

Case No. 46898-1-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

CHAMBERS CREEK LLC, a limited liability company registered to do
business in Washington

Appellant,

v.

CHARLES SCHMIDT and ANTHONY SCHMIDT,

Respondents.

**APPELLANT'S REVISED OPENING BRIEF PURSUANT TO
COURT'S LETTER NOTICE DATED FEBRUARY 24, 2015**

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I. INTRODUCTION

The Appellant is Chambers Creek LLC, an Oregon limited liability company. Appellant was the owner of a demolition/redevelopment project (the “Project”) at the former Abitibi Paper Mill in Steilacoom, Washington, a former news print manufacturing plant (the “Mill Site”). One of the principal objectives of the Project was the recovery and sale of recyclable metals from the Project. Appellant contracted to sell all of the recyclable metals to a single purchaser, Metro Metals.

Coyote Excavating Inc. (“Coyote”) was a contractor on the Project. Anthony Schmidt is the principal of Coyote. Charles Schmidt is Anthony’s father (collectively “Respondents”).

This is one of two cases arising from the Project. In the first action, Appellant asserted claims against Coyote for negligence and breach of contract relating to Coyote’s services on the Project. This action was settled following mediation. A Notice of Settlement was filed on June 21, 2013 and an Order of Dismissal entered on July 18, 2013.

At the tail end of this first litigation, Appellant obtained documentation showing that recyclable metals had been removed from the Mill Site and sold to recyclers other than Metro Metals by Respondents. This action against the Respondents was filed on May 16, 2013 alleging that Respondents had converted recyclable metals belonging to Appellant. The Amended Complaint is *CP 21-40*. Coyote was never a party to this proceeding.

The Appeal is taken from an Order dismissing Appellant’s claims. (*CP 189 -190*).

II. ASSIGNMENTS OF ERROR

Appellant assigns the following errors to the Trial Court:

Assignment of Error No. 1: The Trial Court committed error by granting summary judgment in the face of numerous material disputes of fact.

Assignment of Error No. 2: To the extent that the Trial Court relied on the settlement in *Chambers v. Coyote* as a basis for dismissal of the claims in this separate action, the trial court committed error.

III. ISSUES PRESENTED

Issue No. 1: Did the Trial Court commit error by entering summary judgment?

Issue No. 2: To the extent that the Trial Court relied on the settlement in *Chambers v. Coyote* as a basis for dismissal of the claims in this separate action, did the Trial Court commit error?

IV. STATEMENT OF THE CASE

Chambers Creek LLC (“Chambers”) was the owner of a demolition/redevelopment project (the “Project”) at the former Abitibi Paper Mill in Steilacoom, Washington, a former news print manufacturing plant (the “Mill Site”). The Mill Site consists of approximately 90 acres which, at the time of its acquisition by Chambers, included approximately 200,000 ft² of improvements, including all of the deactivated manufacturing equipment. (*CP 51-52: Ralston 5/6/13 Dec. at ¶¶ 2-3*).

The first stage of the Project was to demolish the existing improvements, extracting and selling the salvageable metal. (*CP 51-52: Ralston 5/6/13 Dec. at ¶¶ 2-3*). It was not disputed that Appellant had

contracted to sell all the recyclable metals obtained from the Mill Site to Metro Metals, which had loaned Chambers a portion of the funds used to acquire the Mill Site. (*See, T. Schmidt Dec. ¶7; CP 36*).

Coyote was hired by Chambers as the general contractor for the demolition phase of the Project pursuant to a written agreement dated February 1, 2010 (the "Contract"). (*CP 52: Ralston 5/6/13 Dec. at ¶ 4 and Ex. 1*). The Contract is a fixed-price contract under which Coyote would provide the labor and equipment to fulfill the Contract. Mica Creek Custom Homes LLC ("Mica Creek") was a subcontractor to Coyote on the Project. (*CP 52: Ralston 5/6/13 Dec. at ¶ 4*). The principal of Mica Creek is Dennis Zyph.

There were performance problems with Coyote practically from the inception. Coyote failed to mobilize sufficient or adequate equipment on site, and was not paying its sub-contractors or employees. (*CP 52: Ralston 5/6/13 Dec. at ¶ 5; CP 109-111, Ralston Dep. at pg. 52-54*). Moreover, Chambers was informed that the IRS had liens against Coyote; (*CP 106; Ralston Dep. at pg. 48 -50*); a fact confirmed by Anthony Schmidt. (*CP 120; Schmidt Dep. at pg. 35*).

In March 2011, Chambers became aware that Coyote had demolished a number of structures on the Mill Site containing asbestos building materials. The result of this demolition activity was that the Mill Site was contaminated with asbestos which Chambers was required by the Department of Ecology to remediate. The final cost of the remediation exceeded \$400,000. (*CP 52-53: Ralston 5/6/13 Dec. at ¶ 7-10*).

The initial lawsuit between Appellant and Coyote stated a single cause of action based on the contamination of the property as a result of Coyote's negligence:

Coyote's negligent breach of its duty not to cause damage to the Property of Chambers Creek has proximately caused damages to Chambers Creek in an amount estimated to exceed \$1,000,000.

(*CP 70-73. 9/30/11 Amended Complaint, Appendix 3 at ¶ 4.2 attached hereto*). Coyote filed a counterclaim for conversion of certain construction equipment. Chambers asserted an affirmative defense of setoff on April 4, 2012. While Defendants assert that the setoff claim was based on the metal theft alleged here, that is not the case. The setoff was based on the clean-up costs relating to the asbestos contamination caused by Coyote. (*CP 75; Brain 9/24/14 Dec. at ¶ 5*). No claim relating to metal theft was ever asserted in the prior *Chambers v. Coyote* litigation. *Id.*

At the end of April, 2013, Chambers obtained documents from R.S. Davis, a Portland recycler, and Seattle Iron documenting the metal sales by the Schmidts. Total sales to Seattle Iron were \$145,282.80. Sales to R.S. Davis were \$ \$223,932.60. (*CP 75-76; Brain 9/24/14 Dec. at ¶¶ 7-8*). That these sales were made is not in dispute.

The Summary Judgment Motion at issue was based on two contentions. First, Respondents assert that various individuals acting on behalf of Appellant were aware of and participated in the sales of recyclable metal to R.S. Davis and Seattle Iron and received a portion of the proceeds. This includes Dennis Zyph, actually an employee of a

subcontractor to Coyote, Mica Creek Construction, and Tim Ralston, Appellant's Project Manager. Second, Respondents contend that the claims were resolved by the prior settlement between Coyote and Appellant.

The factual basis for the first contention was testimony by the Schmidts that Mr. Ralston and Mr. Zyph were involved in and therefore authorized these metal sales. Mr. Ralston specifically denies the alleged involvement of himself and Mr. Zyph in the metal thefts. (*CP 137; Ralston 9/23/14 Declaration at ¶ 3*). Mr. Ralston also testifies that he never authorized the metal sales to Seattle Iron or R. S. Davis. *Id at ¶ 6*.

With respect to Mr. Zyph, the documentation produced by Seattle Iron included a letter dated September 24, 2010 purportedly signed by Dennis Zyph authorizing the metal sales. (*CP 130; Brain 9/24/14 Dec. at Ex. 6*). Respondents relied on this letter as the basis for asserting that Mr. Zyph was aware of and participated in the conversion of recyclable metals.

Defendant Tony Schmidt has admitted signing this letter although he also contends that it was with Mr. Zyph's knowledge. (*CP 115 – 116; Schmidt Dep. at pgs. 11-12, Brain 9/24/14 Dec at Ex. 3*). Again, Mr. Zyph was not a Chambers employee. He was an employee of a subcontractor to Coyote. Mr. Zyph denied involvement in the preparation of the letter:

Within 10 days of my arrival on the Mill Site in approximately February/March 2010, Tony Schmidt approached me about doing a "side deal" to make extra money for ourselves on the project. I understood Mr. Schmidt to be talking about selling metal from the Mill Site

without the knowledge of the project owner, Chambers Creek LLC. I told Mr. Schmidt that I was not dishonest and would not participate in such activities. I also told him that if I found out any questionable activities were taking place, I would immediately report them to Chambers Creek.

I have reviewed the documents produced by Seattle Iron & Metals Corp. and, more particularly, the letter I allegedly signed authorizing Charles Schmidt of Westside Turf Inc. to sell metal to Seattle Iron & Metals Corp. I never wrote the letter nor did I sign that letter or any other letter of its kind.

(CP 66; Zypf 5/31/13 Dec. at ¶ 3-4).

Aside from the testimony of the Schmidts, the only evidence offered by Respondents to establish receipt of the proceeds of metal sales by Mr. Zypf is a bank deposit receipt offered without any attempt to lay appropriate foundation. *(CP 39)*. Plaintiff objected to the admission of this receipt on that basis. In ruling on the summary judgment motion, the trial court did not address any of the evidentiary objections made by either Appellant or Respondents. Nevertheless, there was no attempt to link the date or amount of this deposit to the date or amount of any transaction involving a sale of metal to either Seattle Iron or R.S. Davis. Moreover, as of the November 2010 date on this receipt, it is not in dispute that Mr. Zypf was employed by a subcontractor to Coyote and was not employed by Appellant. Coyote did not walk off the job site until April of 2011. *(CP 53 Ralston 5/6/13 Dec. at ¶ 8)*.

Mr. Charles Schmidt was observed to have been on the job site a number of times. *(CP 101-103; Ralston Dep. at pg. 38 -41)*. Charles Schmidt, however, had no relationship to Coyote according to Tony Schmidt. *(CP 117; Schmidt*

Dep. at pg. 32). Charles Schmidt was on site for the purpose of transporting metal from the mill site to R.S. Davis in the Portland area for sale. (*CP 118; Schmidt Dep. at pg. 33*).

The Complaint in this Matter was originally filed in May 2013. An Amended Complaint was filed on June 17, 2013. The Amended Complaint states causes of action for conversion, civil theft and civil conspiracy. (*CP 10*¹). The Chambers/Coyote matter was mediated on June 21, 2013. A Notice of Settlement was filed on June 21, 2013 and an Order of Dismissal entered on July 18, 2013.

Following the settlement of the dispute between Coyote and Appellant, a Stipulation for Dismissal was entered in *Chambers v. Coyote*. However, this matter was obviously not dismissed. So, this action existed as a separate proceeding both before the mediation and after the dismissal of the claims in the other proceeding.

Contrary to Respondents' assertion, the metal theft issue was not part of the mediation because the Respondents specifically and expressly declined to make the issue part of the mediation. (*CP 76; Brain 9/24/14 Dec. at ¶ 10*) Ex. 4 to the Case Declaration: *CP 155*, is an e-mail from counsel to Appellant to Counsel for Coyote which proposes that the metal theft claims against the Defendants here, the Schmidts, be made part of *Chambers v. Coyote*. In the next e-mail exchange; Ex. 5 to the Case Declaration: *CP 156*, counsel to Chambers acknowledges that the claims against the Schmidts individually have not been made a part of *Chambers*

¹ Appellant concedes that conversion and civil theft are the same cause of action.

v. *Coyote*:

The client is still pondering his options on the conversion claim. If he elects to go forward, I will file a separate action.

Case Declaration Ex. 6: *CP 157* states that Appellant: “has not yet initiated litigation ... for the metal theft...” Case Declaration Ex. 8 is a response to a Coyote Summary Judgment in *Chambers v. Coyote*. At page 4 of Ex. 8: *CP 162*: Appellant states:

Chambers received production of documents from Seattle Iron & Metal documenting sales of metal believed removed from the Mill site by Charles Schmidt Over \$145,000... Chambers believes that a significantly larger amount of non-ferrous metals... was removed by Messers Schmidt and sold in Oregon. Chambers will be filing a lawsuit for civil theft, conversion and civil conspiracy against the Messers Schmidt next week.

Respondents’ own evidence establishes beyond question that the claims here were never part of and were never intended to be part of *Chambers v. Coyote*.

While a settlement may have been reached with respect to the other litigation, no settlement of the claims involved here was reached and certainly, no dismissal entered.

IV. AUTHORITY AND DISCUSSION

A. Standard of Review.

The review of a grant of summary judgment is *de novo* and the Appellate Court performs the same inquiry as the Trial Court. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). A Court views the evidence and all reasonable inferences to be made from that evidence in the

light most favorable to the non-moving party. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-795, 64 P.3d 22 (2003). Summary judgment is appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); Michak, 148 Wn.2d at 794-795. “A material fact is one that affects the outcome of the litigation.” Owen v. Burlington N. & Santa Fe JUL Co., 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

With respect to civil conspiracy, this cause of action has been repeatedly recognized by Washington Courts most recently in Alexander v. Sanford, 181 Wash. App. at 180 -181, 325 P. 2d 341 (2014):

In order to establish a civil conspiracy, a plaintiff:

must prove by clear, cogent, and convincing evidence that (1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy.

When reviewing a civil case in which the standard of proof is clear, cogent, and convincing evidence, a court “must view the evidence presented through the prism of the substantive evidentiary burden.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Thus, the Court must determine whether, viewing the evidence in the light most favorable to the nonmoving party, a rational trier of fact could find that the nonmoving party supported his or her claim with clear, cogent, and convincing evidence. In re Depend. of C.B., 61 Wash.App. 280, 285, 810 P.2d 518 (1991).

B. Material Issues of fact exist which should preclude summary judgment.

The legal standard governing a claim of conversion was described by this Court in *Judkins v Sadler-McNeil*, 62 Wn. 2d 1, 376 P. 2d 837 (1962) as follows:

It is said in Salmond on the Law of Torts (9th ed. 1936), § 78, p. 310:

‘A conversion is the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it.’

This is quoted in *Wilson v. Wilson* (1958), 53 Wash.2d 13, 16, 330 P.2d 178, 179; and *Martin v. Sikes* (1951), 38 Wash.2d 274, 278, 229 P.2d 546, 549.

Proof of the defendants' knowledge or intent are not essential in establishing a conversion. An excellent statement on this proposition, typifying a long line of authority, is found in *Poggi v. Scott* (1914), 167 Cal. 372, 375, 139 P. 815, 816, 51 L.R.A.,N.S., 925:

The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action. ‘The plaintiff's right of redress no longer depends upon his showing, in any way, that the defendant did the act in question from wrongful motives, or, generally speaking, even intentionally; and hence the want of such motives, or of intention, is no defense. Nor, indeed, is negligence any necessary part of the case. Here, then, is a class of cases in which the tort consists in the breach of what may be called an absolute duty; the act itself (in some

cases it must have caused damage) is unlawful and redressible dressible as a tort.' '

(quoted approvingly in *Fisher v. Pickwick Hotel, Inc.* (1940), 42 Cal.App.2d 823, 826, 108 P.2d 1001, 1002, 1003.)

It is not in dispute here that Chambers financing arrangements required Chambers to deliver all recyclable metals to Metro Metal. There is no dispute that the Defendants removed and sold salvageable metal from the Mill Site to recyclers other than the Metro Metals, the company to which Chambers had contracted to sell the salvaged metal. So, the only real issue here would be whether respondents had justification for, as claimed by Appellant, selling metal to a buyer other than Metro Metals and keeping the proceeds.

Respondents' Motion asserted that the conduct would not constitute conversion because Mr. Ralston and Mr. Zyph were aware of and involved in the removal and sale of the metal claimed to be converted based on Respondents' testimony. Mr. Ralston specifically denies the alleged involvement of himself and Mr. Zyph in the metal thefts. *CP 137; Ralston 9/23/14 Declaration at ¶ 3*. Mr. Ralston also testifies that he never authorized the metal sales to Seattle Iron or R. S. Davis. *Id at ¶ 6*.

Mr Zyph testifies that he specifically and expressly refused to be involved in the diversion of recyclable metal and, that the sales to Seattle Iron were procured using a forged authorization letter:

Within 10 days of my arrival on the Mill Site in approximately February/March 2010, Tony Schmidt approached me about doing a "side deal" to make extra money for ourselves on the project. I understood Mr. Schmidt to be talking about selling metal from the Mill Site

without the knowledge of the project owner, Chambers Creek LLC. I told Mr. Schmidt that I was not dishonest and would not participate in such activities. I also told him that if I found out any questionable activities were taking place, I would immediately report them to Chambers Creek.

I have reviewed the documents produced by Seattle Iron & Metals Corp. and, more particularly, the letter I allegedly signed authorizing Charles Schmidt of Westside Turf Inc. to sell metal to Seattle Iron & Metals Corp. I never wrote the letter nor did I sign that letter or any other letter of its kind.

(CP 66; Zypf 5/31/13 Dec. at ¶ 3-4).

The testimony by the Defendants is that the sales were both authorized and known to Chambers Creek. The testimony from Chambers Creek is to the opposite. This is a dispute of material fact turning on the credibility of the witnesses and is precisely the kind of issue which is not supposed to be resolved on summary judgment.

With respect to the civil conspiracy claim, Defendants assert there is no evidence. The fact of the metal sales and Charles Schmidt's involvement in removing metal from the Mill Site for delivery to a recycler other than Metro Metals is undisputed as established by Tony Schmidt's own testimony. Since the theft of metal is conversion, there certainly is an unlawful purpose and, the necessary agreement can be inferred from Charles Schmidt's involvement in transporting the metal. Given the evidence of Coyote's multiple financial problems from the outset of the job, including IRS liens, a finder of fact could reasonably conclude that the Schmidt's conspired to convert metal from the job site as the solution to Coyote's financial problems.

The basis for the motion on the prior settlement issue is: “In the 2011 lawsuit, Plaintiff claimed Coyote Excavation converted the same scrap metal it now claims the individual defendants in the case at bar converted.” The fact of the matter is that the claims were never made in the prior *Chambers v. Coyote* litigation and were pending in a separate lawsuit when the settlement in *Chambers v. Coyote* was reached and that action was dismissed. This lawsuit was not dismissed as part of that settlement. This would seem to be pretty clear evidence that the claims here were not resolved as part of the settlement in the other lawsuit.

Under these circumstances, the various theories on which Defendants claim this action is a “re-litigation,” and particularly the assertion that the claims here were compulsory counterclaims already settled are not applicable here.

Respondents also assert that the claim would be barred by the doctrine of judicial estoppels. In their briefing, Respondents correctly note that the doctrine is governed by a three part standard, but then mis-state the second element of the standard. Defendants state that the second element is: “whether judicial acceptance of an inconsistent position would create the perception that either the first or second court was misled.” (*CP 28: Motion at 8:4-6*). That is only half of the second element. What Defendants leave out is “***whether the party persuaded a court to accept its early position*** such that its acceptance of an inconsistent position in a later proceeding creates the perception that the party misled either the first or the second court.” *Garrett v. Morgan*, 127 Wn. App. 375 at 379, 112 P.3d 531 (2005). No court has previously made any ruling or finding with respect to

the metal theft based claims here. Judicial estoppel simply is not applicable.

V. CONCLUSION

For the reasons stated above, Appellant respectfully submits that this matter was not an appropriate case for resolution on summary judgment. Appellant therefore requests that the decision of the Trial Court be reversed and the matter remanded for trial.

DATED this 24th day of February, 2015.

BRAIN LAW FIRM PLLC

By: 

Paul E. Brain, WSBA #13438

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of February, 2015, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

Counsel for Defendants:

James D. Case _____ Hand Delivery
Case & Dusterhoff LLP _____ U.S. Mail
9800 SW Beaverton Hillsdale Hwy, Suite 200 _____ (first-class, postage prepaid)
Beaverton, OR 97005 _____ Facsimile
 Email

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of February, 2015, at Tacoma, Washington.



Kim Middleton

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