



**IN THE
TENTH COURT OF APPEALS**

No. 10-07-00002-CV

JOSE LUIS LOPEZ,

Appellant

v.

AMY ELIZABETH LOPEZ,

Appellee

**From the 19th District Court
McLennan County, Texas
Trial Court No. 2005-2429-1**

ORDER

The Court's "Order on Opinion," issued on November 5, 2008, is withdrawn, and this order is substituted therefor.

The Court's Opinion and judgment dated August 13, 2008, are withdrawn, and the Opinion and judgment dated November 5, 2008, are substituted therefor. Appellee's motion for rehearing is denied.

PER CURIAM

Before Chief Justice Gray,
Justice Vance, and
Judge Glen Harrison¹

(Chief Justice Gray would request a response to the motion for rehearing with a view to granting it. He would not rewrite the opinion to address the motion for rehearing (or the dissenting opinion) without requesting a response. He does not withdraw his dissenting opinion issued on August 13, 2008, so another dissenting opinion will not issue. He notes, however, that the Court is in error in assuming the trial court had to impliedly make any findings. Jose had to prove conversion. He failed to convince the trial court. In his review of the trial court's judgment he cannot conclude that the trial court erred. It is improper to substitute the Court's judgment on a review of a cold record for the trial court's judgment with the trial court's ability to evaluate the credibility and demeanor of the live witnesses. Because Jose had the burden of proof and, even according to the Court, failed to prove the legal relationship under which Amy was in possession of the receipt or the proceeds thereof, the trial court did not err when it rendered a take nothing judgment against Jose. Additionally there is some question of whether a party that lost on a theory tried by implied consent can appeal that loss. The theory of trial-by-implied-consent is a judgment saving theory.)

"Order on Opinion" dated November 5, 2002 withdrawn; motion for rehearing denied

Order issued and filed November 19, 2008

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¹ Judge of the 32nd District Court of Fisher, Mitchell, and Nolan Counties, sitting by assignment of the Chief Justice of the Texas Supreme Court pursuant to section 74.003(h) of the Government Code. *See* TEX. GOV'T CODE ANN. § 74.003(h) (Vernon 2005).