IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RANDY HEISTAND,	)	**No. 27449-7-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
JAMES F. COX, as Personal Representative of the Estate of STANCHOLE BARNETT, Deceased,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Brown, J. — Cheryl Payne, as successor personal representative of the Estate of Stanchole Barnett, appeals the denial of the Estate's motion for partial reconsideration of Randy Heistand's judgment against the Estate. At trial, Mr. Heistand prevailed on his claim for rent reimbursements on property devised to him by Mr. Barnett, but he failed to establish his right under an alleged oral contract with Mr. Barnett to devise additional land. Post-trial, Mr. Heistand successfully moved for judgment for conversion of property left on part of the disputed land and damages for water interruption to his devised property. The Estate contends (1) Mr. Heistand's conversion claim is time barred and unsupported by the evidence, (2) his water interruption claim

was improperly raised, (3) equitable doctrines preclude the post-trial conversion and water interruption claims, and (4) the trial court should have awarded the estate's attorney fees as the prevailing party below. We disagree, and affirm.

FACTS

Mr. Heistand's father purchased A & A Auto Wreckers in 1973. Mr. Heistand purchased the business in 1990. The property upon which the business was located was owned by Mr. Barnett. Mr. Heistand leased the land for $200 per month. To the north of A & A Auto Wreckers was a scrap metal business owned by Mr. Barnett. Mr. Barnett also resided on the north half of the property. A partial fence separated the two businesses. Mr. Barnett allowed Mr. Heistand to store automobiles and scrap iron on a 200-foot strip of Mr. Barnett's property near the fence line. Mr. Heistand and Mr. Barnett had a close relationship. Mr. Heistand and his wife took care of Mr. Barnett after a hip injury and hauled away Mr. Barnett's scrap metal without compensation.

Mr. Barnett died in November 2004, leaving Mr. Heistand all of his property lying south of the partially remaining fence, in a location not in dispute. Mr. Barnett devised to James Cox[1] the portion of property on the north side of the fence. For nearly a decade prior to Mr. Barnett's death, Mr. Heistand attempted to have Mr. Barnett put in writing an agreement to devise the 200-foot strip of property to him, but no written agreement materialized. When Mr. Barnett died, Mr. Heistand had approximately 50

[1] Mr. Cox was the original personal representative of Mr. Barnett's estate. Mr. Cox has since died and the successor personal representative is Cheryl Payne.

automobiles and 50 to 100 tons of scrap iron on Mr. Barnett's property.

In February 2008, Mr. Heistand filed a creditor's claim for $75,000 for hauling scrap metal for Mr. Barnett, but withdrew it. Later, Mr. Heistand sued for specific performance, claiming the parties had entered into an oral contract for Mr. Heistand to pay $200 per month plus haul scrap metal for Mr. Barnett at no expense, and in exchange, Mr. Heistand would receive all the property including the additional strip of land upon Mr. Barnett's death.

During litigation, the Estate began removing items from the disputed strip of land. Mr. Heistand's attorney requested that the Estate stop removing Mr. Heistand's automobiles and scrap iron. The Estate advised that it needed to remove the items unless Mr. Heistand could provide title to any of the vehicles he claimed he owned. The removal process was complete before Mr. Heistand could provide title or an inventory. He asserted 50 to 75 vehicles and approximately 75 tons of scrap iron were removed. Mr. Heistand amended his complaint to include a claim for conversion.

Also during litigation, the Estate stopped supplying water to Mr. Heistand's property. Mr. Heistand successfully moved to maintain the status quo for the water supply.

Mr. Heistand later established the Estate failed to maintain the status quo. After the 2007 trial, the court concluded Mr. Heistand did not establish by clear, cogent, and convincing evidence a contract to devise additional land. But the court found that rent

paid to the Estate after Mr. Barnett's death for the property devised to Mr. Heistand should be returned. The court encouraged the parties to resolve any remaining disputes about the vehicles and scrap iron removed from the disputed property and water rights, but the parties failed to reach agreement.

In March 2008, Mr. Heistand filed a post-trial motion for judgment on his conversion and water interruption claims, and requesting reimbursement for the back rent previously ordered by the court. Mr. Heistand alleged the vehicles and scrap iron removed from the disputed strip were valued at $50,000. Without water, he rented a port-a-potty for his business, which cost him $2,100; and, he brought in bottled water.

In July 2008, the court entered judgment for Mr. Heistand, ordering the Estate to pay $2,100 for interrupted water service, $5,750 for return of rent paid by Mr. Heistand, $10,200 for vehicles removed from the disputed property, and $13,200 for scrap iron removed for a total judgment of $31,250. Each party was ordered to pay their own fees. The Estate unsuccessfully requested partial reconsideration on the conversion and water interruption judgments. The Estate appealed.

ANALYSIS

A. Conversion Claim

The issue is whether the trial court erred in granting conversion damages based on Mr. Heistand's post-trial motion for judgment.

Initially, the parties dispute the characterization of the court's post-trial judgment.

The Estate incorrectly characterizes the 2008 ruling as a summary judgment. The court stated in its 2007 memorandum opinion and findings of fact/conclusions of law that issues remained regarding the removed property, interrupted water service and the measure of damages. The court encouraged the parties to continue to confer on these issues. When a resolution was not achieved, Mr. Heistand filed a motion for judgment "pursuant to the court's ruling of March 8, 2007." Clerk's Papers (CP) at 93. The court's decision was a post-trial decision partly based on oral trial testimony, and was not a summary judgment ruling.

We review the denial of a motion for reconsideration for abuse of discretion. *Rivers v. Wash. State Conf. of Mason Contrs.,* 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). Abuse of discretion occurs when the trial court's decision rests on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The Estate contends Mr. Heistand's conversion claim was time barred. Whether a claim is time barred is a legal issue, which this court reviews de novo. *Goodman v. Goodman,* 128 Wn.2d 366, 373, 907 P.2d 290 (1995).

RCW 11.40.051(1)(a)(ii) requires a creditor who has notice of a decedent's death to file a claim against his estate within "four months after the date of first publication of the notice." But Mr. Heistand's claim arose well after the publication date. Our Supreme Court's holding in *Brown v. Charlton*, 90 Wn.2d 362, 367, 583 P.2d 1188 (1978) is instructive. There, lot owners sought specific performance of a plat

covenant to furnish domestic water to their lots against the estate of the developer. The estate discontinued water service after the decedent's death. The estate argued the property owners' claim was time barred under RCW 11.40.051(1)(a). The Court held, "Simply put, the claims of respondents did not exist until after the expiration of the 4-month period and therefore could not be barred because not presented to the estate within that period of time." *Brown*, 90 Wn.2d at 367 (citing *In re MacDonald's Estate*, 29 Wash. 422, 69 P. 1111 (1902)).

Here, like in *Brown*, Mr. Heistand's claim did not exist until after Mr. Barnett's death. Therefore, his claim was not time barred by RCW 11.40.051.

The Estate argues about the admissibility of Mr. Heistand's testimony regarding the formation of an oral contract even though the court concluded in its favor, "[Mr. Heistand] has failed to establish by clear, cogent and convincing evidence, the existence of any oral contract to devise real property." CP at 207. Even so, the findings of fact support the court's conclusion of law regarding the lack of an oral contract. *See Scott v. Trans-System, Inc.*, 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003) (court reviews whether findings of fact support conclusions of law).

Regarding the Estate's claim that Mr. Heistand failed to provide evidence of damages for his conversion claim, we review a damages award for an abuse of discretion. *Banuelos v. TSA Wash., Inc.*, 134 Wn. App. 607, 613, 141 P.3d 652 (2006). Mr. Heistand declared 50 to 75 vehicles and approximately 75 tons of scrap iron were

removed. Mr. Heistand opined the vehicle and scrap iron were valued at approximately $50,000. The court awarded him $23,400, within the range of evidence. Thus, the trial court had tenable grounds for its damages award. Therefore, the trial court did not abuse its discretion.

B. Water Interruption Claim

The issue is whether the trial court erred in awarding Mr. Heistand damages for interrupted water service. The Estate contends this issue was not raised by Mr. Heistand; rather, the court raised it sua sponte after trial. The Estate is incorrect.

During litigation, the Estate stopped supplying water to Mr. Heistand's property. Temporary court orders were issued requiring water to be supplied until the matter was settled. Mr. Heistand complained that water was continually interrupted. Mr. Heistand moved to maintain the status quo regarding water to his property. Furthermore, during trial, Mr. Heistand testified as to the water interruption. Given all, the issue was raised pre-trial, during trial, and post-trial. It was not raised sua sponte by the trial court. Moreover, the evidence shows Mr. Heistand had to rent a port-a-potty for $2,100 for his business and purchase bottled water. This evidence provides tenable grounds for the court's award of $2,100 for water interruption.

The Estate argues in its brief that the court erred in ordering it to reimburse Mr. Heistand for rent paid from October 2004 until the court's 2007 ruling. But, the Estate's notice of appeal solely designates the court's order on partial reconsideration for review. Reconsideration was not requested on the rent issue. A notice of appeal must, "designate the decision or part of decision which the party wants reviewed." RAP 5.3(a)(3). Because the Estate did not request reconsideration of the judgment for rent paid and because it only designated the order on partial reconsideration for review, the rent issue is not properly before us.

C. Equitable Defenses

The next issue is whether both Mr. Heistand's conversion and water interruption claims are barred by the doctrines of waiver, laches, and/or equitable estoppel.

Waiver is the intentional relinquishment or abandonment of a known right. *Buchanan v. Switzerland Gen. Ins. Co.,* 76 Wn.2d 100, 108, 455 P.2d 344 (1969). Laches requires proof that: (1) a party knew or should have known of a cause of action against another party, (2) the party's delay in commencing that action was unreasonable, and (3) the other party was damaged by the unreasonable delay. *Kelso Educ. Ass'n v. Kelso Sch. Dist. No. 453*, 48 Wn. App. 743, 750, 740 P.2d 889 (1987). Equitable estoppel requires the party asserting the defense to prove the following elements by clear, cogent, and convincing evidence: (1) a party's admission, statement,

or act which is inconsistent with its later claim; (2) reasonable reliance by another party on that admission, statement, or act; and (3) injury to the relying party if the first party is permitted to repudiate or contradict the earlier statement or action. *Campbell v. Dep't of Soc. & Health Servs.,* 150 Wn.2d 881, 902, 83 P.3d 999 (2004).

Mr. Heistand did not delay in asserting these claims. He contested the removal of the property soon after removal began and immediately complained about water interruption. The court effectively took the removal and water interruption claims under advisement when asking the parties to resolve them; it was proper for the court to address them when resolution failed. These facts do not amount to the relinquishment of a known right, an unreasonable delay or inconsistent action. Accordingly, the Estate's arguments regarding waiver, laches, and equitable estoppel fail.

D. Attorney Fees

The issue is whether the trial court erred by abusing its discretion in denying the Estate's request for attorney fees at trial. The Estate contends it should have been awarded fees because it prevailed at trial and because Mr. Heistand acted in bad faith.

We review the trial court's decision to grant or deny attorney fees for a manifest abuse of discretion. *Lay v. Hass,* 112 Wn. App. 818, 826, 51 P.3d 130 (2002). The relevant statute at the time of the parties' trial states, "the superior court . . . may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party." Former RCW 11.96A.150(1) (2006). This statute gives the court discretionary

authority to award attorney fees. We will not interfere with the decision to allow attorney fees, absent a manifest abuse of that discretion.

Here, both parties received some relief from the trial court. Based on this record, we cannot say the trial court abused its discretion in deciding neither party prevailed sufficiently to justify an award of attorney fees.

E. Attorney Fees and Costs on Appeal

The Estate requests attorney fees on appeal under RCW 11.96A.150, which partly provides this court "may, in its discretion, order costs, including reasonable attorneys' fees." The trial court declined to award fees under this provision as do we.

Mr. Heistand requests fees and costs on appeal, citing RAP 18.9. This rule applies to the award of fees as sanctions for the filing of a frivolous appeal. "An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there [is] no reasonable possibility of reversal." *Fay v. Nw. Airlines, Inc.,* 115 Wn.2d 194, 200-01, 796 P.2d 412 (1990). We resolve all doubts against finding an appeal frivolous after considering the record as a whole. *Delany v. Canning,* 84 Wn. App. 498, 510, 929 P.2d 475 (1997). While we have rejected the Estate's arguments, its appeal is not frivolous. "An appeal that is affirmed merely because the arguments are rejected is not frivolous." *Halvorsen v. Ferguson,* 46 Wn. App. 708, 723, 735 P.2d 675 (1986). While we reject Mr. Heistand's sanctions request, he has prevailed here and is entitled to costs under RAP 14.2.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Kulik, A.C.J.

Korsmo, J.