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### Summary of Winchell v. Schiff, 124 Nev. Adv. Op. No. 80

Brandon Johansson  
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***Winchell v. Schiff*, 124 Nev. Adv. Op. No. 80 (Oct. 9, 2008)<sup>1</sup>**

**TORTS – CONVERSION**

**Summary**

Appeal and cross-appeal from a district court judgment entered on a jury verdict in a conversion/lease action.

**Disposition/Outcome**

Affirmed in part, reversed in part, and remanded with instructions. There was substantial evidence to support the jury's verdict for conversion, but the award should have been offset by awards received under the insurance policy. Actual losses resulting from a conversion claim not only include the lost inventory, but the value of a lost business. Winchell did not demonstrate enough facts to support claims for breach of the covenant of quiet enjoyment and trespass and did not show that punitive damages were appropriate. Schiff did not prove that additur was warranted on her breach of contract damages award.

**Factual and Procedural History**

Winchell, d/b/a/ CGL Seafood, Inc., owned and operated a wholesale fresh fish business in Las Vegas. Winchell leased a cold storage facility from Renate Schiff, the Trustee of Schiff Properties. The lease was a two-year agreement that would expire in December 2000. Winchell was required to keep insurance on the property and indemnify Schiff. The agreement also provided that Schiff and her agents could enter the storage space at any reasonable time for inspection and maintenance purposes.

On April 21, 2000, Schiff's property manager, Beryl Duncan, became concerned that Winchell may have abandoned the premises. Duncan had previous experience with tenants shutting off the power and vacating the premises in cold storage units. Duncan attempted to contact Winchell by telephone, but to no avail. Duncan determined to inspect the unit and hired a locksmith to drill out and replace the locks. As the locksmith opened the door, the alarm went off. Duncan instructed the locksmith to cut the wires to the alarm, but the locksmith only cut the audible portion and the alarm system was still able to record. When in the unit, Duncan found the electricity to be on and that the unit was full of inventory. The locksmith replaced the lock and gave Duncan a new set of keys.

Winchell returned to Las Vegas on August 23, 2000, and upon returning to the unit, noticed the locks had been changed. Winchell called Schiff and the police. Upon entering the unit, Winchell noticed between \$30,000 and \$45,000 worth of inventory had been removed. A review of the alarm showed that an unaccounted entry had been made on the morning of August 23, 2000. Winchell filed an insurance claim and received \$33,084.

Winchell recounted that this incident led to the demise of his business in October 2000, and Winchell stopped paying rent two months prior to the lease expiration and vacated the building. Winchell filed suit against Schiff for conversion, breach of quiet enjoyment, breach of

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<sup>1</sup> By Brandon Johansson.

contract, and trespass, and sought punitive damages. Schiff counter claimed for breach of contract based on the early determination of the lease.

The district court granted Winchell's motion in limine to exclude collateral sources of payments such as the insurance proceeds. At the end of Winchell's case, Schiff moved in open court for judgment as a matter of law on each of Winchell's actions. The district court granted in part and dismissed the claims for breach of quiet enjoyment, breach of contract<sup>2</sup>, trespass, and the request for punitive damages. Only Winchell's conversion and Schiff's breach of contract claims remained. On the conversion claim, Winchell argued that he was entitled to full compensation for actual damages, including loss of inventory and his business, and the jury awarded him \$210,000. The jury awarded Schiff \$2,880 in damages for breach of contract.

Following the verdict, the district court denied Schiff's motion to offset Winchell's damages by the amount Winchell received from the insurance policy. Schiff also motioned for a new trial, but the court entered judgment on the jury's verdict.

## **Discussion**

### **Conversion**

On appeal, Schiff argues that there was not substantial evidence to support the jury's award. "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion."<sup>3</sup> To show conversion, Winchell would have to show that Schiff exerted an act of dominion over his personal property, in derogation of his rights in the property. The evidence at trial showed that Duncan exerted dominion over Winchell's property by having the locksmith replace the locks and disarm the alarm system. Schiff's agents were the only ones to have access to the building after the locksmith changed the locks and it was during this time that the inventory was removed. From this, the jury could have reasonably inferred that Schiff wrongfully exerted dominion over Winchell's unit and inventory.

Schiff argues in the alternative, that the jury's award should only reflect Winchell's actual losses of \$30,000-\$45,000. At trial, Winchell presented evidence through documentary evidence that the business was valued at around \$500,000. The value of the property at the time of conversion is an appropriate measure of damages when the defendant does not return the property.<sup>4</sup> When there is "a serious interference to a party's rights in his property . . . the injured party should receive full compensation for his actual losses."<sup>5</sup> In this case, the conversion led to a total loss of Winchell's business, and Winchell is entitled to the value of the lost business and inventory.

### **Collateral Source**

Schiff argues the district court abused its discretion by not offsetting the damages award by the amount Winchell received from his insurance policy. The collateral source rule prevents the jury from limiting the plaintiff's award on the ground that he received compensation from a

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<sup>2</sup> Winchell does not contest the breach of contract claim on appeal.

<sup>3</sup> First Interstate Bank v. Jafbros Auto Body, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990).

<sup>4</sup> Bader v. Cerri, 96 Nev. 352, 356, 609 P.2d 314, 317 (1980) (overruled on other grounds).

<sup>5</sup> *Id.*

source other than the tortfeasor.<sup>6</sup> The Court concluded that it was not convinced that the insurer was a wholly independent tortfeasor. Winchell was obligated to make the insurance policy proceeds available to Schiff for any losses resulting from his use of the property, and the jury's award should have been offset by the insurance policy proceeds.

### Judgment as a Matter of Law

Winchell argues that the district court wrongly entered a judgment as a matter of law regarding his claims for breach of quiet enjoyment and trespass, and denying his request for punitive damages. The district court may grant a motion for judgment as a matter of law if the nonmoving party "has failed to prove a sufficient issue for the jury."<sup>7</sup> The Court reviewed these appeals de novo.

### Breach of Quiet Enjoyment

In an action for the breach of quiet enjoyment, the tenant must only show constructive eviction, not actual eviction. If actual eviction was required, it would require the tenant to suffer by requiring him to wait until the landlord evicted him before asserting a breach of the covenant. Under the lease in this case, Schiff and her representatives were permitted to enter the storage unit at any reasonable time for inspection. Winchell could not show that Schiff constructively evicted him because he waived his right to refuse to allow Schiff to enter. The district court did not err in granting the motion for judgment as a matter of law regarding the breach of the covenant of quiet enjoyment.

### Trespass

For the same reasons as stated above, Winchell cannot prevail on a claim for trespass because he waived his right to not allow Schiff to enter. An action for trespass can be maintained against a landlord absent a showing that the landlord has reserved a right of entry.<sup>8</sup> There was no evidence offered to show that Schiff entered the building for any other purpose other than to inspect the premises. Therefore, the district court did not err in granting the motion regarding this issue.

### Punitive Damages

Winchell argues Schiff's conduct was oppressive. In Nevada, punitive damages may be awarded when the plaintiff proves fraud, malice, or oppression by clear and convincing evidence.<sup>9</sup> In this case, Schiff's action did not amount to a conscious disregard of Winchell's rights. The district court did not abuse its discretion in denying punitive damages.

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<sup>6</sup> Bass-Davis v. Davis, 122 Nev. 442, 454, 134 P.3d 103, 110 (2006) (recognizing that collateral source evidence is generally prohibited because it prejudices the jury and greatly increases the likelihood that the jury will reduce an award of damages because it knows the plaintiff is already receiving compensation).

<sup>7</sup> NEV. R. CIV. P. 50(a)(1).

<sup>8</sup> See 52A C.J.S. *Landlord and Tenant* § 721 (2003); 49 AM. JUR. 2d *Landlord and Tenant* § 437 (2006).

<sup>9</sup> See NEV. REV. STAT. 42.005. "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person. NRS 42.001(4). "Conscious disregard" means the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences. *Id.* at 42.001(1).

## Additur

Last, Schiff moved for additur regarding the jury's award of damages on her breach of contract claim because Schiff argues the \$2,880 award for breach of contract was inadequate and warrants additur or a new trial on the issue of damages. The district court refused to grant the motion. Schiff argues the award was clearly inadequate because the damages amount did not reflect other costs such as cleaning and re-renting the unit.<sup>10</sup> The Court concluded that it was proper for the jury to reject the other damages amounts. Winchell provided evidence that Schiff waited several months to clean and re-rent the property and hired an independent maintenance staff for the sole purpose of billing Winchell.

## Concurring/Dissenting Opinions

HARDESTY, J., concurring in part and dissenting in part:

Justice Hardesty concurred with the majority in all respects, except one. Justice Hardesty dissented that there was not substantial evidence to support the jury's award for the lost business. While Winchell presented profit and loss statements and tax records, nothing links this to why the business was valued at \$500,000. Justice Hardesty concludes that a jury could not have concluded that \$210,000 in damages reflected the loss of the business.

## Conclusion

The Nevada Supreme Court concludes that there was substantial evidence in the jury's award for the plaintiff's conversion claim, but that it should be offset by the amount the plaintiff received from his insurance policy. The plaintiff failed to allege facts demonstrating his claims for the breach of quiet enjoyment, trespass, and an award for punitive damages. Finally, additur was not warranted because the defendant's evidence was sufficiently undermined during trial

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<sup>10</sup> See *Drummond v. Mid-West Growers*, 91 Nev. 698, 712, 542 P.2d 198, 208 (1975) (In order to obtain additur, the moving party must satisfy a two-part test: (1) demonstrate that "the damages are clearly inadequate and, if so," (2) demonstrate that "the case would be a proper one for granting a motion for a new trial limited to damages.").