

STATE OF MICHIGAN
COURT OF APPEALS

CHEBOYGAN COUNTY ROAD COMMISSION,
and THE TOWNSHIP OF BURT,

UNPUBLISHED
January 19, 2001

Plaintiffs-Appellants/Counter-Claim
Defendants-Cross-Appellees,

v

No. 216908
Cheboygan Circuit Court
LC No. 97-006161-CE

R TRIPLE, a Michigan Corporation, and
CLARENCE R. ROCHELEAU and DORIENNE
L. ROCHELEAU, part individual owners,

Defendants-Appellees/Counter-
Claim Plaintiffs-Cross-Appellants.

Before: Sawyer, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

In this appeal from a bench trial opinion and judgment plaintiffs seek reversal of the trial court's determination that defendants hold title in fee to a disputed, thirty-three foot wide parcel of lakefront property on which lies the terminus of Mullett-Burt Road at Burt Lake. The trial court, finding that defendants held title and the adjunct riparian rights, also held that defendants were permitted to locate a dock in Burt Lake attached to that portion of the property not encumbered by Mullett-Burt Road, a highway by user. On cross appeal, defendants seek remand to the trial court for further proceedings regarding plaintiffs' liability for damages related to certain counts of defendants' counter-claim. Defendants had filed a nine-count counter-complaint seeking damages stemming from plaintiffs' removal of the dock, an action believed by plaintiffs to constitute appropriate enforcement of a local zoning ordinance. Finding no merit in the appellate contentions of either plaintiffs or defendants, we affirm the trial court's judgment.

Plaintiffs' Appeal

Plaintiffs first contend that the trial court erred in sustaining defendants' objections to the admission of five exhibits sought to be introduced by plaintiffs as rebuttal evidence following defendants presentation of proofs. We disagree.

We review a trial court's decision to deny admission of evidence to determine whether the court abused its discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 613-614; 580 NW2d 817

(1998). An abuse of discretion only occurs in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

The exhibits sought to be introduced were five ancient documents contained in a book of records entitled the "Burt Township Highway Commissioners' Book." Plaintiffs had discovered these records only four days before trial began and, in furtherance of a sudden new theory of the case, during their case-in-chief had introduced one similar document from the Commissioners' Book. In denying admission of the five newly discovered exhibits proffered as rebuttal evidence, the trial court noted that plaintiffs had only found these particular documents when searching their records in the week between the two trial dates. The court found that despite generally referencing documents of title, plaintiffs' pre-trial exhibit list was not drafted in a fashion to disclose the existence of these exhibits. The court held that due to the late production of the exhibits, it would sustain defendants' objections to admissibility because to allow the exhibits would unduly prejudice defendants.

We hold that the trial court did not abuse its discretion in excluding the exhibits on the grounds of late discovery and identification and unfair surprise. The court appropriately concluded that defendants would be unduly prejudiced were it to allow plaintiffs to continue adding new evidence, as it was discovered during trial, in support of a theory of the case that was itself only identified days before trial began. The court's decision evidences neither a perversity of will nor defiance of judgment. *Randolph, supra*.

Plaintiffs next contend that the trial court erred in determining that defendants held title to the disputed parcel of property. As in the trial court, plaintiffs argue alternative theories in support of claims that ownership of the parcel lies not with defendants but with either of two other sets of parties. On the one hand, plaintiffs argue that the property was effectively condemned around the turn of the century, that the present road was laid out at that time, and that by operation of law plaintiffs currently hold title in fee to the property. On the other hand, plaintiffs argue that the road is a highway by user, and that to the extent it is not being used to the full statutorily presumed width, fee interest in the unencumbered portion of the thirty-three foot parcel rests with the adjacent lot owners and the purported transfer of such interest to defendants was invalid.

The trial court's opinion thoroughly addressed plaintiffs' alternate arguments. Accurately analyzing the relevant legal principles, the court reasonably, and we believe correctly, interpreted and applied the testimony and evidence presented during trial. Rather than redundantly repeat the trial court's reasoned analysis, we instead adopt that portion of the court's opinion addressing the issues surrounding title. We affirm the court's judgment that defendants own the thirty-three foot parcel of property and all attached riparian rights, subject to a public easement for Mullet-Burt Road, a highway by user. We likewise affirm the court's conclusion that this highway by user does not encumber the full thirty-three feet. The evidence showed that boulders, rocks and fence lines had established a narrower width the entire time the established road was in existence. See *City of Kentwood v Sommerdyke Estate*, 458 Mich 642; 581 NW2d 670 (1998); *Eager v State Highway Commission*, 376 Mich 148; 136 NW2d 16 (1965).

Briefly addressing plaintiffs' final contention, we note that the court had conclusively rendered its ruling on the title issues when, in its opinion, it discussed the doctrines of laches and estoppel. The court's critical holding was not grounded on these doctrines and any claim of error on such basis cannot be sustained.

Defendants' Cross Appeal

Defendants are the owners and operators of Hoppies Bar, an establishment located on Mullett-Burt Road a short distance from Burt Lake. Patrons of the various establishments at one time or another operating at this location have used a dock extending into the lake on the water's edge of the disputed parcel for some fifty years. As throughout those fifty-odd years, patrons come to what is now known as Hoppies Bar by boat, tying up to the dock, and then walking the relatively short distance up to the bar and restaurant. The instant controversy began when, in response to neighbor complaints and in an effort to enforce a local zoning ordinance which prohibits placement of a private dock at the end of a public road, plaintiff township dismantled and removed the dock owned by defendants and used Hoppies' patrons.

When plaintiffs initiated this legal action seeking to clarify the question of title, defendants filed their counter-complaint seeking damages resulting from the allegedly unauthorized removal of the dock and a resulting loss of business at Hoppies. The court's judgment disposed of defendants' counter-claim by awarding defendants \$734.00, the value of the removed parts of the dock and an installation fee. The court held that this amount satisfied any and all of defendants' monetary claims.

On appeal, defendants first claim that the trial court erred in failing to award treble damages under the count alleging conversion. We disagree.

The trial court, following its holding that defendants held title to the property, found that the dock removal was wrongful and that conversion had occurred. The court then appropriately awarded defendants damages in an amount equal to the value of the converted goods at the time of conversion. See *Gum v Fitzgerald*, 80 Mich App 234, 238-239; 262 NW2d 924 (1977).

Defendants rely on MCL 600.2919(a); MSA 27A.2919(1) in support of the argument that they were entitled to treble damages. Pursuant to that statute:

A person damaged as a result of another person's buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney's fees. This remedy shall be in addition to any other right or remedy the person may have at law or otherwise.

The trial court addressed this statute, finding that it did not apply to the facts and allegations of this case. The court reasoned that because it was the township itself that defendants were accusing of conversion, the township could not also be liable for treble damages under the statute as a party which bought, received, or aided in the concealment of stolen, embezzled, or converted property knowing that the property was stolen, embezzled, or converted.

Defendants apparently fail to recognize the distinction identified by the trial court. However, this distinction is critical. The tort of conversion is any distinct act of domain wrongfully exerted over another person's personal property in denial of or inconsistent with the rights therein; statutory conversion, by contrast, consists of knowingly buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property. See *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999). Contrary to defendants' argument, and notwithstanding the wording of the allegation in their counter-complaint, defendants' primary claim was clearly that the township was liable for the tort of conversion. Treble damages were not available.

Defendants next contend that remand is necessary because the trial court erred by failing to rule that plaintiff Township of Burt was not immune from due process claims brought pursuant to 42 USC 1983.

With respect to defendants' § 1983 claim, the trial court ruled that the individual plaintiffs, township officials, enjoyed qualified immunity. The court then concluded that defendants' action against those individuals could not be maintained because the individual plaintiffs acted in good faith. The court, however, failed to specifically address the § 1983 claim as directed against plaintiff township.

Although we agree with defendants that state law immunities and defenses do not protect persons otherwise subject to § 1983 liability, *Rushing v Wayne Co*, 436 Mich 247, 259; 462 NW2d 23 (1990), we decline to remand this action because we hold that defendants could not viably sustain their claim against the township.

42 USC 1983 applies to a municipality only when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury" *Monell v Dep't of Social Services of New York City*, 436 US 658, 694; 98 S Ct 2018; 56 L Ed 2d 611 (1978). Here, under this unusual circumstance wherein the question of title was not yet determined, plaintiff township's one-time effort towards enforcing the zoning ordinance fails to demonstrate a government custom or policy.

Next, defendants contend that the trial court erred by failing to address their count alleging an unconstitutional taking of personal property. Again we conclude that remand is unnecessary.

Plaintiffs, in their effort to enforce what they at the time believed was an applicable zoning ordinance, removed sections and stanchions of the dock rendering it inoperable. Plaintiffs placed the dock parts in secure storage and initiated this litigation. Under Const 1963, art 10, § 2, private property shall not be taken for public use without just compensation therefor being first made or secured. Here, defendants' personal property was not *taken for public use*. We hold that plaintiffs' ultimately invalid attempt to enforce the zoning ordinance, and the manner in which that attempt occurred, is not the type of action contemplated as remediable through a claim of unconstitutional taking.

Finally, we address defendants' claim that the trial court erred in restricting their damages by failing to award lost profits. The only evidence presented with respect to a measure of lost profits was the testimony of two witnesses who operated Hoppies Bar. No documentary records were introduced. Given that the record is devoid of any basis on which to ascertain an accurate measure of lost profits, we again adopt the relevant reasoning of the trial court's opinion and we affirm the court's conclusion that the speculative evidence concerning lost profits rendered it impossible to make such an award.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald