

70494-0

70494.0

ORIGINAL

NO. 70494-0-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MARK HAFFNER, an individual,

Appellant,

vs.

IVAR R. ALM et al,

Respondents.

APPELLANT'S REPLY BRIEF

THE COLLINS LAW GROUP PLLC
Jami K. Elison WSBA #31007
Sheri Lyons Collins WSBA #21969
2806 NE Sunset Blvd., Suite A
Renton, WA 98056
Telephone: (425) 271-2575
Facsimile: (425) 271-0788

Attorneys for Appellant

FILED
COURT OF APPEALS, DIV I
STATE OF WASHINGTON
2017 NOV 20 AM 10:51

TABLE OF CONTENTS

REPLY SUMMARY3

ARGUMENT & AUTHORITY6

 A. There can be no *res judicata* from a district court decision when the trial was only about alleged conversion of personal property, which the district court expressly believed had not yet been converted and even directed Respondent to allow the return of the personal property.6

 B. Appellant’s Assignments of Errors plainly specified election of remedies as an appropriate legal basis for reversal7

 1. Appellant filed the Complaint and “election of remedies” is not a cause of action it would have pleaded.7

 2. At trial, Appellant presented the entire factual basis for the election of remedies argument and argued the legal principle in closing argument.....8

 3. Our appellate courts treat questions of law and independent principles of law as issues properly considered even when unbriefed so long as the parties have opportunity for briefing9

CONCLUSION.....10

TABLE OF AUTHORITIES

TABLE OF CASES

Ang v. Martin, 154 Wn.2d 477, 481, 114 P.3d 637 (2005).6
City of Seattle v. McCreedy, 123 Wn.2d 260, 268, 868 P.2d 134 (1994)....9
Dix v. ICT Group, Inc., 160 Wn.2d 826, 833-34, 163 P.3d 1016
(2007)..6
Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898
(1995)7
Milligan v. Thompson, 110 Wn. App. 628, 635, 42 P.3d 418 (2002).....7
Oak Harbor Education Ass'n v. Oak Harbor School Dist, 162 Wn.
App. 254, 259 P.3d 274 (2011)9
State v. D. Gaines, 121 Wn. App. 687, 696, 90 P.3d 1095, 1100 (2004).....9

RULES

RAP 10.3(a).....7

REPLY SUMMARY

Appellant Mr. Haffner requests this Court of Appeals correctly apply the law under the election of remedies principle. It is undisputed that Respondent Mr. Alm became angry and decided “to get rid of this stuff” that belonged to Mr. Haffner. “I told him, ‘I’m going to get rid of this stuff. First guy that wants this stuff can have it.’ I was really upset.”¹ Alm explains that to have occurred in 2007 when he saw Haffner repairing a motor of a bulldozer.² Alm confirms that to be the event that caused him to “change my mind” about whether Haffner could store his bulldozers on Alm’s property.³

That event led to a dispute between Haffner and Alm over how to settle competing wage and storage rental claims. Those disputes were submitted and resolved by King County District Court on September 15, 2008. The district court ruled that the claims for work and storage between 2004 and 2008 offset each other: “So, I’m going to give both of you a ‘zero.’”⁴ Judgment entered accordingly.⁵

The district court’s language leaves no doubt that the district court did not rule the equipment had been abandoned such that Mr. Alm could

¹RP, Alm, at 31: 10-12.

²RP, Alm, at 35: 3-8 and 47: 8-24.

³RP, Alm, at 47: 5-15.

⁴CP, 62.

⁵CP, 48.

seize possession of the construction equipment. To the contrary, the district court's language confirmed that the court expected Mr. Alm to allow Mr. Haffner to receive his construction equipment and items.

The district court had heard argument about whether Alm was obstructing Haffner's ability to remove the equipment, during which argument Mr. Alm concealed from everyone that the equipment had already been destroyed, saying instead that "I want him to take the whole thing off."⁶ The district court said: "I believe there is equipment on your property."⁷ As the removal of conversion of chattel was not submitted and was also outside the jurisdiction of the small claims proceedings, the district court gave the parting admonition: "If it belongs to him, sir you need to get it off of there and you need to let him get it off."⁸

Mr. Alm defied the instruction from the district court and did not allow Mr. Haffner to get his equipment; in fact, Mr. Alm had misled the district court, because unbeknownst at the time, Mr. Alm had already destroyed the equipment. Since that time, Mr. Alm's case has been an effort to get away with this wrongful act. The only issue that should be tried is the damage resulting from the conversion. Mr. Haffner requests this Court of Appeals vacate the judgment and reverse and remand for a

⁶CP, 61.

⁷CP, 62.

⁸CP, 62.

determination of that issue.

There can be no *res judicata* from the district court decision about abandonment and conversion because the district court believed the equipment was on the property and that it should be returned to Mr. Haffner. There can be a ruling enforcing the legal principle of election of remedies, because rather than admit the property had already been destroyed, which was not learned until trial, Mr. Alm elected to offset wage claims with rental storage claims. It is inconsistent to allow the double recovery that results from that offset combined with the benefit obtained from conversion and immunity for the damages resulting from the conversion. Election of remedies is an independent legal principle that was plainly presented in Assignments of Error, briefed by Mr. Alm, based entirely on facts preserved and admitted at trial, and argued at trial in closing argument, which as this Court knows is not part of the appellate record. There is no waiver of this independent legal principle. Reversal is required for justice to be served in this case.

ARGUMENT & AUTHORITY

The trial court's reliance on trespass was not a mere scrivener's error as suggested by Mr. Alm. It was neither a typo nor an incorrect inclusion of data. It was a fundamental error that the trial court may have believed avoided dealing with the reasons why abandonment cannot be found in this case where Mr. Alm already received the benefit of storage fees, which argument Mr. Haffner emphasized in closing argument.

The trial court abused its discretion by turning *sua sponte* to trespass.

If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion.⁹

The failure to properly enforce the election of remedy legal principle is also an error that requires *de novo* review.

If, however, a pure question of law is presented, ..., a *de novo* standard of review should be applied as to that question.¹⁰

This Court of Appeals cannot conduct a *de novo* review without considering the election of remedies principle.

- A. There can be no *res judicata* from a district court decision when the trial was only about alleged conversion of personal property, which the district court expressly believed had not yet been converted and even directed Respondent to allow the return of the personal property**

⁹ *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833-34, 163 P.3d 1016 (2007).

¹⁰ *Id.*, citing *Ang v. Martin*, 154 Wn.2d 477, 481, 114 P.3d 637 (2005).

There is no *res judicata* for an issue that was not decided, nor could it have been decided based on the district court's understanding of represented facts. "Res judicata refers to 'the preclusive effect of judgments, including the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action.'"¹¹ Because the district court believed Mr. Alm still had possession of the construction equipment and that it could be returned, the issue of conversion and abandonment could not have been litigated at that time. The district court left open and anticipated that Mr. Alm would allow Mr. Haffner to retrieve his equipment. If the district court made any decision about conversion or abandonment, it was that Mr. Haffner had not abandoned the equipment such that Mr. Alm could seize and convert them because the district court instructed Mr. Alm to allow the return.

B. Appellant's Assignments of Errors plainly specified election of remedies as an appropriate legal basis for reversal.

The issue of whether a legal argument is properly presented on appeal, or conversely waived, normally revolves around compliance with RAP 10.3(a).¹² Contrary to Mr. Alm's arguments, that is not this case.

1. Appellant filed the Complaint and "election of remedies" is not a cause of action it would have pleaded.

¹¹ *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995) (quotation in original).

¹² See *Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.3d 418 (2002).

There is no reason why Mr. Haffner would have pleaded “election of remedies” in the Complaint. It is not a cause of action. Moreover, the handling of the district court decision was not raised by Mr. Alm as an issue until a last-ditch amendment the month before trial commenced.¹³

Mr. Haffner timely responded by arguing the scope of the district court decision and presenting the argument that follows from an election of remedies: “Conversion and damage is the only issue for trial.”¹⁴ Contrary to Mr. Alm’s argument in his opposition brief, Mr. Haffner preserved the issue and introduced at trial all facts necessary for that legal principle.

2. At trial, Appellant presented the entire factual basis for the election of remedies argument and argued the legal principle in closing argument.

All facts necessary for a ruling under election of remedies were submitted and admitted during trial. Election of remedies was emphasized during closing argument, which is not a part of the appellate record but may have resulted in the trial court avoiding findings and rulings on abandonment and turning instead to trespass, *sua sponte*. That was reversible error.

¹³ CP, 36-37 (Order allowing amended defense to include res judicata); *see also* CP 38-43 (April 4 filing 11 days before trial raising issue under caption of Defendants’ Motion to Establish The Law of the Case).

¹⁴ CP, 90 (emphasis added).

3. Our appellate courts treat questions of law and independent principles of law as issues properly considered even when unbriefed so long as the parties have opportunity for briefing.

Mr. Alm has not cited a single authority where an appellate court has declined to properly enforce the legal principle of election of remedies based on a waiver argument. Mr. Alm relies upon *Oak Harbor Education Ass'n v. Oak Harbor School Dist.*,¹⁵ but that authority did nothing more than segregate election of remedies as a legal principle that stands on its own outside the terms of a collective bargaining agreement.

The court ruled that the affirmative defense of election of remedies and waiver were “not based on the collective bargaining agreement, but rather on independent principles of law.”¹⁶

Rather than support Mr. Alm’s position, the only authority relied upon clarifies that election of remedies is an “independent principle of law.” Our courts do not decline to correctly apply the law when the assignment of error is properly presented to them. Instead, our courts go a step farther:

[R]eviewing courts may consider an unbriefed legal issue that presents itself with “disquieting obtrusiveness” upon examination of the record, especially if the parties are given the opportunity for supplemental briefing.¹⁷

¹⁵ 162 Wn. App. 254, 259 P.3d 274 (2011).

¹⁶ *Id.* at 261 (quotation in original).

¹⁷ *State v. D. Gaines*, 121 Wn. App. 687, 696, 90 P.3d 1095, 1100 (2004), holding in parenthetical for citation to *City of Seattle v. McCreedy*, 123 Wn.2d 260, 268, 868 P.2d 134 (1994).

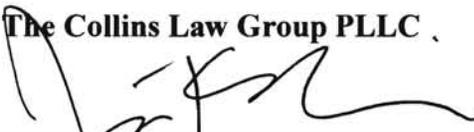
In this matter, the independent legal issue of election of remedies, after having been argued in closing argument at trial, was properly included as a plain assignment of error and Mr. Alm had fair opportunity to submit briefing. There is no basis for Mr. Alm's argument that this Court of Appeals should decline to accurately enforce an independent legal principle. The trial court's failure to do so was reversible error that this Court should now correct in the interest of justice.

CONCLUSION

This Court should (a) vacate the judgment, (b) reverse the ruling and find that conversion has been established as a matter of law with no basis for the affirmative defense of abandonment given the election of remedies, resulting in an award of attorneys' fees for appeal and trial as quantified by the trial court below and (c) remand for determination of damages resulting from the conversion.

DATED this 19th day of May 2014.

The Collins Law Group PLLC



Jami K. Ellison, WSBA #31007
Email: jami@tclg-law.com
2806 NE Sunset Blvd., Suite A
Renton, WA 98056
Tel: (425) 271-2575
Fax: (425) 271-0788
Attorneys for Appellant Mark Haffner

PROOF OF SERVICE

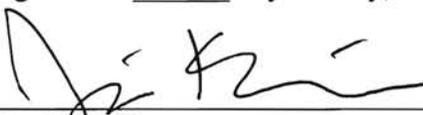
I certify under penalty of perjury that on the 19th day of May, 2014, I served a copy Appellant's Reply Brief via email, per agreement of the parties, and U.S. Mail, postage prepaid on the following:

Via Email and US MAIL

Harry Williams IV
Keller Rohrback LLP
1201 Third Avenue, Suite 3200
Seattle, WA 98101-1900

David G. Speikers
Attorney at Law
32116 SE Red-Fall City, WA 98024
Attorneys for Respondents

Dated at Renton Washington this 19th day of May, 2014.



Jami R. Alison

2014 MAY 20 PM 10:51
COURT OF APPEALS DIV 1
STATE OF WASHINGTON