REED,
Plaintiff/Petitioner,

v.

LES SCHWAB TIRE CENTERS, INC., an Oregon Corporation, and JACOB SCHREIBER and JANE DOE SCHREIBER, individually, and as a marital community,
Defendants/Respondents.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

This case concerns an improper transfer of possessory property interest and, at its heart, is about what sort of remedy is appropriate for a violation. Is some sort of restitution or damages available?

II. REPLY STATEMENT OF THE CASE

The facts that, "Jacob Schreiber, an employee of Spokane Veradale Les Schwab Tire Center jacked the van off of the ground, removed the wheels and tires, took the wheels and tires to the Spokane Veradale Les Schwab Tire Center dismounted the tires and returned the wheels and mounted them back on the van the following day", are not disputed by the parties. *See brief of respondent at page 4.* According to Schreiber, the taking of other customer's wheels has been a practice of Spokane Veradale Les Schwab Tire Center in the past. See Appellant's brief generally at pages 6-8.

III. ARGUMENT

Can a business person or its employees remove the property of another without lawful justification, by willfully interfering with, and thereby depriving another of, the other's right to its property even though the taking and depravation is only for an approximate 24 hour period?

Defendant respondent misses the point of the law suit which is, Does the plaintiff have a common law cause of action for the tort of conversion that the laws of Washington are designed to protect? If the answer is yes; Are damages presumed?

The tort of conversion is rooted in the common law action of trover. See *Eggert v. Vincent*, 44 Wn. App. 851, 855, 723 P.2d 527 (1986), review denied, 107 Wn.2d 1034 (1987). The tort of conversion occurs when, without lawful justification, one willfully interferes with, and thereby deprives another of, the other's right to a chattel. *In re Marriage of Langham*, 153 Wn.2d 553, 564, 106 P.3d 212 (2005) (quoting

Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank, 80 Wn. App. 655, 674-75, 910 P.2d 1308, review denied, 130 Wn.2d 1015 (1996)); 16 David K. DeWolf & Keller W. Allen, *Washington Practice: Tort Law and Practice* § 13.33, at 410 (3d ed. 2006). Conversion requires that the plaintiff have a possessory or other "property interest" in the chattel. See *In re Langham*, 153 Wn.2d at 565 (quoting *Meyers Way Dev.*, 80 Wn. App. at 675); *In re Marriage of Bureta*, 140 Wn. App. 119, 123, 164 P.3d 534 (2007) (quoting *In re Langham*, 153 Wn.2d at 565).

The facts are that the plaintiff had a possessory interest in the property illegally taken, the four wheels, are un-denied by the respondent. To determine whether the Spokane Veradale Les Schwab Tire Center committed the tort of conversion when it initially removed the wheels from the plaintiff's vehicle an took the wheels to its place of business, the court should ascertain whether the Spokane Veradale Les Schwab Tire Center initially took the four wheels "wrongfully" or "with lawful justification."

The parties agree and there is no argument that the Petitioner Reed was past due in his contract for payment of the tires and that Spokane Veradale Les Schwab Tire Center had a contractual right to repossess the tires if the payment were not timely made. However there was no agreement that Spokane Veradale Les Schwab Tire Center or Defendant Jacob Schreiber could enter on to plaintiff petitioner Reed's property and take personal property that does not belong to Spokane Veradale Les Schwab Tire Center or Defendant Jacob Schreiber.

When the legislature enacted RCW 62A.9, The Uniform Commercial Code-Secured Transactions, it authorized each creditor with a secured interest to use self help without breaching the peace to repossess the secured property. The legislature did not authorize the party using self help repossession to remove or take any personal property in which the creditor had no possessory rights. Having taken the four wheels without any contractual or possessory rights Spokane Veradale Les Schwab Tire Center and Defendant Jacob

Schreiber had no lawful justification for their removal and committed the tort of conversion.

Where there has been a factual dispute, the reviewing court looks to see if there is substantial evidence in the record to support the trial court's factual finding. *State v. Griffith*, 136 Wn. App. 885, 891, 151 P.3d 230 (2007). Here the claimant has set out facts that are consistent with the complaint, and other pleadings, evidence and depositions which would entitle the claimant to relief.

The Plaintiff Reed presented evidence sufficient to support a finding that "but for" Schreiber and Les Schwab's taking and possession of the wheels the damage to Reed would not have occurred. Given these uncontroverted facts the court could draw the inferences necessary to conclude that it was more likely than not the defendant's Schreiber and Les Schwab are the persons responsible for damaging Reed.

The defendant Schreiber in his deposition concedes that he did take possession of Reed's four Wheels and that neither

he nor Les Schwab owned or had a security interest in the wheels. Also, they do not question the fact that they belonged to the plaintiff at the time they took possession of them.

For defense, Schreiber and Les Schwab relies upon the fact that, it was a common business practice for them to take property that doesn't belong to them (wheels) if they return same the next day or with in a short period of time.

The defendants have advanced no reason why they should be allowed to take the property of another without legal reason use it until they decide to return it and then state that the plaintiff has no right to compensation for their personal property which was admittedly taken and used by the defendants.

Their position is based upon, they say, because the owner of the property sustained no damages for the loss of use. The plaintiff here should be entitled to recover in this action the value of the use of the personal property taken and used by the defendant. That value is the costs of reasonable value of the

truck being out of service and the economic opportunity costs from loss of work and business losses or the time and money saved by the defendant in dismounting the tires from the wheels at the Veradale Les Schwab rather than Reed's driveway.

There is no question that in the present case, Schreiber admitted to possessing the Wheels for approximately two or three hours before he was called and told to return the wheels immediately or that he didn't return the wheels until the next day. While the period of time the victim was out of possession was short, the defendants presented no evidence or case law that would entitle them to the benefits of the property of another taken and used without permission.

Reed's damage of loss of use of his van and his inability to use it for work or other uses he had contracted for was a foreseeable consequence of the defendant's illegal acts of taking the four wheels off the van without legal justification. And further is based on the existence of a causal relationship between the action charged of the admitted taking the four

wheels off of the van resulting in the denial of reasonable use of the van and its wheels to the victim plaintiff and his damages.

The court should find as the court in *State v. Harrington*, 56 Wash. App. 176, 180, 782 P.2d 1101 (1989) that there is a causal relationship justifying restitution where damage undisputedly occurred during a defendant's possession of a vehicle [here the four wheels]. And that the amount of the restitution damages is a jury question that should defeat summary Judgment.

For this court to find otherwise would be to expand the Uniform commercial code to allow persons using self help repossession to take property that does not belong to them and when challenged or caught converting that property to their own use simply stating that the property will be returned. Said another way, to allow merchants using self help to breach the peace by taking another's personality with out permission are against the public policy of the state of Washington to maintain an orderly society based upon the law.

IV. CONCLUSION

By not allowing the case to go forward the court may be in effect approving and granting the respondents an extraordinary state entitlement to acquire and use other people's property without permission as well as a restriction on how a property owner can use its property when it is illegally interfered with. The Summary judgment granted by the lower court should be reversed.

Because there are damages and proofs of Conversion, the lower court should be reversed and the amended complaint and the CPA Claim should be allowed to go forward for a determination of questions of fact and damages or restitution to be decided by a jury.

Respectfully Submitted this 28th day of October, 2010, by

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