STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1380

Patrick Kelly,
Appellant,

vs.

Donald LeRoy Scherber,
Respondent.

Filed March 19, 2012
Affirmed; motion denied
Schellhas, Judge

Hennepin County District Court
File No. 27-CV-10-28309

Karl E. Robinson, Steven J. Foley, Hellmuth & Johnson, PLLC, Edina, Minnesota (for appellant)

Frank J. Rajkowski, Rajkowski Hansmeier Ltd., St. Cloud, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges the district court's grant of summary judgment to respondent, arguing that the court erroneously concluded that his conversion and civil

theft claims were barred by the six-year statute of limitations in Minn. Stat. § 541.05, subd. 1(4) (2010).[1] We affirm.

FACTS

Respondent Donald Scherber rented a farm from Independent School District 279 and allowed appellant Patrick Kelly to store personal property in a barn on the farm. The personal property included a race car, four snow blowers, a plow blade, a trailer, and tools. Sometime before May 15, 2004, Scherber told Kelly that Kelly needed to remove Kelly's property from the barn by the end of May because "the Farm had been sold and was set for demolition."

On May 15, Kelly's son and some of his friends, thinking that the buildings on the farm would soon be demolished, brought air rifles and a sling shot and damaged farm property. On that same day, because of the damage, Scherber blocked the barn door with a piece of farm equipment and told Kelly, "All of your stuff stays right where it is until I get compensation." In an effort to recover his personal property, Kelly asked the school district for help, but it declined, warning Kelly that he would be "arrested and charged with criminal trespassing" if he returned to the barn. Kelly also asked the police for help, but they declined, stating that the issue "was a civil issue and not a police matter."

On September 10, 2005, the school district told Kelly that the barn would be demolished on the following Monday and that he needed to act quickly to remove his

[1] We cite to the most recent version of the statute because it has not been amended in relevant part.

property from it. When Kelly arrived at the barn, he found the barn door open and discovered that three snow blowers, a snowplow blade, and tools were missing.

On October 28, Kelly's attorney sent a letter to Scherber and the school district, stating in part:

> The act of seizing the equipment and making it unavailable for a period of 15 months is possibly a crime. Holding the property as ransom in an effort to collect money from other persons is also possibly a crime. . . . The undivided responsibility for the full value of all of the missing items rests with the people who took possession of them in May of 2004 and denied Mr. Kelly possession. Until the property is returned, anything that happens to it is the responsibility of [the school district] and Don Scherber.

On August 24, 2010, Kelly commenced an action against Scherber for conversion and civil theft. The district court granted summary judgment to Scherber, reasoning that "the six-year statute of limitations bars [Kelly's] action since it was not commenced until August 24, 2010," and Kelly's "cause of action accrued on May 15, 2004 when [Scherber] restricted [Kelly's] access to the barn and thereby deprived [Kelly] of possession of his personal property for an indefinite period of time."

This appeal follows.[2]

[2] Kelly moved to strike several pages of extra-record deposition testimony from the appendix of Scherber's brief. Scherber opposed the motion and, in the alternative, moved to strike portions of Kelly's brief. Because we do not rely on the extra-record deposition testimony, we deny Kelly's motion as moot. *See Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007) (denying appellant's motion to strike portions of respondent's brief as moot because the court did not rely on them in its decision). Because we deny Kelly's motion, we do not reach Scherber's motion.

D E C I S I O N

"On appeal from summary judgment, we must review the record to determine whether there is any genuine issue of material fact and whether the district court erred in its application of the law." *Dahlin v. Kroening*, 796 N.W.2d 503, 504 (Minn. 2011). "[W]e must view the evidence in the light most favorable to the party against whom judgment was granted." *J.E.B. v. Danks*, 785 N.W.2d 741, 746 (Minn. 2010) (quotation omitted).

Conversion is (1) "an act of willful interference with the personal property of another, done, without lawful justification, by which any person entitled thereto is deprived of use and possession," *Christensen v. Milbank Ins. Co.*, 658 N.W.2d 580, 585 (Minn. 2003) (quotation omitted), (2) "the exercise of dominion and control over goods inconsistent with, and in repudiation of, the owner's rights in those goods," *id.* (quotation omitted), or (3) "[a]n action which destroys the character of goods or deprives the owner of possession for an extended period of time," *Rudnitski v. Seely*, 452 N.W.2d 664, 668 (Minn. 1990).

The statute of limitations for conversion is six years. Minn. Stat. § 541.05, subd. 1(4). "[T]he limitations period begins to run when the plaintiff can allege each of the essential elements of a claim." *MacRae v. Grp. Health Plan, Inc.*, 753 N.W.2d 711, 717 (Minn. 2008). In *Franklin Auto Body Co. v. Wicker*, 414 N.W.2d 509, 512 (Minn. App. 1987), this court held that the limitations period began to run more than six years before appellant brought his conversion action because it accrued when respondent "[l]ock[ed] [appellant] out of [his house] so that [appellant] could not retrieve his property,"

reasoning that "conversion may occur when the possessor exercises *any* act of dominion contrary to the rights of the owner." This court further reasoned that "[appellant's] own version of the story indicates he knew the door was locked [over six years before he brought his claim], and he tried but could not recover the property." *Wicker*, 414 N.W.2d at 512.

Like in *Wicker*, Kelly's "own version of the story" shows that he could have alleged the essential elements of conversion on May 15, 2004—when Scherber blocked the barn door and told Kelly that the door would remain blocked—more than six years before Kelly commenced his conversion action. Kelly's attorney wrote in his October 28, 2005 letter to Scherber and the school district:

> On [May 15, 2004,] Don Scherber closed the doors of the barn and blocked entrance to the barn by placing a piece of farm equipment in front of the door. Don Scherber explained to Mr. Kelly in clear and absolute language that all property belonging to Mr. Kelly would remain locked in the barn and unavailable.
>
> Mr. Scherber said quote, "All of your stuff stays right where it is until I get compensation." Mr. Kelly offered to post $10,000.00 to be held against the amount of damage in an effort to resolve the issue and secure the release of his property.
>
> Mr. Scherber refused the offer stating, "Oh I am going to get a lot more than that."

We therefore conclude that the six-year statute of limitations bars Kelly's conversion action because he could have commenced it on May 15, 2004, more than six years before he commenced his conversion action on August 24, 2010.

Kelly argues that *Wicker* does not apply because, in that case, "the defendant had permanently deprived the plaintiff of the property beginning on a date well beyond the statute of limitations, and that such deprivation had continued until the property was permanently disposed." We disagree. We held in *Wicker* that, although "[s]ale of property certainly can constitute conversion . . . conversion may occur when the possessor exercises *any* act of dominion contrary to the rights of the owner," and therefore "[l]ocking [appellant] out of the building so that [appellant] could not retrieve his property was a conversion." *Id.*

Applying what he refers to as a "notice principle," Kelly also argues that his conversion claims did not accrue until September 11, 2005, "when [he] returned to the Farm and discovered that certain items of his Personal Property had been stolen and others had been damaged." He supports this notice principle with the Eighth Circuit's holding in *Collins* that "[i]n the case of concealment, the limitations period begins to run when the actual owner of the converted property has or could, with reasonable diligence, obtain notice of the conversion." *Collins v. Envtl. Sys. Co.*, 3 F.3d 238, 243 (8th Cir. 1993). But Kelly's reliance on *Collins* is misplaced because the *Collins* notice requirement only applies "[i]n the case of concealment." Kelly alleges no concealment.

Kelly also argues that conversion did not take place on May 15 because (1) "[Scherber] admitted . . . that he did not deprive . . . Kelly of the Personal Property," and (2) "[Scherber] always intended that . . . Kelly would be able to have the Personal Property." Kelly's arguments are unavailing. "[C]onversion may occur when the possessor exercises *any* act of dominion contrary to the rights of the owner." *Wicker*, 414

N.W.2d at 512. Scherber exercised dominion over Kelly's property on May 15 by blocking the barn door. Even if Scherber intended to return Kelly's property to him, the only reason Scherber was in a position to return it was because he had continued to exercise dominion over the property contrary to the rights of Kelly since May 15.

Kelly also argues that "the District Court ignored the circumstances surrounding the May 2004 incident at the Farm and the reason the parties had agreed to preserve the status quo pending resolution of the incident" and "improperly viewed the facts in the light most favorable to Mr. Scherber, rather than in the light most favorable to Mr. Kelly." We disagree. "[T]he district court is not to find facts by resolving disputes at the summary judgment stage, but is to determine whether, when the evidence is construed in the light most favorable to the party opposing summary judgment, there is a genuine issue of material fact." *J.E.B.*, 785 N.W.2d at 747. The October 28, 2005 letter from Kelly's attorney referred to the actions of Scherber and the school district as "[h]olding the property as ransom in an effort to collect money" and "seizing the equipment and making it unavailable for a period of 15 months." Viewing the evidence in the light most favorable to Kelly, we conclude that Scherber blocked the barn door on May 15, 2004, not pursuant to an agreement, but rather as an act of dominion contrary to Kelly's ownership rights. *See Wicker*, 414 N.W.2d at 512 ("Locking [appellant] out of the building so that [appellant] could not retrieve his property was a conversion.").

Kelly also argues that the district court should not have granted summary judgment to Scherber because there is "an inherent fact issue . . . regarding when the Personal Property was stolen and damaged" because "Scherber himself claims that a

construction worker witnessed someone taking items of the Personal Property in September 2005." Kelly's argument is not persuasive. The elements of conversion existed on May 15, 2004, when Scherber blocked the barn door and deprived Kelly access to his personal property. Moreover, Scherber merely claims that he was told that *someone else* converted the property. This claim is not supported by any record evidence.

We conclude that the district court did not err by granting summary judgment to Scherber because the six-year statute of limitations for Kelly's conversion claim began to run on May 15, 2004, when Scherber blocked the barn door, and therefore expired before Kelly commenced his action on August 24, 2010. Although Kelly asserts several times in his brief that the district court erroneously granted summary judgment in favor of Scherber regarding Kelly's civil theft claim, he waives this argument on appeal because he fails to present argument or authority specific to civil theft. *See In re Khan*, 804 N.W.2d 132, 143 (Minn. App. 2011) ("An assignment of error in a brief based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection.").

Affirmed; motion denied.