Cite as 2010 Ark. App. 178

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA09-727

	Opinion Delivered February 24, 2010
TERRI D. VOLGELGESANG APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. CV-2007-11072]
V.	HONORABLE COLLINS KILGORE, JUDGE
IMOGENE H. VOLGELGESANG APPELLEE	AFFIRMED

JOHN MAUZY PITTMAN, Judge

This is an appeal from a money judgment in favor of appellee for damages for appellant's conversion, prejudgment interest, and costs equal to appellee's filing fee. Appellant argues that she was not guilty of conversion because she had no knowledge or wrongful intent; that the trial court erred in refusing to dismiss the complaint because an indispensable party was not joined; that awarding judgment against appellant for the amount converted was inappropriate because her husband had already been ordered to pay restitution in monthly installments; that the award of prejudgment interest was inappropriate; and that the award of costs was inappropriate. We affirm.

There is no serious dispute about the facts of this case. Appellant, Terri Vogelgesang, formerly was married to William Gerald (Jerry) Vogelgesang. Jerry had access by virtue of

a power of attorney to funds in an account belonging to his elderly mother and the appellee here, Imogene Vogelgesang. Over a period of time, Jerry misappropriated all of his mother's funds, approximately $243,000. Jerry deposited some of the stolen funds into a bank account belonging to appellant, Terri Vogelgesang. Jerry attempted suicide after he had completely exhausted his mother's funds. The theft was then discovered, and he was convicted, imprisoned, and ordered to pay restitution in the amount of $400 per month. Appellant was informed by appellee that funds belonging to appellee were in appellant's bank account, and appellee made demand upon appellant for the return of those funds. Appellant did not return the funds, and appellee filed this action for conversion. The trial court found that appellant committed the tort of conversion by intentionally exercising dominion and control over $15,383.08 belonging to appellee. The court awarded appellee judgment in that amount, plus prejudgment interest in the amount of $7,616.73 and reimbursement of appellee's circuit court filing fee of $140. This appeal followed.

Appellant first argues that the evidence is insufficient to support a finding of conversion because there was no showing that she knew that appellee's money had been deposited into her account; therefore, appellant argues, appellee failed to prove wrongful intent. We disagree. Although wrongful possession of another's property is a necessary element of conversion, there is no need to show conscious wrongdoing.[1] Judge Neal nicely

[1] The cases cited by appellant to the contrary involve unauthorized transfers to good-faith purchasers for value. These cases are inapposite because appellant was not a

summed up the elements of conversion in *Buck v. Gillham*, 80 Ark. App. 375, 379, 96 S.W.3d 750, 753 (2003):

> Conversion is a common-law tort action for the wrongful possession or disposition of another's property. *McQuillan v. Mercedes-Benz Credit Corp.*, 331 Ark. 242, 961 S.W.2d 729 (1998). The tort of conversion is committed when a party wrongfully commits a distinct act of dominion over the property of another which is inconsistent with the owner's rights. *Dillard v. Wade*, 74 Ark. App. 38, 45 S.W.3d 848 (2001). The property interest may be shown by a possession or a present right to possession when the defendant cannot show a better right, since possession carries with it a presumption of ownership. *Big A Warehouse Dist. v. Rye Auto Supply*, 19 Ark. App. 286, 719 S.W.2d 716 (1986). The intent required is not conscious wrongdoing but rather an intent to exercise dominion or control over the goods that is in fact inconsistent with the plaintiff's rights. *Grayson v. Bank of Little Rock*, 334 Ark. 180, 971 S.W.2d 788 (1998); *Tackett v. McDonald's Corp.*, 68 Ark. App. 41, 3 S.W.3d 340 (1999). The conversion need not be a manual taking or for the defendant's use. *Big A Warehouse Dist. v. Rye Auto Supply, supra.*

Here, the evidence was sufficient to show that appellant intended to exercise dominion or control over funds belonging to appellee in a manner inconsistent with appellee's rights.

Nor do we agree that the thief, Jerry Vogelgesang, was an indispensable party to the action, and that the trial court erred in refusing to dismiss the case because he was not joined as a party. It is true that Ark. R. Civ. P. 19(b) permits the court to declare that a necessary party, without whom complete relief cannot be given, is an indispensable party and to dismiss

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purchaser for value. *See, e.g.*, *J.M. Products, Inc. v. Arkansas Capital Corp.*, 51 Ark. App. 85, 910 S.W.2d 702 (1995).

the action on that ground. A crucial factor in deciding whether dismissal is proper is the degree of prejudice that would be suffered as a result of the necessary party's absence by those who are already parties to the action. Here, dismissal was not a proper remedy for failing to join the thief. Jerry, appellant's former husband, was also her current housemate; in fact, he actually testified at trial. Thus, he was completely available if appellant wanted him joined in the litigation. The Reporter's Notes to Rule 19 states that the policy behind the rule "is to avoid dismissal of actions where possible and when it is possible to join an absent party, dismissal is not proper as such party will be ordered to enter the action as a defendant or plaintiff." Jerry could easily have been made a party if appellant had desired to have him joined, and the trial court did not err in refusing to dismiss.

Appellant cites no direct authority for her argument that the trial court erred in granting judgment for appellee because Jerry Vogelgesang had already been ordered to pay full restitution following his criminal conviction. She argues that allowing more than one recovery for the same injury would be unconscionable. This is a bold claim, indeed. It is undisputed that Jerry stole essentially all of the assets that his eighty-three-year-old mother had—approximately $243,000—leaving her penniless and reduced to collecting food stamps to survive. It is also undisputed that, although Jerry has been ordered to pay restitution for all of the funds he stole, he has been ordered to pay only $400 per month. Under these circumstances, and given appellant's failure to join Jerry as a party despite his availability,

it is ludicrous to assert that the $15,383.08 that she has been ordered to pay appellee might result in an unconscionable double recovery.

Nor do we agree that the trial court erred in awarding prejudgment interest. Appellant's argument that prejudgment interest is appropriate only for a willful conversion is based on cases involving innocent purchasers for value, and fails for the same reasons applicable to her argument regarding wrongful intent discussed *supra*. Finally, appellant is incorrect in asserting that there is no authority permitting recovery of costs in a tort case. The costs awarded here were for appellee's filing fees, and awards of costs for filing fees are expressly allowed under Ark. R. Civ. P. 54.

Affirmed.

VAUGHT, C.J., and ROBBINS, J., agree.