

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.

BRIEF OF APPELLANT

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I. INTRODUCTION

This case is an Appeal from a Summary Judgment of the Superior Court for Spokane County dismissing an action to recover general damages for the intentional removal and taking of personal property of another by a business and its employees based upon deceptive acts of Conversion and violation of the Consumer Protection Act of Washington.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court's denial of Mr. Reed's motion to amend the complaint was error. The trial court should have granted this motion.
2. The trial court's granting of the Defendants' motion for summary judgment against Mr. Reed was error. The trial court should have denied this motion.
3. The trial court's denial of Mr. Reed's motion for reconsideration of the trial court's order granting summary judgment was in error. The trial court should have granted this motion

B. Issues Pertaining to Assignments of Error

1. **Did the trial court, err in allowing summary judgment on the question of damages not supported by the record**

and failing to allow amended complaint to include new causes of action and proper parties?

- 2. Is the law's regard for a person's property so great that when a person wrongfully, knowingly takes the personal property of another without permission that damages are presumed?**
- 3. Is it clearly the policy of the law not to aid a defendant upon a contract for repossession where the defendant committed an intentional and illegal transaction of intentional removal of another's property without permission?**
- 4. Does the record contain evidence from which a jury could have found appellant guilty of conversion and violation of the Consumer protection Act?**

III. STATEMENT OF THE CASE:

On July 13, 2007, plaintiff Mike K. Reed entered into an agreement with defendant Les Schwab Tire Centers Of Washington, Inc. for the purchase, mounting, and balancing of four tires for his Ford van. The total cost of these items was \$509.82. *See CP 124, 131, page 30.* In the months following this purchase, Plaintiff made periodic payments to defendant Les Schwab Les Schwab Tire Centers Of Washington, Inc. *See CP 131, page 31.* Appellant fell behind in his payments. He was contacted on several occasions by Les Schwab Tire Centers

Of Washington, Inc. store at 15915 E. Sprague Veradale, WA regarding the delinquency. *See CP 127 and 131, page 31.*

On May 27, 2008, one or more employees of defendant Les Schwab Tire Centers Of Washington, Inc., while repossessing the tires from the Ford Van belonging to Plaintiff took without permission the four wheels from the Ford van that were attached to the tires and removed the wheels from the property while the van sat in the plaintiff's residential driveway. The wheels were removed to defendant Les Schwab Tire Centers Of Washington, Inc's. place of business at 15915 E. Sprague Veradale, WA. *See CP at 127.*

The four wheels were not part of the financing agreement nor were they purchased from Les Schwab Tire Centers Of Washington, Inc. The actions of removal and intentional taking of the four wheels with out permission were done under the direction and insistence of defendant Jacob Schreiber and others. As a result of the illegal and unauthorized taking of the four wheels Mr. Reed lost the use of his van and income from

economic loss of use. *See Partial deposition of plaintiff Reed at CP 135, pp 59-60.*

On May 29, two days after the defendants had repossessed their tires and took dominion over his four wheels without permission; Plaintiff Mike K. Reed received a deceptive letter dated May 23, 2008 which gave him “10 days from the date of this letter,” or until June 3, 2008 to pay the balance. The letter was mailed from defendant Les Schwab Tire Centers Of Oregon Inc. and actually not mailed until the date of the conversion of the wheels on May 27. *See CP 135 at page 57.* This letter included a statement that it was a “final reminder” and that the contract between the parties allowed Defendant Les Schwab Tire Centers Of Washington, Inc. to take action as follows:

1. Repossess our merchandise,
2. File legal action against you and add the cost to your balance, or;
3. Assign your account to a collection Agency.

The letter stated in pertinent part

“If you do not pay the balance within 10 days of the date of this letter we will be forced to pursue collection of your account by one of the means listed above.”

See CP at 140.

There was no indication in the letter or other notices that the defendants’ had the right or were going to put the van on blocks and deprive Reed of his property or take the four wheels with the tires from his home to their business without permission. *See CP at 140.*

The plaintiff upon return home a few hours later immediately called Les Schwab Tire Centers Of Washington, Inc. Veradale branch and spoke with defendant Schreiber. *See CP at 133, pages 41-44.* Plaintiff then demanded that the defendants immediately return the four wheels.

The wheels were not returned until May 28, 2008, some 24 hours plus later. The wheels were affixed to the van and the blocks had been removed, leaving the wheels setting on the

ground without any tires on them. *See CP generally at 134, page 50-51.*

Plaintiff Reed subsequently brought this action against the Defendants Jacob Schreiber Individually and his wife, Jane Doe Schreiber and Les Schwab Tire Centers, Inc., an Oregon Corporation for the tort of conversion and violations of the Consumer Protection Act (RCW 19.86, et seq). *See CP 1-9.*

The deposition of Jacob Schreiber was taken on March 1, 2010. *See CP 61.* The deposition revealed the following:

That the wheels were not sold to Mr. Reed by Les Schwab; That Jacob Schreiber took the wheels without permission on behalf of Les Schwab; that Jacob Schreiber remembered having a conversation with Mr. Reed's Attorney demanding the immediate return of the wheels because they were stolen and that he wasn't finished with the wheels and so he refused to return them. *See CP 62*

Schreiber remembers admitting that he did not own the wheels and that he took them anyway. *See CP 63, lines 12-14.*

That it didn't take two days to dismount the tires from the wheels; That a demand letter had been sent from Les Schwab's main office in Prineville Oregon giving him a last chance of 10 days to pay up or that collection activities or repossession would be taken that there was nothing in the letter that stated the defendants were going to take the wheels; that the letter included notice that was designed to give final notice of ten days to contact the defendants prior to repossession; that the letter was dated the 23rd of May and that the defendants repossessed the tires and took the wheels without permission on the 27th of May; that the date that the letter was post marked was the 27th of May the same day the repossession took place; that the plaintiff given the notice had until the first couple of days in June before the collection action would commence; that the defendants did not intend to give the plaintiff 10 days to respond to their final letter; and that defendant Schreiber had conversations with other management people Ryan Carpenter

and Scott Burgess about the handling of Mr. Reed's account and what to do. *See CP 81-91*

Defendant Schreiber also stated after qualifying the dates of the receipt of the letter in an answer to the following question as follows:

Q. How come you went and you repossessed his tires and took his wheels without permission, on the 27th, then?

A. That's our procedure. Once they receive that letter, we have the legal right to do it. Within 10 days.

See CP generally at 92-93.

Schreiber goes on to state that he made a conscious decision to take the wheels without permission with ulterior goals. *See CP 64.*

His deposition further reveals that Les Schwab through the management team of himself, Burgess, and Carpenter had an additional letter sent to the plaintiff Reed from the headquarters in Prineville, Oregon giving him 30 days from the receipt of the letter to redeem his four tires. The letter was

dated June 7th 2010 and postmarked June 10, 2010. *See CP 78-79.* The letter indicated that the plaintiff had 30 days to redeem the four tires or until about July 10. *See CP 95-102.* However the tires were sold out from under Reed on or about June 27.

The defendants alleged in their answer as well as summary judgment pleadings that, the action had not been properly brought by the plaintiff, because he had sued an improper entity, the account was over due at the time the tires were repossessed, Les Schwab's security agreement allowed them to enter Reed's driveway to repossess the tires, there was no basis for a Consumer Protection Act claim and defendant Jacob Schreiber was not an employee Of Les Schwab Tire Centers, Inc. an Oregon Corporation. *See CP at pages 11 and 135.*

The defendant filed an answer asserting its right to repossess the tires as per security agreement and a counterclaim alleging money due as a deficiency. The defendants alleged the plaintiff named the wrong legal entities and the defendant's

answered for the same entities and moved for summary judgment of all parties. The plaintiff alleged the suit and properly named the assistant manager of the local Les Schwab tire company Jacob Schreiber.

The court hearing the defendants' motion for summary judgment and plaintiff's motion to amend on a related back theory denied the plaintiffs motion for leave to amend and granted the defendant's motion for Summary Judgment.

IV. ARGUMENT

A. Was Defendant Jacob Schreiber a proper entity before the court?

It is the plaintiff's position that Jacob Schreiber was properly before the court as an agent and employee of Les Schwab and should have not been dismissed. There is privity or a sufficient nexus of between the two defendants. See *Kuhlman v. Thomas*, 78 Wn.App 115, 121-22 (1995). Parties viewed as sufficiently the same.

The defendant states that Jacob Schreiber was not an employee Of Les Schwab Tire Centers, Inc. an Oregon Corporation. CP at 11, No. 4. However in his deposition he testifies that the pay checks he receives comes from the Home Office in Prineville, Oregon, the letters he had sent to the plaintiff were generated and sent from Prineville, Oregon. CP at 100-101. Additionally as a public policy statement there cannot be any thing in a person's job description that would allow them to take another persons property without permission.

The defendant Schreiber was properly named before the court and should not have been dismissed.

B. Did the court abuse its discretion by refusing to grant the plaintiffs amended complaint?

Leave to amend the pleadings should be freely given unless prejudice results to the non-moving party. *Kirkham v. Smith*, 106 Wn.App. 177, 23 P.3d 10 (2001). Refusal to so grant an amendment without a showing of undue prejudice, dilatory practice, or undue delay may be an abuse of discretion.

Tagliani v. Colwell, 10 Wn. App. 227, 517 P2d 207 (1973). Amendment of pleadings is allowable at any stage of the proceedings when necessary in furtherance of justice. *Jones v. Western Mfg. Co.*, 32 Wash. 375, 73 P. 359 (1903). Whether to allow a pleading to be amended is discretionary with the trial court. Amendments are freely authorized in the interest of justice unless the opposing party would be disadvantaged thereby. *Caruso v. Local 690*, 33 Wn.App. 201 (1982).

The discovery process yielded new factual issues justifying amending the complaint. Among the newly discovered evidence were two new CPA violations. *See CP at pages 69-70.*

There was and is no actual prejudice demonstrated, shown, or argued to the court by the opposing party. The case was scheduled to be tried on May 3rd. The motion to amend was filed on March 15. There has been no undue delay or dilatory practice on the part of Plaintiffs. The discovery process yielded new factual issues justifying amending the

complaint. The Court should have granted the motion to amend Plaintiff's Complaint in the interest of justice and judicial economy.

C. Did the defendants convert the plaintiff's four wheels?

"In order to maintain an action for conversion, there must have been, on the part of the defendant, some Unlawful assumption of dominion over the personal property involved, in defiance or exclusion of the plaintiffs' rights, or else a withholding of the possession from the plaintiffs, under a claim of right or title inconsistent with that of the plaintiffs. *See Thweat v. Stamps*, 67 Ala. 96, 98; *France v. Gibson*, 101 S. W. (Tex. Civ. App.) 536; *Swank v. Elwert*, 55 Or. 487 (105 Pac. 901)." *Lee Tung v. Burkhart*, 59 Or. 194, 116 Pac. 1066 (quoted by *Shaffer v. Walther et al.*, 38 Wn.2d 786, 793 (1951)).

Here the ownership right of the plaintiff to his personal property, the four wheels, was never denied. See CP at 63. The removal and taking of the wheels was not a necessary act as the

tires could have been dismounted on the plaintiff's premises without taking the wheels. When the plaintiff's wheels were taken without permission to the Les Schwab Veradale address the defendant's exercised dominion and control over the property in defiance of petitioner's rights. All of the petitioner's rights incident to the normal ownership of property were taken away by the defendant's willful interference with his wheels "without lawful justification." See *Wilson v. Wilson*, 53 Wn.2d 13, 16, 330 P.2d 178, 179 (1958); and *Martin v. Sikes*, 38 Wn.2d 274, 278, 229 P.2d 546, 549 (1951).

When asked to immediately return the wheels the defendant stated "no" he wasn't finished dismounting the repossessed tires, and did not return the wheels until the following day, some 24 hrs plus after removing them. CP at 134. Defendants admit that there is no paperwork or contract that would allow them to remove the unsecured property of the plaintiff from his premises without permission. CP at 134.

D. Is the law's regard for a person's property so great that when a person wrongfully, knowingly takes the personal property of another without permission that damages are presumed?

The defendants knowing and willfully took the property, four wheels, belonging to the plaintiff with out permission. The public policy of Washington should be that theft or conversion no matter how slight cannot and will not be allowed and if these conversions happen that damages are presumed. Presumed damages are not new to the State of Washington. See *Haueter v. Cowles Publishing*, 61 Wn.App, 574, 578, Implying presumed damages can be recovered in the absence of actual damages, *Vern Sims Ford, Inc.*, 42 Wn. App. at 679-80 (same); *Corbin v. Madison*, 12 Wn. App. 318, 327, 529 P.2d 1145 (1974) (same). Presumed damages are necessarily general as opposed to special because, by definition, they are awardable in the absence of special damages. *Amsbury v. Cowles Publ'g Co.*, 76 Wn.2d 733, 737, 458 P.2d 882 (1969); *Olympia Waterworks v. Mottman*, 88 Wash. 694, 696, 153 P. 1074 (1915); *Haueter*,

61 Wn. App. at 578. The law's regard for a person's property was so great that damages were presumed. *Zimmer v. Stephenson*, 66 Wn.2d 477, 479-80, (1965).

The plaintiff here cites three separate claims of deceptive conduct by defendants on which he has suffered damages. 1.) The deceptive admittedly dishonest conduct in the removal and taking of his four wheels without permission; 2.) The official letter giving him notice that he had 10 days to pay his bill prior to other collection action being taken; and 3.) The deception in the official letter giving him 30 days from the date of the letter prior to the repossessed tires being sold.

The record here contains substantial evidence from which a jury could have found respondents guilty of conversion, Claims for Consumer Protection Violations and awarding of damages. The case should be remanded for trial.

E. Is there substantial evidence of a Consumer Protection Act claim to have a trial on the merits? Are there one or more separate violations of the Consumer Protection Act, RCW 19.86?

The Washington Supreme court made the following holdings in the Hangman Ridge case:

To recover damages under the Consumer Protection Act (RCW 19.86), a private party must prove that the defendant's act or practice (1) is unfair or deceptive, (2) occurs in the conduct of any trade or commerce, (3) affects the public interest, and (4) causes (5) an injury to the plaintiff in his business or property.

Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986)

1. Are the acts complained of unfair or deceptive?

The facts are that the defendants without legal justification deprived the plaintiff of the ownership right of his personal property, the four wheels. The defendant's removal and taking of the wheels was not a necessary act as the tires could have

been dismantled on the plaintiff's premises without taking the wheels. When the plaintiff's wheels were taken without permission to the Les Schwab Veradale address the defendant's exercised dominion and control over the property in defiance of petitioner's rights. All of the petitioner's rights incident to the normal ownership of property were taken away by the defendant's willful interference with his wheels "without lawful justification.

Any time someone removes property of another without permission and refuses to return it immediately or deprives the owner of its use these acts are not only illegal but are unfair and deceptive on their face.

2. Did the acts occur in the conduct of any trade or commerce?

Defendants operate a business called Les Schwab Tires, they sell Batteries, Tires, Tire chains, used tires, breaks, shocks, and other sundry automobile parts and services. The deposition of Schreiber revealed that it was Les Schwab's procedure to

take the property of another without permission when repossessing tires. CP at 89, 92-93. Les Schwab's security agreement allowed them to enter Reed's driveway to repossess the tires. The defendants alleged a right to repossess the security through their contracts and security agreements made exhibits in this case.

It is or at least should be without question that the acts or removal of non secured property without permission as complained of occurred in the conduct of trade or commerce and that these acts are not isolated instances but every day occurrences.

3. Do the acts complained of affect the public interest?

Here the third element is the easiest to satisfy. RCW 48.80.005 states in pertinent part that "the legislature . . . declares that the distribution and sale of vehicle parts . . . vitally affect the public interest." Les Schwab advertises, sells and services vehicle parts (tires, batteries, breaks,

shocks, wheels, and chains) and as such their deceptive dishonest acts of taking another's property without permission satisfies the public interest element of the CPA.

See RCW 48.80.005.

4. Did the deceptive and illegal acts complained of cause an injury to the plaintiff in his business or property?

Reed testified in his deposition at CP 135, page 59-60, that as a result of the taking of the wheels he lost income from work he was not able to accomplish and from loss of use of his van. Reed also testified by declaration that the account at Les Schwab was a consumer transaction. CP 65-67

5. Does the conduct complained of have the capacity to deceive a substantial portion of the public?

Defendant Schreiber in his deposition indicated after qualifying the dates of the receipt of the letter in an answer to the following question as follows:

Q. How come you went and you repossessed his tires and took his wheels without permission, on the 27th, then?

A. That's our procedure. Once they receive that letter, we have the legal right to do it. Within 10 days.

See CP generally at 92-93.

Q. So, if he had until the first day of June to make his – to make his account current, then why did you repossess him on the 27th?

A. Well, we had tried numerous times to get contact with him. No contacts. We sent the letter, that's our procedure after the letter is sent. To our knowledge, if it got there, we repossess.

See CP at 89.

When he indicated that removal of non secured property, the four wheels, without permission within 10 days was "Our Procedure" that statement by its self indicated the conduct complained of has the capacity to deceive a substantial portion of the public.

V. Conclusion

The court should reverse the Summary judgment court and remand this case for Amendment of the complaint, and trial on the issues of conversion and Consumer Protection Violations.

Respectfully Submitted this 30th day of August, 2010, by

CARUSO LAW OFFICES

A handwritten signature in black ink, appearing to read "R. Caruso", written in a cursive style.

Robert E. Caruso
Attorneys for Plaintiff Reed

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Appellee.

Appeals Case No.: 290697

Spokane County Case No.:
09-2-02863-4

DECLARATION OF SERVICE
OF APPELLANT'S BRIEF AND
TRANSCRIPT OF SUMMARY
JUDGMENT HEARING

Pursuant to GR 13, I declare under penalty of perjury under the laws of the State
of Washington that the following is true and correct:

1. I am the attorney of record for the Appellant in the above-entitled action.
2. I am over the age of 18 and competent to testify.
3. I make these statements upon my own personal knowledge.
4. I served Appellant's Brief and a copy of the Transcript of the Summary Judgment
Motion Hearing on Appellees by delivering a copy of these documents to:

Mullin, Cronin, Casey & Blair
115 N. Washington, 3rd Floor
300 Jockey Club Bldg
Spokane, WA 99201

Signed this 30th day of August 2010 in Spokane, Washington.



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DECLARATION OF SERVICE

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