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No. 70494-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MARK HAFFNER,

Appellant,

v.

IVAR R. ALM, MARGE ALM, husband and wife, and the marital
community composed thereof, and CLAYTON LITTLEJOHN,

Respondents.

BRIEF OF RESPONDENTS IVAR R. ALM AND MARGE ALM

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I. INTRODUCTION

Mark Haffner sued Ivar Alm and Marjorie Alm for conversion. Haffner had left equipment, including the two bulldozers at issue here, on the Alms' property from 2003 to 2008. In 2008, after years of requests that Haffner remove the equipment, and after years of Haffner ignoring those requests, the Alms allowed someone else to remove the bulldozers. The Alms received no payment for the bulldozers, which were not working and were simply scrap metal (for the remainder of this brief, the Alms will be referred to in the singular, as Ivar Alm has passed away).

This is not Haffner's first legal case against Alm involving the bulldozers: he had previously sued Alm in small claims court, alleging that Alm owed him money for work Haffner supposedly performed with the bulldozers and rent for use of a third bulldozer not at issue here. During the small claims case, Haffner also alleged that Alm had stolen his bulldozers.

The small claims court awarded Haffner no money for his claims. Regarding the claim Alm stole Haffner's bulldozers, the District Court admonished Haffner that "you are going to have to let go of the thought that it was stolen," because if "you leave equipment on a place for a long, long time, it might become their [Alm's] property because you've simply left it there." CP 62.

In the case now on appeal, after a bench trial, the Superior Court found for Alm. The Superior Court was “not persuaded by Haffner’s testimony.” CP 93. The court found that Haffner “was given notice to remove the property over a number of years and failed to comply.” CP 94. Because he lacked “persuasive evidence,” the Superior Court found that “None of the Plaintiff’s claims have merit and all claims are denied.” CP 94. The Superior Court’s judgment should be affirmed for at least three reasons.

First, Haffner abandoned his bulldozers, as both the District Court and the Superior Court found. Abandonment is a complete defense to conversion. This Court should affirm the well-supported finding by two courts that Haffner abandoned his property.

Second, Haffner failed to raise in Superior Court his claim that Alm may not argue abandonment because of the rarely-used doctrine of “election of remedies.” The failure to raise the issue below means it is waived on appeal. Indeed, Haffner told the trial court and opposing counsel that the factual question of abandonment was the center of the case. It would be unfair and a waste of judicial resources to allow Haffner to litigate an issue in this Court that he never raised below. Since this issue is waived, Haffner cannot prevail on it.

Third, Haffner's election of remedies argument, even if was not waived, fails on its own terms. Alm argued throughout both the small claims court and Superior Court cases that Haffner abandoned the property. Alm consistently stated his goal was to force Haffner to get his equipment off Alm's land. Even if election of remedies applied, Alm's election was clear and consistent: removal of the equipment.

Two courts have found Haffner's claims to be without merit. The Superior Court found that Haffner had abandoned his equipment, and that finding is well supported by the record. This dispute, like the two broken, abandoned bulldozers, is ready for the scrap heap. The Superior Court's judgment should be affirmed.

II. STATEMENT OF THE CASE

In 2003, Mark Haffner was told to remove his bulldozers from a third party's property. RP Ivar Alm, 8:11-21. Without space of his own, he needed to park his bulldozers somewhere. *Id.* Haffner approached Ivar Alm about the bulldozers, and Alm agreed to allow Haffner to keep them on his farm for "three or four months." *Id.* 8:6-18. In exchange, Haffner would dig a ditch for Alm. RP Ivar Alm, 9:9-11. Haffner eventually had four pieces of equipment on Alm's property: two "TD-25" bulldozers, a "450" bulldozer and an equipment trailer. RP Ivar Alm, 8:19 -9:1-3. The TD-25s are the subject of this appeal. A year later, in 2004, Haffner had

not removed the bulldozers. RP Ivar Alm, 9:5-22. Indeed, rather than removing the machines, it “looked like he was starting to take it – some of the stuff apart back there.” RP Ivar Alm, 9:12-14. Haffner was attempting to repair the machines. RP Svarthumle, 12:8. Alm asked Haffner to remove his bulldozers because his farm was “not a junkyard.” RP Ivar Alm, 9:14. The TD-25s were left on the Alm’s property “[b]asically disassembled.” RP Svarthumle, 30:13. Haffner’s disassembled machines were visible from the Alms’ living room and bedroom, and it was “not a pretty sight.” RP Marjorie Alm, 11:19-21. Alm’s neighbor’s commented on the machines, “What are you doing with that junk out there?” RP Ivar Alm, 61:6-7.

For years, Haffner intermittently tried to get the bulldozers working, choosing to try to repair them on Alm’s property rather than remove them. RP Svarthumle, 12:8. Despite Haffner’s efforts to repair the machines, “just about everything” was wrong with the TD-25s. RP Ivar Alm, 26:21-27:16.

Haffner was careful to come to Alm’s property on Tuesdays, when he knew Alm would be at a cattle auction. RP Marjorie Alm, 13:23-14:1; 11:4-15. Alm stopped seeing Haffner because Haffner “just got tired of [Alm] asking him to leave.” RP Ivar Alm, 25:8.

Alm testified that he asked Haffner “four or five” times to remove his machines. RP Ivar Alm, 30:20-21. Before eventually scrapping the TD-25 machines, Alm asked people who knew Haffner to tell Haffner to contact Alm so that Haffner could take the equipment if he wanted it. RP Ivar Alm, 31:6-25. Alm asked Haffner’s brother to relay that message, and the brother assured Alm he had. RP Ivar Alm, 31:23-25. Haffner did not have a working telephone number. RP Ivar Alm, 59:3.

In 2007, Alm reiterated that Haffner could no longer repair the machines on his property and they must be removed, telling him “Don’t come back unless you bring the big equipment with you to get [the equipment] off.” RP Ivar Alm, 35:3-19. Marjorie Alm told Haffner that “anytime he want[ed]” and “had the equipment to haul his stuff off,” she would “meet him out at the gate and unlock it for him.” RP Marjorie Alm, 14:1-12. In 2008, the TD-25s were hauled off Alm’s property for scrap value minus the cost of hauling, netting Alm zero dollars. RP Ivar Alm, 34:2-6; CP 80. The 450 and trailer were subsequently hauled off by Haffner to a different property. RP Marjorie Alm, 22:21-24; CP 80. There is no dispute that Haffner was allowed to haul the one working machine, the 450, off the Alm’s property. CP 80.

Haffner’s friend of “30-plus years” Jon Svarthumle, RP Svarthumle, 5:16, who claimed to have a “symbiotic” relationship with

Haffner, RP Svarthumle, 5:25-6:1, admitted visiting the Alm's property "20 to 30 times working extensively on the TD-25 to repair and basically prepare it to be moved." RP Svarthumle, 11:20-22. This work occurred over a number of years. RP Svarthumle, 12:8. Svarthumle testified that Haffner had "several disabilities and—and financial constraints. He had a hard time coming up with money for parts [for the TD-25s he was allegedly repairing]." RP Svarthumle, 29:6-8.

Rather than take his equipment back, Haffner filed a case in small claims court, alleging that Alm owed Haffner money for work performed and rent on the 450 bulldozer. While Alm countered that Haffner should have paid rent for the storage of his equipment, the transcript makes clear that what Alm really wanted was Haffner to remove the property: "I've been trying to get his stuff off my property." CP 61. When asked for the amount of "rent" he sought from Haffner for storing the TD-25s, Alm admitted that there was no contract and confirmed that he "picked that number" (\$200/month) for rent because "he won't take his stuff from my place." CP 58.

In small claims court, both parties talked about the fact that the TD-25s had been removed from Alm's property. In response to the court's question, "why didn't you just move them off?," Alm responded that "I did part of it here, six weeks ago. The other two are still here . . ." CP 58-

59 (the two pieces remaining were the 450 bulldozer and the equipment trailer). Haffner alleged that Alm had stolen the TD-25s, but the district court rejected Haffner's claim, stating that "if you leave something long enough on a piece of property it can go. It might not be stealing." CP 60.

The small claims court found for neither party, offsetting any work Haffner performed, rent for use of the 450, and loss of the TD-25s by the "rent" he would have owed for leaving his equipment on Alm's property. CP 62. The district court was clearly annoyed that the parties had no records to support their contentions. *Id.* Haffner kept no records or time of work performed. *Id.* Alm, of course, had no rent receipts because he did not want to charge rent, but rather wanted his property cleared. CP 61.

As part of its decision, the small claims court reiterated its finding that Haffner had abandoned the equipment. CP 62 Speaking to Haffner as it announced its ruling, the court said that:

If you leave equipment on a place for a long, long time, it might become their property because you've simply left it there. So, you are going to have to let go of the thought that it was stolen. It was left there.

Id.

As reflected in the District Court proceeding, in June or July 2008, Alm allowed someone to haul off the two TD-25 bulldozers for scrap, and Alm received no payment for the scrap. RP Ivar Alm, 53:15. The 450

bulldozer and the equipment trailer remained on Alm's property. CP 59.

Haffner eventually hauled them off. CP 80:20-22.

After the District Court's decision, and the refusal of the sheriff to consider Alm's disposal of the TD-25s a criminal matter, CP 28-31, Haffner filed another suit, the current case, alleging conversion.

Alm raised abandonment as an affirmative defense. CP 8:27. Haffner never sought to strike that affirmative defense and never filed a motion seeking a legal ruling on the abandonment defense. Instead, Haffner viewed abandonment as a factual issue to be decided during trial: "Defendants claim that Plaintiff Mark Haffner had abandoned his property. Plaintiff rebuts that contention." CP 15:1-2. (Haffner's opposition to Alm's motion for summary judgment). In his trial brief, Haffner again represented abandonment as a factual issue that Alm could raise, but that Alm would fail to prove: "Defendants [sic] only argument is that Plaintiff abandoned the equipment. The evidence shows that argument to be untenable." CP 67:19-20. Haffner's proposed findings of fact included the finding that "Plaintiff Mark Haffner did not abandon his construction equipment." CP 69:17. Haffner's proposed conclusions of law on abandonment demonstrate again that the issue was one of fact: "Defendants have not proved the elements of the affirmative defense of abandonment." CP 71:1-3.

After a bench trial, the Superior Court was “not persuaded by Haffner’s testimony.” CP 93. The Superior Court found that “various aerial photographs” presented at trial “do not in any way support the extensive work [Haffner] claims to have performed.” *Id.* The court found that “the evidence clearly supports . . . that [Alm] gave him ample notice to remove the equipment. The Alms even went to the extent of having Plaintiff’s brother speak to him.” *Id.*

The court also found Haffner’s contention that he was prevented from entering the property “to be without merit.” *Id.* As the court noted, instead “of continuing to sporadically attempt to ‘work on’ the equipment, he could have complied with the Alms’ demand to remove the equipment . . .” *Id.*

The court found that Haffner “was given notice to remove the property over a number of years and failed to comply.” CP 94. As a result of his lack of “persuasive evidence,” the Superior Court found that “None of the Plaintiff’s claims have merit and all claims are denied.” *Id.*

III. ARGUMENT

Haffner abandoned his bulldozers. The small claims court found abandonment, and so did the Superior Court. Since abandonment is a complete defense to a claim for conversion, Alm must prevail.

Haffner makes two meritless responses to the clear findings of abandonment. First, Haffner says Alm may not argue abandonment. He bases this contention on the election of remedies doctrine. But Haffner waived that issue because he never raised it at the trial court. Instead, both before trial and at trial, Haffner argued that Alm made an insufficient factual showing of abandonment. Haffner's second argument is that the Superior Court's findings were submitted late and contain dicta. No case holds those issues to be reversible error. The judgment should be affirmed.

A. Standard of Review

After a bench trial, findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Green v. Normandy Park*, 137 Wn. App. 665, 689, 151 P.3d 1038 (2007). If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. *Id.* In determining the sufficiency of evidence, "an appellate court need only consider evidence favorable to the prevailing party." *Endicott v. Saul*, 142 Wn. App. 899, 909, 176 P.3d 560 (2008). Purely legal issues are reviewed de novo. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

This Court “may affirm the [lower] court on any grounds established by the pleadings and supported by the record.” *In re Marriage of Rideout*, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003) (internal citation and punctuation omitted). Even if “the ruling of the trial court [was] based upon an erroneous ground, it will be sustained if it is correct upon any ground.” *Mooney v. Am. Mail Line, Ltd.*, 61 Wn.2d 181, 183, 377 P.2d 429 (1963).

B. Haffner abandoned his property and therefore as a matter of law cannot establish conversion

Haffner alleged conversion. Conversion “is the willful interference with another’s property without lawful justification, resulting in the deprivation of the owner’s right to possession.” *Lowe v. Rowe*, 173 Wn. App. 253, 263, 294 P.3d 6 (2012), reconsideration denied (Jan. 31, 2013), review denied, 177 Wn.2d 1018, 304 P.3d 114 (2013). “Abandonment of property is a complete defense to the tort of conversion.” *Id.*

The recent decision in *Lowe* is on point and dispositive of Haffner’s claims. In *Lowe*, the trial court dismissed a conversion claim because Lowe had “ample time and opportunity” to remove vehicles Lowe had left on Rowe’s property. 173 Wn. App. at 262. The *Lowe* court affirmed the trial court, which “concluded that the 3½-month period

allotted Mr. Lowe to remove his inheritance was sufficient as a matter of law.” 173 Wn. App. at 263.

On appeal, Lowe argued that “that he did not abandon the vehicles because he was continuing to remove them up to the point where Mr. Rowe crushed some of them and then barred him from the property.” *Id* The court of appeals noted that while “that evidence may indicate he did not intend to abandon the property,” it did “not answer the question of whether he had already done so by his dilatory actions . . .” *Id*. In rejecting Lowe’s argument, the court of appeals noted that it had “many times” “upheld trial court determinations of abandonment where a property owner with notice of the need to retrieve property failed to do so in a timely manner even while claiming the property as his own.” *Id*.

Mr. Rowe was “not required to maintain the old vehicles on his land indefinitely and could act when Mr. Lowe declined to meet the deadlines provided him.” *Id*. at 263)Nor was Rowe “required to set a specific final date for the removal to be completed.” *Id*. at 263)As in this case, there was “no evidence presented that the time allotted . . . was insufficient to remove the vehicles,” and “the fact that he had not removed the vehicles is not proof that he could not have done so.” *Id*)

This case is indistinguishable from *Lowe*. Haffner, like Lowe, claims he did not abandon his vehicles. But the *Lowe* court held that

vehicles that sat on another's property for three and half months were abandoned; Haffner's vehicles were on Alm's property for about five years. If Lowe abandoned his property, Haffner abandoned his many times over.

Haffner tries to distinguish *Lowe*, arguing that Lowe "was provided with clear dates and timelines." Appellant's brief at 15. That contention is unpersuasive for at least two reasons.

First, in *Lowe*, Lowe had similarly contended that he was not given a "definite" date to remove the vehicles, but the court of appeals held that there was no requirement "to set a specific final date for the removal to be completed." *Id.* at 263)

Second, Haffner was told repeatedly, over a period of years, to remove his equipment and failed to do so. The trial court found that Alm "even went to the extent of having Plaintiff's brother speak to him about the removal." CP 93. Alm did not have a working phone for Haffner. RP Ivar Alm, 59:3. And, in 2007, Alm again told Haffner that he could no longer repair the machines on his property and they must be removed, telling him "Don't come back unless you bring the big equipment with you to get it off." RP Ivar Alm, 35:3-19. Haffner confirms that, at least by 2007, Alm had unequivocally told Haffner to remove the equipment immediately. Appellant's Brief at 7. Under *Lowe*, that is sufficient notice.

Alm stated that the equipment needed to be removed promptly, and *Lowe* holds that far less than a year's notice is all that is required to be given prior to disposing of property. Since Haffner failed to remove the property, he abandoned it; since abandonment is a complete defense to conversion, Haffner's claim fails.

This conclusion is amply supported by the record. The trial court found that the "evidence clearly supports" that Haffner left his equipment on Alm's property and that Alm "gave [Haffner] ample notice to remove the equipment." CP 93. The trial court found Haffner's "contention that he was prevented from entering [Alm's] property" to be "without merit." CP 93. There is no requirement that the trial court use the term "abandonment" since it plainly found the evidence showed abandonment under the standard in cases such as *Lowe*.¹

Haffner had notice, was not prevented from removing the property, and failed for take action for a "long, long time." In the prior small claims action, the District Court also found that Haffner had abandoned his property. Speaking to Haffner as it announced its ruling, the court said that:

¹ The Superior Court's use of "trespass" in its ruling is plainly a scrivener's error. Substituting "an abandonment" for "a trespass" clarifies the ruling: "... the evidence clearly supports that Mr. Haffner leaving his equipment on the Alms property constituted [an abandonment] and that they gave him ample notice to remove the equipment." CP 93. There was no testimony on trespass at trial, and neither side argued trespass to the court.

If you leave equipment on a place for a long, long time, it might become their property because you've simply left it there. So, you are going to have to let go of the thought that it was stolen. It was left there.

CP 62.

Haffner argues that rather than *Lowe*, this Court should be guided by *Olin v. Goehler*, 39 Wn. App. 688, 694 P.2d 1129 (1985). Appellant's Brief at 15. In *Olin*, the court of appeals held that Goehler was wrongfully evicted. 39 Wn. App. at 691). In the context of a real property lease, the *Olin* court did state that a continuous and unambiguous expression of a "desire to resume possession" was sufficient to rebut an argument that the lockout was legal. *Id.* at 692-93).

Olin is not on point or persuasive here, as it involves a facts based on a written lease to real property and the trial court here found that Haffner had access to the property, so there was no lockout. CP 92 (finding Haffner's "contention that he was prevented from entering the property . . . to be without merit"). This Court cited *Olin* in *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 522, 20 P.3d 447 (2001), for the proposition that, when a store held a person's personal property for 16 days, those 16 days were sufficient to create a triable issue on a conversion claim. If anything, then, this Court has interpreted *Olin* to mean that even shorter periods than *Lowe*'s 3½ months are sufficient to change the right

to property. *Olin*, then, supports the finding that Haffner abandoned his property by leaving it for years on Alm's property.

The Superior Court's judgment should be affirmed because Haffner's abandoned property cannot be the basis for a claim of conversion.

C. Haffner waived the issue of election of remedies

Haffner did not make his "election of remedies" argument in the Superior Court and thus may not make that argument here. "As a general matter, an argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." *Washington Fed. Sav. v. Klein*, 177 Wn. App. 22, 29, 311 P.3d 53 (2013) review denied, 179 Wn.2d 1019, 318 P.3d 280 (2014); RAP 2.5(a). While the argument is meritless on its own terms, there is no excuse for Haffner's failure to raise the issue below. The entire issue at trial was whether Haffner had abandoned his equipment. The record is clear that Haffner failed to raise "election of remedies" below, and that the parties and court proceeded through trial focused on the affirmative defense of abandonment.

Alm pled abandonment as an affirmative defense. CP 8. Haffner never sought to strike that affirmative defense and never filed a motion seeking a legal ruling on the abandonment defense. Instead, Haffner viewed abandonment as a factual issue to be decided during trial:

“Defendants claim that Plaintiff Mark Haffner had abandoned his property. Plaintiff rebuts that contention.” CP 15 (Haffner’s opposition to Alm’s motion for summary judgment, arguing that factual disputes prevented summary judgment for Alm). Haffner argued that he would show that he was “actively trying to retrieve his equipment,” and therefore Alm could not prove his affirmative defense of abandonment. CP 15. Haffner failed to convince the Superior Court, which was “not persuaded by Mr. Haffner’s testimony.” CP 93.

In his trial brief, Haffner again represented abandonment as a factual issue that Alm could raise, but that Alm would fail to prove: “Defendants [sic] only argument is that Plaintiff abandoned the equipment. The evidence shows that argument to be untenable.” CP 67. Haffner’s position is clear: abandonment was a factual issue for trial. Haffner’s proposed findings of fact included the finding that “Plaintiff Mark Haffner did not abandon his construction equipment.” CP 69. Haffner’s proposed conclusions of law on abandonment demonstrate again that the issue was one of fact: “Defendants have not proved the elements of the affirmative defense of abandonment.” CP 71.

The testimony at trial was focused on whether Haffner abandoned the bulldozers, and the Superior Court found that Haffner had abandoned the bulldozers. For instance, the Superior Court wrote that

Mr. Haffner's contention that he was prevented from entering the property I find to be without merit. Instead of continuing to sporadically attempt to 'work on' the equipment, he could have complied with the Alms demand to remove the equipment by making arrangements for the equipment and vehicles necessary for such removal.

CP 93. While the Superior Court did not use the word "abandonment," it is clear that it found abandonment: "Plaintiff was given notice to remove the property over a number of years and failed to comply. None of the Plaintiff's claims have merit and all claims are denied." CP 94.

Election of remedies is an affirmative defense. *See, e.g., Oak Harbor Educ. Ass'n v. Oak Harbor Sch. Dist.*, 162 Wn. App. 254, 260, 259 P.3d 274 (2011); *Pleading Election of Remedies*, 99 A.L.R.2d 1315 at §2 ("In holding that the defense of election of remedies must be pleaded, the courts often point out that election of remedies is an affirmative defense"). Affirmative defenses must generally be pled. CR 8(c). "Generally, affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the express or implied consent of the parties." *Bickford v. City Of Seattle*, 104 Wn. App. 809, 813, 17 P.3d 1240 (2001). The point is to avoid surprise. *Id.* Haffner's failure to raise election of remedies in pleadings, motions, or at trial means that the issue is waived as Haffner's

action plainly prejudiced Alm, who went to trial on the basis of the issues Haffner presented.

Haffner lost the trial on the central issue of his pleadings and briefs: could Alm show abandonment? Because Haffner never raised the election of remedies issue before the Superior Court, and because the record easily supports the Superior Court's finding, the judgment should be affirmed.

D. **The record does not support Haffner's contention that Alm elected the remedy of rent**

Even if Haffner had not waived the issue of election of remedies, his argument on the issue is meritless. Alm's counsel was not able to find a case where, in a subsequent case, election of remedies was used to bar an affirmative defense.

Election of remedies "is a rule of narrow scope, having the sole purpose of preventing double redress for a single wrong." *Lange v. Town of Woodway*, 79 Wn.2d 45, 49, 483 P.2d 116 (1971). In the rare instances where the rule applies, it has three elements: "Two or more remedies must exist at the time of the election; the remedies must be repugnant and inconsistent with each other; and the party to be bound must have chosen one of them." *Id.* None of these elements is met here.

First, the remedies here did not exist at the same time.

Abandonment is a defense to conversion, but not a defense to the wage and rent claims Haffner made in small claims court.

Second, Alm never chose the remedy of rent over the defense of abandonment. In the small claims court Alm argued abandonment, and the District Court found Haffner abandoned his property. Alm never elected a remedy other than abandonment, and acknowledged that the two bulldozers at issue here were no longer on his property. Given the lack of written documents, the District Court decided no party should be awarded damages. But Alm plainly argued that Haffner abandoned his property, and the District Court told Haffner that since he left “equipment on a place for a long, long time, it might become their property because you’ve simply left it there. It was left there.” CP 62. Alm did not elect rent as a remedy.

Haffner’s contention of election of remedies also relies on an accusation that Alm “failed to disclose” information to the District Court. “At the time of the district court hearing, Alm failed to disclose that he had already taken possession of the bulldozers.” Appellant’s Brief at 12. This accusation is not supported by the record. When the District Court asked Alm “Why didn’t you just move that stuff off?” Alm replied

I did part of it here, six weeks ago. The other two are still there but I thought they were pieces of . . . never mind.”

CP 59. Alm did not hide anything. Haffner alleged the TD-25 bulldozers were “stolen,” CP 59-60, and Alm stated that he had, in fact, moved “part of” Haffner’s property. CP 59. Although Haffner had abandoned all four pieces of equipment, Alm did not scrap the two pieces that were “usable.” RP Alm at 62:8. Because those two pieces had some value, Alm “figured he’d wake up pretty soon and come and get them.” RP Ivar Alm, 62:9-10; *see also* RP Ivar Alm, 63:1-2 (“I thought [the other pieces] were too good to throw away. I could have got rid of them two”); RP Ivar Alm, 62:12-13 (“The 450 was [still] there and the trailer was there. That was all that was left”). There is no dispute that Alm subsequently allowed Haffner to move the 450 bulldozer and his equipment trailer off Alm’s property. CP 80; RP Ivar Alm, 62:12-13. Indeed, Alm’s position in small claims court was completely consistent with a defense of abandonment: he disposed of Haffner’s broken bulldozers because they were abandoned.

Alm did seek to offset Haffner’s claims for wages with “rent,” but it is clear that his preferred remedy was that Haffner would remove the equipment. Before the small claims court, Alm consistently stated his position that he Haffner did almost no work for him. CP 56 (“I never hired him.”). Alm also stated that consistently that he wanted Haffner’s

equipment removed. CP 58 ('I've been trying to get him off of there. He was only supposed to be in there two or three months and after, ever since then, he won't take his stuff off my place."); CP 61 ("I've been trying to get his stuff off of the property."). Alm stated that he would have allowed Haffner to remove the equipment. CP 61 (Court: "If he had removed the whole thing, you wouldn't have had any problem?" Alm: "Nothing.").

Finally, ignorance or mistake do not constitute election of remedies. Alm could not have known he would be a defendant in a subsequent suit alleging conversion, especially since the removal of the TD-25s was before the District Court, so even if his defense in small claims court was inconsistent with the defense of abandonment, the cases do not support enforcing an election of remedies under such circumstances. *Letterman v. City of Tacoma*, 53 Wn.2d 294, 300-01, 333 P.2d 650 (1958) ("It is well settled that an act done through ignorance or mistake does not constitute an election of remedies . . ."). Nor does Alm gain a double recovery: all Alm got was what he had wanted for years, Haffner's junk off his property. Alm earned no money when he scrapped the broken bulldozers.

E. **Haffner’s various attacks on Superior Court’s findings of fact and conclusions of law are without merit**

Haffner’s assignments of error raise numerous issues. Appellant’s brief at 4-5. These issues appear to be closely connected but are listed separately. For completeness, Alm addresses them below.

Haffner claims that the trial court decided the wrong issue. Appellant’s brief at 4 (Issue 1(a)). He says that much of what the trial court found was “superfluous.” Language that is “not necessary to the decision” is dicta. *Pedersen v. Klinkert*, 56 Wn.2d 313, 317, 352 P.2d 1025 (1960). No case Alm’s counsel could find holds that the presence of dicta is a reason to reverse. The record shows abandonment, and this Court “may affirm the [lower] court on any grounds established by the pleadings and supported by the record.” *Marriage of Rideout*, 150 Wn.2d at 358.

Haffner claims that the trial court failed to find conversion. Appellant’s brief at 4 (Issue 2(a)). The record shows abandonment, and this Court “may affirm the [lower] court on any grounds established by the pleadings and supported by the record.” *Marriage of Rideout*, 150 Wn.2d at 358. Finding the affirmative defense is plainly sufficient to order judgment for Alm.

Haffner claims that the trial court erroneously held “trespass” to be a defense. Appellant’s brief at 5 (Issue 2(b)). The record shows

abandonment, and this Court “may affirm the [lower] court on any grounds established by the pleadings and supported by the record.” *Marriage of Rideout*, 150 Wn.2d at 358. The Superior Court’s use of the term of “trespass” is dicta. No case Alm’s counsel could find holds that the presence of dicta is a reason to reverse. Alternatively, “trespass” is a scrivener’s error. Substituting “an abandonment” for “a trespass” clarifies the ruling: “. . . the evidence clearly supports that Mr. Haffner leaving his equipment on the Alms property constituted [an abandonment] and that they gave him ample notice to remove the equipment.” CP 93. None of the witnesses used the term “trespass” and trespass was not at issue. The trial court’s scrivener’s error should not benefit the losing party, Haffner, where the record supports a finding of the correct term, “abandonment.”

Haffner’s argument that the trial court could not have found abandonment relies on a factual determination: “. . . the evidence establishes active efforts to recover the bulldozers . . .” Appellant’s brief at 5 (Issue 2(c)). Since substantial evidence supports the Superior Court’s judgment, Haffner’s argument fails. *Sunnyside Valley Irr. Dist.*, 149 Wn.2d at 879-80 (“a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently). In addition, *Lowe* holds that even evidence that a person does

not intend to abandon property is insufficient to counter dilatory actions.

Lowe, 173 Wn. App. at 263).

F. **Because the issue of the alleged conversion was argued before the small claims court res judicata bars Haffner's claim the Superior Court**

Finally, this Court may also uphold the Superior Court because the small claims verdict was res judicata. Alm moved for a ruling that the small claims court had ruled on conversion. CP 38-43 (motion); CP 65-66 (Alm's proposed order on res judicata). The small claims court plainly considered the allegation that Alm had stolen the TD-25s. CP 59 (Haffner alleging the TD-25s were stolen); CP 60 (District Court explaining to Haffner that his abandonment negated the allegation of conversion or "stealing"); CP 62 (same). In filing this subsequent suit raising the same issue, Haffner failed to heed the District Court's admonishment: ". . . you are going to have to let go of the thought it was stolen." CP 62.

Because the prosecution of this action impairs the rights established in the small claims action; the evidence in both actions is substantially the same and Haffner's case here is based on the same facts as the small claims action; and because the conversion claim was considered and decided on the merits by the small claims court, Haffner's claim is barred by res judicata. *Civil Serv. Comm'n v. City of Kelso*, 172 Wn.2d 166, 171, 969 P.2d 474 (1999) (laying out elements of res

judicata). Although the Superior Court did not rule that the conversion claim was barred by res judicata, this Court may affirm on any grounds “established by the pleadings and supported by the record.” *Marriage of Rideout*, 150 Wn.2d at 358. Both the pleadings and the record support a finding of res judicata, which is an issue of law that this Court may decide. *Berschauer Phillips Const. Co. v. Mut. of Enumclaw Ins. Co.*, 175 Wn. App. 222, 227, 308 P.3d 681 (2013).

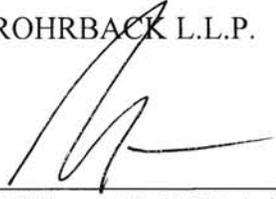
IV. CONCLUSION

The judgment of the Superior Court should be affirmed and costs awarded to Respondent Marjorie Alm.

RESPECTFULLY SUBMITTED this 17th day of April, 2014.

KELLER ROHRBACK L.L.P.

By



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CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on April 17, 2014, I caused a true and correct copy of the foregoing BRIEF OF RESPONDENTS IVAR R. ALM AND MARGE ALM to be delivered as follows:

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