

RENDERED: NOVEMBER 20, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001130-MR

DAVID NEWMAN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 05-CI-010954

THE ESTATE OF JOSEPH K. HOBBIC

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, MOORE, AND VANMETER, JUDGES.

CLAYTON, JUDGE: This appeal comes from the award of both compensatory and punitive damage after a jury trial. Based upon the following, we affirm the decision of the trial court.

BACKGROUND INFORMATION

Appellant, David Newman, and decedent, Joseph K. Hobbic (the “decedent”), were involved in a motorcycle business, Kentucky Kustom Cycles, Inc. (“Kustom Cycles”), beginning sometime around 1975 or 1976. After Hobbic’s death in 2003, his Estate and Kentucky Kustom Cycles brought an action against Newman and Kustom Cycles. The primary issue as originally pled involved the ownership of the motorcycle business. That issue apparently remains to be resolved. In March 2007, the trial court permitted the filing of an amended complaint by the Estate to assert a claim against Newman relating to the transfer of titles of two motorcycles which occurred after Hobbic’s death. This count involved an allegation that Newman had transferred title of a 1951 Harley and a 1956 Harley which belonged to Kustom Cycles. Specifically, appellees alleged Newman had either forged Hobbic’s signature on the titles or had someone else forge it. The instant appeal concerns only the trial of this latter claim.

During trial, Newman moved for a directed verdict arguing that there was no evidence he had either forged the titles or had someone else forge them. The trial court denied his motion, however, and the jury found Newman liable and awarded the Estate \$10,500 in compensatory damages and the same amount in punitive damages. These amounts totaled \$21,000, which was the maximum amount set forth in the jury instructions.

Newman now appeals the verdict contending that the trial court erred in failing to direct a verdict in his favor, failing to grant a judgment not

withstanding the verdict (“JNOV”) and in instructing the jury. We will examine each of these issues in turn.

STANDARD OF REVIEW

In *Lewis v. Bledsoe Surface Min. Co.*, 798 S.W.2d 459, 461 (Ky. 1990), the Kentucky Supreme Court set forth the standard to be applied when reviewing the denial of a motion for directed verdict:

All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is “‘palpably or flagrantly’ against the evidence so as ‘to indicate that it was reached as a result of passion or prejudice.’”(Citations omitted).

The same standard applies for JNOV motions. In ruling on a JNOV motion, the trial court is required to consider the evidence in a light most favorable to the party opposing the motion and to give that party every reasonable inference that can be drawn from the record. *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. 1985). A motion JNOV is not to be granted “unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.” *Id.* As an appellate court, we are to consider the evidence in the same light. *See Lovins v. Napier*, 814 S.W.2d 921, 922 (Ky. 1991); *Brewer v. Hillard*, 15 S.W.3d 1, 7 (Ky. App. 1999).

As for jury instructions, they are considered questions of law and have a de novo standard of review. *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, (Ky. App. 2006).

“Instructions must be based upon the evidence and they must properly and intelligibly state the law.” *Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981). “The purpose of an instruction is to furnish guidance to the jury in their deliberations and to aid them in arriving at a correct verdict. If the statements of law contained in the instructions are substantially correct, they will not be condemned as prejudicial unless they are calculated to mislead the jury.” *Ballback's Adm'r v. Boland-Maloney Lumber Co.*, 306 Ky. 647, 652-53, 208 S.W.2d 940, 943 (1948).

Id. at 275.

With these standards in mind, we will examine the issues before us.

DISCUSSION

Newman first argues that the trial court erred in first denying his motion for a directed verdict and later denying his motion JNOV. He contends that the averments made in the complaint and first amended complaint did not include the tort of conversion. Kentucky Rules of Civil Procedures (CR) 8.01 provides that a pleading set forth “a short and plain statement of the claim showing that the pleader is entitled to relief and . . . a demand for judgment for the relief to which he deems himself entitled.”

In the complaint and the amended complaint, the appellees set forth statements indicating that Newman took possession of the motorcycles through fraudulent means. Therefore, the appellees included the tort of conversion within

their pleadings and Newman's motion for directed verdict was properly denied by the trial court.

Newman next contends that the trial judge should have granted a JNOV arguing that the appellees did not set forth evidence to the jury of conversion. We disagree.

At trial, the appellees offered the testimony of Shawn Blandford, the purchaser of one of the motorcycles. Blandford testified that he purchased the 1956 motorcycle for somewhere between \$1,600 and \$1,800. He thereafter made some repairs to the bike and sold it for \$6,000. Blandford testified that the motorcycle probably was worth even more than the amount for which he had sold it.

The appellees also offered the certified copies of the records regarding the sales transactions of the motorcycles. Betty Hobbic, an employee at Kustom Cycles since 1985 and familiar with the decedent's signature, testified that the signature on the titles was not Joe Hobbic's. Clearly this testimony was sufficient for the trial court to deny Newman's motion for JNOV.

Next, Newman contends that the trial court erred in instructing the jury in a manner unwarranted by either the pleadings or the evidence which allowed the jury to reach an unwarranted liability verdict against Newman. Newman contends that the trial court's liability instruction set out in Jury Instruction Number Two of the court's tendered instructions was not based upon

any liability theory, either pled by the appellees or recognized under Kentucky Law.

As previously set forth, Newman contends that conversion was neither pled by the appellees nor proven at the trial. We have already held that the pleadings were sufficient. We have also held that there was sufficient evidence presented at trial to withstand a motion for JNOV. The issue now before us is whether the jury instruction cited by Newman was in error.

Jury Instruction Number Two provided as follows:

You will find for Plaintiff, the Estate of Joe Hobbic, if you are satisfied from the evidence:

- (a) that the Defendant, David Newman, came into possession of the motorcycles owned by Mr. Hobbic and
- (b) without permission of Mr Hobbic or anyone acting on his behalf, the Defendant sold them.

If you find for the Plaintiff under this Instruction, please proceed to Instruction Number Three. If you find for the Defendant, please proceed to Verdict Form Number One.

In order to prove the tort of conversion, a plaintiff must show:

- (1) the plaintiff had legal title to the converted property;
- (2) the plaintiff had possession of the property or the right to possess it at the time of conversion;
- (3) the defendant exercised dominion over the property in a manner which denied the plaintiff's rights to use and enjoy the property and which was to the defendant's own use and beneficial enjoyment;
- (4) the defendant intended to interfere with the plaintiff's possession;

- (5) the plaintiff made some demand for the property's return which the defendant refused;
- (6) the defendant's act was the legal cause of the plaintiff's loss of the property; and
- (7) the plaintiff suffered damage by the loss of the property.

Kentucky Ass'n of Counties All Lines Fund Trust v. McClendon, 157 S.W.3d 626, 632 (Ky. 2005) quoting 90 C.J.S. Trover and Conversion § 4 (2004).

At trial, the plaintiff set forth evidence that the property was originally partially owned by Joe Hobbic. The Estate also proved that Newman took the property and sold the property without the consent of Joe Hobbic or a representative of his Estate. There was also evidence that Newman intended to take possession of the property and to sell it with all proceeds going to himself. The Estate has proven conversion and the jury instruction set forth above allowed the jury to decide that such case had been made. Thus, we find Newman's issue with Jury Instruction Number Two to be without merit.

Next, Newman contends that the trial court erred in instructing the jury in a manner unwarranted by either the pleadings or the evidence which allowed the jury to award an amount of damages based upon speculation or conjecture. This argument set forth by Newman involves Jury Instruction Number Three which reads as follows:

If you found for the Plaintiff in Instruction Number Two, you will determine from the evidence the value of the motorcycles at the time they were taken and sold by the Defendant and award the Plaintiff a sum equal to that amount but not exceeding the amount claimed of \$21,000.00, and fill out Verdict Form Number Two.

Newman argues that there should have been a sum based upon the amount entered into evidence.

Newman also argues that the questions asked of the court during jury deliberations indicate that the jury instruction was flawed. During deliberations, the jury sent out two questions regarding the amount of damages. First, they asked, “What is the basis for Plaintiff’s claim for \$21,000.00?” Next, the jury asked, “What is the basis for Plaintiff’s punitive damages claim for \$50,000?” (Video Record 1/22/08 at 04:05:40). The trial court answered, “You have heard all the evidence.” *Id.* at 04:06:50.

The motorcycles in question were vintage Harley Davidson’s. As such, their value is dependent upon the buyer. While an employee of the Property Valuation Administrator (“PVA”) testified that they were assessed at \$4,400 and \$300 in value, Shawn Blandford testified that he sold one for \$6,000 and that he may have been able to get more from the transaction. While the jury verdict of \$21,000 would be the high end of the value of the motorcycles according to the evidence, we do not find that it a verdict unsupported by the evidence. Thus, we find that jury instruction number three is not in error.

For the above mentioned reasons, we affirm the decision of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Harry B. O'Donnell IV
Louisville, Kentucky

BRIEF FOR APPELLEE:

B. Frank Radmacher III
Louisville, Kentucky

Stephen A. Schwager
Louisville, Kentucky