11-18-2016

Green River Ranches v. Silva Land Co. Respondent's Brief 2 Dckt. 43547

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 43547-2015 and 43548-2015

GREEN RIVER RANCHES, LLC
Plaintiff,
v.
SILVA LAND COMPANY, LLC, et al
Defendant.

JACK MCCALL,
Plaintiff-Respondent,
v.
SILVA DAIRY, LLC, an Idaho limited liability company,
Defendant-Appellant,
and
MAX SILVA, an individual
Defendant.

RESPONDENT'S BRIEF IN RESPONSE TO SILVA DAIRY, LLC

Appeal from the District Court of the Fifth Judicial District in and for Twin Falls County
Consolidated Case Nos. CV-2013-3154 / CV-2013-4728 / CV-2013-4732
The Honorable Randy J. Stoker, District Judge

Attorneys for Jack McCall, an individual and doing business as JT Livestock

Bradley J. Dixon, ISB No. 6167
Kersti H. Kennedy, ISB No. 9064
GIVENS PURSLEY LLP
601 W. Bannock Street
PO Box 2720
Boise, ID 83701-2720
Telephone (208) 388-1200
Facsimile (208) 388-1300
bradleydixon@givenspursley.com
kerstikennedy@givenspursley.com

Attorneys for Silva Land Company, et al, and Max Silva

Nathan M. Olsen, ISB No. 7373
PETERSEN MOSS HALL & OLSEN
485 E Street
Idaho Falls, ID 83402
Telephone: (208) 523-4650
Facsimile: (208) 524-3391
Email: nolsen@pmholaw.com

Attorneys for Silva Dairy, LLC

Steven L. Taggart, ISB No. 8551
MAYNES TAGGART PLLC
PO Box 3005
Idaho Falls, Idaho 83403
Telephone: (208) 552-6442
Facsimile: (208) 524-6095
Email: staggart101@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules and Regulations

Other Authority

I. STATEMENT OF THE CASE

A. Nature of the Case

This dispute is the result of a breakdown in the business relationship between Mr. McCall and Silva Dairy, LLC. Mr. McCall is a businessman, rancher, and lender in the Twin Falls area. Mr. McCall owns a livestock business, and used Silva Dairy's cattle herd management services for a number of years. Silva Dairy likewise did business with Mr. McCall, and incurred several obligations to him related to his status as a lender and owner of Twin Falls real estate.

In 2010 and for several years following, Silva Dairy experienced financial difficulties that resulted in a Chapter 12 "Family Farm" bankruptcy. As a result of these issues and Silva Dairy's inability to meet a number of its financial obligations to Mr. McCall, Mr. McCall began extracting himself from the parties' business relationship. This resulted in protracted litigation in the district court among Mr. McCall, Mr. Max Silva, and their various business entities.

The upshot of this litigation is this appeal and the consolidated appeal between Mr. McCall and Mr. Silva as individuals. Here, Silva Dairy appeals the district court's factual findings that its claim against Mr. McCall for herd management services is more than offset by amounts that Silva Dairy owes Mr. McCall for feed it converted, pasture rent, and other obligations.

The district court's factual findings regarding the parties' respective obligations are well supported with substantial and competent evidence, are not clearly erroneous, and should be upheld by this Court on appeal.

B. Facts

In April of 2010, Mr. McCall placed his herd of dairy cattle under Silva Dairy's management, and Silva Dairy cared for the herd until August 2012 when Mr. McCall removed

them from the dairy's care. (R. Vol. I, p. 72.) The parties did not have a written agreement for the cost of management, and Mr. McCall had not compensated Silva Dairy for its management of his herd at the time he removed the cattle in August 2012. *Id.*

Mr. McCall contended, however, that Silva Dairy's claim for a management fee was offset by amounts that Silva Dairy owed him. Specifically, Silva Dairy had converted the cattle feed that he provided the dairy for his cattle, in an amount that exceeded what he owed the dairy. *Id.* Silva Dairy had converted it by feeding it to its own herd and ultimately reducing the amount that Mr. McCall had deposited with Silva Dairy by more than what Mr. McCall's cattle could consume. *See id.* Further, Silva Dairy also owed Mr. McCall for the pasturing of some of Silva Dairy's cattle on his real estate, as well as for a $10,000.00 loan he provided so that the dairy could hire a bankruptcy attorney, and another $55,000.00 in various expenses that he had covered for Silva Dairy. (*Id.*, p. 73.)

C. Procedural History

Mr. McCall refers the Court to Silva Dairy's description of the proceedings in its opening brief. (App. Br. Silva Dairy, pp. 3-6.)

For the Court's ease of reference, the issue of Mr. McCall's conversion of feed claim and other offset claims were tried to the Court from June 24 to 26, 2015. (Tr. Vol. II, *passim.*) Because Silva Dairy was a bankrupt debtor-in-possession during the pendency of the case, Mr. McCall could only seek an offset against the amounts he owed the dairy for herd management. The district court had held that McCall owed Silva Dairy $204,977.65 for herd management, so Mr. McCall would be relieved from paying Silva Dairy anything if his offset claims exceeded this amount. (*See* R. Vol. I, p. 86.) The district court found that Mr. McCall's claims against

Silva Dairy exceeded this amount, and therefore entered a judgment dismissing Silva Dairy's claims against McCall on July 16, 2015. (*Id.*, p. 91.)

II. ADDITIONAL ISSUE PRESENTED ON APPEAL

Attorney Fees on Appeal: Mr. McCall seeks costs and attorney fees on appeal as authorized by I.A.R. 40 and 41. Mr. McCall bases his claim for fees on I.C. § 12-120(3) as the prevailing party in a commercial transaction. This request is made to the extent allowed by law to include the bankruptcy code.

III. STANDARD OF REVIEW

District Court's Factual Findings: The standard of review over the factual findings and legal conclusions of a trial court was restated by this Court in *Electrical Wholesale Supply Co., Inc. v. Nelson*:

> Review of a district court's findings of fact is limited to ascertaining whether the evidence supports the findings of fact and whether the findings of fact support the conclusions of law. *Roell v. Boise City*, 134 Idaho 214, 999 P.2d 251 (2000) (citing *Conley v. Whittlesey*, 133 Idaho 265, 895 P.2d 1127 (1999). ***A district court's findings of fact in a court-tried case are construed liberally on the appeal in favor of the judgment entered. Id.*** It is the province of the trier of fact to weigh conflicting evidence and testimony and to judge the credibility of the witnesses. *Id.* If the findings of fact are based on substantial evidence, even if the evidence is conflicting, they will not be overturned on appeal.

136 Idaho 814, 820, 41 P.3d 242, 248 (2002)(emphasis added). Further, this Court stated:

> Determining and weighing the credibility of the witnesses and their testimony offered at trial is best left to the district court judge. *Worzala v. Worzala*, 128 Idaho 408, 413, 913 P.2d 1178, 1183 (1996) ("When reviewing factual determinations on appeal, this Court will defer to the magistrate's weighing of evidence and determination of witness credibility") (citing *Rohr v Rohr*, 118 Idaho 689, 691, 800 P.2d 85, 87 (1990) ("[d]eference must be given to the special opportunity of the trial court to assess and weigh the credibility of the witnesses who appear before it."). This Court generally does not second-guess the district court's findings unless they are unsupported by the evidence in the record.

Id. at 822, 41 P.3d at 250.

"A trial court's findings of fact which are based upon substantial and competent, although conflicting, evidence will not be disturbed on appeal; which is to say the findings of fact will not be set aside unless clearly erroneous." *Reed v. Reed*, 137 Idaho 53, 56, 44 P.3d 1108, 1111 (2002) (citing *Dechambeau v. Estate of Smith*, 132 Idaho 568, 571, 976 P.2d 922, 925 (1999)). A finding of fact is "clearly erroneous" only if it is not based upon substantial and competent evidence. *Kraly v. Kraly*, 147 Idaho 299, 302, 208 P.3d 281, 284 (2009). Competent evidence must be admissible, relevant and material. *Pacificorp v. Idaho State Tax Commission,* 153 Idaho 759, 768, 291 P.3d 442, 451 (2012). "Competency is an evidentiary perquisite to admission. If evidence is incompetent, it is the opponent's obligation to object to that evidence offered for admission. Idaho R. Evid. 103." *Id.* "Evidence is substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven." *Id.*, citation and internal quotations omitted.

District Court's Legal Conclusions: Legal conclusions are reviewed *de novo* by this Court. *E.g.*, *Syringa Networks, LLC v. Idaho Dep't of Admin.*, 159 Idaho 813, 367 P.3d 208, 216 (2016).

Attorney Fees: The trial court has discretion to award attorney fees and costs; that award is subject to review for an abuse of discretion. *Magleby v. Garn*, 154 Idaho 194, 196, 296 P.3d 400, 402 (2013). When this Court considers whether a trial court abused its discretion, the standard is whether the court perceived the issue as discretionary, acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available, and reached its decision by an exercise of reason. *Id.* at 196–97, 296 P.3d at 402–03.

IV. ARGUMENT

A. The District Court Did Not Err in Finding that Silva Dairy Had Converted Mr. McCall's Feed in the Amount of $413,953.00.

1. Mr. McCall's claim was properly characterized as one for conversion.

Under Idaho law, "conversion is defined as a distinct act of dominion wrongfully asserted over another's personal property in denial or inconsistent with rights therein." *Peasley Transfer & Storage Co. v. Smith,* 132 Idaho 732, 743, 979 P.2d 605, 616 (1999). In 1933, the Court adopted the following definition of conversion:

> Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial or inconsistent with his rights therein, such as a tortious taking of another's chattels, or any wrongful exercise or assumption of authority, personally or by procurement, over another's goods, depriving him of the possession, permanently or for an indefinite time. The act must be essentially tortious, but it is not essential to conversion sufficient to support the action of trover that the defendant should have complete manucaption of the property, or that he apply the property to his own use, if he has exercised dominion over it, in exclusion of, in defiance of, or inconsistent with the owner's right.

Carver v. Ketchum, 53 Idaho 595, 597, 26 P.2d 139, 141 (1933) (citing 26 R.C.L. 1098, § 3). In short, "conversion is a dealing by a person with chattels not belonging to him, in a manner inconsistent with the rights of the owner." *Id.* More specifically, a bailee converts a bailor's property when it exercises wrongful dominion over the property inconsistent with its role as bailee. *See Torix v. Allred*, 100 Idaho 905, 910, 606 P.2d 1334, 1339 (1980).

When a bailee commingles fungible property such as grain, a conversion occurs when the bailee uses so much of the commingled property that the bailor's share is totally or partially depleted. This concept is described in the Restatement Second of Torts in reference to grain elevators:

> In many grain-producing states a long standing custom authorizes proprietors of grain elevators to mingle grain of various owners. Under such circumstances,

> unless a depositor forbids the commingling, the warehouseman is not liable for a conversion of grain by reason of the mere fact that it is mixed with grain of similar kind and quality. The warehouseman, however, must at all times retain sufficient grain to meet the demands of all depositors, and if he disposes of so much grain as to reduce the amount in his possession below the total quantity deposited, he becomes liable to each depositor under the rule stated in § 234 for the conversion of such depositor's proportional share of the deficiency.

Restatement (Second) of Torts § 226 (1965), cmt. e. The district court's characterization of this sort of conversion claim as a "failure to return borrowed property" is consistent with the Restatement's approach to fungible and commingled tangible goods. (R. Vol. I, p. 83.)

Mr. McCall does not dispute that he provided feed to Silva Dairy for the purpose of feeding his cattle that were in its care. (*See id.*, p. 72.) He also knew that Silva Dairy was mixing Mr. McCall's feed with its feed for nutritional purposes. *Id.* Mr. McCall, however, never approved Silva Dairy to deplete his feed inventory below the total amount of the feed he had deposited, minus the amount of feed that would be consumed by his cattle.[1]

At trial, Mr. McCall testified as follows:

> I knew Silvas were using my feed. There's no way you can have two or three thousand ton of alfalfa that isn't there. I mean, I'm not very smart, but I can drive by, that's what should have been there in my inventory. Was I aware they were using some of my feed, yes I was aware of that. I just didn't know how much. And then I wasn't aware of the fact they were going to tell me to go to hell, they weren't going to pay a dime on it.

(Tr. Vol. II (June 2015 Trial), p. 370, LL 16-19.)

Silva Dairy refused to restore Mr. McCall's inventory with Silva Dairy feed or pay Mr. McCall for the missing feed that was over and above what Mr. McCall's herd consumed. *See id.*

[1] This factual scenario is fundamentally different than the fact pattern in *Torix*, *supra*, where the bailee acted consistently with the bailor's wishes and thus no conversion was found. This is at odds with Silva Dairy's characterization of the case. (*See* App. Br. Silva Dairy, p. 15.).

Thus, as a bailee, Silva Dairy exercised wrongful dominion over Mr. McCall's feed when it allowed his share to drop below his deposits minus the feed consumed by his cattle. Therefore, the district court did not err in holding that the tort of conversion applied to Mr. McCall's claim.

2. The District Court's finding that Silva Dairy had converted $413,953.00 worth of feed is supported by substantial and competent evidence.

The district court heard testimony in the June 2015 court trial on the issue of "[h]as Silva Dairy converted some of McCall's dairy feed and if so, in what amount?" (R. Vol. I, p. 72.) The district court's finding that Silva Dairy had converted over $400,000.00 worth of feed was supported by significant amounts of testimony by Mr. Onaindia as expert witness and Mr. McCall, as well as documentary evidence.

Mr. Onaindia is a CFO of a dairy and consultant, and has significant experience dealing with the financial aspects of the dairy industry. (Tr. Vol. II, p. 264, LL 1-19.). In acting as Mr. McCall's expert witness, Mr. Onaindia testified that he had reviewed Mr. McCall's ledger, and profit and loss statements, and determined how much Mr. McCall had purchased in feed for his cattle. (*Id.*, p. 279, LL 24-26, p. 280, LL 1-3.) He found that Mr. McCall spent a total of $2.4 to $2.5 million on feed in the relevant time period. *See id.* Mr. Onaindia then determined how much the cattle should have eaten based upon his experience in the dairy industry and an examination of nutritionist recommendations. (*Id.*, pp. 273-76.) He applied the market value to the "should have eaten" number and subtracted that from the amount of feed that Mr. McCall had purchased for his cattle. Based on this, he concluded that it should have cost about $1.6 million to feed the cattle during this period, leaving a gap of $800,000.00 to $900,000.00 worth of feed. (*Id.*, p. 275, LL 21-23.) The missing feed would be the amount that Silva Dairy had misappropriated. Mr. Onaindia also reviewed the Silva's financial documents and found that

the reported cost of feeding its cattle was understated by approximately the same number. (*Id.*, p. 283, LL 9-19, p. 285, LL 5-14.)

Overall, the district court found Mr. Onaindia's testimony to be "**extremely credible**," and did not find his testimony contradicted by Silva Dairy's attempt to impeach him as one of Mr. McCall's company's borrowers. (R. Vol. I, p. 85 (emphasis in original)). Ultimately, the district court *conservatively* calculated the total damages as follows: "After deducting the ending inventory--$386,047—and using his lower number--$800,000—the Court finds that Silva Dairy converted **at least** $413,953 of McCall's feed." *Id.* (emphasis in original).

The district court gave Mr. Onainadia's testimony as to amount of damages more weight than Mr. McCall's testimony, although the testimony, in terms of method of calculating damages, was largely consistent. (*Id.*, p. 84.) Mr. McCall had concluded that Silva Dairy had converted $881,864.00 worth of feed, but the Court questioned Mr. McCall's methodology, due to his reliance on erroneous feed projections and inflated commodity prices. *Id.* As a result, the court discounted Mr. McCall's number by 50% to $440,000, which is quite close to the number that the court derived from Mr. Onaindia's testimony. *Id.*

The district court is in the best position to hear the testimony of witnesses, make credibility determinations, and weigh the evidence. As long as the court's determination is based on substantial and competent evidence, the decision is not clearly erroneous. Here, the court found highly credible the testimony of Mr. McCall's expert witness, an experienced dairyman, that Silva Dairy had converted over $400,000.00 of Mr. McCall's feed. His testimony was consistent with Mr. McCall's when Mr. McCall's incorrect assumptions were corrected. This is substantial and competent evidence, and the finding is not clearly erroneous.

Silva Dairy highlights a number of perceived inaccuracies in Mr. McCall's data regarding how much he spent on feed. It is important to remember, however, that Mr. McCall need only prove that Silva Dairy converted $112,522.88 to offset Silva Dairy's claim against him for herd management, when the other offsets are taken into account. (*See* R. Vol. I, p. 86.) At most, Mr. McCall need only clear $204,977.65—the amount of the herd management claim with no other offset. *Id.* Further, Mr. Onaindia spot checked many of the invoices (Tr. Vol, II, p. 280, LL 1-3), suggesting that the data is accurate. The district court heard conflicting evidence on accuracy of the data, and was in the best position to determine the weight of that evidence. Further, the court found that, to the extent feed was purchased for other cattle, it would be a de minimis amount. It is the district court's job to assess the weight of conflicting evidence and to come to a conclusion as to a disputed fact. Conflicting evidence is not a reason to overturn a trial court's findings on appeal. Here, the district court's finding is supported by substantial and competent evidence, is not clearly erroneous, and should be upheld on appeal.

B. The District Court did not err in finding that Mr. McCall was entitled to offset $40,067.87 from the herd management fee for feed purchased for Silva Dairy.

If this Court affirms the district court on the conversion claim, whether or not Mr. McCall prevails on this claim would be irrelevant because the total offset would still be more than Silva Dairy's claim against Mr. McCall. In any case, Mr. McCall's claim for feed purchased for Silva Dairy's use was supported by substantial and competent evidence. Silva Dairy does not dispute that Mr. McCall paid the feed bills in the amount of $40,067.87. (App. Br., p. 9.)

Silva Dairy contends, however, that Mr. McCall admitted that Silva Dairy paid for feed for McCall's herd in 2010, and thus the dairy is entitled to an offset. (*Id.*, p. 10.) Silva Dairy's characterization of the record is inaccurate. The evidence cited by Silva Dairy references

elements of feed that were commingled with Mr. McCall's feed, as discussed above. The line of questioning with Mr. McCall regarding his Exhibit 132 was related to the chart he had prepared, which showed that he had provided more than his fair share in feed. (*See* Tr. Vol. II, p. 339, LL 16, p. 340, LL 1-13.) While the chart showed that the McCall's herd consumed elements of nutrition not provided by Mr. McCall, Mr. McCall's feed provisions far exceeded the amounts provided by other sources. While Silva Dairy claims McCall "admitted" that he owed $146,000.00 total for this feed, in reality, he explained that the feed he provided more than offset what Silva Dairy had commingled into the feed it was providing the McCall cattle:

> Q: . . . . So does JT Livestock owe to Silva Dairy $146,000 for feed they did not pay for?
>
> A: In those categories, but you can go back and take the other feed like the alfalfa, they're the positive numbers –

(Tr. Vol. II, p 417, LL 7-11.)

The exchange cited by Silva Dairy is not evidence that it bought some of McCall's feed, entitling it to an offset of this claim. Rather, it is evidence that some feed from other sources was commingled with Mr. McCall's and fed to his herd. In any event, this evidence was received by the district court, and the district court is in the best position to address the meaning and weight of conflicting evidence. The district court's finding that McCall is entitled to an offset for the feed he purchased for Silva Dairy is not clearly erroneous.

C. The District Court did not err in holding Silva Dairy liable for the pasture rent claim.

The issue of whether Mr. Silva individually or Silva Dairy is liable for the pasture rent was tried to the court in the June 2015 trial. Silva Dairy did not object to testimony related to this issue as an un-pleaded issue under IRCP 15(a). (*See, e.g.*, Testimony of Ray Broner, Tr. Vol. II, pp. 585-602.) After trial, the district court reversed its prior finding that this claim was against

Mr. Silva individually, and found it was against the dairy, in large part because the dairy's brand was on the cattle. (R. Vol. I, p. 78.) The court had misunderstood that the brand MS was for Max Silva, individually, when in fact it was for Silva Dairy. *Id.*

Under IRCP 15(b), issues may be tried by implied consent to the court:

> (2) *For Issues Tried by Consent.* When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move, at any time, even after judgment, to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

Id. Silva Dairy did not indicate its objection to this evidence, and thus it was tried by implied consent to the court. And, as the rule says, a failure to amend does not affect the trial's result. Therefore, the lack of a pleading asserting this claim against Silva Dairy does not mandate reversal of the district court's finding.

D. The District Court Did Not Abuse Its Discretion in Declining to Award Silva Dairy Its Attorney Fees.

Mr. McCall understands Silva Dairy's argument on attorney fees to be that if this Court reverses the district court and the dairy's management fee claim stands, it would be entitled to its fees. This issue is of course premature. To the extent the dairy is arguing that the district court should have awarded it its fees prior to the appeal, Mr. McCall asserts that the district court did not abuse its discretion in declining to award Silva Dairy its fees. (*See* R. Vol. I, pp. 87-89.)

E. Mr. McCall Should Be Awarded its Fees and Costs on Appeal.

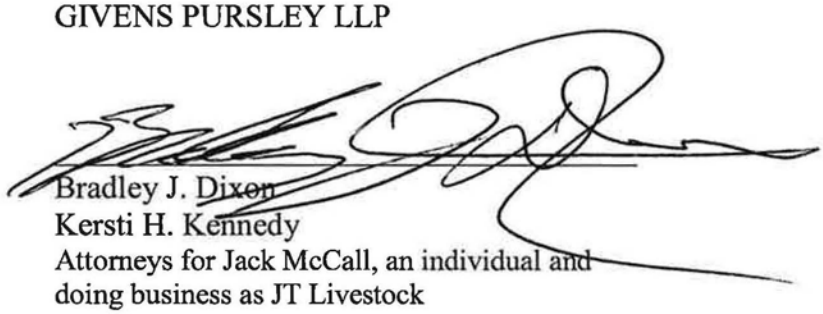
Mr. McCall requests and is entitled to attorney fees and costs on appeal pursuant to I.A.R. 40 and 41 and under Idaho Code § 12-120(3). This request is made to the extent allowed by law to include the bankruptcy code.

V. CONCLUSION

For the foregoing reasons, Mr. McCall respectfully requests this Court affirm the judgment of the district court and award him his attorney fees and costs in defending this appeal.

DATED: November 15 2016.

GIVENS PURSLEY LLP



Bradley J. Dixon
Kersti H. Kennedy
Attorneys for Jack McCall, an individual and doing business as JT Livestock

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of November, 2016, I served a true and correct copy of the foregoing **RESPONDENT'S BRIEF IN RESPONSE TO SILVA DAIRY, LLC** in the above-entitled matter as follows:

Nathan M. Olsen PETERSEN MOSS HALL & OLSEN 485 E Street Idaho Falls, ID 83402 Facsimile: (208) 524-3391 Email: nolsen@pmholaw.com *Attorneys for Silva Land Company, et al, and Max Silva*	[X] Via U.S. Mail [ ] Via Facsimile [ ] Via Overnight Mail [ ] Via Hand Delivery [X] Via email
Steven L. Taggart MAYNES TAGGART PLLC PO Box 3005 Idaho Falls, Idaho 83403 Facsimile: (208) 524-6095 Email: staggart101@gmail.com *Attorneys for Silva Dairy, LLC*	[X] Via U.S. Mail [ ] Via Facsimile [ ] Via Overnight Mail [ ] Via Hand Delivery [X] Via email

By: _____
Bradley J. Dixon
Kersti H. Kennedy