IN THE COURT OF APPEALS OF IOWA

No. 7-354 / 96-1160 000205

MICHAEL LAWERENCE JOHNSON,

Plaintiff-Appellee,

vs.

ROGER MILLER,

Defendant-Appellant.

FILED
AUG 22 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge.

Defendant appeals from the district court's ruling awarding plaintiff damages in a replevin action for defendant's failure to take proper care of plaintiff's property.

AFFIRMED IN PART; REVERSED IN PART.

James E. Walker of Corbett, Anderson, Corbett, Poulson, Flom & Vellinga, Sioux City, for appellee.

Carl M. Lane, Sioux City, until withdrawal, and then Michael Johnson, Sioux City, pro se.

Considered by Sackett, P.J., and Streit and Vogel, JJ.

000206

SACKETT, P.J.

The question in this appeal is whether the district court erred in awarding plaintiff-appellee Michael Lawrence Johnson damages against defendant-appellant Roger Miller in plaintiff's replevin action. We affirm in part and reverse in part.

The case, filed in equity, was by agreement tried at law. Replevin is an action at law. Iowa Code § 643.2. When the action is tried to the court, its findings of fact have the force of a jury verdict and are binding on appeal if supported by substantial evidence in the record. Review is upon assigned errors of law. *Ritchie v. Hilmer*, 251 Iowa 1002, 1004, 103 N.W.2d 858, 859 (1960); *Glenn v. Keedy*, 248 Iowa 216, 219, 80 N.W.2d 509, 511 (1957).

Plaintiff had a business in a building in Sioux City owned by defendant. The trial court found after the business closed plaintiff left property in defendant's building. At all times plaintiff had access to the property and could have entered the building and removed the property.

Plaintiff commenced this replevin action seeking the return of property valued over $25,000. Prior to trial, plaintiff himself removed most of the property from defendant's building.

The trial court found defendant had failed to return certain property to plaintiff and failed to take any steps to prevent damage or theft to plaintiff's property. The trial court then awarded plaintiff $1868.79 for damage to plaintiff's truck while on defendant's property and $451 for the loss of certain items of personal property.

Defendant's contention on appeal is that the trial court erred in concluding he wrongfully detained plaintiff's personal property where there was no inference or assertion of control of the property by defendant.

Replevin is an action to recover specific personal property that has been wrongfully taken or wrongfully detained, with an incidental right to damages caused by reason of such detention. *Flickinger v. Mark IV Apartments Ass'n*, 315 N.W.2d 794, 796 (Iowa 1982).

The gist of a replevin action is enforcement of the plaintiff's right to immediate possession of the property wrongfully taken or detained. *Iowa Truck Ctr., Inc. v. Davis*, 204 N.W.2d 630, 631 (Iowa 1973); *Marx Truck Line, Inc. v. Fredricksen*, 260 Iowa 540, 546, 150 N.W.2d 102, 105 (1967); *Ritchie*, 251 Iowa at 1004, 103 N.W.2d at 859; *Harrow v. Ryan*, 31 Iowa 156, 158 (1870); *Gimble v. Acklex*, 12 Iowa 27, 30 (1861). A wrongful taking need not be by forcible dispossession; any unlawful interference with, or assertion of control over the property is sufficient. *Flickinger*, 315 N.W.2d at 496. A wrongful detention occurs when the defendant wrongfully withholds or retains possession of the property sought to be recovered. *Id.*

Plaintiff-appellee has failed to file an appellate brief. Where an appellee fails to file an appellate brief, we have a number of options available. *Bosch v. Garcia*, 286 N.W.2d 26, 27 (Iowa 1979); *County of Jefferson v. Barton-Douglas Contractors, Inc.*, 282 N.W.2d 155, 157 (Iowa 1979). That failure does not entitle an appellant to reversal as a matter of right, but does provide a basis for other sanctions. *Bosch*, 286

000208

N.W.2d at 27. Ordinarily we will not search the record for a theory upon which to affirm the trial court. *Id.* We may confine our consideration to issues raised in appellant's brief or treat appellee's failure to file a brief as a concession of claims made by appellant, depending upon their merit. *Id.*

The trial court found defendant's wrongful control was his failure to take steps to prevent damage or theft to plaintiff's truck. We agree with defendant that this finding, where plaintiff had the same access as defendant to the truck, is not sufficient to support an award to plaintiff for the damage to the truck, there being no evidence to show a withholding or retention of possession by defendant. Plaintiff claimed defendant would only release the truck if he paid defendant money. Defendant denied this claim and the trial court agreed with defendant's version of the facts.

Confining our review to the issues raised in defendant's brief, we reverse the award of $1868.79 for damage to plaintiff's truck.

The trial court found defendant failed to return $451 worth of property to plaintiff. There is substantial evidence in the record to support this finding. We affirm this award.

Costs on appeal are taxed one-half to plaintiff and one-half to defendant.

AFFIRMED IN PART; REVERSED IN PART.