

**FILED**

**FEB 23 2012**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**NO. 30282-2-III**

**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

**GARY LOWE,**

**Appellant,**

**v.**

**CARL ROWE, JR.,**

**Respondent.**

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**BRIEF OF RESPONDENT ROWE**

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Michael V. Hubbard,  
WSBA #8823  
Attorney for Respondent, Rowe  
145 Main, P. O. Box 67  
Waitsburg, WA 99361  
(509) 337-6643

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## Table of Contents

	Page
I. <u>Introduction</u> .....	4
II. <u>Assignments of Error</u> .....	6
III. <u>Issues Pertaining to Assignments of Error</u> . . . . .	7
IV. <u>Standard of Review</u> .....	7
V. <u>Statement of the Case</u> .....	8
VI. <u>Argument</u> .....	10
VII <u>Attorney’s Fees on Appeal</u> . . . . .	14
VII. <u>Conclusion</u> .....	19

## Table of Authorities

Table of Cases:	Page No.
<i>In re Trustee's Sale of Real Property of Brown</i> 161 Wn.App. 412, 415-416, 250 P.3d 134, 136 (2011) .....	16
<i>Jones v. Jacobson</i> , 45 Wn.2d 265, 273 P.2d 979 (1954) .....	16
<i>Lamar Outdoor Advertising v. Harwood</i> 162 Wn. App. 385, 394-397, 254 P.3d 208, 213 - 214 (2011) .....	16
<i>Parrott Mechanical, Inc. v. Rude</i> ) 118 Wn.App. 859, 78 P.3d 1026, (2003) .....	10
<i>Meyer v. Univ. of Wash.</i> , 105 Wash.2d 847, 852, 719 P.2d 98 (1986) .....	10
<i>Michael v. Mosquera-Lacy</i> , 165 Wn.2d 595, 601-602, 200 P.3d 695, 698 (2009) .....	10
<i>Seven Gables Corp. v. MGM/UA Entm't Co.</i> , 106 Wn.2d 1, 13, 721 P.2d 1 (1986) .....	11
<i>Ski Acres, Inc. v. Kittitas County</i> , 118 Wn.2d 852, 827 P.2d 1000 (1992) .....	7
<i>Syrovoy v. Alpine Resources, Inc.</i> , 68 Wn. App. 35, 841 P.2d 1279 (1992) .....	7
<i>Wilson v. Wenatchee School Dist.</i> 110 Wn.App. 265, 40 P.3d 686 (2002) .....	7

**STATUTES**

	Page No.
RCW 4.24.500 .....	5, 6, 18
RCW 4.24.510 .....	5,11,18, 19

**RULES OF COURT**

	Page No.
CR 12 (c) .....	4, 7
CR 56 .....	5, 7

**OTHER AUTHORITIES**

	Page No.
RAP 18.1 .....	19

## I. Introduction

Lowe sued Rowe: Alleging, “First Claim...defendant unlawfully and tortiously converted personal property [vehicles] of the plaintiff...; and Second Claim...defendant made a false report to a law enforcement agency describing the plaintiff as a criminal trespasser, [which] statements ...were defamatory per se.”

Rowe denied Lowe’s claims and moved to dismiss for failure to join the Marll estate as a necessary party and for judgment on the pleadings. CR 12 (c). CP: 37 (motion), CP: 39-59 (Defendant’s memorandum with exhibits A-F). Lowe responded by to that motion by memorandum, CP: 60-4, and by filing an additional response that included four pages of transcript from Rowe’s deposition, material beyond the pleadings, CP: 65-79. Rowe, in return to that filing, replied by memorandum with citation to particular facts in the record and to the law, CP: 79-89, which submission also included the declaration of Diane Rock, with its exhibits 1 and 2, containing

copies of certain exhibits and pages of transcript from the depositions of the parties. CP: 90-189. Since matters outside the pleadings were presented to and not excluded by the trial court, that motion was treated below as one for summary judgment under CR 56.

The court, finding no genuine issue of material fact existed, granted Rowe's motion, dismissing all of Lowe's claims and entering judgment for Rowe against Lowe for statutory damages of \$10,000.00 plus an award of reasonable attorney's fees on the defamation claim. RCW 4.24.500, 510. The Order for Entry of Judgment stated:

The reasons for the court's ruling are that the plaintiff had notice, ample time and opportunity to remove the vehicles from the Marll property purchased by defendant Rowe and failed to do so, thereby forfeiting any rights he had in them; and, defendant Rowe was lawfully in early possession of the Marll estate property during the times relevant to this action. The evidence supporting those reasons is contained in the documents noted above from defendant Rowe, particularly the declaration of Steve Jolley, attorney for the Marll estate.

Plaintiff Lowe has shown no legal basis upon which he would be entitled to relief under his theory of tortious conversion on the vehicles. As to plaintiff's defamation claim, Rowe was in lawful possession of the Marll estate real property, entitled to report to and obtain from the Columbia County Sheriff's office a no-trespass warning and entitled to protection from liability for making that report by RCW 4.24.500. (CP: 205-08)

Lowe appeals.

## **II. Assignments of Error**

Lowe assigns error to:

1. The trial court's letter decision of July 25, 2011 (CP: 190-92);
2. The trial court's "Order for Entry of Judgment for Defendant" of August 26, 2011 (CP: 205-09); and
3. The trial court's "Judgment for Defendant" of August 26, 2011 and filed on September 6, 2011 (CP: 210-12).

### **III. Issues Pertaining to Assignments of Error**

Appellant Lowe sets forth the issues on appeal in terms of whether Rowe met his burden of proof for dismissal and judgment on the conversion and defamation claims under CR 12 (c) or CR 56 (c). Rowe offers, in different words, that the issue is whether the record on review supports the decision and judgment entered by the trial court.

### **IV. Standard of Review**

The standard of review for a ruling under CR 12 (c) and CR 56 is de novo. *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 827 P.2d 1000 (1992) (summary judgment); *Syrovoy v. Alpine Resources, Inc.*, 68 Wn. App. 35, 841 P.2d 1279 (1992) (timber contract). On review, the appellate court engages in the same inquiry as the trial court. *Wilson v. Wenatchee School Dist.* 110 Wn.App. 265, 40 P.3d 686 (2002).

## V. Statement of the Case

**Background:** Lowe resides in the summer time in Dayton, WA and in the winter in Belton, Texas. CP: 117. Lowe has not filed income taxes for the last five years, “Because I filed a letter in the courthouse in Belton, Texas, to the IRS agent, and I asked him to show me where I owe him, according to their regulations, anymore money, and they did not respond within the 30 days...” CP: 118. “Q. And because they didn’t respond within the 30 days, the United States government’s position was discharged? A. Yes.” CP: 118.

Lowe inherited certain vehicles, with an inventoried value of \$10,000, from the Vernon Marll Estate (Jolley Declaration, pp 2-3); CP: 14-15. The personal representative of that estate gave thirty day written notice to Lowe on May 3, 2008 to remove the vehicles he had inherited from the Marll home place, which was being sold, and formally transferred all the vehicles bequeathed to Lowe on June 17, 2008. CP: 14-45; CP: 23-24; CP: 130. Lowe failed to remove the vehicles within

the thirty days, despite opportunity and ability to do so. CP: 126, 128.

On August 12, 2008, Lowe engaged a wrecker (tow truck driver) to remove a 41 Chevrolet truck from the Marll home place that had been sold to Rowe. CP: 141. Lowe promised to pay Rowe \$80.00 for that truck but never did. CP: 142; CP: 173. Consequently, that day, Rowe issued the no trespass warning to Lowe. CP: 56-7. At that time, Rowe was in actual possession of the Marll home place, ahead of closing as granted by the Marll estate: “By agreement with the estate, the Rowe Living Trust took early possession of the property upon signing the earnest money.” CP: 14. (At page 5 of his additional response Lowe asserts, as he did at the hearing on June 15, 2011, “That is a false statement by attorney Jolley”, CP: 69; but offers nothing to the court to substantiate that claim.)

Lowe had from May 3 to August 12, 2008 to remove the cars he claimed from the Marll Estate lands but failed to do so. CP: 183. “If he wanted them, he had 98 days to get them. I

guess he didn't want them." Rowe Deposition, CP: 183; (Note this writer counts it as 102 days).

## VI. Argument

### 6.1 The Record Supports the Trial Court's Ruling for

Rowe. Rowe established a substantial record at the trial level to support his motion to dismiss and for judgment. Uncontroverted, relevant facts offered in support of summary judgment are deemed established. *Parrott Mechanical, Inc. v. Rude*) 118 Wn.App. 859, 78 P.3d 1026, (2003). As stated in *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601-602, 200 P.3d 695, 698 (2009): "Summary judgment is subject to a burden shifting scheme. 'After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact.' *Meyer v. Univ. of Wash.*, 105 Wash.2d 847, 852, 719 P.2d 98 (1986). To establish the existence of a genuine issue of material fact, the nonmoving party 'may not rely on speculation, [or] argumentative assertions that unresolved

factual issues remain.’ *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)”.

Rowe submits he created a sufficient record below to shift the burden to Lowe to rebut the contentions of the moving party. Consider the following: Lowe asserted “There are issues of fact here that can only be decided by trial”. (CP: 63) But, he never stated what the factual issues were specifically on the conversion claim. And, on the second, defamation, he just argued, “There should be no judgment on the Pleadings regarding the immunity from the defamation claim under RCW 4.24.510 because there as been no finding that the defendant has ‘prevailed’... (CP: 73)

Of course, in ruling in Rowe’s favor on defamation, the trial court did make Rowe the prevailing party. (CP: 192; CP: 205-08; CP: 210-12) Lowe submitted no material in the form of declarations/affidavits beyond the pleadings other than the excerpt of four pages from Rowe’s deposition (CP: 75-8), which Lowe did not develop further so as to create perhaps a genuine issue of material fact. Instead he made bare assertions, such as Rowe had “no authority” and was “acting in bad faith”

when he issued the trespass warning against Lowe. (CP: 69) And, Lowe added, “What about the declaration from Attorney Steve Jolley (CP: 14, lines 13-21) that there was an early possession agreement? That is a false statement by attorney Jolley.” (CP: 69) But, Lowe offered no evidence to the trial court to support his contention that Mr. Jolley’s statement on early possession of the Marll estate realty was false, nor did he offer any evidence to contravene Mr. Jolley’s declaration, which confirmed early possession in Rowe of the Marll realty.

On the other hand, Rowe listed the evidence he relied upon in making his motion to the trial court, CP: 82-3, and attaching:

(a). Declaration of Diane R. Rock, July 19, 2011 with selected transcript pages and exhibits from the depositions of the parties; (CP: 90-189);

(b). Declaration of Steve Jolley, attorney for the probate estate of Vernon Marll and its personal representative, Marc. R. Roecks, together with its three exhibits, (1) the Marll Will; (2) the May 3, 2008 30 day notice from Roecks to Lowe to

remove the inherited vehicles from Marll home place due to its sale; and (3) the listing and transfer of the eight vehicles from the Marll estate to Lowe plus one to Sarah Literal; (CP: 13-27);

(c). Declaration of Diane R. Rock, filed October 12, 2010, with conformed copy of the Declaration of Completion of the probate of the Vernon Marll estate, filed in Spokane County Superior Court on September 2, 2010; (CP: 31-36)

(d). Lowe's complaint herein, filed February 20, 2009 (CP: 1-3); and

(e). Rowe's answer, with affirmative defenses, filed July 13, 2009. (CP: 6-27)

In addition, in its Order for Entry of Judgment, the trial court studied the pleadings filed in this action and specifically noted that it considered the following documents and evidence:

**by plaintiff:**

Additional Response to Defendant's Motion for Judgment on the Pleadings, including pages 23, 24,

29 and 30 from the transcript of defendant Carl Rowe's deposition. (CP: 182-183; CP: 188; CP: 30)

**by defendant:**

(a) Declaration of Diane R. Rock, July 19, 2011 with selected transcript pages and exhibits from the depositions of the parties; (CP: 90-189)

(b) Declaration of Steve Jolley, attorney for the probate estate of Vernon Marll and its personal representative, Marc. R. Roecks, together with its three exhibits, (1) the Marll Will; (2) the May 3, 2008 30 day notice from Roecks to Lowe to remove the inherited vehicles from Marll home place due to its sale; and (3) the listing and transfer of the eight vehicles from the Marll estate to Lowe plus one to Sarah Literal; (CP: 13-24)

(c) Declaration of Diane R. Rock, filed October 12, 2010, with conformed copy of the Declaration of Completion of the probate of the Vernon Marll

estate, filed in Spokane County Superior Court on September 2, 2010; (CP: 30-36)

(d) Lowe's complaint herein, filed February 20, 2009; and (CP: 1-3)

(e) Rowe's answer, with affirmative defenses, filed July 13, 2009. (CP: 6-27).

**6.2 Lowe had Notice and Opportunity.** The record now on review reveals Lowe had notice and opportunity to remove the vehicles he claimed but failed to do so. CP: 13-24. This would apply to vehicles inventoried in the Marll estate and those described only by Lowe in a handwritten list he prepared, CP: 116, and to which he admitted he did not have the title, a bill of sale or any other writing to show he had any interest in them. CP: 138. Lowe failed to remove the vehicles within the time allotted by the Marll estate or by Rowe.

On this record notice and requirement of Lowe to remove the vehicles was reasonable. Lowe submitted no evidence by affidavit, declaration or specific references to deposition

testimony in this case to support a different conclusion in that regard.

Lowe relies on the law applicable to an involuntary bailee, citing *Jones v. Jacobson*, 45 Wn.2d 265, 273 P.2d 979 (1954). However, the *Jones* case stands for the proposition that abandonment of a chattel by the owner thereof is a complete defense to an action for conversion. at, 267. There is no reasonable basis for dispute as to the legal effect of Lowe's failure to remove the vehicles in a timely manner: he thereby forfeited whatever interest he may have acquired in them and he deemed to have abandoned them. See, e. g. *In re Trustee's Sale of Real Property of Brown* 161 Wn.App. 412, 415-416, 250 P.3d 134, 136 (2011).

This court recently cited *Jones v. Jacobson* with approval in upholding summary judgment to the owner for failure of a tenant to remove a billboard after notice on the sale of the building to which it was affixed. *Lamar Outdoor Advertising v. Harwood* 162 Wn. App. 385, 394-397, 254 P.3d 208, 213 - 214 (2011). Likewise, here, Lowe had notice and opportunity to remove the vehicles but failed to act in a timely and

reasonable manner, thereby causing him to lose whatever interest he may have had as a matter of law.

### **6.3 Rowe entitled to Judgment on the Defamation Claim.**

The record shows that Rowe was granted early possession of the Marll estate real property. CP: 13-5 (Declaration of Steve Jolley, attorney for Marll Estate). After all the time Lowe had to remove the vehicles had expired, on August 10, 2008 Lowe sent a wrecker two days later onto the Marll/Rowe property to remove a truck. CP: 141-2; CP: 183. Lowe then promised to but did not pay Rowe \$80.00 for that truck. CP: 142.

Consequently, Rowe obtained the no trespass warning against Lowe from the CCSO on August 12, 2008. CP: 114-5. Lowe in deposition admitted that warning contained no false statements and that Rowe had possession of the land. CP: 143.

As a matter of public policy the legislature enacted:

#### **RCW 4.24.500. Good faith communication to government agency--Legislative findings—Purpose.**

Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending against such suits can be

severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies.

That statute has its supporting corollary in RCW 4.24.510, protecting citizens who provide such information by affording them immunity from claims and the right to damages:

**RCW 4.24.510. Communication to government agency or self-regulatory organization--Immunity from civil liability.**

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

The record here supports the application of the above statutes.

When Lowe sued Rowe for defamation for making a truthful report to law enforcement in order to obtain protection, to which Rowe was entitled, against Lowe from trespass, he made

himself subject to the above statutes and liable to Rowe for damages and attorney's fees.

### **VII Attorney's Fees on Appeal**

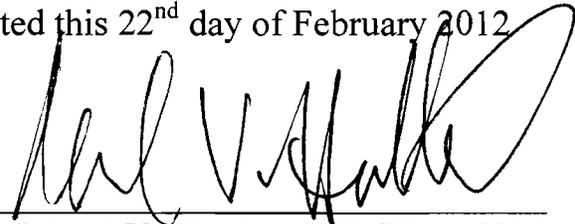
#### **7.1. Respondent's Request for an Award of Fees.**

Under RAP 18.1, Rowe requests, should he be the prevailing party on appeal, that an award of attorney's fees and expenses be assessed against Lowe. Specifically on the defamation claim, RCW 4.24.510 grants the right to recover expenses and attorneys' fees and that provisions should apply on appeal.

### **VIII. Conclusion**

After engaging in the same inquiry as the trial court in this case, it should appear to this panel that the record is one that supports Rowe and that judgment should be affirmed in his favor.

Respectfully submitted this 22<sup>nd</sup> day of February 2012

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

**Michael V. Hubbard, WSBA# 8823**  
**Attorney for Respondent Rowe**

**FILED**

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<b>GARY LOWE,</b>	)	
	)	<b>No. 30282-2</b>
<b>Appellant,</b>	)	
	)	
<b>v.</b>	)	<b>CERTIFICATE</b>
	)	<b>OF SERVICE</b>
<b>CARL ROWE, JR.,</b>	)	
	)	
<b>Respondent.</b>	)	
	)	

STATE OF WASHINGTON )  
) ss.  
COUNTY OF WALLA WALLA )

DIANE ROCK, under penalty of perjury under the laws of State of Washington, declare the following to be true:

I am a citizen of the United States of America, a resident of the State of Washington, over the age of twenty-one years, not a party to the above entitled action and competent to be a witness herein.

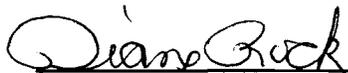
1  
2 On the 22<sup>nd</sup> day of February, 2012, within Walla Walla County, Washington, I  
3 certify that I mailed a copy of the foregoing:

4 **Brief of Respondent Rowe**

5 To: **Michael J. Beyer, Esq.** **Carl Rowe, Jr.**  
6 **1403 W. Broadway Ave.** **PO Box 551**  
7 **Spokane, WA 99201** **Quartzsite, AZ 85346**

8 by depositing such copy in the United States mail in the Post Office at Waitsburg,  
9 Walla Walla County, Washington, on said date with first class postage prepaid.

10  
11 Signed by me at Waitsburg, WA this 22<sup>nd</sup> day of February 2012

12  
13 

14 **Diane Rock**  
15 **Legal Assistant**