

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 2133



DOUGLAS A. TALLEY, III

VERSUS



LIVINGSTON PARISH SHERIFF'S OFFICE
AND KELLY DUGAS & SONS WRECKER SERVICE

Judgment Rendered: May 7, 2010

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Livingston, Louisiana
Trial Court Number 121,714

Honorable M. Douglas Hughes, Judge

Harry L. Shoemaker, III
Baton Rouge, LA

Attorney for
Plaintiff – Appellant
Douglas A. Talley, III

Cullen J. Dupuy
Jennifer D. Simms
Baton Rouge, LA

Attorneys for
Defendants – Appellees
Livingston Parish Sheriff's
Office and Kelly Dugas &
Son's Wrecker Service

BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

WELCH, J.

In this appeal, plaintiff, Douglas A. Talley, III, challenges a judgment granting a peremptory exception raising the objection of prescription filed by defendant, Sheriff Willie Graves, in his capacity as Sheriff of Livingston Parish (Sheriff). We affirm.

BACKGROUND

On October 21, 2008, Mr. Tally filed this lawsuit against the Sheriff and Kelly Dugas & Son Wrecker Service, Inc. In his original and amending petitions, Mr. Tally made the following allegations: On October 20, 2007, Mr. Talley was operating his 2001 Pontiac Grand Am when he was pulled over by Sheriff's Deputy Justin Davis of the Livingston Parish Sheriff's Department. Mr. Talley provided the deputy with a bill of sale for the automobile he had purchased from Armstrong Motors Auto Sales, LLC (Armstrong Motors) on October 11, 2007. The deputy told Mr. Talley that he had been pulled over because the deputy was unable to see the temporary tag and because there was a blue light around the license plate holder that was illegal. When Mr. Tally asked why he was being detained, Deputy Davis advised that there was a stolen vehicle report from Hammond, about a year old, and that the vehicle was being confiscated as a stolen vehicle. Deputy Davis acknowledged that the vehicle was registered to Armstrong Motors and that the bill of sale to Mr. Tally was from Armstrong Motors. Mr. Talley inquired why the vehicle was being confiscated, and was told by Deputy Davis that he had legal grounds to impound the vehicle because of the stolen vehicle report. Kelly Dugas & Son Wrecker Service, Inc. arrived at the scene to confiscate the allegedly stolen vehicle. Mr. Tally and his guest passenger were instructed to sit in the grass and wait for alternate transportation.

On October 22, 2007, Mr. Talley contacted Armstrong Motors and advised Randy Armstrong that the vehicle had been confiscated by the Sheriff as a stolen

vehicle. Mr. Armstrong advised him that the vehicle was registered to Armstrong Motors and that the vehicle had been leased to someone and then repossessed due to nonpayment. That same day, Mr. Talley learned from Armstrong Motors that the vehicle had been registered in his name and that Mr. Armstrong was in possession of the registration certificate and license plate.

The following day, Tuesday, October 23, 2007, Mr. Talley's roommate, Charlotte Winans, contacted the Sheriff to apprise him of the situation and spoke with the director of operations, who advised that he would have a detective contact her. Detective Brad Troll attempted to obtain information regarding the stolen vehicle report. On October 25, 2007, the automobile dealer telephoned Ms. Winans and advised her that he and his sister spoke with Detective Troll and told the detective that the vehicle had been leased. Detective Troll later advised Ms. Winans that the vehicle would be released to Mr. Talley in the morning and that all towing and storage fees would have to be paid by Mr. Talley at the time of the release.

On Friday, October 26, 2007, Mr. Talley arrived at Kelly Dugas & Son Wrecker Service, paid \$239.80 in fees, and obtained possession of his vehicle. Mr. Talley drove the vehicle home, turned it off and attempted to start it again thirty minutes later, but the vehicle would not start. Mr. Talley averred that the vehicle had been damaged while in the care and custody of Kelly Dugas & Son Wrecker Service, Inc., necessitating the replacement of the vehicle's fuel control modular and fuel injectors.

In the petition, Mr. Talley charged that there was no legal basis to seize, impound, and confiscate his vehicle and that the seizure and impoundment of his vehicle was illegal and constituted a wrongful conversion and illegal taking of his automobile by the Sheriff. He asserted that the Sheriff was vicariously liable for the negligent and/or willful illegal acts and/or omissions of Deputy Davis under the

doctrine of *respondeat superior*. Mr. Talley sought to recover special and general damages including: (1) fees paid to Kelly Dugas & Son Wrecker Service, Inc. in the amount of \$239.80 for towing and storage; (2) damages to his vehicle resulting in the repair and/or replacement of the fuel control modular and fuel injectors; (3) pain and suffering caused by becoming ill as a result of having to stand in the cold and sit in the wet grass awaiting alternate transportation following the seizure of his vehicle; (4) loss of enjoyment of life; (5) mental and emotional anxiety and distress; (6) loss of his personal vehicle for over three weeks; and (7) all other relevant damages.

The Sheriff filed a peremptory exception raising the objection of prescription, urging that Mr. Talley's claims against him are for conversion and arise in negligence, and as such, they are subject to the one-year prescriptive period for delictual actions set forth in La. C.C. art. 3492. The Sheriff argued that the events on which Mr. Talley's claims are based occurred on October 20, 2007, the date the vehicle was allegedly converted, and on that same date, Mr. Talley had actual knowledge that he was potentially a victim of a tort. Accordingly, the Sheriff maintained, prescription commenced to run on the date the vehicle was seized, October 20, 2007, and Mr. Talley had one year, or until October 20, 2008, to file a lawsuit against the Sheriff. Because this lawsuit was not filed until October 21, 2008, the Sheriff insisted, Mr. Talley's claims prescribed on their face, requiring Mr. Talley to demonstrate that prescription on his claims was suspended or interrupted.

In opposition to the peremptory exception of prescription, Mr. Talley countered that prescription on his cause of action for wrongful conversion did not begin to run on the date of the initial seizure of his vehicle on October 20, 2007, but began to run only when it became clear to him that the conversion and seizure of his automobile was wrongful. Mr. Talley urged that he was told that his vehicle

was being held pending investigation of a stolen vehicle report and it was not until October 25, 2007, when the investigation was complete, that he understood that continued impoundment and possession of his automobile by the Sheriff was wrongful and adverse to him. Mr. Talley argued that prescription did not begin to run until October 26, 2007, when the Sheriff allowed him to regain possession of his automobile, at which point he also discovered that his vehicle sustained damages during the impoundment, and therefore, this lawsuit, filed within one year of that date, on October 21, 2008, is timely.

At the hearing on the peremptory exception, Mr. Talley argued that prescription on his claim for wrongful seizure did not begin to run until the property had been released from evidence on October 26, 2007, which was also the first time that he learned of the damage to his vehicle. The trial court disagreed and found that prescription began to run on October 20, 2007, the date the vehicle was seized, and this lawsuit, filed on October 21, 2008, is untimely. The court entered judgment granting the peremptory exception of prescription and dismissed the lawsuit with prejudice, decreeing that the judgment constituted a final judgment under La. C.C.P. art. 1915(A) with respect to Mr. Talley's claims against the Sheriff.

PRESCRIPTION

Mr. Tally asserts a cause of action for conversion. A conversion is an act in derogation of the plaintiff's possessory rights and any wrongful exercise or assumption of authority over another's goods, depriving him of the possession, permanently or for an indefinite time. **Quealy v. Paine, Webber, Jackson & Curtis, Inc.**, 475 So.2d 756, 760 (La. 1985). Conversion is a tort, governed by the one-year prescriptive period applicable to delictual actions by virtue of La. C.C. art. 3492. **Reed v. Abney**, 2004-1928, p. 5 (La. App. 1st Cir. 2/10/06), 928 So.2d 585, 588.

Generally, prescription commences when the plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he or she is a victim of a tort. **Babineaux v. State ex rel Department of Transportation and Development**, 2004-2649, p. 3 (La. App. 1st Cir. 12/22/05), 927 So.2d 1121, 1123. The party raising the exception of prescription has the burden of proving that the claim has prescribed. However, when it appears on the face of the pleadings that prescription has run, the burden shifts to the opposing party to show that prescription was suspended or interrupted. **Babineaux**, 2004-2649 at pp. 3-4, 927 So.2d at 1124.

The alleged conversion occurred on October 20, 2007; the lawsuit was filed on October 21, 2008. Thus, the petition reveals on its face that prescription has run, and Mr. Talley bore the burden of establishing that prescription was interrupted or suspended. At trial, Mr. Talley urged that prescription on his cause of action did not begin to run until he knew that the conversion and seizure of his automobile was wrongful and that the Sheriff's continued possession of his property was adverse to him. On appeal, however, Mr. Talley has abandoned that theory and argues for the first time in this litigation that the actions of the Sheriff in seizing and holding his vehicle constituted a continuing tort causing continuing damages each day his vehicle was held by the Sheriff, and therefore, prescription on his conversion claim did not begin to run until the conduct causing the damage was abated on October 26, 2007, the date the Sheriff released his vehicle from custody. Therefore, Mr. Talley urges, the lawsuit, filed on October 21, 2008, was timely, and the trial court should have denied the peremptory exception of prescription.

We disagree. Initially, we note that Mr. Talley failed to raise the continuing tort theory in the trial court; as a general rule, this court cannot consider contentions raised for the first time on appeal which were not pleaded in the court

below and which the trial court did not address. **Johnson v. State**, 2002-2382, p. 4 (La. 5/20/03), 851 So.2d 918, 921; **Jackson v. Home Depot, Inc.**, 2004-1653, pp. 6-7 (La. App. 1st Cir. 6/10/05), 906 So.2d 721, 725. However, even if we find this issue to properly be before this court, we find that the continuing tort theory is inapplicable to the instant case.

Pursuant to the continuing tort theory, when the tortious conduct and resulting damages are of a continuing nature, prescription does not begin until the conduct causing the damage is abated. **South Central Bell Telephone Company v. Texaco, Inc.**, 418 So.2d 531, 533 (La. 1982). In order to allege a continuing tort, a plaintiff must allege both continuous action and continuous damage. **Thomas v. State Employees Group Benefits Program**, 2005-0392, p. 8 (La. App. 1st Cir. 3/24/06), 934 So.2d 753, 758. If the "operating cause" of the damage is discontinuous in nature, even if the damage is continuous, the continuing theory is inapplicable, and prescription runs from the date that knowledge of such damage was apparent or should have been apparent to the injured party. *Id.* In the instant case, the alleged conduct is not continuous in nature; rather, the basis for Mr. Talley's conversion action stems from the seizure, impoundment, and confiscation of his vehicle by the Sheriff, all of which occurred on October 20, 2007. Mr. Talley did not allege in his petition that the actions of the Sheriff's detectives following the seizure in investigating the stolen vehicle report were continuous wrongful acts. There is only one alleged wrongful act on the part of the Sheriff - the alleged conversion of his vehicle. Because Mr. Talley has not alleged continuous wrongful action on the part of the Sheriff, the continuing tort theory is not applicable.

Therefore, prescription commenced to run the day that Mr. Talley had knowledge of facts indicating to a reasonable person that he was a victim of a tort. According to the allegations of the petition, Mr. Talley repeatedly questioned the

deputy after the stop as to why he was being detained and why his vehicle was being confiscated. Mr. Talley furnished the deputy with a bill of sale from Armstrong Motors to show that he was the rightful owner of the vehicle and learned soon thereafter from the deputy that the vehicle was registered to the company that sold the vehicle to him. At the time the vehicle was seized, on October 20, 2007, Mr. Talley had actual knowledge of facts indicating that he possibly was a victim of the tort of conversion. The prescriptive period as to his cause of action against the Sheriff commenced that day, and because he did not file this lawsuit for more than one year thereafter, Mr. Talley's claims against the Sheriff are prescribed.

CONCLUSION

For the foregoing reasons, the judgment appealed from is affirmed. All costs of this appeal are assessed to appellant, Douglas A. Talley, III.

AFFIRMED.