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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2120**

Gary Tank,
Respondent,

vs.

Caleb Krusemark,
Appellant.

**Filed August 12, 2019
Affirmed
Smith, John, Judge***

Martin County District Court
File No. 46-CV-16-1117

Brandon J. Edmundson, Derrick M. Greiner, Kraemer, Shaffer & Edmundson, Ltd.,
Fairmont, Minnesota (for respondent)

Jacob M. Birkholz, Birkholz & Associates, LLC, Mankato, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and
Smith, John, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SMITH, JOHN, Judge

We affirm the district court's denial of appellant Caleb Krusemark's motion for punitive damages as a matter of law following judgment in appellant's favor on his conversion claim because appellant failed to plead civil theft under Minn. Stat. § 604.14 (2018).

FACTS

Respondent Gary Tank brought a claim against appellant in conciliation court, alleging that appellant's cattle damaged respondent's fencing. The conciliation court awarded respondent damages. Appellant filed a demand for removal to the district court. Respondent filed an amended complaint with the district court claiming breach of contract, injury to personal property, trespass, and nuisance. Appellant answered and brought counterclaims for conversion, unjust enrichment, and bailment, alleging that respondent had removed hay valued in excess of \$45,000 that appellant was storing on respondent's property.

At the beginning of the jury trial, appellant informed respondent and the district court that he would seek punitive damages. Respondent objected, arguing that appellant was required, but failed, to bring a separate motion requesting punitive damages after appellant filed his counterclaim. The district court explained that it could not find any clear case law applying the punitive damages statute in a conversion case and, because trial had begun and a jury was seated, it would let the jury determine whether punitive damages should be awarded and the parties could address the issue upon posttrial motions if

appellant prevailed. Respondent objected to the district court submitting the issue of punitive damages to the jury.

The jury found appellant not liable for respondent's property damage. The jury found respondent liable on appellant's conversion claim and awarded appellant \$16,000 in damages for the value of the personal property, and zero dollars in punitive damages. The district court issued an order concluding that appellant was entitled to \$50 in punitive damages under Minn. Stat. § 604.14 and entered judgment.

Appellant moved for judgment as a matter of law under Minn. R. Civ. P. 50.02, arguing that he is entitled to punitive damages in the amount of \$16,000.¹ Respondent moved for judgment as a matter of law, or alternatively a new trial, arguing that appellant is not entitled to any punitive damages. The district court granted respondent's motion for judgment as a matter of law, concluding that appellant is not entitled to punitive damages, and denied all other motions.

D E C I S I O N

Appellant argues that the district court erred in denying his motion for judgment as a matter of law because he is entitled to punitive damages under Minn. Stat. § 604.14. A district court's decision to deny a motion for judgment as a matter of law is reviewed de novo. *Alby v. BNSF Ry. Co.*, 918 N.W.2d 562, 566 (Minn. App. 2018), *review granted* (Minn. Oct. 16, 2018).

¹ Appellant also moved the district court to open the judgment under Minn. R. Civ. P. 59.01, arguing that the damages were insufficient, but rule 59.01 only permits the district court to open a judgment “[o]n a motion for a new trial in an action tried without a jury.”

The civil-theft statute provides that a person “who steals personal property from another is civilly liable to the owner of the property for its value when stolen plus punitive damages of either \$50 or up to 100 percent of its value when stolen, whichever is greater.” Minn. Stat. § 604.14. In ruling on appellant’s motion for judgment as a matter of law, the district court explained that “[b]ecause [appellant] did not file a separate motion requesting punitive damages and waited until trial to indicate he would seek them, the court finds [appellant] cannot receive those as part of his damage award.” The district court reached the correct conclusion, but did so upon incorrect reasoning.

The general rule is that “[u]pon commencement of a civil action, the complaint must not seek punitive damages.” Minn. Stat. § 549.191 (2018). After filing the suit, a party may make a motion to amend the pleadings to claim punitive damages. *Id.* Section 549 provides the required procedure to seek punitive damages:

The motion must allege the applicable legal basis under section 549.20 or other law for awarding punitive damages in the action and must be accompanied by one or more affidavits showing the factual basis for the claim. At the hearing on the motion, if the court finds prima facie evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim punitive damages.

Id. The district court explained that there is nothing in the civil-theft statute that allows a litigant to receive punitive damages without following the requirements of section 549.191, and section 549.191 specifically applies to and accounts for situations where punitive damages are authorized by a separate statute and requires those statutes be named in the motion. Appellant did not file with the district court a motion accompanied by one or more affidavits, and therefore did not comply with the requirements of section 549.191.

Appellant argues that Minn. Stat. § 604.14 overrides the amendment requirement of section 549.191 and creates a mandated award not subject to the standard applied in Minn. Stat. § 549.20 (2018). In *Williamson v. Prasciunas*, 661 N.W.2d 645, 648-49 (Minn. App. 2003), the defendants admittedly converted Williamson’s jewelry and later returned it. Williamson then initiated a lawsuit claiming conversion and theft. *Id.* at 648. Williamson moved for summary judgment on her conversion claim and sought permission to amend her complaint to ask for punitive damages. *Id.* The district court granted summary judgment on Williamson’s conversion claim and denied the motion seeking to add a claim for punitive damages. *Id.* at 649. The district court had found that Williamson was not entitled to amend her complaint to seek punitive damages because she had already been awarded \$12,000 in punitive damages. *Id.* at 653. This court highlighted the district court’s reasoning: “Influential to the court[’]s ruling is the fact that [the statute] concerning civil liability for theft already provides for ‘punitive’ damages in the amount of 100% of the value of the stolen property.” *Id.* The court then explained that “Williamson has not only had her property returned to her, but also has received a punitive damage award equal to the property’s value” and therefore, it was within the discretion of the district court to deny the motion to seek additional punitive damages. *Id.* at 653-54.

Williamson makes clear that a party need not file a motion to amend the pleadings to obtain punitive damages under section 604.14. The Eighth Circuit has interpreted

Williamson to the same effect.² *OnePoint Sols., LLC v. Borchert*, 486 F.3d 342, 349 (8th Cir. 2007) (“Following the reasoning in *Williamson*, we conclude that a plaintiff alleging civil theft under Minnesota Statute § 604.14 may seek recovery of the stolen property and ‘punitive damages’ . . . without receiving permission from the court to amend its complaint to seek punitive damages.”). Therefore, contrary to the district court’s reasoning, appellant was not required to file a motion to amend the pleadings to obtain punitive damages under section 604.14. But appellant never pleaded civil-theft under section 604.14, and contrary to appellant’s assertion, appellant’s pleading of conversion does not entitle appellant to punitive damages under section 604.14.

Litigants are bound by the theory or theories upon which the action was actually tried in the district court. *Reese Design, Inc. v. I-94 Highway 61 Eastview Ctr. P’ship*, 428 N.W.2d 441, 446 (Minn. App. 1988). This court recently examined both conversion and civil-theft, demarcating the distinctions between the two claims. *See TCI Bus. Capital, Inc. v. Five Star Am. Die Casting, LLC*, 890 N.W.2d 423, 430-31 (Minn. App. 2017).³

² A federal court’s interpretation of Minnesota law is not binding on this court, though it may have persuasive value. *See Lamere v. St. Jude Med., Inc.*, 827 N.W.2d 782, 788 n.1 (Minn. App. 2013).

³ Under the civil-theft statute, this court concluded that “steal” means “that a person wrongfully and surreptitiously takes another person’s property for the purpose of keeping it or using it.” *Id.* at 431. The court defined the tort of conversion as “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,” and “the exercise of dominion and control over goods inconsistent with, and in repudiation of, the owner’s rights in those goods.” *Id.* at 428 (quotations omitted). The court explained that a finding of conversion is “properly limited to those serious, major, and important interferences with the right to control the chattel.” *Id.* (quotation omitted). The primary distinction between “steal” and “conversion” is that a person must wrongfully obtain possession to steal, but a person may be liable for conversion after rightfully obtaining possession of property.

Conversion and civil-theft, while similar, are two distinct claims required to be pleaded separately.⁴ *Cf. Williamson*, 661 N.W.2d at 648, 653 (concluding that appellant is entitled to punitive damages without amending the complaint where appellant pleaded conversion *and* theft).

Appellant argues, in reliance on Minn. R. Civ. P. 15.02, that his failure to plead civil theft does not bar recovery under section 604.14. Minn. R. Civ. P. 15.02 provides, “[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” The rule continues,

[s]uch amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of a trial of these issues.

In other words, rule 15.02 allows for recovery of unpleaded damages when the issue is litigated by consent, or an amendment to the pleadings was made. Since no amendment to the pleadings was made, and the claim was not litigated by express consent, the issue is whether punitive damages under section 604.14 was litigated by implied consent.

⁴ Appellant cites a federal district court decision for the proposition that it is a claimant’s right to seek damages from a conversion claim under the Minnesota civil theft statute. *Reisdorf v. i3, LLC*, 129 F.Supp.3d 751, 779 (D. Minn. 2015). *Reisdorf* did explain that a plaintiff who prevails on a claim of conversion may seek punitive damages that are in addition to the value of the converted property under Minn. Stat. § 604.14. *Id.* But *Reisdorf* expressly acknowledged that the counterclaim asserted two counts—that Reisdorf engaged in unlawful conversion *and* civil theft in violation of section 604.14, respectively. *Id.*

Consent to litigate an issue not raised in the pleadings may be implied where a party does not object. *Shandorf v. Shandorf*, 401 N.W.2d 439, 442 (Minn. App. 1987); *see DeRosier v. Util. Sys. of Am., Inc.*, 780 N.W.2d 1, 5 (Minn. App. 2010) (providing, as an example, that an issue may be litigated by consent where the defendant raises substantive defenses and fails to object to evidence concerning the claim). In order to find implied consent to litigate an issue, the intent to try the issue must be “clearly indicated.” *Folk v. Home Mut. Ins. Co.*, 336 N.W.2d 265, 267-68 (Minn. 1983).

Appellant argues that he sought relief under section 604.14 at trial, respondent failed to object, allowed the jury to deliberate on the issue, gave implied consent to litigate the issue, and therefore the issue must be treated as if it had been raised initially. This is not so. Respondent objected at every opportunity.⁵ Appellant did not properly plead his civil-theft claim and the issue was not litigated by consent. Appellant is therefore not entitled to punitive damages under the civil-theft statute. *Shandorf*, 401 N.W.2d at 442 (“Relief cannot be based on issues that are neither pleaded nor voluntarily litigated.”).

Affirmed.

⁵ At the close of trial, appellant requested a separate jury instruction for punitive damages. Respondent objected, arguing that there was no notice or reference to punitive damages until the jury charge, so it is not appropriate in this case, and therefore no punitive damage instruction should be included. The district court stated that, given its uncertainty on the issue, it would rather include the instruction than have to re-try the matter and the parties could address the issue further on motions after the verdict. Respondent reiterated his objection to the submission of punitive damages in any way.