

Opinion issued September 22, 2011.



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-10-00416-CV

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**LEONARD WILLIS AND LEN WILLIS D/B/A A-Z SERVICE CENTER,**  
Appellants

V.

**KIRK A. SMITH, Appellee**

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**On Appeal from the County Court at Law No. 3 and Probate Court**  
**Brazoria County, Texas**  
**Trial Court Case No. CI042421**

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**MEMORANDUM OPINION**

Leonard Willis and Len Willis, doing business as A-Z Service Center, appeal the trial court's judgment. Kirk A. Smith brought suit against the Willises

for conversion of his 2002 Dodge pickup truck. After a bench trial, the trial court awarded damages to Smith for conversion of his truck, but offset the amount by the cost of repairs made to the truck by the Willises. The trial court rendered judgment in favor of Smith for \$584.74 in damages, return of the truck, attorney's fees of \$3,000.00, and costs. In their sole issue in this appeal, the Willises contend that the evidence is factually insufficient to show that they converted the truck. We affirm.

### **Background**

Smith and Len Willis met while at a rehabilitation center and became friends. Smith told Len about the problems he was having with his 2002 Dodge truck. Len, a mechanic, told Smith that it sounded like the diesel fuel injection pump had failed. In November 2007, after both men had left rehabilitation, Smith towed the truck to A-Z Service Center, the shop Len ran and that was owned by his father, Leonard. Smith and the Willises presented sharply contrasting stories of what happened next.

Smith testified that he and a friend towed the truck to the shop for Len to diagnose and give him an estimate for any repairs. He thought that there would be no charge because he and Len were friends. He stated that the shop was closed and he left the keys to the truck with the manager of the motel next door, which was

also owned by Leonard. He did not meet or speak to anyone else. He denied giving any form of consent to Len to perform the repairs.

Len, on the other hand, testified that he and a friend met Smith and Smith's friend at the shop. The shop was closed that day and an alarm was active, so they did not go into the shop. Len testified that he told Smith that his father might be able to finance the repairs. According to Len, Smith told him that if Leonard would finance the repairs to go ahead and perform the repairs. Len's friend testified that he heard the conversation and that Smith consented to the repairs if Leonard would finance the cost of the repairs. Len further testified that his father agreed to finance the costs of the repairs because Smith was Len's friend. Len, therefore, made the repairs. In addition to replacing the fuel injection pump, he replaced the supply pump, and, determining the pump problems came from water in the fuel tank, he removed the fuel tank and cleaned it and flushed the fuel lines. The total cost of the repairs was \$5,382.26 for parts and labor.

The parties also tell differing versions of what happened next. According to Smith, he left the truck so that Len could make an estimate of the repairs that needed to be done. A few days after dropping the truck off, he was supposed to meet Len to pick up the truck, but "[t]hat didn't happen." A few months later, Smith called Len, who was working out of state. Smith was unable to arrange a time to pick up the truck. Len would not tell him where the truck was being stored.

Smith's sister Melissa and her husband Paul began trying to get in touch with Len concerning the truck in August 2008. Both testified that he rarely answered his phone. When they did speak with him, he told them he was out of state for work and would contact them in a few weeks when he was back in Texas. He never called them back. Melissa and Paul also testified that Len told them about \$1,200.00 was owed for the repairs on the truck. Paul additionally testified that, after he received notice of the mechanic's lien in March 2009, he spoke to Leonard who confirmed the \$5,400.00 amount showing on the lien and asserted he could claim storage fees that would bring the amount up to \$10,000.00.

Len testified that, after he completed the repairs, he attempted to contact Smith for eight months. When he called Smith's cellular telephone number, he would either get voicemail or "it was like there was nothing there." Len estimated he called Smith "20 to 30 times" and left messages "a couple of times." Len also stated that he never called Melissa or Paul back but explained that he did not want to share information about Smith's truck with "in-laws."

In March 2009, the Willises asserted a mechanic's lien on the truck in the amount of \$5,400.00. This prompted the phone call from Paul to Leonard mentioned above. After he spoke with Leonard about the lien, Paul became concerned and contacted Smith's attorney, who sent a demand letter and later filed this suit.

After hearing the evidence, the trial court found Smith had proved the elements of conversion. The trial court also found the mechanic's lien was not valid. The trial court found damages for Smith in the amount of his monthly payments on the truck from December of 2007 until the time of trial (less a period when Smith was incarcerated) for a total of \$5,967.00. The trial court also found that the Willises "mitigated their damages" by repairing the truck and ordered Smith's damages reduced by the amount of parts and labor on the repairs, \$5,382.26. The trial court rendered judgment on the balance of \$584.74, as well as costs of court and \$3,000.00 for attorney's fees.

### **Conversion**

In their sole issue, the Willises contend that the evidence is factually insufficient to support a finding that they converted the truck.

"In reviewing a challenge to the factual sufficiency of the evidence, we must consider and weigh all the evidence and should set aside the judgment only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Esse v. Empire Energy III, Ltd.*, 333 S.W.3d 166, 177 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). "In considering and weighing the evidence, however, we must defer to the factfinder as final determiner of the credibility of witnesses and the weight to give their testimony." *C.M. Asfahl Agency v. Tensor, Inc.*, 135 S.W.3d 768, 797 (Tex. App.—Houston [1st Dist.] 2004, no pet.). As the

factfinder, the trial court may believe one witness and disbelieve another and resolve inconsistencies in any testimony. *See Dyer v. Cotton*, 333 S.W.3d 703, 709 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *see also Esse*, 333 S.W.3d at 177 (stating that “trial court acts as fact-finder in a bench trial and is the sole judge of the credibility of the witnesses”).

To establish a claim for conversion, a plaintiff must prove the following elements: (1) the plaintiff owned or had possession of the property or entitlement to possession; (2) the defendant unlawfully and without authorization assumed and exercised control over the property to the exclusion of, or inconsistent with, the plaintiff’s rights as an owner; (3) the plaintiff demanded return of the property; and (4) the defendant refused to return the property. *Ashdon, Inc. d/b/a Impression Bridal v. Gary Brown & Assocs., Inc.*, 260 S.W.3d 101, 116 (Tex. App.—Houston [1st Dist.] 2008, no pet.). The Willises challenge whether Smith proved he had a right of possession of the truck. Specifically, the Willises assert that Smith consented to the repairs of the truck and, therefore, they had a valid lien that entitled them to possession of the truck.

The Willises rely on Len’s testimony that is corroborated by his friend’s testimony. They also attack Smith’s directly contrary testimony by arguing Smith presented no “collaborating [sic] witnesses, no documents or writings of any kind to establish any facts; nothing other than the testimony of [Smith] himself to prove

that he had not consented to the repairs to his truck.” The trial court, in the judgment, recited the finding that Smith had established all the elements of his conversion claim. Therefore, the trial court implicitly found that Smith did not consent to Len making the repairs to the truck in exchange for payment. As the sole judge of the credibility of the witnesses, the trial court could have believed Smith’s testimony and disbelieved the testimony of Len and his friend. *See Dyer*, 333 S.W.3d at 709. We must defer to that determination. *See C.M. Asfahl Agency*, 135 S.W.3d at 797.

We overrule the sole issue.

### **Conclusion**

We affirm the judgment of the trial court.

Rebeca Huddle  
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.