No. 97418-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals Case No. 50722-6)

VANCOUVER SIKH SOCIETY, et al.,

Plaintiffs and Respondents,

V.

JAGJIT PREHAR, et ux et al.,

Defendants and Appellants.

APPELLANTS' ANSWER TO PETITION FOR REVIEW

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I. Introduction

At the trial in this action, VSS tried mightily to prove that the Prehars converted the funds of VSS when those funds were applied toward the purchase of a building for use as a Gurudwara for the Sikh community in Vancouver, Washington. The trial court rejected this theory of conversion when it found: "At the time the funds were applied to the real estate purchase the managing members of VSS approved of the use and anticipated the use of the funds for the purchase of the real property in [the Prehars'] name."[1] In its cross-appeal, VSS attacked this finding, but the Court of Appeals concluded it was supported by substantial evidence.

In its Petition for Review, VSS tries yet again to prove that the Prehars converted VSS's funds when the building was purchased, but VSS fails to show how the Court of Appeals erred in its conclusion. Instead, VSS raises other theories of liability, such as breach of fiduciary duty, unjust enrichment,

[1] CP at 220.

and "money had and received." But the Court of Appeals correctly declined to address these theories, because they were not pled or argued to the trial court, and it would be unfair to the Prehars, "who did not have an opportunity to develop defenses or litigate the claims" in the trial court.[2]

Finally, the Petition for Review fails to show how this case meets any of the criteria for review set forth in RAP 13.4(b). VSS fails to identify a single Supreme Court decision or published Court of Appeals decision that is in conflict with the decision below. Moreover, VSS fails to show how this internecine dispute between these parties, which turns on its unique set of facts, involves an issue of substantial public interest. For all these reasons, explained at greater length herein, the Court should deny the Petition for Review.

[2] Court of Appeals Opinion, p. 11

II. Argument

A. The Court of Appeals Correctly Applied the Pertinent Washington Law

As noted above, the "trial court found that the Prehars used $85,000 of VSS's funds with VSS's permission."[3] In particular, the trial court found that "[p]laintiff's evidence does not show that [the Prehars] misrepresented, misappropriated or breached their fiduciary duties to VSS. At the time the funds were applied to the real estate purchase the managing members of VSS approved of the use and anticipated the use of the funds for the purchase of the real property in [the Prehars'] name."[4] As a result, the trial court rejected VSS's theory that the funds were converted at the time of this transaction.

The trial court concluded, however, that on August 28, 2014, "[w]ithin two weeks of August 12, 2014, when demand to return VSS property was made, [the Prehars] intentionally interfered with the $85,000 belonging to VSS by unlawfully

[3] Id. at p. 5
[4] Id. at p. 6

retaining it."[5] The Prehars challenged this finding on appeal on the grounds that it was not supported by any substantial evidence, because there was no evidence that any demand to return the money was ever made.

The Court of Appeals applied the correct standard of review to the Prehars' appeal, and there is no argument by VSS to the contrary. The Court of Appeals also applied the correct legal principals regarding the tort of conversion, and there is no argument by VSS to the contrary.

The Court of Appeals noted the substantial evidence that the "parties agreed that the Prehars would use VSS's funds to purchase the property in their own names."[6] The Court of Appeals also cited to the testimony of VSS's witnesses and determined that "[t]here is no evidence in the record that VSS demanded the Prehars return the $85,000."[7] The Court of Appeals also held that "the demand to transfer title to the

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[5] Ibid.
[6] Id. at p. 9
[7] Ibid.

St. Johns property was insufficient to establish the tort of conversion for $85,000."[8] Based on the foregoing, the Court of Appeals correctly concluded, "[w]ithout a finding of fact that the Prehars interfered with the $85,000 belonging to VSS, the trial court's conclusion that conversion occurred in August 2014 is unsupported by its findings."[9]

The Court of Appeals then addressed the other claims, which VSS was raising for the first time on appeal—claims of unjust enrichment, breach of fiduciary duty, and money had and received. The Court of Appeals correctly noted that it could choose to address issues raised for the first time on appeal in appropriate circumstances, but the court followed its usual practice of declining to do so, noting the prejudice it would case to the Prehars. "To consider VSS's equitable claims for the first time on appeal would be particularly unfair to the Prehars,

[8] Ibid.
[9] Id. at p. 10

who did not have an opportunity to develop defenses or litigate the claims."[10]

The Court of Appeals expanded on this point: "VSS's assertion of new causes of action for the first time on appeal circumvents the notice pleading rules and, if allowed, would deprive the Prehars of the opportunity to conduct discovery, present evidence, and otherwise respond in a meaningful way."[11]

In addition, as the Court of Appeals observed, even if it had chosen to address these new causes of action for the first time on appeal, "the record is insufficient for us to decide these claims as a matter of law."[12] The court noted that the record "contains conflicting evidence regarding whether the Prehars unfairly benefited from the transaction," and an "appellate court

[10] Id. at p. 11
[11] Ibid.
[12] Ibid.

does not evaluate evidence, make factual findings, or evaluate such issues."[13]

Finally, the Court of Appeals addressed VSS's cross appeal, which challenged the trial court's factual finding that VSS approved of the use of its funds to help purchase the property in the Prehars' name. Once again, the court correctly applied the "substantial evidence" standard of review. After reviewing the pertinent evidence, the court concluded that there was substantial evidence to support this finding, thereby rejecting VSS's cross appeal.

These conclusions by the Court of Appeals rendered moot the remaining arguments regarding the proper amount of the judgment, the calculation of prejudgment and post-judgment interest, and the Prehars' affirmative defenses. A majority of the panel also determined that the opinion would not be printed in the Washington Appellate Reports. VSS made

[13] Ibid.

no motion to publish the opinion, nor did it move for reconsideration.

B. There is No Conflict with Any Decision by the Supreme Court or any Published Decision by the Court of Appeals

Under RAP 13.4(b)(1) and (2), a party seeking review must show that "the decision of the Court of Appeals is in conflict with a decision of the Supreme Court," or that "the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals." In its petition, VSS strains to manufacture some artificial conflict between the decision below and those of this Court and the Court of Appeals. Despite its strenuous efforts, however, VSS fails in this endeavor.

VSS asserts two areas of conflict. First, VSS argues that the decision below "ignored well-established rules that preclude a corporate fiduciary from appropriating property to his or her

own benefit…." This argument fails, however, for several reasons.

First, as noted by the Court of Appeals, "VSS's complaint did not allege a cause of action for breach of fiduciary duty."[14] As noted above, the appellate court correctly exercised its discretion to refuse to consider such a new cause of action for the first time on appeal. Because the court refused to address VSS's claim for breach of fiduciary duty, the court's decision simply cannot conflict with any "well-established rules" regarding corporate fiduciary duties.

Moreover, all of VSS's arguments in this regard ignore the trial court's finding that "[p]laintiff's evidence does not show that [the Prehars] misrepresented, misappropriated or breached their fiduciary duties to VSS."[15] VSS did not challenge this finding by the trial court; thus, it is a verity on appeal, and this argument is not a proper basis for seeking review.

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[14] Id. at p. 10
[15] Id. at p. 6

VSS's second argument regarding an alleged conflict is that the Court of Appeals "refused to acknowledge the Court's holding in *Seekamp v. Small*, 39 Wn.2d 578, 237 P,2d 589 (1951)." But there is no conflict between the decision below *Seekamp*, because *Seekamp* dealt with a completely different set of facts.

In that case, the plaintiff willingly gave the defendant $1,500 to invest in onions for him.[16] When that investment was sold, it turned a profit of $2,720, yielding a total sum of $4,220. The defendant then took that money and—without any consent from the plaintiff—invested the $4,220 in potato futures, suffering a heavy loss that wiped out the gains on the onions, and then some. The jury found the defendant liable for conversion, but they awarded the plaintiff the sum of ***$5,500***. This sum, however, was not supported by the evidence; the most that could have been converted was ***$4,220***. Rather than remand for a new trial, the Supreme Court ordered the trial

[16] *Seekamp v. Small*, 39 Wn.2d 578, 237 P.2d 589 (1951)

court to issue a remittitur in the amount of $4,220. As the Supreme Court concluded:

> The jury having found against respondent on the issue of authorization to reinvest the proceeds of the onion sale in potato futures, the evidence clearly establishes that respondent had and received $4,220 to which appellant was entitled. We know of no reason why appellant should not recover it in this action.[17]

The facts in *Seekamp* are in stark contrast to the facts presented here. VSS consented to Prehar's use of all its funds to help purchase the property. Prehar relied on this consent in putting an additional $370,000 of his own money towards the purchase of the building, and in donating tens of thousands of dollars more to fund the Gurudwara's operations over the next several years. The defendant in *Seekamp* never had any consent to invest the plaintiff's money in a different investment, and he did not expend any of his own money in reliance on plaintiff's consent.

Thus, there is no conflict between *Seekamp* and this case. Nevertheless, VSS argues that *Seekamp* stands for the broad

[17] *Id*. at 584.

proposition that the appellate courts should always, *sua sponte*, invoke the doctrine of "money had and received" whenever there has been a "taking of money" but the "requirements of the tort of conversion are not met."[18] VSS's argument, however, tries to stretch *Seekamp* way beyond its proper precedential value.

In sum, VSS has failed to identify a single decision by this Court, or any published decision by the Court of Appeals, that conflicts with the decision issued below. This decision is based on the lack of any substantial evidence to meet an essential element of the tort of conversion, and it is not the job of the appellate courts to rescue failed tort claims by adopting other theories of liability that were never pled or litigated in the trial court.

[18] Petition for Review, p. 16

C. This Case Does not Involve Any Issue of Substantial Public Interest

In a last-ditch effort to persuade this Court to review and reverse the decision below, VSS argues that this case meets the requirements of RAP 13.4(b)(4), which allows for review when the "petition involves an issue of substantial public interest that should be determined by the Supreme Court." As noted above, however, this case does not involve any sweeping legal issues that need to be addressed any further by this Court. Instead, the case is easily decided by applying the proper standard of review to the evidence, and by applying well-settled law regarding the elements of the tort of conversion. In other words, this case involves nothing more than a garden-variety conversion claim that was not proved.

As a result, this case does not meet the criteria set forth in RAP 13.4(b)(4). VSS argues that "community standards dictate" that the Prehars be held liable in this case.[19] But VSS's argument in this regard is based on the assumption—neither

[19] Id. at p. 7

pled nor proved—that the Prehars violated some fiduciary duty to VSS by using its money as a small part of the purchase price for the property. This argument ignores the trial court's findings that the Prehars had VSS's consent to use these funds and that the Prehars neither misappropriated any funds nor breached any fiduciary duty. As a result, VSS's hoarse wail for "justice" in the name of "community standards" is simply misplaced.

D. The Issues Relating to Prejudgment and Post-Judgment Interest do not Warrant Review

Finally, the Petition for Review raises various issues regarding the proper calculation of prejudgment and post-judgment interest. Because there was no conversion, however, and no damage award, any issues regarding calculating interest are completely moot. None of these issues—on their own—would warrant review by this Court, especially when any

discussion on these issues would most likely be seen as *orbiter dictum*.

III. Conclusion

For the foregoing reasons, the Prehars respectfully request this Court to deny the Petition for Review.

Respectfully submitted August 9, 2019

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DATED this 9th day of August, 2019

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August 09, 2019 - 8:27 AM

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