COURT OF APPEALS
DECISION
DATED AND RELEASED

February 14, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0175

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

MILWAUKEE MUTUAL INSURANCE COMPANY,

Plaintiff-Respondent,

v.

JAMES PFANTZ,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. James Pfantz appeals from a judgment awarding damages to Milwaukee Mutual Insurance Company on its claim that Pfantz converted peat owned by Milwaukee Mutual which was stored on Pfantz's property. On appeal, Pfantz argues that the peat became realty due to the amount of time it remained on his property and that even if the peat was personalty, Milwaukee Mutual did not have a right to regain possession of it. Pfantz also disputes the trial court's calculation of Milwaukee Mutual's damages. We reject Pfantz's contentions and affirm.

The trial court made the following findings of fact after a trial to the court. Milwaukee Mutual owned real estate in Brookfield, Wisconsin, and needed to remove substantial amounts of peat from it to facilitate development. In the spring of 1989, Milwaukee Mutual entered into a verbal agreement with NBS Associates, Ltd. (NBS) in which NBS would arrange to store the peat and pay Milwaukee Mutual as it used the peat from the storage site for its packaging and sale operation. In April or May 1989, Milwaukee Mutual hired a trucking company to transport the excavated peat to three different parcels of real estate in Campbellsport, Wisconsin, one of which belonged to Pfantz.

Before any peat was deposited on his property, Pfantz met with William Stoffel and Frederick Beede, two principals of NBS. Pfantz agreed to lease the gravel pit portion of his property for peat storage. Pfantz and NBS orally agreed that the annual rent would be $1500 effective April 1989. Although the term of the lease was not specified, Pfantz testified that he understood and agreed that the peat would be in his gravel pit for "a couple of years" before it would be used by NBS.[1] Beede and Stoffel did not disclose to Pfantz the origin of the peat or the terms of the agreement between NBS and Milwaukee Mutual.

On or about November 1, 1989, Milwaukee Mutual entered into a written agreement with NBS regarding the storage and purchase of the peat. The agreement provided that NBS could purchase peat from Milwaukee Mutual but that Milwaukee Mutual would retain title and right to the unpurchased peat and could remove it from storage at any time prior to December 31, 1995. NBS agreed to store the peat until that date. Lastly, NBS was required to obtain written leases from the owners of the real estate where it had stored Milwaukee Mutual's peat.

The court found that Pfantz never signed a lease with NBS. The parties also stipulated that there was no evidence that NBS had removed any peat from Pfantz's gravel pit and that Pfantz had received no rental payments at any time for the stored peat. However, Pfantz testified and the court found that he never rescinded the permission he gave to NBS to store peat in his gravel

[1] NBS had peat stored closer to its manufacturing site and intended to deplete that peat before drawing upon the peat stored on Pfantz's property.

pit.[2] Further, Pfantz never complained to NBS about the use of his property or the fact that rent had not been paid. Although Pfantz had a chance meeting in 1991 or 1992 with Beede at a gas station and Beede indicated that NBS was hoping to pay Pfantz rent, there were no other discussions regarding rent due.

Due to financial difficulties, NBS defaulted on various obligations to Milwaukee Mutual, and in August 1993, Milwaukee Mutual hired a trucker to remove the peat from Pfantz's gravel pit. Milwaukee Mutual did not give Pfantz any advance notice of its intention to recover the peat, and Pfantz denied the trucker permission to enter his property to take the peat away. The court found that at the time the trucker arrived, Pfantz had no knowledge of Milwaukee Mutual's claim to the peat. The court found that Pfantz first learned of the peat storage arrangement between Milwaukee Mutual and NBS on September 16, 1993, when he received a copy of the Milwaukee Mutual/NBS agreement.

The trial court addressed Pfantz's contention that Milwaukee Mutual had abandoned the peat. The court found that Pfantz had not made any claim to NBS for the peat and had taken no legal action regarding the nonpayment of rent or the presence of the peat in the gravel pit until Milwaukee Mutual began retrieving it. The court also found that neither NBS nor Milwaukee Mutual acted in a manner which could be construed as a surrender or abandonment of Milwaukee Mutual's legal rights to the peat. The court found that Milwaukee Mutual believed it had a binding lease with Pfantz (even though Pfantz never signed it) and had never received any notice of default or nonpayment of rent from Pfantz. In light of this belief, Milwaukee Mutual had no reason to take any overt action regarding the peat. The trial court found that Pfantz first exercised dominion and control over the peat when he refused Milwaukee Mutual's requests for access to his property to remove the peat.

The trial court also addressed Pfantz's contention that the peat had become part of his real estate. The court found that the peat was deposited in an unused gravel pit on Pfantz's property. Pfantz exercised no management over the peat and he did not plant any seeds or trees in the peat, although trees

[2] Pfantz was aware that peat was being delivered to his property because he observed numerous trucks delivering peat to the gravel pit over approximately fifteen work days.

and shrubbery subsequently rooted there. The court found that the peat could be easily removed from the gravel pit. There was no evidence that the trees, grasses or shrubs growing out of the peat had affixed themselves to anything other than the peat. Finally, Pfantz testified that it would not be difficult to remove the peat from the gravel pit.

The trial court then made the following conclusions of law. First, the peat was personal, not real, property because it was still capable of being removed and was subject to a lease. The court concluded that the growth of trees and shrubbery on the peat did not render it real property. Citing ***Eden Stone Co. v. Oakfield Stone Co.,*** 166 Wis.2d 105, 479 N.W.2d 557 (Ct. App. 1991), the court concluded that removing the peat from its original site for storage elsewhere severed the peat from Milwaukee Mutual's real estate, rendering it personal property. The court also concluded that neither NBS nor Milwaukee Mutual had abandoned the peat and Milwaukee Mutual had legal right and title to the peat in Pfantz's gravel pit until the peat was sold to NBS. Pursuant to its agreement with NBS, Milwaukee Mutual was entitled to immediate possession of the peat at all times, and Pfantz converted the peat when he exercised wrongful and unauthorized dominion and control by refusing Milwaukee Mutual's requests to remove it.

Turning to damages, the trial court cited the general rule that in an action for conversion, the wronged party may recover the value of the property at the time of the conversion. Milwaukee Mutual submitted evidence that the peat had a market value of $5 per cubic yard. This figure was arrived at by reference to the agreement between NBS and Milwaukee Mutual which set the amount NBS had to pay Milwaukee Mutual for any peat removed from Pfantz's property. The court deemed the agreement prima facie evidence of the peat's value as of the date Pfantz converted it, notwithstanding when Pfantz received notice of Milwaukee Mutual's legal claim to the peat. The court found that the arm's-length transaction between Milwaukee Mutual and NBS was a credible basis for establishing the value of the peat in Pfantz's pit.

The parties had earlier stipulated that as of July 21, 1992, 10,920 cubic yards of peat remained in Pfantz's gravel pit. Based upon the quantity of peat in the gravel pit at the $5 per cubic yard price, the court determined that the damages were $54,600. However, because Milwaukee Mutual had agreed

to reduce this amount by $9000 in unpaid rent, the court reduced the damages to $45,600.

On appeal, Pfantz argues that the peat was real property and that its severance from Milwaukee Mutual's real estate prior to deposit on his property did not permanently change its character to personal property. Pfantz's argument is inappropriately divorced from the facts of this case. While we agree that peat "in its original bed" is part of the realty, *see* ***Eden Stone,*** 166 Wis.2d at 118, 479 N.W.2d at 563 (quoted source omitted), the facts of this case are that the peat was removed from its original bed (property owned by Milwaukee Mutual which was being prepared for development) and deposited on Pfantz's property. Having been severed or removed from its "original bed," the peat became personal property and subject to an action in conversion. *See* ***id.*** at 118 n.10, 479 N.W.2d at 563. We conclude that the fact that Pfantz himself did not sever and remove the peat from Milwaukee Mutual's property is of no consequence for the conclusion that the peat is personalty, not realty. We also disagree that the passage of time changed the character of the peat from personalty back to realty. Pfantz cites no legal authority for the proposition that the peat, by virtue of its presence on his property for several years, became realty.

Pfantz attempts to distinguish ***Eden Stone*** by arguing that the peat in this case was not wrongfully severed, whereas the boulders in ***Eden Stone*** were. We reject this distinction. In a footnote in ***Eden Stone,*** the court cited with approval ***Palumbo v. Harry M. Quinn, Inc.,*** 55 N.E.2d 825 (Ill. App. Ct. 1944). The facts of ***Palumbo*** are quite similar to the facts of the instant case. Palumbo received the right to remove topsoil from a former owner. He stripped the topsoil from the property and stored it there. When he attempted to remove the stored topsoil, the subsequent property owner laid claim to it. Because the topsoil had been removed, the court concluded that it was personalty and subject to conversion. *See* ***Palumbo***, 55 N.E.2d at 828. The ***Eden Stone*** court observed that "the same is true in [***Eden Stone***]: the disputed holey boulders have been quarried or severed; thus, they are legally capable of being converted." ***Eden Stone,*** 166 Wis.2d at 118 n.10, 479 N.W.2d at 563.

Pfantz argues that the peat was abandoned by NBS. In support of this, he points to trial testimony of Beede in which Beede retracts an earlier deposition statement that the peat was abandoned. Pfantz's citation to the

record on appeal does not support his contention that the property was abandoned. At trial, Beede testified that the peat was not abandoned, although NBS did not have cause to use any of it. Pfantz's contention that NBS's inaction with regard to the peat constituted an abandonment is contrary to the trial court's finding of fact, which is not clearly erroneous. *See* § 805.17(2), STATS.[3]

Pfantz next argues that if the peat was personal property, Milwaukee Mutual did not have the right to immediate possession. The trial court concluded otherwise, and we agree. "Conversion is the wrongful or unauthorized exercise of dominion or control over a chattel." ***Farm Credit Bank of St. Paul v. F&A Dairy,*** 165 Wis.2d 360, 371, 477 N.W.2d 357, 361 (Ct. App. 1991). The party alleging conversion must prove that it was in possession of or entitled to immediate possession of the chattel that was converted. ***Id.*** Pfantz argues that it is not clear when he should have realized that Milwaukee Mutual was the original owner of the peat. However, the trial court found that Pfantz received notice from Milwaukee Mutual's counsel as of September 16, 1993, that Milwaukee Mutual claimed the peat. This finding is not clearly erroneous. *See* § 805.17(2), STATS.

Pfantz challenges Milwaukee Mutual's right to immediate possession by claiming that under § 704.05(5), STATS., he had a landlord's lien on the personal property left by a tenant. However, as the trial court found, Pfantz did not take any steps to enforce his claimed lien on the peat.[4] Moreover, the statute applies when "a tenant removes from the premises and leaves personal property ...." Section 704.05(5)(a). Here, the peat was not left on the property by a removed tenant. Rather, Milwaukee Mutual had arranged with NBS to store

---

[3] In order for there to be an abandonment of property, there must be a relinquishment coupled with an intent to part with it permanently. *See* ***Burkman v. City of New Lisbon,*** 246 Wis. 547, 555-56, 18 N.W.2d 4, 8 (1945) (quoted source omitted).

[4] Pfantz argues that complying with the § 704.05(5), STATS., notice requirements for storage of a tenant's property would have been fruitless because NBS had ceased operating. Therefore, Pfantz argues that there was no tenant to whom notice could be sent. This is not the standard for giving notice under § 704.05(5). While that section of the statute grants a landlord a lien on the personalty of a tenant "for the actual and reasonable cost of removal and storage or, if stored by the landlord, for the actual and reasonable value of storage," § 704.05(5)(a)1, a landlord must give notice of the property's storage to the tenant's "last-known address ...." ***Id.*** Pfantz could have given the required notice.

the peat. Although the alleged written lease agreement between Pfantz and NBS was invalid, Milwaukee Mutual had a right to rely upon that agreement in attempting to demonstrate that it retained legal title to the peat stored on Pfantz's property.

Finally, Pfantz disputes the trial court's calculation of damages using the $5 per cubic yard figure. The trial court awarded damages based upon the contract price of $5 per cubic yard which NBS agreed to pay Milwaukee Mutual for any peat it used. The general rule is that the wronged party in an action for conversion may recover as damages "the value of the property at the time of the conversion plus interest to the date of trial." ***Production Credit Ass'n of Madison v. Nowatzski,*** 90 Wis.2d 344, 354, 280 N.W.2d 118, 123 (1979). The court found that the $5 per cubic yard provision of the Milwaukee/NBS Mutual agreement was evidence of the value of the property as of the date Pfantz converted it (September 1993) because that value governed through December 31, 1995, the date by which Milwaukee Mutual could remove the peat from storage. The court further found that the Milwaukee/NBS Mutual transaction occurred at arm's length and that the transaction was a credible basis for valuing the peat.

An arm's-length transaction can be used to establish a value for property. *See* ***Steenberg v. Town of Oakfield,*** 167 Wis.2d 566, 573, 482 N.W.2d 326, 328 (1992) (arm's-length transaction can be proof of value of property.) Pfantz does not point to other evidence of the peat's value, and we cannot conclude that the trial court's use of the $5 per cubic yard value was either clearly erroneous or an application of an inappropriate legal standard.

Pfantz argues that under ***Traeger v. Sperberg,*** 256 Wis. 330, 41 N.W.2d 214 (1950), damages should not have been awarded because he did not interfere with Milwaukee Mutual's ability to sell the peat to NBS because NBS had gone out of business. We do not read ***Traeger*** so broadly. Rather, ***Traeger*** states the general rule that damages in conversion are the value of the property at the time the conversion occurs. *See* ***id.*** at 333, 41 N.W.2d at 216. The ***Traeger*** court went on to state that "it is universally recognized that the purpose of this rule is to compensate the plaintiff for the loss sustained because his property was taken." ***Id.*** The court then explained the measure of damages when a party's contract to sell the converted chattel is interfered with as "the amount he [or she] would have received under the agreement." ***Id.*** The supreme court

upheld the trial court's use of the contract price as the measure of damages. ***Id.*** at 333-34, 41 N.W.2d at 216.

We construe this statement as a recognition of one method of calculating damages in conversion. The statement actually supports the trial court's determination in this case that the arm's-length transaction between Milwaukee Mutual and NBS was evidence of the value of the peat.[5]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[5] To the extent this court has not addressed a specific argument made on appeal, the argument can be deemed rejected. *See* ***State v. Waste Management of Wis., Inc.,*** 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1977), *cert. denied*, 439 U.S. 865 (1978) (appellate court is not required to address each and every argument made on appeal).