

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000005-MR

DAVID NEWMAN AND
KUSTOM CYCLES, INC.

APPELLANTS

v.

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

KENTUCKY KUSTOM CYCLES, INC.;
THE ESTATE OF JOSEPH K. HOBBIK; AND
THE ESTATE OF MICHAEL PETERS

APPELLEES

OPINION

AFFIRMING IN PART AND REVERSING IN PART

** ** * ** * **

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,¹ CHIEF SENIOR
JUDGE.

STUMBO, JUDGE: David Newman, et al. appeal from a judgment of the
Jefferson Circuit Court reflecting a jury verdict finding that Newman improperly

¹ Chief Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

converted the assets of a corporate entity to his own use, and that the conversion was contrary to the terms of the estates of his former business partners. Newman contends that the trial court improperly failed to direct a verdict in his favor, and erred in instructing the jury on the issue of conversion after having previously ruled that the appellees failed to prove certain elements of the tort of conversion. We affirm the trial court's determination that Newman was not entitled to a directed verdict, a judgment notwithstanding the verdict or CR 59.05 relief. We are persuaded, however, by Newman's contention that the evidence did not support an instruction on conversion. Accordingly, we affirm in part and reverse in part.

On January 23, 1976, Kentucky Kustom Cycles, Inc. (hereinafter referred to as the "1976 Corporation" or "KCI") was incorporated in the Commonwealth of Kentucky and registered with the Kentucky Secretary of State. Appellant Newman, along with Kerry V. Owens and Paul Drake operated the business and were designated as Directors. Sometime thereafter, Owens and Drake either sold their interests in the 1976 Corporation or otherwise abandoned the business. It would later be alleged that on August 31, 1982, the 1976 Corporation was administratively dissolved and lost the right to the name Kentucky Kustom Cycles, Inc. From 1982 to 1997, the business continued to operate, though apparently not as a corporate entity.

On October 15, 1997, a successor entity also called Kentucky Kustom Cycles, Inc. (hereinafter referred to as the "1997 Corporation") was formed. The Articles of Incorporation show Newman, Joseph Hobbic and Michael Peters as

shareholders and Directors in the corporation, with Newman and Hobbic each owning 500 shares, and Peters owning 200 shares. It would later be alleged that on August 23, 2002, Newman amended the articles of KCI to change its name to Kustom Cycles, Inc., and did so without the knowledge or consent of Hobbic and Peters.

On December 22, 2005, the 1997 Corporation, the Estate of Joseph K. Hobbic, and Michael Peters filed the instant action against Newman and the 1976 Corporation in Jefferson Circuit Court. The plaintiffs alleged in relevant part that after Hobbic died in 2002, the Executrix of his estate sought an audit of the 1997 Corporation. In response, the plaintiffs claimed that Newman refused to participate in the audit and contended that the Hobbic estate and Peters had no ownership interest in the business. They went on to allege that Newman committed a number of torts against his business partners and their assigns, including breach of fiduciary duty, fraud, conversion and unjust enrichment. The essence of the complaint was the allegation that Newman converted assets of the 1997 Corporation to his own use, with a commensurate breach of fiduciary duty to Hobbic and Peters. Newman responded that Hobbic and Peters had no ownership interest in the business.

In March of 2007, the plaintiffs were granted leave to file an amended complaint, in which they asserted claims relating to the ownership of two motorcycles, which they alleged, were improperly transferred after Hobbic's death.

On the defendants' motion, the corporate ownership claim was bifurcated from the motorcycle title claim, and the matters were tried separately.

Peters died during the pendency of the action, and his interest was taken up by his estate. The corporate ownership claim was tried before a jury in November of 2009. The jury returned a verdict in favor of the Hobbic and Peters' estates, finding that the Hobbic estate owned 500 shares of the 1997 Corporation and that the Peters' estate owned 200 shares of the 1997 Corporation. It also found that Newman came into possession of Kustom Cycles, Inc. and converted to his own use the assets, profits and proceeds of the business in a manner contrary to the estates of Hobbic and Peters. No monetary damages were sought or awarded. Newman tendered a post-trial motion for a judgment notwithstanding the verdict ("JNOV"), and in the alternative for an altered, amended or vacated judgment. The motion was denied, and this appeal followed.²

Newman now argues that the circuit court erred in failing to sustain his motion for a directed verdict at trial. As a basis for this argument, Newman contends that the Appellees failed to present any evidence at trial from which the jury could properly determine that either Hobbic or Peters owned any shares of stock in the 1997 Corporation. For the same reasons, Newman also maintains that the court erred in denying his motion for a JNOV, or in the alternative for relief under CR 59.05 (motion to alter, amend or vacate a judgment). Newman directs our attention to case law, which stands for the proposition that while it is the jury's

² The bifurcated issue of motorcycle ownership is not now before us.

province to weigh the evidence, the trial court must direct a verdict where there is no evidence to support the jury's conclusion. Additionally, Newman notes that the jury may not be permitted to reach a verdict based solely on speculation or conjecture. As applied to the matter at bar, Newman argues that the Hobbic and Peters' estates failed to produce any evidence upon which the jury could conclude without resorting to speculation or conjecture that Hobbic or Peters ever owned any stock in the 1997 Corporation. Newman also points to the statutory elements of stock acquisition set out in KRS Chapter 271B, and maintains that the Appellees tendered no documentation that these elements were met. In the absence of any support for the conclusion that Hobbic and Peters were shareholders of the 1997 Corporation, Newman contends that he was entitled to relief from judgment either in the form of a directed verdict, JNOV or CR 59.05 relief (motion to alter, amend or vacate a judgment).

We have closely examined the record and the law on this issue, and find no error. Newman's argument centers on his contention that the record is void of any proof upon which the jury could have reasonably reached the conclusion that the Hobbic estate owns 500 shares of the 1997 Corporation and that the Peters' estate owns 200 shares of the 1997 Corporation. The record refutes this claim. At trial, the Hobbic and Peters' estates produced the 1997 Corporation's Articles of Incorporation. These Articles, which were filed with the Kentucky Secretary of State on October 15, 1997, establish Newman, Hobbic and Peters as Incorporators and members of the Board of Directors of the 1997 Corporation. Additionally, the

Articles memorialize the issuance of 1200 shares of stock in the corporation, with Newman and Hobbic each receiving 500 shares, and Peters receiving 200 shares.

The issue then turns on whether this evidence is sufficient to overcome Newman's motions for a directed verdict, JNOV and CR 59.05. This Court will review a trial court's refusal to direct a verdict under a clear error standard. See [Radioshack Corp. v. ComSmart, Inc., 222 S.W.3d 256 \(Ky. App. 2007\)](#). The question of whether to direct a verdict rests on a determination of whether the jury's verdict can be supported with all evidence construed in favor of the prevailing party. [Lewis v. Bledsoe Surface Mining Co., 798 S.W.2d 459, 461 \(Ky. 1990\)](#). An appellate court may reverse the denial of a directed verdict if it determines, after reviewing the evidence in favor of the prevailing party, that the verdict is palpably or flagrantly against the evidence to indicate that it was reached because of passion or prejudice. [Id. at 461-62, citing Nat'l Collegiate Athletic Ass'n v. Hornung, 754 S.W.2d 855, 860 \(Ky. 1988\)](#).

The question for our determination, then, is whether the verdict in favor of the Hobbic and Peters' estates is so palpably or flagrantly against the evidence as to indicate that it was reached because of passion or prejudice. We must answer this question in the negative. The Articles of Incorporation of the 1997 Corporation, which designated Hobbic and Peters as members of the Board of Directors and which memorialized their receipt of 500 and 200 shares of stock, respectively, provide a rational basis for the jury's conclusion that Hobbic and Peters were shareholders in the corporation. Additionally, we are not persuaded by

Newman's contention that the plaintiffs could not prevail absent a showing that each of the elements set out in KRS 271B.6-200 et seq. were met. The question for the trial court in addressing Newman's various motions for relief may broadly be characterized as whether some evidence existed to support the verdict. The Articles of Incorporation are such evidence, and accordingly we find no error on this issue.

Newman also contends that the trial court erred in instructing the jury on the issue of conversion. He maintains that since no evidence was adduced that Hobbic and Peters owned the 1976 Corporation, it was improper to instruct the jury on the question of whether Newman improperly converted the corporation to his own use. We conclude that Instruction No. 2 was improper, but for different reasons.

The elements of a claim of conversion were set out in *Kentucky Association of Counties All Lines Fund Trust v. McClendon*, 157 S.W.3d 626 (Ky. 2005). Citing *90 C.J.S. Trover and Conversion 4 (2004)*, *McClendon* stated that,

The elements necessary to prove a conversion claim established in case law are: (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 the 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.

Setting aside elements 1 – 6, which the Appellees arguably met, no evidence was presented – nor do the Appellees direct our attention to any such evidence - that the Appellees suffered damages from Newman’s alleged conversion of the corporation. Instruction No. 1 inquired of the jury as to whether Hobbic and Peters owned stock in the 1997 Corporation, but made no provision for awarding damages. Similarly, Instruction No. 2 also made no provision for an award of damages, instead directing the jury to determine if Newman “came into possession of the corporation and business now known as Kustom Cycles, Inc., and converted to his own use, the assets, proceeds and profits of the business, all contrary to the Estate of Joe Hobbic and the Estate of Michael Peterson [sic].”

Each Instruction then directed the jury to draw a conclusion of fact with no provision for awarding damages. In this regard, the judgment on appeal is closely akin to, or perhaps is in fact, a declaratory judgment. That is to say, the judgment reflected the jury’s finding that the Hobbic and Peters’ estates owned shares in the 1997 Corporation, but it made no damages award. Because the elements of conversion include a determination that the plaintiff suffered damages, *McClendon, supra*, and because no such damages were found or even allowed for in the Instructions at issue, we must conclude that the trial court erred in instructing the jury to determine if Newman “converted” the corporation to his own use and benefit. Accordingly, we reverse on this issue.

For the foregoing reasons, we reverse the Judgment of the Jefferson Circuit Court solely as to its determination that Newman “converted to his own use” the assets of the corporation. In all other respects, including the jury’s determination that the Hobbic and Peters’ estates own 500 and 200 shares of the corporation, respectively, the Judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS,
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BRIEF FOR APPELLEES,
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