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ARKANSAS COURT OF APPEALS

DIVISIONS I, II & II
No. CA12-197

SAM DURHAM APPELLANT V. TERRY SMITH and SUSAN SMITH APPELLEES	**Opinion Delivered** December 12, 2012 APPEAL FROM THE IZARD COUNTY CIRCUIT COURT [Nos. CV-07-37-4, CV-08-90-2] HONORABLE TIM WEAVER, JUDGE AFFIRMED

LARRY D. VAUGHT, Chief Judge

This is the second appeal of appellees Susan and Terry Smith involving their sale of land and farming equipment to appellant Sam Durham. The underlying facts of this case are fully set out in *Durham v. Smith*, 2010 Ark. App. 329, 374 S.W.3d 799 (*Durham I*), but for purposes of this appeal a brief overview of the facts follow.

Durham purchased the land and farming equipment from the Smiths; however, when the property went into foreclosure, Terry entered the property and retrieved a tractor and hay baler, claiming that he still owned the items. Indeed, the items were financed in his name, with money still owed on the bank notes. The bank sold the remaining equipment and land to satisfy Durham's debt, and he then sued the Smiths for conversion of the tractor and hay baler.

Following a hearing in May 2009, the circuit court found that, although Smith had wrongfully taken the equipment, Durham was not entitled to damages because the Smiths had

not been unjustly enriched by the conversion; rather, they had sold the equipment for $30,000, the amount still owed on it. Durham appealed, and we reversed the circuit court's denial of damages on the conversion claim, holding that it erroneously based its denial on a theory of unjust enrichment and instructing the circuit court to reconsider damages under the appropriate standard, which is the fair-market value of the equipment at the time of the conversion.

A hearing was held on December 20, 2010, and Durham offered to present testimony from an expert witness concerning the fair-market value of the tractor and baler when the conversion occurred. The Smiths offered to put on new evidence as well, in the form of testimony about the condition of the equipment when it was removed from the property. The parties agreed that the original record did not include evidence of the fair-market value of the equipment at the time of the conversion. The original record does, however, contain evidence of the equipment's value at the time of its initial purchase and when it was sold (approximately one year after the conversion).[1]

On remand, the circuit court solely relied on the established record from the May 2009 hearing, after stating that it was "convinced" that it was not permitted to consider new evidence on remand. And, after considering the evidence contained in the established record, the circuit court found that Durham tendered $7,025.29 to the Smiths and believed their testimony that the check was reimbursement for a payment they had made on the tractor and

[1]Terry originally purchased the tractor for $45,000 and the baler for $23,000, via a bank loan. Approximately one year after the conversion occurred, Terry sold the tractor and baler to Dean Batterson for $30,000, the amount still owed on the note.

baler. The circuit court also found that the Smiths had signed a bill of sale warranting that the property they sold to Durham was free and clear of all encumbrances. Finally, the circuit court found that Durham was making payments on the equipment through the Smiths in a "side arrangement" designed to keep the foreclosing bank from finding out that money was still owed on the equipment. Based on these findings, the circuit court concluded that Durham had failed to prove the fair-market value of the equipment; that he had known about and assumed the debt on the tractor and baler; that Terry's sale of the equipment for $30,000—the full amount of that debt—would be counted as a setoff; and that Durham was not entitled to any damages on the conversion claim.

Durham now argues that on remand the circuit court exceeded our mandate by (1) holding that the Smiths were entitled to an offset and denying his claim for conversion, and (2) not permitting Durham to introduce new evidence regarding the fair-market value of the equipment at the time of conversion. The first point is easily resolved as it is contingent on how we resolve the second point. According to the evidence introduced at the original hearing, the circuit court was correct in finding that the amount of the setoff—to satisfy the amount owed on the items—was greater than their actual value. As such, the trial court was correct in its determination that, without proof of damages, Durham's conversion claim must fail. *Dew v. Dew*, 2012 Ark. App. 122, 390 S.W.3d 764. However, whether the circuit court should have allowed additional evidence on remand is the more difficult question.

We have long held that the trial court's jurisdiction on remand is limited to executing the mandate of the appellate court.

> The inferior court is bound by the judgment or decree as the law of the case, and must carry it into execution according to the mandate. The inferior court cannot vary it, or judicially examine it for any other purpose than execution. It can give no other or further relief as to any matter decided by the Supreme Court, even where there is error apparent; or in any manner intermeddle with it further than to execute the mandate, and settle such matters as have been remanded, not adjudicated, by the Supreme Court.

Wal-Mart Stores, Inc. v. Regions Bank Trust Dep't, 356 Ark. 494, 156 S.W.3d 249 (2004) (quoting *Fortenberry v. Frazier*, 5 Ark. 200 (1843)). In *Dolphin v. Wilson*, 335 Ark. 113, 115–16, 983 S.W.2d 113, 118–19 (1998), our supreme court cited with approval a few of the major precepts regarding mandates:

> A "mandate" is the official notice of action of the appellate court, directed to the court below, advising that court of the action taken by the appellate court, and directing the lower court to have the appellate court's judgment duly recognized, obeyed, and executed.
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> However, the lower court is vested with jurisdiction only to the extent conferred by the appellate court's opinion and mandate. Therefore, the question of whether the lower court followed the mandate is not simply one of whether the lower court was correct in its construction of the case, but also involves a question of the lower court's jurisdiction.
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> Any proceedings on remand which are contrary to the directions contained in the mandate from the appellate court may be considered null and void.
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> . . . .

Id., 983 S.W.2d at 118–19.

In this case, the circuit court refused to hear new testimony about fair-market value because our mandate did not specifically instruct it to receive additional evidence on the matter. On remand, the circuit court did, however, reconsider the issue of damages under a fair-market-value theory as opposed to the unjust-enrichment analysis it originally used. In *Durham I*, we stated,

> Had the court found that the Smiths were entitled to some type of offset and that the offset was worth more than the value of the converted property, then it would have been justified to find that Mr. Durham had not been damaged. Absent those findings, however, the circuit court was wrong to deny damages on an unjust-enrichment theory.

2010 Ark. App. 329, at 10, 374 S.W.3d at 805. The circuit court made that exact finding on remand and reached the conclusion that Durham had not been damaged. The mandate of the prior opinion did not require more evidence to be taken, and the circuit court correctly ruled on the record before it. To do otherwise would have exceeded the circuit court's jurisdiction and resulted in reversible error.

Affirmed.

GLADWIN, ROBBINS, GLOVER, ABRAMSON, and MARTIN, JJ., agree.

PITTMAN, WYNNE, and BROWN, JJ., dissent.

WAYMOND M. BROWN, Judge, dissenting. I respectfully dissent from the majority holding in this case.

A circuit court's jurisdiction on remand is limited to executing the mandate of the appellate court.[1] But our supreme court has also held that a trial court must implement both

[1] *Wal-Mart Stores, Inc. v. Regions Bank Trust Dep't.*, 356 Ark. 494, 156 S.W.3d 249 (2004) (quoting *Fortenberry v. Frazier*, 5 Ark. 200 (1843)).

the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.[2] Any proceedings on remand that are contrary to the directions contained in the mandate from the appellate court may be considered null and void.[3] New causes of action, defenses, issues, or proof cannot be raised after remand when they are inconsistent with the appellate court's opinion and mandate.[4] However, when a circuit court's hearing of new evidence on remand is consistent with the appellate court's opinion and mandate, there is no error.[5]

The circuit court in this case declined to hear new testimony about fair market value because our mandate did not specifically instruct it to receive additional evidence on the matter. However, additional evidence may be considered on remand if it is within the boundaries of this court's mandate and consistent with our opinion;[6] it is not necessary for the mandate to specifically require or prohibit the taking of additional evidence. What matters is that the circuit court follow the instructions and intent of the appellate court on remand. When we remanded this case back to the circuit court, we stated:

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[2]*Id.* (citing *Casey v. Planned Parenthood*, 14 F.3d 848 (3d Cir. 1994)).

[3]*Dolphin v. Wilson*, 335 Ark. 113, 983 S.W.2d 113 (1998) (citing 5 Am. Jur. 2d § 791 (1995)).

[4]*Id.*

[5]*See Johnson v. State*, 363 Ark. 463, 215 S.W.3d 668 (2005) (held trial court did not err in hearing new evidence on the very matter specified to be considered on remand).

[6]*See Foreman v. State*, 328 Ark. 583, 945 S.W.2d 926 (1997) (held trial court did not err in holding remand hearing with new witness because it was in accordance with mandate). *Cf. Dolphin*, *supra* (held trial court exceeded mandate by allowing party to raise entirely new cause of action on remand).

> [T]he proper measure of damages is the fair market value of the property at the time and place of conversion. Fair market value is the price a piece of property would bring between a willing seller and a willing buyer in the open market after negotiations. In finding that the Smiths were not unjustly enriched by the conversion, the circuit court appeared to be denying damages on what was equitable. But this was clearly wrong. Mr. Durham was entitled to whatever the tractor and hay baler were worth at the time of conversion. Had the court found that the Smiths were entitled to some type of offset and that the offset was more than the value of the converted property, then it would have been justified to find that Mr. Durham had not been damaged. Absent those findings, however, the circuit court was wrong to deny damages on an unjust enrichment theory. Accordingly, we reverse the circuit court on this point and remand for reconsideration of damages for conversion.[7]

The intent of our mandate was clearly for the circuit court to try to determine what the fair market value of the equipment was at the time of the conversion, not just the Smiths' setoff against that amount. The circuit court, mistakenly believing it was forbidden from receiving additional evidence on the matter, made a finding on the issue of setoff but refused to hear testimony that might have assisted it in determining fair market value. Instead, the court speculated or assumed that the fair market value of the equipment was less than the amount owed on it, and on those grounds denied Durham any damages for the conversion. Damages must not be left to speculation and conjecture.[8]

Under the circumstances of this particular case, I feel that the circuit court erred by *not* hearing the additional evidence offered by appellant and appellees concerning the fair market value of the equipment, since that was the very matter to be determined on remand and the original record was insufficient to allow meaningful reconsideration of the issue. Therefore, I dissent.

PITTMAN and WYNNE, JJ., join.
Cooper & Bayless, P.A., by: *Mark Cooper*, for appellant.
Tom Garner and *Jeremy B. Lowrey*, for appellees.

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[7]*Durham v. Smith*, 2010 Ark. App. 329, 374 S.W.3d 799.

[8]*JAG Consulting v. Eubanks*, 77 Ark. App. 232, 72 S.W.3d 549 (2002).