

MAJ 12 2012

NO. 30282-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

GARY LOWE,

Appellant,

vs.

CARL ROWE, JR.,

Respondent.

REPLY BRIEF OF APPELLANT GARY LOWE

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A. ARGUMENT IN REPLY

1. Standard of review revisited. On page 7, and ostensibly on pages 10 through 15, of his "Brief of Respondent," CARL ROWE, JR. attempts to outline the standards governing review of this appeal but then continues on to either ignore or misapply those standards with respect to the superior court record as it pertains to summary dismissal of this case on the basis of Rules 12(c) and 56(c) of the Washington Civil Rules of the Superior Court [CR]. Primarily what the respondent chooses to overlook is the unavoidable fact the trial court undertook to "weigh" the putative evidence before it. Ironically, the respondent has engaged in the same sin through his discussion on pages 10 through 15 of his brief. A review of his assessment of the evidence bears this out.

Neither CR 12(c) or CR 56(c) may be used to weigh, try or decide an issue of fact which is otherwise left to the trier of fact to resolve. Thoma v. C. J. Montag & Sons, Inc., 54 Wn.2d 20, 26, 337 P.2d 1052 (1959); see also, State ex rel. Zempel v. Twitchell,

59 Wn.2d 419, 367 P.2d 125 (1962). Instead, the focus must be limited to those considerations governing either a CR 12(c) or CR 56(c) motion. If these factors have not been proven by the moving party, then the superior court is in error and subject to reversal as a matter of law on appeal. Id.

So as to once more emphasize and clarify the actual standards governing this appeal, summary dismissal of a law suit by the trial court is reviewed de novo on appeal. With respect to CR 12(c), the appellate court examines the pleadings to determine whether the claimant can prove any set of facts, consistent with the complaint, that would entitle the claimant to relief requested thereunder. Parrilla v. King County, 138 Wn.App. 427, 157 P.3d 879 (2007). The movant bears the burden of proving otherwise. Id. In this regard, the allegations in the complaint are accepted as true whereas the opposing claims of the moving party are deemed to be untrue. Id.

Here, in terms of CR 129(c), there can be no question whatsoever that the appellant, GARY NATHANIEL LOWE, made out a viable claim for relief based upon the averments and allegations set forth in his complaint. If those factual claims were

considered as true as required under that rule, then Mr. LOWE would clearly be entitled to damages for conversion in connection with the vehicles bequeath to him from the estate, as well as for defamation and invasion of privacy associated with Mr. ROWE's bad-faith application to the sheriff in obtaining a criminal trespass warning. [CP 1-3, 4-5].

In addition, if the superior court considers matters outside the pleadings, the motion for summary resolution is converted into a CR 56(c) motion. Lopez v. Reynoso, 129 Wn.App. 165, 174, 118 P.3d 398 (2005), review denied, 157 Wn.2d 1003 (2006). The grant of a summary judgment motion is once again reviewed de novo. McNabb v. Dept. of Corrections, 163 Wn.2d 393, 180 P.3d 1257 (2008). The appellate court engages in the same inquiries as the trial court. See, Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

CR 56(c) requires the moving party to demonstrate "that there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law." See also, Wilson v. Steinbach, 98 Wn.2d 434, 656 P.2d 1030 (1982). The

moving party has this burden regardless of which party has the ultimate burden of proof if the matter proceeds to trial. Preston v. Duncan, 55 Wn.2d 678, 682, 349 P.2d 605 (1960).

A material fact is one upon which the case depends either in whole or in part. Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990); Morris v. McNichol, 83 Wn.2d 491, 494-95, 59 P.2d 7 (1974). All evidence and all reasonable inferences therefrom are to be considered in the light most favorable to the non-moving party. Mountain Park Homeowners Ass'n, at 341. Any doubts in this regard are resolved against the moving party and in favor of the non-movant. Id.; Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs., at 516.

Likewise, if the operative facts are "particularly within the knowledge" of the moving party, the matter should be allowed to proceed to trial. In that regard, the non-movant should be afforded the opportunity to disprove the moving party's facts by cross-examination and by that party's demeanor on the witness stand. United States v. Logan Co., 147 F.Supp. 330 (W.D.Pa. 1957); Felsman v. Kessler, 2 Wn.App. 493, 496-97, 468 P.2d 691

(1970); see also, Subin v. Goldsmith, 224 F.2d 753 (2d Cir. 1955).

Elements of proof concerning the defendant's veracity, motive, intent, knowledge, or the reasonableness and good faith nature of his actions lie within this exception. Id.; see also, LaPlante v. State, 85 Wn.2d 154, 159, 531 P.2d 299 (1975); Morris, at 495; Preston, at 682. Conflicting assertions of fact in opposing affidavits will normally give raise to issues such as witness credibility and the differing weigh to be given contradicting evidence which goes beyond the proper pale of a summary judgment proceeding. Balise v. Underwood, 62 Wn.2d 195, 199-200, 381 P.2d 966 (1963); Barker v. Advanced Silicon Materials, LLC., 131 Wn.App. 616, 128 P.3d 633, review denied, 158 Wn.2d 1015 (2006).

Again with these considerations in mind, the respondent was not entitled to summary dismissal of Mr. LOWE's case under either CR 12(c) or CR 56(c). Accordingly, as once again explained below, the challenged decisions of the superior court should be reversed by this court. RAP 12.2.

2. Cause of action for conversation. Once again, it is well-

settled that tortious conversion entails the wilful act of interfering with or exercising jurisdiction over any chattel, without lawful justification, whereby the person entitled thereto is deprived of the possession, use or dominion over such chattel or personalty. In re Marriage of Langham and Kolde, 153 Wn.2d 553, 664, 106 P.3d 212 (2005); Brown ex rel. Richards v. Brown, 157 Wn. App. 803, 817, 239 P.3d 602 (2010); Westview Inv., Ltd. v. U.S. Bank Nat'l Ass'n, 133 Wn.App. 835, 138 P.3d 638 (2006); Consulting Overseas Mgmt., Ltd. v. Shtikel, 105 Wn.App. 80, 83, 18 P.3d 1144 (2001); Eggert v. Vincent, 44 Wn.App. 851, 854, 723 P.2d 527 (1986), review denied, 107 Wn.2d 1034 (1987); see also, D. DeWolf, "Washington Elements of an Action," Wash.Prac., § 4A:1 at 201-02 (2007-2008 Ed.). Conversion can occur by way of the destruction, use or wrongful transfer or sale of another's chattel to a third-party. See, Restatement (Second) of Torts, §§221 through 241; see also, D. DeWolf, § 4A:1 at 202; Allas Hotel Supply Co. v. Baney, 273 Or. 731, 543 P.2d 289, 291-92 (1975); Walker v. Norfolk & W. Ry. Co., 67 W.Va. 273, 67 S.E. 722, 724 (1910).

Chattel which may be subject to a claim of conversion is

any "article of personal property . . . [and] may refer to animate as well as inanimate property." In re Marriage of Langham and Kolde, 153 Wn.2d 553, 564, 106 P.3d 2005). Even money, or the proceeds from the sale of a chattel may become the focus of a claim of tortious conversion. See, Consulting Overseas Management, Ltd. v. Shtikel, 105 Wn.App. 80, 83, 18 P.3d 1144 (2001).

Good faith control or dominion over a chattel is irrelevant and serves as no defense to a claim of conversion. "[N]either good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action [in conversion]." Judkins v. Sadler-Mac Neil, 61 Wn.2d 1, 376 P.2d 837 (1962) (quoting Poggi v. Scott, 167 Cal. 372, 375, 139 P. 815 (1914)). The intent required is simply the intent to exercise dominion or control over the property of another without any lawful justification of depriving that person of such property. Miller v. Hehlen, 209 Ariz. 462, 104 P.3d (App. 2005); see also, Prosser and Keeton, Torts §15, at 92, 102 (5th Ed. 1986).

As stated before, a person may be held liable for conversion even in the event he is an involuntary bailee of the

subject chattel, such as when he has either inherited or purchased certain real estate upon which chattel belonging to a third party may be found or stored. See, Jones v. Jacobson, 45 Wn.2d 265, 273 P.2d 979 (1954); Hartford Finc. Corp. v. Burn, 96 Cal.App.3d 591, 158 Cal.Rptr. 169, 173 (Cal.App. 1979). The only recognized defenses to an action or claim of conversion is proof that the chattel has been abandoned by the owner, or the owner's recovery of the same is barred by the applicable statute of limitations. See, Jones, at 267; D. DeWolf, §§ 4A:8 and :9 at 203.

Based upon these principles of law, there can be no question the subject claim for tortuous conversion of chattel against CARL ROWE, JR. [CP 3-5] was not subject to dismissal under CR 12(c). If accepted as true, the allegations and evidence before the court established that certain items of property belonging to Mr. LOWE had been destroyed by the crusher which had been engaged by the defendant. For purposes of CR 12(c), this at a minimum established by way of the plaintiff's complaint [CP 1-3, 4-5] a cause of action for conversion against the defendant, Mr. ROWE.

Likewise, the requirements of CR 56(c) were not satisfied

or met by Mr. ROWE in this case. Contrary to respondent's bald assertions on pages 15 through 17 of his brief, the superior court record as previously cited and referenced by the appellant on pages 3 through 7 of his opening brief makes it clear there is a genuine issue of material fact whether he had, in fact, "abandoned" the property in question so that it could lawfully be deemed "forfeited." Without question, a simple review of these pages of Mr. LOWE'S opening brief bears this out for purposes of a CR 56(c) analysis.

Ironically, the existence of a genuine issue concerning "abandonment" and "forfeiture" is further reflected in the undisputed fact Mr. ROWE had secured the "criminal trespass warning" from the sheriff's office [CP 56-57, 114-15, 142-43], while Mr. LOWE was still attempting to recover and remove the subject vehicles and other property from Mr. ROWE's premises. Under these circumstances, Mr. LOWE can hardly be said to be in a tenable position to claim the lack of any genuine issue of fact concerning his bald claims of "abandonment" or "forfeiture," when he in fact was responsible himself in preventing Mr. ROWE from removing said vehicles and other property from the premises

at issue.

It should also be remembered that the respondent eventually recanted and allowed Mr. LOWE to remove his remaining property from the premises in July 2010. [CP 156-58]. Common sense dictates that any claim of "abandonment" or "forfeiture" on Mr. ROWE's part is entirely at odds with his having allowed Mr. LOWE to recover his remaining items of property. However, this belated change of mind on the part of Mr. ROWE did not in any way render moot the fact that some of Mr. LOWE's chattel had already been destroyed by Mr. ROWE. [CP 68-69, 188].

Finally, respondent's reliance upon In re Trustee's Sale of Real Property of Brown, 161 Wn.App. 412, 415-16, 250 P.3d 134 (2011), and Lamar Outdoor Advertizing v. Harwood, 162 Wn.App. 385, 394-97, 254 P.3d 208 (2011), is entirely misplaced in this instance. Specifically, those cases do not support any putative argument of respondent that the personal property of the appellant had been abandoned in relation to the involuntary bailment of that property as outlined on pages 3 through 7 of appellant's opening brief and as discussed and argued on pages 15

through 20 of that brief.

In fact, Brown had nothing whatsoever to do with personal property but was instead concerned with the abandonment of a parcel of land under statutory guidelines contained in RCW 6.13.050. The key factors in that regard were that the owner of the real estate had been absent from the property for six months, had ceased making payments on the mortgage in favor of paying rent on real property in another state, had turned off the water supply to the subject property and had acquired a new driver's license and vehicle plates in his new state of residence. Brown, at 415-16.

By the same measure, Lamar has nothing whatsoever to do with a defense of "abandonment" in the context of an involuntary bailment of property and in response to a claim of conversion arising thereunder. That case involved no issue of involuntary bailment but instead concerned a contract dispute, wherein it was determined by the trial court that the lease associated with the roof area where the plaintiff's advertizing sign or billboard had been located had been sold and that 90-day notice, as required under paragraph 11 of the contract, had been given so Lamar, the

plaintiff, had no claim of damages over the loss of its sign. Lamar, at 395-96. Here, there was no contract dictating the parties' actions and rights associated with the subject personal property. Id.

Consequently, as before the trial court, there was no legal grounds or factual basis upon which Mr. LOWE's cause of action for the tort of conversion of chattel could be properly dismissed under either the criteria of CR 12(c) or 56(c). Accordingly, this erroneous decision of the trial court should be reversed on appeal. RAP 12.2.

3. Cause of action for defamation. On pages 17 through 19 of the "Brief of Respondent, Mr. ROWE goes on to baldly assert that he was entitled to judgment on Mr. LOWE's defamation claim under the provisions of RCW 4.24.500 and .510. Curiously enough, however, he totally ignores and side-steps the argument in appellant's opening brief, at pages 20 through 22, that those provisions have no bearing or application whatsoever to the present set of facts and circumstances in this case. He also does not address the issue whether these statutes can be involved only in "good faith."

Such failure on respondent's part to address this precise issue should now be considered a concession on the part of Mr. ROWE as to the merits of Mr. LOWE's claim that RCW 4.24.500 and .510 have no proper application in this matter. See, State v. Ward, 125 Wn.App. 138, 143-44, 104 P.3d 61 (2005). This is particularly true since such concession is entirely consistent with the governing law. Accord, State v. Steen, 164 Wn.App. 789, 804 n.10, 265 P.3d 901 (2011).

Without question, it is a time-honored rule of statutory construction that a statute will be interpreted in a common sense fashion and with a mind towards the purpose behind its intended purpose, and will not be applied or construed in a manner or fashion which would lead to an absurd or nonsensical result. United States v. American Trucking Assn's, Inc., 310 U.S. 534, 543-44, 84 L.E.2d 1345, 60 S.Ct. 1059 (1940). Mr. ROWE has cited no case law or other legal authority for his novel interpretation of the "SLAPP" statutes. Mr. LOWE is also unaware of any such authority and believes that the respondent would have readily cited such authority if it did in fact exist.

To reiterate, a simple basic review of RCW 4.24.500

through .520 makes it clear that these provisions have nothing whatsoever to do with a false reporting of a crime as between individuals but are instead intended to apply only in the context of those matters which have become commonly known as "SLAPP" suits, or strategic lawsuits against public participation which "are designed to intimate the exercise of First Amendment rights and right under Article I, section 5 of the Washington State Constitution." Laws of 2002, ch. 232 [Intent]. Here again, the right of freedom of speech is clearly not at issue. Id.

Once more, even if the "SLAPP" provisions could arguably be said to apply to this case involving a defamation claim, it still remains clear that those statutes can only be lawfully invoked in "good faith." In that regard, there exists a genuine issue of material fact as to whether Mr. ROWE was acting in "good faith" when making out his application to the sheriff's department for a warning of prosecution of criminal trespass against Mr. LOWE. Strategically, the net effect of Mr. ROWE's actions in this regard was to further "deprive" Mr. LOWE from removing his remaining chattel. [CP 56-57, 114-15, 142-43].

Insofar as the operative fact of "motive" is "particularly

within the knowledge" of the moving party, Mr. ROWE, the cause of action for defamation should not have been summarily dismissed under CR 12(c) or 56(c) but instead allowed to proceed to trial so that Mr. LOWE was given the opportunity to prove "bad faith" by way of Mr. ROWE's demeanor on the witness stand during cross-examination. United States v. Logan Co., 147 F.Supp. 330 (W.D.Pa. 1957); Felsman v. Kessler, 2 Wn.App. 493, 496-97, 468 P.2d 691 (1970); see also, Subin v. Goldsmith, 224 F.2d 753 (2d Cir. 1955).

Thus, in addition to the inapplicability of the "SLAPP" statutes, the element of proof concerning the defendant's motive and intent associated with Mr. ROWE's underlying application to the sheriff's office, precluded summary dismissal in this instance. Id.; see also, LaPlante v. State, 85 Wn.2d 154, 159, 531 P.2d 299 (1975). Hence, the challenged decision of the trial court associated with Mr. LOWE's defamation claim should also be reversed. RAP 12.2.

4. Respondent's request for attorney fees. Finally, on page 19 of the brief of respondent, Mr. ROWE baldly claims once more that he is entitled to an award of attorney fees and expenses

under RCW 4.24.510 on this appeal. As stated in part A.3, above, he has not proven that the SLAPP statute at issue has any application or bearing on the facts and circumstances of this case. Even assuming, arguendo, that it did have any relevance, Mr. ROWE would at most be entitled to recovery of those fees and expenses associating with his defending against the defamation claim and not any remaining part of this appeal. This is assuming, of course, that he should prevail on appeal on this particular issue and claim.

B. CONCLUSION

Based upon the foregoing points and authorities, appellant GARY NATHANIEL LOWE once more respectfully requests that challenged decisions of the superior court [CP 190-92, 205-09, 210-12] be reversed, and this matter be remanded for trial on the causes of action for conversion and defamation as brought against the defendant, CARL ROWE, JR., in the matter.

DATED this 12th day of March, 2012.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Michael J. Beyer", written over a horizontal line.

Michael J. Beyer, WSBA #9109
Attorney for Appellant
GARY NATHANIEL LOWE