

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MICHAEL E. and LESLIE D. DENT, a)	
married couple, and STEPHEN L.)	2 CA-CV 2010-0064
DENT, a single man,)	DEPARTMENT A
)	
Plaintiffs/Appellants,)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
v.)	Rule 28, Rules of Civil
)	Appellate Procedure
LORI S. DENT, a single woman,)	
)	
Defendant/Appellee.)	
)	

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV09151

Honorable Kimberly A. Corsaro, Judge Pro Tempore

REVERSED AND REMANDED

Law Firm of Marc Mauseth
By Marc Mauseth
Tubac
Attorney for Plaintiffs/Appellants

James P. Lagattuta
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Attorney for Defendant/Appellee

ESPINOSA, Judge.

¶1 Stephen, Michael, and Leslie Dent appeal the trial court's judgment following a bench trial, in which the court found Lori Dent not liable for conversion. For the reasons that follow, we reverse and remand.

Factual and Procedural History

¶2 We view the facts in the light most favorable to supporting the judgment, *Harris. v. City of Bisbee*, 219 Ariz. 36, ¶ 3, 192 P.3d 162, 163 (App. 2008), deferring to the trial court’s factual findings unless clearly erroneous, *see* Ariz. R. Civ. P. 52(a); *Spaulding v. Pouliot*, 218 Ariz. 196, ¶ 8, 181 P.3d 243, 246 (App. 2008). During their marriage, Stephen and Lori Dent, along with Stephen’s brother, Michael, and Michael’s wife, Leslie, purchased a winter home in Tubac. In 2008, Stephen and Lori separated and their divorce trial was held in November 2008 in Nebraska. After the trial, but before the court issued its under advisement ruling, Lori entered the Tubac home and removed various personal items and furniture. In its ensuing order, the Nebraska court granted Stephen’s and Lori’s interest in the Tubac home to Stephen. Lori failed to return the personal property, and in March 2009, Stephen, Michael, and Leslie sued Lori in Arizona for conversion, seeking compensation for the items she removed from the Tubac home. After a bench trial, the court ruled in Lori’s favor.

Discussion

¶3 We are bound by the trial court’s findings of fact unless they are clearly erroneous, *see Spaulding*, 218 Ariz. 196, ¶ 8, 181 P.3d at 246, but review de novo its conclusions of law, *see Pueblo Santa Fe Townhomes Owners’ Ass’n v. Transcon. Ins. Co.*, 218 Ariz. 13, ¶ 19, 178 P.3d 485, 491 (App. 2008). On appeal, Stephen, Michael, and Leslie contend the trial court misapplied the law to the facts by wrongly concluding Lori did not commit conversion despite “uncontroverted evidence” that she had removed

property in which they had an ownership interest from the Tubac home. “Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.” *Miller v. Hehlen*, 209 Ariz. 462, ¶ 34, 104 P.3d 193, 203 (App. 2005), *quoting* Restatement (Second) of Torts § 222(A)(1) (1965). “To maintain an action for conversion, a plaintiff must have had the right to immediate possession of the personal property at the time of the alleged conversion.” *Case Corp. v. Gehrke*, 208 Ariz. 140, ¶ 11, 91 P.3d 362, 365 (App. 2004).

¶4 By virtue of her pretrial admissions,¹ Lori conceded that the Nebraska court had assigned her share of the removed property to Stephen. At trial, she also admitted knowing she was not the sole owner of the property at the time she had taken it from the Tubac home. Accordingly, it was undisputed that Stephen, Michael, and Leslie had interests in the property Lori removed.² The trial court, however, concluded that as a

¹The Nebraska court awarded Stephen the Tubac home “free and clear of any claim of [Lori].” Upon commencement of the conversion lawsuit, Stephen submitted written discovery requests including requests for admissions to Lori. One of the requests for admission asked Lori to admit that the Nebraska court had “awarded what ever interest was held by [Lori] and Stephen jointly in the household goods listed on the Joint Property Statement, that were indicated . . . as being in the possession of [Stephen], to Stephen.” Lori did not timely respond to the requests and the trial court deemed them admitted. *See* Ariz. R. Civ. P. 36(a) (matter admitted if party to whom directed does not respond within forty days).

²It appears Lori’s sole defense on appeal is to contest that the ownership of the property was “undisputed,” as Stephen, Michael, and Leslie characterize it. In doing so, she contradicts her pretrial admission and also the legal implications of her having taken the property from the home before the divorce court’s ruling was issued.

“co-owner of those items,” she had the right to remove and, apparently, to retain them. But the tort of conversion does not require that the tortfeasor have no interest in the chattel nor does it require that the plaintiff have sole ownership. *See Miller*, 209 Ariz. 462, ¶ 34, 104 P.3d at 203; *see also Remington v. Landolt*, 541 P.2d 472, 477-79 (Or. 1975) (husband could maintain conversion action against wife who, after filing for divorce, entered marital home and removed personal property).³ It is, therefore, immaterial that at the time Lori took the property, the Nebraska court had not yet awarded any interest she had in it to Stephen because her removal deprived the co-owners of its use. *See Remington*, 541 P.2d at 477-79 (wife’s co-ownership of property at time of taking could not defeat conversion action). And once the Nebraska court ruled, she enjoyed no interest in the property and thus had no right to retain it. *See Hyde v. Gill*, 513 S.E.2d 278, 282 (Ga. Ct. App. 1999) (lessee lost right to possess equipment after expiration of lease, and retention of such property could give rise to claim for conversion); *see also Gehrke*, 208 Ariz. 140, ¶ 11, 91 P.3d at 365 (upon default, debtor’s interest in property extinguished and secured party may bring conversion action to recover). Accordingly, the trial court could not have reached the conclusion that no

³A plaintiff in a conversion action must show he or she has the right to “immediate possession” of property. *Gehrke*, 208 Ariz. 140, ¶ 11, 91 P.3d at 365. Notwithstanding Michael’s and Leslie’s rights, Stephen undoubtedly had this right by virtue of Arizona community property laws. *See* A.R.S. § 25-214(B), (C)(3) (each party has equal right to control community property and one spouse may not unilaterally bind the community’s property during the period between filing for dissolution and final decree of divorce); *see also Mezey v. Fioramonti*, 204 Ariz. 599, ¶ 38, 65 P.3d 980, 989 (App. 2003) (spouse’s statutory authority to manage community assets circumscribed by “fiduciary duty to [other spouse]’s interest in the property”), *disapproved of on other grounds by Bilke v. State*, 206 Ariz. 462, 80 P.3d 269 (2003).

conversion had occurred based on Lori's alleged status as a co-owner when the evidence established she had taken property that belonged, at least in part, to others, and retained it after the Nebraska court ruled she had no interest in it. *See Miller*, 209 Ariz. 462, ¶ 34, 104 P.3d at 203 (conversion committed when party interferes with property rights of others).

¶5 In its ruling, the trial court neither cited any authority nor acknowledged the elements of conversion. It reached a conclusion that Lori was a co-owner of property at all times, in direct contradiction of the Nebraska order, which Lori conceded awarded all property to Stephen. Rather than determining whether Lori had interfered with Stephen's, Michael's, and Leslie's rights, thereby incurring liability, the court found no conversion had occurred. In so finding, it appears to have relied on circumstances such as Lori's efforts in selecting the removed property, her good faith,⁴ and her presumed restraint in limiting herself to "approximately 25% of the value of the total personal property and furnishings." Accordingly, the court's judgment was based on an incorrect application of the law and clearly erroneous as well as irrelevant findings of fact.

⁴Although conversion is an "intentional" tort, the relevant intent is "the defendant's intent to exercise control of or dominion over the goods, [and] no more," rendering a defendant's benign or malevolent subjective motivation irrelevant. Dan B. Dobbs, *The Law of Torts* § 62, at 128 (2000).

Disposition

¶6 The trial court's decision is reversed and remanded for further proceedings consistent with this decision.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge