

FILED

JAN 24 2012

COURT OF APPEALS  
DIVISION III  
SPokane, WA

NO. 30282-2-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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GARY LOWE,

Appellant,

vs.

CARL ROWE, JR.,

Respondent.

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BRIEF OF APPELLANT GARY LOWE

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Michael J. Beyer, WSBA #9109  
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Spokane, Washington 99201  
(509) 499-1877

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### **A. ASSIGNMENTS OF ERROR**

1. The superior court of Columbia County, State of Washington, erred in entering its letter decision on July 25, 2011, wherein the court summarily dismissed the causes of action of the plaintiff, GARY NATHANIEL LOWE, against the defendant, CARL ROWE, JR., for tortious conversion and defamation, on the basis of CR 12© and, alternatively, on the further basis of CR 56©. [CP 190-92].

2. The superior court of Columbia County, State of Washington, further erred in entering its "Order for Entry of Judgment for Defendant" on August 26, 2011, and filed on September 6, 2011, wherein the court ordered the dismissal of said causes of action of the plaintiff, GARY NATHANIEL LOWE, against the defendant, CARL ROWE, JR., for conversion and defamation, on the basis of CR 12© and, alternatively, on the further basis of CR 56©, and also awarded the defendant under the provisions of RCW 4.24.500 and .510 damages, fees and cost associated with his defending against the subject defamation claim of plaintiff. [CP 205-

09].

3. The superior court of Columbia County, State of Washington, further erred in entering its "Judgment for Defendant" on August 26, 2011, and filed on September 6, 2011, wherein the court entered judgment in favor of the defendant, and against plaintiff, and also awarded under RCW 4.24.510 defendant exemplary damages as well as his fees and costs associated with his defending against the subject defamation claim of plaintiff. [CP 210-12].

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether, contrary to the challenged decisions of the superior court, the defendant failed to meet his burden of proof entitling him to summary dismissal of the plaintiff's claim against him for tortious conversion of personal property under either Rule 12© or 56© of the Washington Civil Rules for Superior Court [CR]? [Assignment of Error Nos. 1 through 3].

2. Whether, contrary to the challenged decisions of the superior court, the defendant was

likewise not entitled to summary dismissal of plaintiff's claim of defamation against him on the basis of statutory immunity and an award of costs and attorney fees under the provisions of RCW 4.24.500 and .510, insofar as he failed to meet his burden of proof for dismissal under either Rule 12© or 56© of the Washington Civil Rules for Superior Court [CR]? [Assignment of Error Nos. 1 through 3].

### **C. STATEMENT OF THE CASE**

This matter concerns the central issue whether the defendant, CARL ROWE, JR., was entitled to summary dismissal of the claims of the plaintiff, GARY NATHANIEL LOWE, on the basis of either judgment on the pleadings or summary judgment under the corresponding Rules 12© and 56© of the Washington Civil Rules for Superior Court [CR]. Those claims relate to conversion of property and defamation leveled against Mr. ROWE.

1. Factual Background. The plaintiff in this case was a beneficiary of the estate of Vernon Marll which estate was probated in the superior

court of Spokane County, State of Washington, under cause No. 08-4-00184-1. [CP 1-2, 17]. Specifically, pursuant to paragraph VI of his uncle's will, Mr. LOWE was bequeathed a Model A Ford pickup together with all other vehicles owned by the decedent except for his passenger car which was instead bequeathed to Mr. LOWE's aunt and the decedent's sister, Sarah Literal [CP 14, 17, 21, 70, 82, 104]. The fair market value of the inventory of vehicles bequeathed to Mr. LOWE was estimated by the personal representative to be \$10,000, and title to the same was ultimately transferred to him on June 17, 2008. [CP 14-15, 24, 50, 111, 133-35]. In addition to these inherited vehicles, Mr. LOWE owned several vehicles, tractors, trailers and other equipment which had been stored on his uncle's property. [CP 112-13, 116, 137-38, 139-40, 149-50, 188].

During the pendency of the estate, a real estate purchase and sale agreement was executed on April 24, 2008, as between the seller, Estate of Vernan Marll, and the buyer, Mr. ROWE, with respect to certain real property owned by the

decedent, and situated in Columbia County. [CP 8, 11-13]. At the time of this agreement, the vehicles which had been gifted to Mr. LOWE remained on this real estate. [CP 8].

Thereafter, the estate sent Mr. LOWE a letter, dated May 3, 2008, requesting that he remove the vehicles from the property within thirty [30] days since it had been sold and this transaction would be closing shortly. [CP 23, 49]. In this letter, the attorney for the estate acknowledged that this might well pose somewhat of a hardship upon Mr. LOWE to accomplish within this time frame. [CP 23]. In fact, Mr. LOWE objected to this notice as being unreasonable. [CP 124].

Nevertheless, Mr. LOWE took it upon himself to make arrangements with Mr. ROWE to work together with him, and begin removing the subject vehicles from the premises. [CP 68, 70, 78, 136, 140, 152-55]. Mr. ROWE acknowledged that he assisted Mr. LOWE in his efforts to remove some of the vehicles which were tangled in blackberry bushes and other growth. [CP 68, 78].

Unbeknownst to Mr. LOWE [CP 141], Mr. ROWE

later on had a metal crusher brought onto the property and certain vehicles and equipment belonging to Mr. LOWE were crushed and removed from the premises. [CP 68-69, 188]. Prior to this time, Mr. ROWE had never given Mr. LOWE any deadline to remove the vehicles. [CP 78]. His only explanation for this decision to unilaterally dispose of the vehicles was that Mr. LOWE had not removed them within the 30-day time-period specified by the estate [CP 23, 49], and the realtor had told him that if they were not removed within this time-frame that the cars then belonged to him. [CP 77, 187].

In this same regard, Mr. ROWE has acknowledged that Mr. LOWE never advised him that he had any intention of abandoning his claim to the vehicles and other items of property. [CP 77, 187]. To the same effect, Mr. ROWE acknowledged that the cars and other items at issue did not belong to him; he simply "wanted to get them off the property and the scrap iron men were there" to cut them up. [CP 188].

In addition to so disposing of certain

vehicles and equipment belonging to Mr. LOWE, Mr. ROWE took steps to prevent Mr. LOWE from coming on to the property in order to retrieve any remaining items of property belonging to him. [CP 142-43]. Specifically, Mr. ROWE executed on August 12, 2008, a criminal trespass warning against Mr. LOWE concerning any future trespass or entry on the subject premises, and had the sheriff of Columbia County, State of Washington, serve the same on him. [CP 56-57, 114-15, 142-43]. In this regard, he stated in his application concerning the same that he had "authority to prohibit (trespass) people from entering . . . on this property." [CP 56, 69]. This occurred prior to the October 31, 2008, date of closing on the real estate sale. [CP 8, 69]. Under the terms of the April 24 real estate purchase and sale agreement, Mr. ROWE was not entitled to possession until that date [CP 11-13], even though he has since alleged the realtor had advised him otherwise. [CP 69-70, 75-76].

2. Procedural History. On February 20, 2009, the plaintiff, GARY N. LOWE, filed suit against the defendant, CARL ROWE, JR., in the superior

court of Columbia County, State of Washington, under cause no. 09-2-00011-4, claiming damages for conversion in connection with the vehicles bequeath to him from his uncle's estate, and defamation and invasion of privacy associated with Mr. ROWE's bad-faith filing and application for criminal trespass warning. [CP 1-3, 4-5]. The defendant answered claiming essentially in terms of affirmative defenses that Mr. LOWE had lost any right of interest or claim to the vehicles because of his failure to remove the same within thirty [30] days after notice from the estate, and that he was immune from any liability associated with having reported Mr. LOWE'S alleged criminal trespass under the provisions of RCW 4.24.500 through .520. [CP 6-27].

Later on, in July 2010, an agreement was reached between the parties allowing Mr. LOWE to retrieve from Mr. ROWE'S property any remaining vehicles which had not been destroyed and rendered to scrap metal. [CP 156-58]. Base upon this agreement, Mr. LOWE then removed his remaining vehicles and property. [CP 86].

On June 17, 2011, Mr. ROWE filed a motion seeking, inter alia, dismissal of the plaintiff's suit on the pleadings under Rule 12© of the Washington Civil Rules for Superior Court [CR]. [CP 37, 39-59]. Essentially, the gravamen of the defendant's argument for dismissal was that the plaintiff's claims were barred "through laches, operation of law or equity" and further, in his view, that the claim of conversion had been rendered somehow moot in light of his eventually agreement to allow Mr. LOWE to remove his remaining vehicles and other possession in July 2010. [CP 46-47, 86-88].

Mr. ROWE also requested punitive damages of \$10,000.00 and award of costs and attorney fees under RCW 4.24.510 in having to defend against the defamation claim. [CP 59]. In addition, to those affirmative defenses set forth in his answer, Mr. ROWE further claimed in his motion that Mr. LOWE was barred from any recovery associated with his claim of conversion on the basis of laches. [CP 46].

Mr. LOWE opposed the motion insofar as he had

never abandoned his claim to the vehicles and Mr. ROWE had no lawful right to interfere with his interest in the same and, further, even if applicable that the defendant had acted in bad-faith so as to bar any putative claim of immunity under RCW 4.24.500 through .510 in association with his criminal complaint of trespass to law enforcement in this matter. [CP 65-78].

The superior court granted the defendant's motion under CR 12© and also on the basis of CR 56©. [CP 190-92, 205-09]. In this vein, the court opined that "[p]laintiff's failure to timely remove the vehicles forfeited his right to the cars or to keep them on the estate property that had been sold." [CP 191, 207-08]. Accordingly, in the court's view, the plaintiff "ha[d] shown no legal basis upon which he [would be] entitled to relief under his theory of tortious conversion." [CP 191, 208]. The court was also of the opinion that Mr. ROWE "had authority to prohibit [Mr. LOWE] from trespassing on the property . . . [and was therefore] entitled to attorney fees, costs and damages under [RCW 4.24.510]." [CP 192, 208].

Ultimately, the court found that, with respect to the dismissal of the claims for tortious conversion and defamation, "no genuine issue of fact exists and . . . the defendant Rowe is entitled to judgment as [a] matter of law on the pleadings under CR 12© and, having considered matter beyond the pleadings in the form of testimony from the parties by deposition, for summary judgment under CR 56[©]." [CP 207]. Judgment for the defendant was filed on September 6, 2011. [CP 210-12]. This appeal followed. [CP 917-53]. Additional facts are set forth below as they relate to the appellant's argument on a specific issue or issues.

#### **D. STANDARD OF REVIEW**

The appellate court reviews de novo a dismissal ruling on a motion for judgment on the pleadings under CR 12©, examining the pleadings to determine whether the claimant can prove any set of facts, consistent with the complaint, that would entitle the claimant to relief thereunder. Parrilla v. King County, 138 Wn.App. 427, 157 P.3d

879 (2007). The movant bears the burden in this regard and, in terms of this review by the appellate court, the allegations in the complaint are accepted as true whereas the allegations of the moving party were considered in turn as untrue. Id.

If the trial court has considered matters outside the pleadings, the motion will be converted or transformed into a motion under CR 56©. Lopez v. Reynoso, 129 Wn.App. 165, 174, 118 P.3d 398 (2005), review denied, 157 Wn.2d 1003 (2006). In this regard, the grant of a summary judgment motion is in turn reviewed de novo. McNabb v. Dept. of Corrections, 163 Wn.2d 393, 180 P.3d 1257 (2008). The appellate court engages in the same inquiry as the trial court. See, Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

CR 56© 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 irrespective of which party would have the ultimate burden of proof if the case were to go 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.

In this same vein, where the operative or dispositive facts are "particularly within the knowledge" of the moving party, the cause should be allowed to proceed to trial in order that the non-movant is given 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.

Neither CR 12© or CR 56© may be used to weigh, try or decide any issues of fact. 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). Conflicting assertions of fact in opposing affidavits will normally give raise to issues such as witness credibility and the differing weight to be given contradicting evidence which goes beyond 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).

#### **E. ARGUMENT**

1. Cause of action for conversion. Generally speaking, 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 in a number of ways including 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).

Caselaw establishes that a person may be held liable for conversion even in the event he is an involuntary bailee of the subject chattel, such as when one 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 v. Jacobson, supra.; D.

DeWolf, §§ 4A:8 and :9 at 203.

Based upon the foregoing principles of law, there can be no question whatsoever that the subject claim for tortious conversion against the defendant, CARL ROWE, JR. [CP 3-5], was not subject to dismissal under either Rule 12© or 56© of the Washington Civil Rules for Superior Court [CR]. Clearly, 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. Likewise, there is no question that by way of the criminal trespass warning [CP 56-57, 114-15, 142-43] that Mr. LOWE had at least for a time been deprived from removing other chattel that remained on the subject real estate of Mr. ROWE. See, D. DeWolf, § 4A:1 at 201-02.

Under the facts and circumstances presented, he could not in any sense establish either that the chattel at issue had been "abandoned" by Mr. LOWE [CP 77, 187], or that the latter was somehow "barred" from recovery on the basis of any statute of limitation. Id. Contrary to the court's

mistaken view, a mere claim of "forfeiture" based upon a thirty-day notice is no defense whatsoever to an action for conversion [CP 191, 207-08]. See, Jones v. Jacobson, supra.; D. DeWolf, §§ 4A:8 and :9 at 203.

It is equally clear that Mr. ROWE's remaining defenses based upon the doctrines of laches and mootness were not in any way supported by the allegations and evidence then before the superior court. While, admittedly, Mr. LOWE was eventually allowed to remove his remaining property from the premises per the parties' agreement in July 2010 [CP 156-58], this agreement did not in any way render moot the fact that some of Mr. LOWE's chattel had been previously destroyed by Mr. ROWE [CP 68-69, 188] and that he had for a time "deprived" the owner from recovering the remaining property by way of threat of criminal prosecution for trespass against Mr. LOWE [CP 56-57, 114-15, 142-43].

In sum, there was no legal or factual basis upon which Mr. LOWE's cause of action for conversion could be properly dismissed by the court

under either CR 12© or 56©. Accordingly, this erroneous decision of the trial court should be reversed by the court of appeals on this appeal. RAP 12.2.

2. Cause of action for defamation.

Under Washington law, a cause of action for defamation is made out by way of allegation and proof showing the existence of a false and defamatory statement which was published by the defendant, the lack of any privilege associated with the same and damages. See generally, Dunlap v. Wayne, 105 Wn.2d 529, 716 P.2d 842 (1955); D. DeWolf, § 13.1 at 422. In this regard, Mr. ROWE's sole defense to Mr. LOWE's claim of defamation was his reliance upon the provisions of RCW 4.24.500 and .510. The superior court accepted this defense as conclusive. [CP 190-92, 205-09, 210-12]. The court was also of the opinion that Mr. ROWE was "entitled to attorney fees, costs and damages under [RCW 4.24.510]." [CP 192, 208].

A simple review of RCW 4.24.500 through .520 makes it clear that these provisions have nothing whatsoever to do with a simple false reporting of

a crime as between individuals. Instead, these provisions which are commonly known as "SLAPP" suits or strategic lawsuits against public participation "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, the right of freedom of speech is not at issue. Id.

Furthermore, even if these particular statutory provisions could be arguably said to apply under these facts, it remains clear that the same can only be lawfully invoked in "good faith." Here, there is a clear and genuine issue of material fact as to whether Mr. ROWE was acting in "bad faith" when making out the warning of prosecution concerning criminal trespass. Again, the net effect was to "deprive" Mr. LOWE from recovering his remaining chattel. [CP 56-57, 114-15, 142-43]. At the very minimum, and insofar as the operative or dispositive fact of "motive" is "particularly within the knowledge" of the moving party, Mr. ROWE, the cause of action for

defamation should have been allowed to proceed to trial in order that Mr. LOWE was afforded the opportunity to prove "bad faith" by way of cross-examination of Mr. ROWE and by means of his 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). In other words, the element of proof concerning the defendant's motive and intent regarding the issue of bad faith, associated with his invocation of and reliance upon RCW 4.24.500 and .510 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 concerning Mr. LOWE's defamation claim should also be reversed on this appeal and the case remanded for trial. RAP 12.2.

#### **F. CONCLUSION**

Based upon the foregoing points and authorities, appellant GARY NATHANIEL LOWE

respectfully requests that challenged decisions of the superior court [CP 190-92, 205-09, 210-12] on this appeal be reversed, and this matter be remanded for trial on the causes of action for conversion and defamation raised against the defendant, CARL ROWE, JR., in the matter.

DATED this 24th day of January, 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