

STATE OF MICHIGAN
COURT OF APPEALS

JOHN R. BENSMILLER,

Plaintiff-Appellant,

v

ELIAS BROTHERS RESTAURANT, INC., and
CAMILLE CLEVELAND,

Defendants-Appellees.

UNPUBLISHED
October 31, 1997

No. 194144
Wayne Circuit Court
LC No. 94-408416 AV

Before: White, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals from the circuit court's affirmance of the district court's denial of plaintiff's motion for summary disposition and grant of defendants' motion for partial summary disposition in this action based on a wrongful garnishment. In lieu of granting leave to appeal this Court's initial order denying leave to appeal, the Supreme Court remanded to this Court for consideration as on leave granted. We affirm in part, and reverse in part.

Underlying the instant case was a wrongful death suit plaintiff brought as personal representative of the estate of his deceased son against defendant Elias Brothers. The court in the wrongful death action entered a directed verdict in defendant's favor, and an order to tax bill of costs, which ordered the estate to pay \$8,321 in sanctions pursuant to MCR 2.405, the offer of judgment rule. When the estate failed to pay the costs, Elias Brothers, through its attorney, Camille Cleveland, pursued plaintiff personally by garnishing approximately \$3,500 from his wages. Plaintiff objected to the garnishments in letters to the district court but filed no formal motion to release or terminate the garnishments. The garnishments began in October 1989 and continued for the remainder of the 1989-1990 school year, after which plaintiff retired early from his position as a school teacher in order to avoid the garnishments. Plaintiff retained counsel who, in October 1990, wrote defendants requesting that they cease and desist from the garnishments. Counsel's letter to defendants asserted that the garnishments were improper and illegal because only the estate could be subject to defendant's claim for costs. Defendants immediately complied and ceased the garnishments. Plaintiff then brought suit against defendants, alleging abuse of

process, malicious use of process, invasion of privacy, intentional interference with a contractual relationship, intentional infliction of emotional distress, and conversion.¹

Both parties filed motions for summary disposition. Plaintiff argued that garnishment of his wages was improper as a matter of law because the offer of judgment sanctions were awarded against the estate only. Defendants argued that plaintiff was properly garnished because he stood to benefit personally from the wrongful death proceeds and was thus a “real party in interest;” that plaintiff’s intentional tort claims should be dismissed because there was no genuine issue of fact as to whether defendant acted intentionally and that plaintiff failed to establish other requisite elements of the torts; and that plaintiff was not entitled to lost wages or exemplary damages. The district court denied plaintiff’s motion and defendants’ motion in part, ruling that the question whether the personal representative was personally liable for the sanctions against the estate was a question of fact for the jury. However, the district court granted defendants summary disposition as to plaintiff’s six intentional tort claims on the basis that no genuine issue of material fact remained, and also granted defendants summary disposition of plaintiff’s claim for lost wages and exemplary damages, effectively dismissing all of plaintiff’s claims. Plaintiff appealed to the circuit court, which affirmed the dismissal of his claims. This Court denied plaintiff’s application for leave to appeal. On further appeal, the Supreme Court remanded to this Court as on leave granted.

I

Plaintiff argues that the district court erred in denying his motion for summary disposition where it failed to rule as a matter of law that the garnishments were improper and that plaintiff was not personally liable for the estate’s costs. We review a determination on a motion for summary disposition de novo. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993).

A garnishment proceeding cannot be commenced until after a claim has been reduced to a judgment. MCL 600.4011(5); MSA 27A.4011(5), MCR 3.101. No judgment against plaintiff in his individual capacity existed in the instant case. Moreover, defendants did not pursue payment of the claim against the estate in the Probate Court as provided by the Revised Probate Code, MCL 700.712; MSA 27.5712.²

Defendants argue that the garnishment proceedings against plaintiff were appropriate because no evidence exists to demonstrate that plaintiff was formally appointed personal representative. As defendants failed to raise this argument below, we decline to address it, *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 99; 494 NW 2d 791 (1992), beyond noting that it is unsupported by the record.

Defendants also argue that plaintiff was the real party in interest in the underlying wrongful death suit because he would have benefited personally had he prevailed in that action, he personally paid the costs of the underlying litigation, and he initially pleaded damages for the mental anguish suffered by surviving heirs at law, and therefore could be properly garnished.

The two cases defendants cite in support of their argument are inapposite. In *Crittenden v Canfield*, 87 Mich 152, 160; 49 NW 554 (1891), a real estate matter, the Court levied costs against the next-friend of the minor plaintiffs on the basis that, prior to the commencement of the suit, the next-friend had procured a quitclaim deed to the property at issue and thus “had a personal interest in the result which he sought to bring about.” The second case is also distinguishable. In *Baumgarth v Fireman’s Fund Ins Co*, 159 Mich 207, 208, 210; 123 NW 592 (1909), the Court held that costs are taxable against persons beneficially interested as assignees of a cause of action by virtue of an assignment made before the action commenced. Plaintiff in the instant case had no similar personal interest in the wrongful death action by which he could be held personally liable for the offer of judgment sanctions. Defendants thus improperly garnished plaintiff’s wages.

Nonetheless, we conclude that the district court properly dismissed plaintiff’s claims of malicious use of process, invasion of privacy, intentional interference with a contractual relationship, and intentional infliction of emotional distress, because plaintiff failed to establish the requisite intent.³ There was no genuine issue of fact regarding malice or willful and wanton conduct. Plaintiff did not move to set the garnishments aside; there is no claim that defendants received copies of the letters plaintiff sent to the court; and defendants ceased immediately upon receiving plaintiff’s attorney’s letter.

We conclude, however, that plaintiff presented sufficient evidence to survive defendants’ motion as to the conversion claim and that this claim did not require proof of intent beyond that shown in the record. A conversion is any distinct act of dominion wrongfully exerted over another’s personal property, and occurs at the point that such wrongful dominion is asserted. *Attorney General v Hermes*, 127 Mich App 777, 786; 339 NW2d 545 (1983). Although conversion is generally an intentional tort in the sense that the defendant’s act exercising dominion must be willful, one can commit the tort unwittingly if unaware of the plaintiff’s property interest. *Citizens Ins Co v Delcamp Truck Center, Inc*, 178 Mich App 570, 575; 444 NW2d 210 (1989). An action for conversion does not rest on the knowledge or intent of the defendant, does not require wrongful intent, and is not excused by care, good faith, or lack of knowledge. 18 Am Jur 2d, Conversion, § 3, p 147; *Hermes, supra* at 787 (noting that good faith is not a defense to a conversion action).

In the instant case, as no judgment had entered against plaintiff personally in the wrongful death action, defendant wrongfully garnished plaintiff’s wages and exercised dominion over his property. Defendant’s good faith or mistaken belief that such garnishment was proper is not a defense to plaintiff’s conversion claim. Accordingly, the district court erred in dismissing plaintiff’s conversion claim.

As to damages, we conclude that the district court properly dismissed plaintiff’s claim for lost wages, as there was no genuine issue of material fact whether plaintiff acted reasonably in leaving his job to avoid the garnishments. Reasonable minds could not differ on the question whether plaintiff’s leaving his job was a reasonable effort to mitigate damages, especially given plaintiff’s failure to formally file a motion opposing the garnishments. *Device Trading v Viking Corp*, 105 Mich App 517, 525; 307 NW2d 362 (1981).

Plaintiff also sought exemplary damages. Exemplary damages are awardable where the defendant commits a voluntary act which inspires feelings of humiliation, outrage and indignity. *Janda v Detroit*, 175 Mich App 120, 127; 437 NW2d 326 (1989), citing *Veselenak v Smith*, 414 Mich 567, 574; 327 NW2d 261 (1982). The conduct must be malicious or so willful and wanton as to demonstrate a reckless disregard of plaintiff's rights. *Janda, supra* at 128. Negligence is not sufficient to justify an award of exemplary damages. *Veselenak, supra* at 575. Plaintiff has not established culpability beyond mere negligence. We therefore conclude the district court properly ruled that exemplary damages are not available here.

In the absence of fraud, violence, or willful negligence or wrong, the proper measure of damages in an action for conversion is that sum which will afford compensation for the actual injury. 6 Michigan Civil Jurisprudence, Conversion, § 26, p 40, citing *Winchester v Craig*, 33 Mich 205 (1876). The measure of damages in a conversion action is the fair market value of the item at the time of the conversion, in the absence of any testimony establishing a peculiar value in the goods to the owner. *Willis v Ed Hudson Towing, Inc*, 109 Mich App 344, 349; 311 NW2d 776 (1981). Damages in a conversion case include interest from the date of conversion, to be calculated in accordance with MCL 600.6013; MSA 27A.6013 and MCL 438.31; MSA 19.15(1). *Ehman v Libralter Plastics, Inc*, 207 Mich App 43, 45; 523 NW2d 639 (1994).⁴

We affirm the district court's dismissal of plaintiff's malicious use of process, abuse of process, invasion of privacy, intentional interference with a contractual relationship, and intentional infliction of emotional distress claims, as well as plaintiff's claims for exemplary damages and lost wages. We reverse the district court's grant of summary disposition of plaintiff's conversion claim.

Affirmed in part, reversed in part.

/s/ Helene N. White

/s/ Richard A. Bandstra

/s/ Michael R. Smolenski

¹ The complaint also alleged two counts of violation of the Collection Practices Act, MCL 445.251 *et seq.*; MSA 19.658(1) *et seq.* Plaintiff did not appeal the dismissal of these counts.

² This Court has held that mediation sanctions assessed against an estate in a wrongful death action are expenses of administration, i.e., liabilities of the estate. *In re McDivitt Estate*, 169 Mich App 435, 440; 425 NW2d 575 (1988).

³ We observe that, although not addressed below, other elements of the torts also appear to be absent. Regarding the invasion of privacy count, plaintiff's complaint alleged that the writs of garnishment were published to only one person, and thus failed to establish the requisite publication. *Beaumont v Brown*,

401 Mich 80, 104-106; 257 NW2d 522 (1977). Regarding the intentional interference with a contractual relationship count, plaintiff failed to establish that his contract with the school was breached. *Admiral Ins Co v Brochert*, 194 Mich App 300, 312; 486 NW2d 351 (1992). Regarding the intentional infliction of emotional distress claim, plaintiff failed to establish the requisite extreme and outrageous conduct. See *Roberts v Auto Owners Ins Co*, 422 Mich 594, 602-603; 374 NW2d 905 (1985).

As to the abuse of process claim, the process was used for its proper and intended purpose.

⁴ In the instant case, the issue of damages may prove to be appropriately resolved through summary disposition.