STATE OF MICHIGAN

COURT OF APPEALS

GARY L. CHRISTIE and PATRICIA A. CHRISTIE, Plaintiffs/Counterdefendants-Appellees,	UNPUBLISHED March 2, 2010
v CHARLES F. FICK and C. F. FICK & SONS, INC., Defendants/Counterplaintiffs-Appellants.	No. 285924 Crawford Circuit Court LC No. 06-007131-NZ

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment for plaintiffs entered after a jury trial. We affirm.

Plaintiffs had been renting and living in a cabin in Grayling from defendants since 1998, at a price of $300 a month. They claimed that defendants, in 2005, unlawfully locked them out of the premises and also moved a large quantity of valuable equipment from the cabin into storage, where it was subsequently damaged. Defendants claimed that plaintiffs were behind in rent, that plaintiffs had abandoned the premises, and that plaintiffs had numerous opportunities to retrieve their personal property after it was moved. The case was submitted to the jury on only two claims: a violation of the anti-lockout statute, MCL 600.2918, and statutory conversion under MCL 600.2919a. The jury found for plaintiffs on both claims, granting $141,500 in damages for the anti-lockout claim and $89,000 in damages for the conversion claim. The $89,000 was trebled for a total of $267,000. Damages were ultimately allowed, however, for only one of the two theories, and the jury was informed of this by way of the verdict form. The final amount of the judgment, including attorney fees and costs but excluding statutory interest, was $299,256.21.

Defendants argue that the trial court erred in instructing the jury with regard to exemplary damages.[1] Defendants contend that if a cause of action is statutorily based, exemplary damages are not allowable unless the statute specifically allows for such damages. Defendants contend that the statutes at issue here make no such allowances. Defendants further argue that a plaintiff in Michigan may not recover damages for emotional injuries allegedly suffered as a result of property damage. Plaintiffs counter that exemplary damages, as opposed to punitive damages, are awarded as an element of "actual damages" and were therefore allowable in this case because the statutes in question – the anti-lockout statute and the conversion statute – refer to "actual damages."

The trial court first ruled that a separate jury instruction on exemplary damages is not appropriate unless the statute in question refers to exemplary damages. However, the court mentioned, during a December 10, 2007, hearing, that exemplary damages might possibly come in as part of "actual damages" in this case. Defense counsel stated that he was going to research the issue further and get back to the court later in the week. At a later hearing, defense counsel argued that damages for "embarrassment or humiliation" were simply not allowable, even as part of "actual damages."

Further discussions and rulings regarding jury instructions took place off the record. The court ultimately gave the following instruction to the jury:

> [I]f you find by a preponderance of the evidence that the conduct of one or more of the Defendants or their agents was malicious or willful . . . and wanton so as to demonstrate the reckless disregard of Plaintiffs' rights, then, you may also award damages for emotional distress, embarrassment, and humiliation.
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> The above damages are not to be awarded to punish the Defendant but rather to compensate the Plaintiff. If you determine that Plaintiffs are entitled to these damages, they should not be set in an amount beyond which fully compensates the Plaintiff.
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> * * *
>
> Actual damages inflicted by the Defendants or Defendants' agents may also include compensation to the Plaintiffs for humiliation, sense of outrage, indignity where the Defendants or Defendants' agents have engaged in willful and malicious conduct, which I've already explained that term.

Defendants moved for a new trial or judgment notwithstanding the verdict (JNOV) and raised the issue again. The court stated in response that "the law does not state that you can only seek exemplary damages which the statute expressly states . . . ."

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[1] "An award of exemplary damages is proper if it compensates a plaintiff for the humiliation, sense of outrage, and indignity resulting from injustices maliciously, wilfully, and wantonly inflicted by the defendant." *McPeak v McPeak*, 233 Mich App 483, 490; 593 NW2d 180 (1999).

> We review claims of instructional error de novo. Jury instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. Instructional error warrants reversal if the error resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be inconsistent with substantial justice. [*Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002) (citations and quotation marks omitted).]

We review de novo a trial court's decision concerning a motion for JNOV, *Craig v Oakwood Hosp*, 471 Mich 67, 77; 684 NW2d 296 (2004), and we review for an abuse of discretion a trial court's decision concerning a motion for a new trial, *Denha v Jacob*, 179 Mich App 545, 549; 446 NW2d 303 (1989).

Defendants rely primarily on *B&B Investment Grp v Gitler*, 229 Mich App 1; 581 NW2d 17 (1998). In *B&B Investment Grp*, a slander case, the Court stated:

> Exemplary damages have not been awarded in any Michigan slander of title case, either common-law or statutory. However, exemplary damage awards in intentional tort cases have been considered proper if they compensate a plaintiff for the humiliation, sense of outrage, and indignity resulting from injuries maliciously, willfully and wantonly inflicted by the defendant. . . . The theory of these cases is that the reprehensibility of the defendant's conduct both intensifies the injury and justifies the award of exemplary damages as compensation for the harm done to the plaintiff's feelings. . . .
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> Nonetheless, where a cause of action is statutorily based, there must be a basis in the statute for awarding exemplary damages, i.e., either an express provision or a legislative history from which one could infer a legislative intent to provide such an unusual remedy. We conclude there is no such statutory basis here; there is neither an express provision nor a legislative history from which one could infer a legislative intent to provide exemplary damages. In enacting other statutes, the Legislature has included words expressly providing for exemplary damages where it has intended that they be recoverable. [*Id*. at 10 (citations and quotation marks omitted).]

At first blush, *B&B Investment Grp* seems to support defendants' position: for a statutorily based action, exemplary damages are available only if there is a basis in the statute for such damages. Indeed, plaintiffs do not dispute that their actions were statutorily based and that the statutes in question did not provide a *specific* basis for exemplary damages.

However, the case law makes clear that there is a distinction between "an award of exemplary damages" and "an award for mental anguish as a component of actual damages." In *Veselenak v Smith*, 414 Mich 567, 574; 327 NW2d 261 (1982), the Supreme Court clearly stated that "actual damages now include compensation for mental distress and anguish." As noted by

plaintiffs, the anti-lockout and conversion statutes refer to "actual damages."[2] In *Eide v Kelsey-Hayes Co*, 431 Mich 26, 53; 427 NW2d 488 (1988), the Court again noted that "actual damages" include compensation for mental injury. The Court noted that a separate award of "exemplary damages" was inappropriate in that case because the "actual damages" encompassed the plaintiff's mental distress. *Id*. at 56-57.

Therefore, the case law indicates that a separate award for exemplary damages is not appropriate in a statutorily based action unless the statute in question specifically provides for such damages. However, and significantly, damages for mental distress are allowable as part of a plaintiff's actual damages. Here, the trial court did seem to conflate the idea of exemplary damages with the idea of actual damages awarded for mental distress, because the court used the "willful and wanton" language applicable to an award of exemplary damages. However, the court made clear that the award for emotional distress was to be a part of plaintiffs' "actual damages," and, in fact, the court made the burden of proof *higher* than it would otherwise have been (if it had left out the "willful and wanton" language). Under the circumstances, there is simply no basis for reversal.[3]

Defendants next argue that the trial court erred in refusing to give a jury instruction regarding mitigation of damages.

Defense counsel requested that SJI2d 53.05 be given. This instruction reads:

> A person has a duty to use ordinary care to minimize his or her damages after [he or she/his or her property] has been [injured/damaged]. It is for you to decide whether plaintiff failed to use such ordinary care and, if so, whether any damage resulted from such failure. You must not compensate the plaintiff for any portion of [his/her] damages which resulted from [his/her] failure to use such care.

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[2] Plaintiffs also contend that *Peisner v Detroit Free Press*, 421 Mich 125, 135; 364 NW2d 600 (1984), supports their position on appeal. In *Peisner*, *id*. at 130-143, the Court undertook a lengthy analysis of whether exemplary and punitive damages could be awarded in addition to "actual damages" that encompassed injury to feelings. However, the Court's analysis was based on the fact that "actual damages" in the pertinent statute was defined to include damages "to feelings." *Id*. at 130. Therefore, *Peisner* is simply not pertinent in the present case.

[3] Defendants also contend that damages for emotional distress are not available in connection with injury to property. This argument was not presented to the trial court and we therefore decline to address it. *Camden v Kaufman*, 240 Mich App 389, 400 n 2; 613 NW2d 335 (2000). We have reviewed the citations to the record where defendant claims to have raised this issue and have found no basis for finding an adequate preservation of the issue. At one point defendants' attorney mentioned that the claims involved were "property claims[s]," but he did not make the same argument below that he makes on appeal – i.e., that emotional-distress damages are never available in property cases – but instead focused on the idea, discussed in this opinion, that exemplary damages are not available in statutorily based actions unless specifically authorized by the statute.

The trial court indicated that it did not give this instruction because the alleged conversion was an intentional tort and therefore the instruction did not apply.[4] The court added: "But it really turns on the facts of the case, and it would seem logical to me that once the property owner has made his reasonable attempt, which the jurors found he did, he made a reasonable attempt that there be a reasonable refusal." The court was referring to the instructions it gave regarding the elements of the conversion claim. The court provided the following elements to the jury:

> First, that one or more of the Defendants wrongfully exerted dominion . . . over the property of the Plaintiffs.
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> Second, that Plaintiffs made a reasonable attempt to recover their property. It is for you to decide what constitutes a reasonable attempt based on all the facts and circumstances in the case.
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> And third, that Plaintiffs' reasonable attempt to recover their property was refused by one or more of the Defendants or their agents.

At the post-judgment hearing, the court stated:

> I believe that the duty to mitigate in this scenario, which is a landlord/tenant case, it was incorporated into the instructions, and the jury was properly instructed on the plaintiff's duty. And that was, he must make reasonable attempts and efforts to recover the property, which he obviously did in this case.

Gum v Fitzgerald, 80 Mich App 234; 262 NW2d 924 (1977), states as follows with regard to damages available for conversion:

> Plaintiffs are required to show that a reasonable attempt has been made to recover their property in order to establish that their right to possession has been refused. Once this refusal is established *they may recover the value of the lost or damaged goods determined as of the time of the conversion*. [Emphasis added.]

The *Gum* Court indicated that once there has been a refusal of a right to possession, *no further demand for the property is necessary* in order for the plaintiff to recover. *Id*. Given (1) that defense counsel had earlier agreed that *Gum* controlled in this case with regard to the elements of conversion; (2) the clear language in *Gum* indicating that a plaintiff may recover the value of the property as of the time of the conversion once a refusal has taken place, with no further requirement to demand the property; and (3) the trial court's instructions, there is no basis for reversal. To require mitigation of damages would essentially be rejecting the statement in *Gum*

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[4] The court was relying on *Allen v Morris Building Co*, 360 Mich 214; 103 NW2d 491 (1960), in which the Court stated: "The rule requiring an injured party to mitigate his damages does not apply, where the invasion of his property rights is due to defendant's intentional or positive and continuous tort" (citation and quotation marks omitted).

that a plaintiff, in order to recover for conversion, need not make further demands for the property after the initial refusal.

Defendants next contend that the trial court erred in allowing plaintiffs to amend their pleadings. In general, we review for an abuse of discretion a court's decision regarding a motion to amend. *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995).

Defendants state that plaintiffs' complaint referred only to "conversion" but that plaintiffs were allowed to proceed with a "statutory conversion" claim, thus subjecting defendant to treble damages and an additional theory of recovery not available in a common-law conversion claim.

MCR 2.118(C)(1) states:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.

If a claim is not objected to at trial but could have been subject to an amendment under MCR 2.118(C)(1), then reversal is not required. See, e.g., *Belobradich v Samsethsiri*, 131 Mich App 241, 248; 346 NW2d 83 (1983). Moreover, MCR 2.118(C)(2) states:

> If evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings, amendment to conform to that proof shall not be allowed unless the party seeking to amend satisfies the court that the amendment and the admission of the evidence would not prejudice the objecting party in maintaining his or her action or defense on the merits. The court may grant an adjournment to enable the objecting party to meet the evidence.

The transcript of a motion hearing on July 12, 2007 – five months before trial – makes clear that defendants were aware as of that date that plaintiffs were relying on MCL 600.2919a. Moreover, at the hearing on December 10, 2007, defense counsel, in arguing against an award of exemplary damages, referred to the fact that the "statutes that are alleged in this matter" did not allow for exemplary damages. On the first day of trial, defense counsel stated, "nowhere in the Complaint does it say common law conversion," but he made no motion to dismiss or otherwise raise the issue of an improper attempt to amend the pleadings. The court simply stated, "It just says conversion" and "I think that's sufficient notice."

The record indicates that defendants essentially consented to the statutory conversion claim. Even if they are deemed to have not consented, there is simply no prejudice apparent, when defendants were clearly aware, well before trial, that plaintiffs were intending to proceed under a statutory-conversion theory. Reversal is not warranted.

Defendants next argue that the trial court erred in allowing the jury to consider claims under MCL 600.2919a(1)(b). This issue involves statutory interpretation,[5] which we review de novo. *Ardt v Titan Ins Co*, 233 Mich App 685, 690; 593 NW2d 215 (1999).

MCL 600.2919a states, in part:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:
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> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
>
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.

In *Marshall Lasser, PC v George*, 252 Mich App 104, 111-112; 651 NW2d 158 (2002), the Court held that the predecessor to MCL 600.2919a(1)(b) did not apply to the person who actually committed the conversion but only to other persons. The earlier statue stated:

> 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. . . .

Defendants claim that the earlier statute and the current statute are materially identical and that therefore MCL 600.2919a(1)(b) cannot apply in this case under *Marshall Lasser*, because the converter and the "receiver" were essentially the same.

However, as pointed out by plaintiffs, the two statutes are materially different. The current statute refers to "possessing" and "concealing" converted property. Clearly, a converter himself may "possess" or "conceal" converted property. Unambiguous statutes must be applied as written. *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004). At any rate, this interpretation is fully supported by the legislative analysis of the proposed amendment. See House Legislative Analysis, HB 4356, May 31, 2005. Defendants' argument is without merit and reversal is unwarranted.

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[5] The trial court ruled, during the hearing on plaintiff's post-judgment motions, that the plain language of the statute provided for its applicability in this case.

Defendants next argue that the trial court erred in denying their motion for summary disposition concerning unpaid rent. At the motion hearing, plaintiffs' attorney admitted that one month's rent was in arrears, but stated that it would have been paid if Charles Fick had come by to collect it. The court stated:

> I do feel more comfortable allowing that counterclaim to go to the jury at this time. I think there's a question of fact viewed in the light most favorable to the Plaintiff that there may not even be – they would have even paid the one month rent had he come back. So I mean, I'm gonna allow that to go to the jury and not grant summary [disposition] on the counterclaim for unpaid rent.

We review de novo a trial court's decision concerning a motion for summary disposition. *Ardt*, 233 Mich App at 688.

> MCR 2.116(C)(10) provides for summary disposition where "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter or law." When reviewing an order of summary disposition under MCR 2.116(C)(10), we examine all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ. . . . Where the moving party has produced evidence in support of the motion, the opposing party bears the burden of producing evidence to establish that a genuine issue of disputed fact exists. [*Ardt*, 233 Mich App at 688.]

The month for which plaintiff's attorney admitted that rent was unpaid was October 2005. Plaintiff Patricia Christie testified at her deposition that Charles Fick stopped by the cabin that month to collect rent and she told him, "'Gary ran up town. He'll be back in 10, 15 minutes . . . .'" Patricia stated that Fick "just kind of flew out the door" and she "never seen him again after that." Gary Christie stated in an affidavit that "all rental payments made by himself were made to, and delivered to, Charles F. Fick." He stated in his deposition that Fick "always" came to the cabin to obtain the rent and that he and Patricia were instructed not to bring the rent to Fick's nearby truck stop. He stated that Fick came "almost religiously, either between the 19th and the 22nd to pick the money up."

In light of this evidence, we conclude that plaintiffs raised a genuine issue of material fact concerning whether the October 2005 rent was unpaid only because defendants had not followed their usual collection procedure. Accordingly, the trial court did not err in denying the motion for summary disposition.

Defendants lastly argue that the trial court erred in its award of attorney fees. We review a trial court's award of attorney fees for an abuse of discretion. *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006).

Plaintiffs sought attorney fees of $31,296. The court stated, in part:

> They're entitled to attorney fees under the conversion statute against C.F. Fick & Sons, Inc., and they're entitled to the full amount requested because it

> would – it would be wholly illogical to reduce the amount because it's the exact same amount of proofs and work to present as to C.F. Fick & Sons, Inc. as it is to . . . Charles Fick personally. . . .
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> I do find that the hours submitted and the rate billed are both reasonable and fair and consistent with the high volume of exhibits and evidence involved in this case. And I also find that – and there's ample law to back this up. I had this issue come up before, that where two attorneys are actually working on the file, in tandem for portions of it like they were here in the trial . . . they are both entitled to their attorney fees as long as they're reasonable. They both are reasonable, and I felt it was reasonable and necessary to have both attorneys here.
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> I think that the Plaintiffs' supporting affidavit for Plaintiffs' bill of costs is reasonable and fair. And I will . . . authorize an award of attorney fees pursuant to the – under the authority of the conversion statute. Further, it's arguable that portions of them are awardable under the mediation statute. That's an alternative ruling. I think the primary ruling is the conversion statute, actual attorney fees.
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> And the other basis I find not to be very supportive. So under the mediation rule, you're certainly entitled to a portion of these.[6] Under the conversion statute, you're entitled to all of them. So it's a single award.

The court did not specifically address defense counsel's argument that the attorney fees should be limited to solely those fees related to the conversion claim, but the court did state that it disagreed with defense counsel "on those, the other points."

On appeal, defendants take issue with the fact that no evidentiary hearing was conducted with regard to attorney fees. However, defense counsel failed to request a full evidentiary hearing during the motion hearing concerning plaintiffs' request for attorney fees. Moreover, plaintiffs submitted a detailed bill that the trial court specifically found to be reasonable and fair, and we do not find that the trial court abused its discretion in this regard.[7] Defendants also argue that the fee award should be limited to solely those fees relating to the conversion claim. However, the claims here were so interrelated that it was not an abuse of discretion for the trial court to award fees for the case as a whole.

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[6] Because Charles F. Fick accepted the case evaluation, attorney fees were not available against him, individually, under the case-evaluation rules.

[7] The bill noted that attorney John Rosczyk expended 126 hours on the case, at a rate of $150 an hour, and that attorney Michael Edwards expended 82 non-traveling hours on the case, again at a rate of $150 an hour.

Affirmed.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray