

R & B Holding Co., Inc. v. Christopher Advertising Group, Inc.
Fla.App. 3 Dist.,2008.

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District Court of Appeal of Florida,Third District.

R & B HOLDING COMPANY, INC., a Florida corporation d/b/a/ Kendall Toyota,
Appellant,

v.

CHRISTOPHER ADVERTISING GROUP, INC., a Florida corporation, Appellee.

Nos. 3D06-2669, 3D06-1560.

April 2, 2008.

Background: Advertising agency brought action against former client for conversion and civil theft after client locked agency employees out of client's premises, where agency's offices were located. After jury returned verdict of \$1,000,000 damage award on conversion claim and \$3,000,000 trebled damage award on theft claim, the Circuit Court set verdict aside, reduced conversion award to \$57,777.40, and granted client's motion for directed verdict on civil theft claim. Agency appealed, and the District Court of Appeal, 883 So. 2d 867, reversed and remanded for a new trial on damages. After remand, the Circuit Court, Miami-DadeCounty, Herbert Stettin, J., entered judgment on a \$5,822,751.26 jury verdict in favor of agency. Client appealed.

Holdings: The District Court of Appeal, Cortiñas, J., held that:

(1) law of the case doctrine did not bar agency from seeking damages for advertising materials that were never returned, but

(2) replacement cost was not the proper measure of damages for client's conversion of such materials.

Reversed and remanded.

Cope, J., filed opinion concurring in part and dissenting in part.

[1] Appeal and Error 30 ↻1097(1)

30 Appeal and Error

30XVI Review

30XVI(M) Subsequent Appeals

30k1097 Former Decision as Law of the Case in General

30k1097(1) k. In General.

Most Cited Cases

Law of the case doctrine did not bar advertising agency that sued a former client for conversion, and that prevailed in a prior appeal concerning the measure of damages for an advertising database that had to be recreated by agency, from seeking damages for additional advertising materials that agency did not intend to reproduce, where District Court of Appeal did not consider the proper methodology for valuation of such materials in the prior appeal.

[2] Appeal and Error 30 ↻1097(1)

30 Appeal and Error

30XVI Review

30XVI(M) Subsequent Appeals

30k1097 Former Decision as Law of the Case in General

30k1097(1) k. In General.

Most Cited Cases

Appeal and Error 30 ☞1195(1)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(F) Mandate and Proceedings in Lower Court

30k1193 Effect in Lower Court of Decision of Appellate Court

30k1195 As Law of the Case

30k1195(1) k. In General.

Most Cited Cases

Courts 106 ☞99(1)

106 Courts

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k99 Previous Decisions in Same Case as Law of the Case

106k99(1) k. In General. Most

Cited Cases

The law of the case doctrine mandates that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings.

[3] Appeal and Error 30 ☞241

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k234 Necessity of Motion Presenting Objection

30k241 k. Sufficiency and

Scope of Motion. Most Cited Cases

Former client of advertising agency that was sued by agency for conversion of advertising materials preserved for appellate review the issue of the proper methodology for valuation of materials that agency did not intend to reproduce, where client filed

extensive pre-trial motion in limine opposing application of replacement cost as the basis for damages, which was denied by the trial court.

[4] Damages 115 ☞208(1)

115 Damages

115X Proceedings for Assessment

115k208 Questions for Jury

115k208(1) k. In General. Most

Cited Cases

Determining whether a particular methodology is a proper method for computing damages is a question of law and not a jury determination.

[5] Appeal and Error 30 ☞842(11)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k842 Review Dependent on

Whether Questions Are of Law or of Fact

30k842(11) k. Damages or

Amount of Recovery. Most Cited Cases

The appropriate measure of damages, as compared with the amount of damages awarded, involves a legal question reviewable on appeal.

[6] Trover and Conversion 389 ☞44

389 Trover and Conversion

389II Actions

389II(D) Damages

389k43 Value of Property

389k44 k. Measure of Dam-

ages in General. Most Cited Cases

Trover and Conversion 389 ☞46

389 Trover and Conversion

389II Actions

389II(D) Damages

389k43 Value of Property

389k46 k. Time. Most Cited

Cases

The correct measure of damages for conversion is the fair market value of the property on the date of the conversion, plus interest at the legal rate from the date of conversion until entry of the final judgment; however, given the compensatory nature of an award of damages in conversion cases, the meaning of fair market value varies with the context in which the standard is applied.

[7] Trover and Conversion 389 ↪47

389 Trover and Conversion

389II Actions

389II(D) Damages

389k43 Value of Property

389k47 k. Specific Articles of

Personal Property in General. Most Cited Cases

Replacement cost was not the proper measure of damages for former client's conversion of old advertising materials belonging to advertising agency that agency had no intention of reproducing; rather, agency was required to produce evidence demonstrating the actual value of the materials to it, or would be limited to nominal damages. Restatement (Second) of Torts § 927.

Greenberg Traurig and Arthur J. England and Julissa Rodriguez and Brigid F. Cech Samole, Miami; Ruden, McClosky, Smith, Schuster & Russell and Peter L. Wechsler, Miami; Ruden, McClosky, Smith, Schuster & Russell and John H. Pelzer, Fort Lauderdale, for appellant.

Wetherington, Klein & Hubbart and Phillip A. Hubbart; Ross and Girten and Lauri Waldman Ross, Miami, for appellee.

Before COPE, CORTIÑAS, and SALTER, JJ.

CORTIÑAS, J.

*1 We consider whether replacement cost is the proper method of valuation for commercial property that was converted over ten years ago where there is no showing of any need for the reproduction of the property and no intention to reproduce it. Because we conclude that replacement cost is not the proper method of valuation in such an instance, we reverse.

Appellant, R & B Holdings, Inc. d/b/a Kendall Toyota ("Kendall Toyota"), appeals a final judgment totaling \$5,822,751.26 after a jury trial. Plaintiff, Christopher Advertising Group, Inc. (the "Agency") sued Kendall Toyota for conversion and civil theft of advertising materials and other property belonging to the Agency but kept by Kendall Toyota after their business relationship was terminated. In an earlier appeal, we determined that the proper measure of damages for reproduction of certain converted database materials that were necessary to the Agency to recommence its business operations was the cost of recreating the database. *Christopher Adver. Group, Inc. v. R & B Holding Co.*, 883 So.2d 867 (Fla. 3d DCA 2004) ("*Christopher I*"). We also noted that the Agency may be entitled to lost profits if shown with certainty and demonstrated causation. *Id.* at 875. However, in *Christopher I*, we were not confronted with, and therefore did not address, the valuation of other unreturned advertising materials ("Unreturned Items") that were not reproduced by the Agency. After remand and a subsequent trial, the Agency was awarded \$2,240,368.25 in damages for conversion of the Unreturned Items plus interest in the amount of \$2,068,995.67. In addition, the Agency was awarded the principal sum of \$220,412.50 in damages for the civil theft claim, which, along with interest, was

trebled.

[1][2] Appellant argues that the Agency was foreclosed from seeking damages for the Unreturned Items under the doctrine of law of the case. The law of the case mandates that “questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings.” *See State v. McBride*, 848 So.2d 287, 289 (Fla.2003) (quoting *Fla. Dep't of Transp. v. Juliano*, 801 So.2d 101, 105 (Fla.2001)); *U.S. Concrete Pipe Co. v. Bould*, 437 So.2d 1061 (Fla.1983); *Thornton v. State*, 963 So.2d 804 (Fla. 3d DCA 2007). However, because we did not consider whether replacement cost was the proper methodology for valuation of the Unreturned Items, we find that the doctrine of law of the case has no application. Instead, the issue in this second appeal involves the proper method for computing damages related to the Unreturned Items.

[3] The Agency contends that this issue was not preserved for appeal because Appellant's primary basis for excluding evidence on replacement cost for the Unreturned Items was the “law of the case” doctrine. We disagree. Appellant properly preserved the issue of whether or not replacement cost was a proper methodology for valuation of the Unreturned Items by filing an extensive pre-trial motion in limine opposing the application of replacement cost as the basis for damages. The trial court heard argument on this motion and subsequently denied the motion. The very first ground cited in its motion in limine concerned “the proper measure of damages” and, throughout the motion, Kendall Toyota opposed replacement cost as a proper method of damages. As such, we find that the issue was properly preserved.

See Fittipaldi USA, Inc. v. Castroneves, 905 So.2d 182, 187 (Fla. 3d DCA 2005). We next examine *de novo* whether replacement cost was a proper methodology for computing damages concerning the Unreturned Items.

*2 [4][5] Determining whether a particular methodology is a proper method for computing damages is a question of law and not a jury determination. The appropriate measure of damages, as compared with the amount of damages awarded, involves a legal question reviewable on appeal. *See Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 286 (W.D.Mich.1995); *Merchant v. Peterson*, 38 Wash.App. 855, 859, 690 P.2d 1192 (Wash.Ct.App.1984) (the appropriate measure of damages, as compared with the amount of damages awarded, involves a legal question reviewable on appeal); *see also Reider v. Thompson*, 197 F.2d 158, 161 (5th Cir.1952) (noting that measure of damages is a rule of law and ascertainment of damages is a matter of evidence); *St. Louis Sw. Ry. Co. v. Hill Bros.*, 58 S.W.2d 861, 862 (Tex.Civ.App.1933) (“As to whether damages have been sustained is a question of fact for the jury. The rule to measure these damages is one of law....”); *Gulf, C. & S.F. Ry. Co. v. King*, 174 S.W. 960, 961 (Tex.Civ.App.1915) (“What is the proper measure of damages is a rule of law, to be applied by the court, as applicable to the facts given in evidence.”)

[6] The correct measure of damages in conversion is the fair market value of the property on the date of the conversion, plus interest at the legal rate from the date of conversion until entry of the final judgment. *Florida Farm Bureau Casualty Ins. Co. v. Patterson*, 611 So.2d 558 (Fla. 1st DCA 1992). However, given the compensatory

nature of an award of damages in conversion cases, the meaning of fair market value varies with the context in which the standard is applied. *Merchant*, 38 Wash.App. at 859, 690 P.2d 1192 (citing *John W. McDougall Co. v. Atkins*, 201 Tenn. 589, 301 S.W.2d 335, 337 (1957) and *C. McCormick, Damages* §§ 43, 44 (1935)).

[7] Our holding in *Christopher I* rested, in part, on the Restatement (Second) of Torts, which provides, in pertinent part:

§ 927 Conversion or Destruction of a Thing or of a Legal Protected Interest in it

(1) When one is entitled to a judgment for the conversion of a chattel or the destruction or impairment of any legally protected interest in land or other thing, he may recover either

(a) the value of the subject matter or of his interest in it at the time and place of the conversion, destruction or impairment ...

(2) His damages also include:

(a) the additional value of a chattel due to additions or improvements made by a converter not in good faith;

(b) the amount of **any further pecuniary loss** of which the deprivation has been a legal cause;

(c) interest from the time at which the value is fixed; and

(d) compensation for the **loss of use not otherwise compensated.**

Restatement (Second) of Torts § 927 (1979) (emphasis added). Thus, compensa-

tion for pecuniary losses caused by the deprivation of the converted property is contemplated under the Restatement, as is compensation for loss of use not otherwise compensated. However, at the second trial of this case, no testimony was presented by plaintiff which tended to show any losses for the Unreturned Items. Nor was there any testimony that the decade-old advertising materials, for which plaintiff had been previously compensated by clients, was necessary for the Agency's ongoing business operations. Indeed, Paul Christopher, the Agency's principal, testified he had no intention to reproduce the Unreturned Items. Under these facts and in light of the testimony in this case, replacement cost is not the proper measure of damages for determining the value of the Unreturned Items.

*3 Because there are no Florida cases which address the proper method for valuation of the Unreturned Items, we look to other jurisdictions which, under their respective facts, reject replacement cost as the proper methodology for valuation. For example, *Long v. Arthur Rubloff & Co.*, 27 Ill.App.3d 1013, 327 N.E.2d 346 (1975), involved a dispute between a real estate agency and a former employee. The employee argued that following his termination, the real estate agency took possession of files which included leasing data compiled by the employee prior to his employment with the real estate agency. The court found that the leasing data was "not an ordinary object of commerce in the sense that an ascertainable market value could be attributed to it. Furthermore, the nature of the thing converted was not such as to make production or replacement cost a viable alternative." *Id.* at 355. Noting that the "leasing data allegedly was of a commercial and economic value to [the employ-

ee],” the court found:

Given its peculiar nature, we believe that the **proper basis for determining compensatory damages is its actual value to [the employee], and that [the employee] was entitled to demonstrate its value to him by such proof as the circumstances admit.** But the burden of proving the value of property converted is upon the plaintiff **...and the evidence must afford some reasonable and proper basis for ascertaining value.** At a minimum, it must rise to the dignity of proof, and supply such elements or standards for measuring value to enable the trier of fact to exercise its judgment.

Id. (emphasis added) (citations omitted). While the court held that the employee was entitled to recover the value of the leasing data appropriated by the real estate agency, it also held that the mere opinion of the employee as to the reasonable value of the leasing data was insufficient to establish damages. The court further noted that:

[O]ther than [the employee's] opinion, there was absolutely no testimony from which the trier of fact could determine the value of the leasing data to the [employee]. No testimony was offered to show what **value the leasing data had been to [the employee] in the past, what commissions, if any, were made by use of the data, or other testimony to show how possession of the [converted property] economically benefited the plaintiff.**

Id. (emphasis added).

Similarly, in the instant case, the record is devoid of any evidence adequately demonstrating the value of the Unreturned Items to the Agency. There was no evidence presented concerning the economic con-

sequences, if any, that were directly tied to the Agency's possession of the Unreturned Items prior to conversion.

Because we conclude that replacement cost was not a proper measure of damages for valuation of the Unreturned Items, we reverse the damage award associated with these materials, including interest. We remand for a new trial on plaintiff's conversion claim concerning the Unreturned Items wherein plaintiff bears the burden of proving the value of the property converted.^{FN*} See *J.M. Young v. Ethyl Corp.*, 581 F.2d 715 (8th Cir.1978) (reversing and remanding after holding that the court applied an improper measure of damages under state law to the facts of the case); *Atlanta v. Conner*, 262 Ga.App. 423, 585 S.E.2d 634 (2003) (vacating award and remanding for recalculation of damages where the trial court used an improper measure of damages that resulted in a windfall to appellee); *Orester v. Dayton Rubber Mfg. Co.*, 228 N.Y. 134, 126 N.E. 510 (1920) (reversing for improper instruction on the measure of damages and remanding for a new trial); *Am. Elecs., Inc. v. Neptune Meter Co.*, 33 A.D.2d 157, 160, 305 N.Y.S.2d 931 (N.Y.App.Div.1969) (reversing on proper method of computing damages and remanding for a new trial with instructions that “[p]laintiffs should have another opportunity to attempt to establish their damage by proper proof” and “[f]ailing so to do plaintiffs are entitled only to nominal damages.”); *Hilliard v. First Indus., L.P.*, 158 Ohio App.3d 792, 2004-Ohio-5836, 822 N.E.2d 441 (remanding where the jury used an improper method to calculate damages). Such evidence must afford a reasonable basis for determining value in order to allow the trier of fact to exercise its judgment. *Long*, 327 N.E.2d at 355. If plaintiff cannot meet

its burden, it may only be entitled to nominal damages for the Unreturned Items.

***4** With respect to the other issues raised on appeal, we affirm the trebling of \$220,412.50 in civil theft damages for the converted items that were replaced as well as the interest award associated with these damages in the amount of \$202,525.39. However, we reverse the trebling of the interest award. *Greenberg v. Grossman*, 683 So.2d 156 (Fla. 3d DCA 1996); *Vining v. Martyn*, 660 So.2d 1081 (Fla. 4th DCA 1995). We affirm on all other issues on appeal, including the cross-appeal.

Reversed and remanded.

SALTER, J., concurs.COPE, J. (concurring in part and dissenting in part).

I entirely agree with the analysis of the measure of damages in this conversion case.

I must respectfully dissent from that part of the opinion which remands this matter for yet another new trial on damages. Plaintiff-appellee Christopher Advertising Group, Inc. (“the Agency”) did not request that relief in its brief filed in this appeal, so the point is waived. Further, in the previous retrial, the plaintiff did not present any alternative damage calculation, so the point is waived for that additional reason. The plaintiff is entitled to, at best, an award of nominal damages.

In its briefs here, defendant-appellee R & B Holding Company, Inc. (“Kendall Toyota”) argued that the trial court erred by allowing the jury to award conversion damages for the cost of reproducing materials which were never returned to the plaintiff Agency (“the Unreturned Items”). In the initial brief, Kendall Toyota requested that this court “vacate the

\$2,240,368.25 award for Kendall's conversion of alleged database ‘never returned,’ **with a direction to enter judgment for Kendall on that issue...**” (Emphasis added). In the answer brief, the Agency argued that the trial court's ruling on the measure of damages was correct. The Agency asked that the final judgment for damages be affirmed in all respects. The Agency did not make an alternative request for a new trial on damages.^{FN*}

Because the Agency did not ask this court for a new trial damages, the point has been waived. “An error not raised in the brief is waived.” *Ramos v. Philip Morris Cos., Inc.*, 743 So.2d 24, 29 (Fla. 3d DCA 1999) (citations omitted); *Mazza v. Rose Media Group, Inc.*, 937 So.2d 307, 310 n. 2 (Fla. 4th DCA 2006); 3 Fla. Jur.2d *Appellate Review* § 212 (2004); *see also Chaachou v. Chaachou*, 135 So.2d 206, 221 (Fla.1961); *City of Miami v. Steckloff*, 111 So.2d 446, 447 (Fla.1959).

The Agency is represented by able counsel. It is obvious the Agency recognized that there was no viable way to request a new trial on damages, because the Agency had not presented any alternative measure of damages as a “fallback” position in the trial court. That being so, there was no viable theory on which to ask this court to order a new trial.

The Florida Supreme Court has expressly rejected the idea that an appellate court can rule on the merits of a post-trial appeal and then send the case back for a trial on matters never previously raised. The Florida Supreme Court stated:

***5** It is our view that a procedure which allows an appellate court to rule on the merits of a trial court judgment and then permits the losing party to amend his ini-

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(Cite as: --- So.2d ----, 2008 WL 859209)

tial pleadings *to assert matters not previously raised* renders a mockery of the “finality” concept in our system of justice.

Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp., 537 So.2d 561, 562 (Fla.1988) (quoting *Dober v. Worrell*, 401 So.2d 1322, 1324 (Fla.1981)). The court went on to say, “Our growing, complex society and diminishing resources mandate the requirement that litigants present all claims to the extent possible, at one time, and one time only.” *Arky, Freed*, 537 So.2d at 563.

Respectfully, the majority opinion's new trial order is contrary to the foregoing precedent. The majority opinion returns this matter to the trial court in order for the plaintiff to come up with a new damages theory. That is impermissible under the cited cases.

There is a body of law which addresses what procedure to follow where, as here, the plaintiff establishes the invasion of a right but presents insufficient evidence of the amount of damages. In that situation, an “award of nominal damages is proper.” *Beverage Cannery, Inc. v. Cott Corp.*, 372 So.2d 954, 956 (Fla. 3d DCA 1979); *see also Greater Coral Springs Realty, Inc. v. Century 21 Real Estate of S. Fla., Inc.*, 412 So.2d 940, 941 (Fla. 3d DCA 1982); 9 Fla. Jur.2d *Damages* §§ 5-6 (2004). The Agency is entitled to, at most, an award of nominal damages-but not a new trial on damages.

For the stated reasons, our reversal of the conversion damages award should be with directions to enter judgment for Kendall Toyota on that issue (because the Agency made no alternative request for nominal damages). Alternatively, our reversal

should be with directions to enter judgment for nominal damages for the Agency. We should not order another new trial on damages. I concur with the majority opinion on the remaining issues.

FN* We are mindful that the legal error in employing replacement cost as the method of damages for the Unreturned Items may have resulted from reliance on our opinion in *Christopher I*. This likely possibility further compels us to remand for a new trial. We are also not at all surprised that the Agency, appellee herein, did not request a new trial on damages since it was the prevailing party at trial; the fact that the Agency asked us to affirm the final judgment in all respects does not constitute a waiver concerning our ability to remand for a new trial.

FN* The Agency cross-appealed on the attorney's fee award, an issue which is irrelevant to the question of the correct measure of conversion damages.

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