

F I L E D

AUG 29 1985

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DAVID B. STEVENS,

)

557

Plaintiff-Appellant,

)

Filed August 29, 1985

vs.

)

**FRANK WATSON, JR., and SEERY &
DOLLAR, a partnership,**

)

5-229
84-1306

)

Defendants-Appellees.

Appeal from the Iowa District Court for Polk County - Richard A. Strickler,
Judge.

Plaintiff appeals the refusal to dismiss defendant's counterclaim of abuse
of process, the adverse judgment of various other issues, and the determination
of damages awarded each party. REVERSED IN PART; AFFIRMED IN PART.

Dennis P. Ogden and Dwight W. James of James & Galligan, Des Moines,
Iowa, for plaintiff-appellant.

Robert W. Seery of Seery & Dollar, Des Moines, Iowa, for defendant-
appellees.

Heard by Oxberger, C.J., Schlegel, and Sackett, JJ.

SCHLEGEL, J.

Plaintiff appeals the refusal to dismiss defendant's counterclaim of abuse of process, the adverse judgment of various other issues, and the determination of damages awarded each party. In an action for legal fees, plaintiff asserted that defendant Watson individually and the firm Seery & Dollar owed plaintiff certain legal fees earned on cases that had originated in plaintiff's firm. Plaintiff sued both defendants on theories of money had and received, tortious interference with client contractual relationships, and conversion. Also, a cause of action was alleged against Seery & Dollar for breach of trust. Defendant Seery & Dollar counterclaimed alleging plaintiff abused the legal process by instituting the above actions (against the defendant firm). Plaintiff moved to dismiss the counterclaim for failure to state a claim for which relief can be granted but the trial court refused. The cause was tried without a jury and the court found the plaintiff liable for abuse of process, and defendant Watson liable for tortious interference with client contracts. Defendants Seery & Dollar and Watson were found not liable to plaintiff on any remaining theories alleged. Plaintiff appealed the refusal to dismiss the counterclaim and also appeals the decision that abuse of process had in fact occurred. We reverse on the counterclaim issue and also reverse on the issues of money had and received, conversion, and breach of trust. We affirm the trial court's decision regarding tortious interference.

In January 1979, attorney Frank Watson, Jr., was employed by the Stevens & Price law firm under an oral arrangement that required Watson to pay to the firm all fees earned on cases that he worked on while at the firm in return for a salary and overhead expenses. In June of 1980, however, Mr. Watson decided to leave Stevens' employ and seek work elsewhere. On June 15, 1980, Watson successfully negotiated an association with defendant Seery & Dollar. Watson

did not immediately begin to work with Seery & Dollar however, but chose instead to take two weeks of vacation time that he had earned from his employment with Stevens.

Relying upon his interpretation of consultation with Stevens' former partner Mr. Price, Watson contacted several clients that he'd been working with while an employee of Stevens. He then told these clients that he was no longer going to practice with Stevens and that the clients could elect to have Stevens handle their affairs; he could continue to handle their affairs; or they could elect to take their matters to a different attorney altogether. Approximately four of these clients chose to have Watson handle their cases and signed a letter authorizing Watson to retain their files.

As soon as Mr. Watson had relocated, he went to see Stevens and explained what he'd done with the clients and their files. Mr. Stevens agreed to let Watson retain the files upon Watson's promise to "treat him right." Then, beginning on July 1, 1980, Watson associated with Seery & Dollar under a partnership agreement that, among other provisions, required Watson to pay to the firm 40% of all legal fees earned. Watson told Seery & Dollar that he had no further obligation to anyone upon joining the firm.

In November, 1980, Watson settled a case involving one of the former clients of the Stevens firm. He deposited the fee in the Seery & Dollar trust account and then, after consulting with Mr. Seery, sent Stevens a check for \$722.35 which represented what Watson felt he owed Stevens for work on the case and costs that had been advanced by the Stevens firm. Stevens rejected the tender, expressing the belief that his firm was entitled to a greater portion of the fee.

Negotiations commenced involving Watson, Seery, Stevens and James Cook, who had become associated with Stevens. Despite Mr. Cook's opinion

that no cause of action had arisen against Seery and Dollar, Stevens filed claims against the firm believing that it had been involved in the decision to limit the offer to Stevens, and that by including the firm in the action, it in turn would put pressure on Watson to pay Stevens more for his portion of the fee, and that Watson, alone, would not be able to pay any judgment against him.

The court found Watson liable to Stevens on theories of money had and received and tortious interference with contractual relations with clients, awarding damages of \$3,367.19. Seery & Dollar was not found liable under any theory and Stevens was found liable to the firm on its counterclaim of abuse of process. The firm was awarded \$10,600 in damages.

I. Abuse of Process Counterclaim. The trial court overruled plaintiff's motion to dismiss defendant Seery & Dollar's counterclaim of abuse of process. A motion to dismiss is sustainable only if the petition shows to a certainty that the pleader has failed to state a claim upon which any relief may be granted under any set of facts which may be proved in support of the claim asserted. Cunha v. City of Algona, 334 N.W.2d 591, 594 (Iowa 1983). Overruling or sustaining a motion to dismiss does not depend upon the trial court's discretion. It must rest upon legal grounds and is subject to review by this court. Symmonds v. Chicago, M., St. P. & P.R. Co., 242 N.W.2d 262, 264 (Iowa 1976); Board of Supervisors v. Standard Appliance Co., 249 Iowa 438, 440, 87 N.W.2d 459, 461 (1958). This case was tried as an ordinary proceeding at law and our review is on assigned error. Iowa R. App. P. 4.

Abuse of process is the intentional misuse or perversion of regularly issued legal process, after it has been issued, to achieve some collateral, and improper purpose incompatible with the lawful function of the process. Brody v. Ruby, 267 N.W.2d 902, 905 (Iowa 1978). The gist of an abuse of process claim is that it misuses or misapplies the process justified in itself for an end other than

that which it was designed to accomplish. Sarvold v. Dodson, 237 N.W.2d 447, 449 (Iowa 1976).

The Supreme Court has dealt with the claim of abuse of process before, consistently abiding by the principles laid out in section 682 of the Restatement (Second) of Torts 1977. It states: "[O]ne who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." Mills County State Bank v. Roure, 291 N.W.2d 1, 4 (Iowa 1980); Sarvold v. Dodson, 237 N.W.2d 447, 448-49 (Iowa 1976). In 1983, however, the supreme court adopted comment b of section 682 of the Restatement (Second) of Torts. In Schmidt v. Wilkinson, 340 N.W.2d 282, 284 (Iowa 1983), the court emphasized that the existence of the word "primarily" in the context of the Restatement section narrows the claim of abuse of process. Id. at 284. "The significance of this word is that there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is incidental motive of spite or an ulterior purpose of benefit to the defendant" Id. at 284. The Schmidt court also agreed with the additional commentary found in Restatement (Second) of Torts section 682 app. (1981), where it states: "Some act or threat directed to an immediate objective not legitimate in the use of the process is required, and the defendant is not liable if he has done no more than carry the process to its authorized conclusion, even with bad intentions." (Emphasis ours). Id.

It must be kept firmly in mind, however, that it is the use of the process that is essence of the tort and must therefore be alleged for a claim to withstand a motion to dismiss. See Sarvold v. Dodson, 237 N.W.2d 447, 449 (Iowa 1976), noted with approval in Schmidt at 284.

Defendant Seery & Dollar cite Schmidt as authority in support of the trial court's ruling refusing to dismiss the counterclaim. However, the key allegations in Schmidt can be distinguished from the allegations made in defendant Seery & Dollar's counterclaim. In Schmidt, the claim stated: "5. That defendants improperly used the civil process against plaintiffs primarily to accomplish purposes for which the civil process was not designed." (Emphasis the court's). Schmidt, 340 N.W.2d 282, 284. In contrast, the allegations made by defendant Seery & Dollar in their amended counterclaim is as follows:

4. Plaintiff did not file all of the above against the Defendant, Seery & Dollar, a partnership, for the purpose of the allegations alleged therein, but maliciously filed the same for the wrongful purpose of harassing the Defendant partnership in an attempt to coerce the Defendant partnership into causing Defendant Watson to pay amounts the Plaintiff knew were not due him and to embarrass the Defendant partnership and subject it to public ridicule.

Defendant Seery & Dollar's original counterclaim also included the following:

"5. Plaintiff's filing of the various petitions and amendments thereto set forth above thereby initiated the wrongful purpose as set forth herein without any justification on the part of the Plaintiff and thereby constitutes an abuse of process."

The necessity to allege the "improper use" of process was emphasized in Froning & Deppe, Inc. v. South Story Bank and Trust, 327 N.W.2d 214, 215 (Iowa 1982). In Froning, the defendant bank filed a counterclaim of abuse of process, contending that an "abuse of process claim will still lie if the 'ulterior motive or purpose' of the action was to intimidate or embarrass the defendant." Id. at 215. The Supreme Court disagreed, saying:

In the present case, as in Brody v. Ruby, 267 N.W.2d 902, 906 (Iowa 1978), it does not affirmatively appear that plaintiff has made improper use of any process of the court. In denying the abuse of process claim made in Brody, we followed the decision rendered in Holiday Magic, Inc. v. Scott, 4 Ill.App.3d 962, 969, 282 N.E.2d 452, 456-57 (1972). There the court stated:

[M]ere institution of a suit or proceeding, even with the malicious intent or motive, does not itself constitute an abuse of process.... [E]ven assuming that these allegations are sufficient properly to allege the existence of an ulterior purpose, there is no allegation regarding any act in the use of process that was not proper in the regular prosecution of the proceeding.

Other jurisdictions that have adopted comment b of section 682 Restatement (Second) Torts, agree that the word "primarily" narrows the claim of abuse of process in that "improper use" must be alleged. In Stromberg v. Costello, 456 F.Supp. 848, 849, 850 (D. Mass. 1978), the defendant twice applied for criminal complaints in order to coerce the plaintiff to withdraw a civil action. In holding that the complaint did not state a cause of action for abuse of process, the court said that:

[W]hile the complaint clearly alleges that defendant had an improper purpose and claims that plaintiff was injured, there is no allegation that defendant actually used the applications for criminal complaints he filed to coerce the plaintiff to withdraw the civil action. The complaint alleges only that such was defendant's purpose.

In the case at bar, defendant Seery & Dollar have failed to allege in their complaint that plaintiff Stevens "improperly used" the process. Therefore, we hold that it was error for the trial court to refuse plaintiff's motion to dismiss the amended counterclaim.

II. Other Theories. Plaintiff also alleged that defendants Watson and Seery & Dollar were liable on theories of: (1) money had and received; (2) conversion; (3) breach of trust (Seery & Dollar only); and (4) tortious interference with client contractual relations. The trial court determined that only defendant Watson was liable for money had and received and tortious interference with contractual relations. Plaintiff appeals the decisions of the trial court and claims that the evidence was sufficient to find both defendants liable on all

of the above theories except for breach of trust in which only defendant Seery & Dollar are liable.

The trial court's findings of fact bind this court if supported by substantial evidence. Iowa R. App. P. 14(f)(1). When as here the trial court determines that a party has failed to carry the burden of proof on an issue, the Supreme Court will not interfere unless it finds the burden was carried as a matter of law. Chown v. USM Corp., 297 N.W.2d 218, 220 (Iowa 1980).

The theories of money had and received and conversion are similar. In an action for money had and received the plaintiff must prove that defendant received money, which in equity and good conscience belongs to the plaintiff. Hulme v. Stumma, 204 N.W.2d 632, 633 (Iowa 1973). A conversion cause of action alleges that the defendant wrongfully controlled or exercised dominion over chattels in derogation of another's possessory right thereto. Welke v. City of Davenport, 309 N.W.2d 450, 451 (Iowa 1981); Jensma v. Allen, 248 Iowa 556, 562, 81 N.W.2d 476, 480 (1957); Leonard v. Sehman, 206 Iowa 277, 279, 220 N.W. 77, 78 (1928); 18 Am. Jur. 2d Conversion § 1 (1965); 89 C.J.S. Trover & Conversion § 36 (1955). To maintain an action for conversion the plaintiff must have a possessory right in the property converted. Munier v. Zachary, 138 Iowa 219, 222, 114 N.W. 525, 526 (1908); 18 Am. Jur. 2d Conversion § 54. "If money was converted . . . and restitution of the proceeds is sought, the common-law form of action is assumpsit for money had and received." Restatement Restitution § 128 comment 1 (1937). Although conversion includes an intent element, it is an intent to exercise dominion or control; the converter's good faith, ignorance of the owner's true rights, mistake, or the owner's negligence are irrelevant. Towe Farms, Inc. v. Central Iowa Production Credit Association, 528 F.Supp. 500, 506 (S.D. Iowa 1981). The mere fact that a third party has an interest in

or title to the thing does not preclude an action for conversion. Welke v. City of Davenport, 309 N.W.2d 450, 451-52 (Iowa 1981).

The record shows that pursuant to their employment agreement, Seery & Dollar collected and received both contingent fees and fees based on an hourly rate and distributed the fees to the firm and to Watson. While the trial court found that Watson had received the fees and was therefore liable to plaintiff Stevens for money had and received, it in turn reasoned that Seery & Dollar was not liable merely because it had received the fees via the partnership agreement with Watson. But the manner in which the defendant may receive the money is not determinative here. Plaintiff merely had to prove that the defendant or defendants had in fact received the fees. Hulme v. Stumma, 204 N.W.2d 632, 633 (Iowa 1973). And, since the trial court reasoned that it was inequitable for defendant Watson to retain the fees rightfully belonging to plaintiff, it follows that it would be no less an injustice if Seery & Dollar were permitted to retain the fees simply by virtue of the antecedent partnership agreement with defendant Watson. We therefore hold that the trial court erred in not finding defendant Seery & Dollar liable for money had and received.

We also hold that the defendant firm should be liable on the theory of conversion. The trial court absolved both defendants on the theory of conversion because it found that Stevens allowed Watson to retain the client files "thinking that Defendant Watson would treat him 'right,' " thereby proving peaceful possession.

We believe that the record shows, however, that although plaintiff Stevens allowed the "files" to go with defendant Watson, nowhere does it show that plaintiff Stevens conceded his share of the "fees" that would be derived from the files. Therefore, the possession and intent to exercise dominion and control does not arise until fees are earned and paid to the defendant firm. And, the

record again shows that both defendant Watson and Seery & Dollar intended to keep all fees derived from the cases except for the amount tendered plaintiff Stevens. The dispute is not over the files, it is over the fees that were derived from the files.

Because we hold that both defendants are liable to plaintiff on the theories of money had and received and conversion, we likewise hold that the trial court erred in refusing to impose a constructive trust upon that portion of fees received by defendant firm to which plaintiff is equitably entitled. A constructive trust is a remedy, applied for purposes of restitution, to prevent unjust enrichment. It is an equitable doctrine. Regal Insurance Co. v. Summit Guaranty Corp., 324 N.W.2d 697, 704 (Iowa 1982). Constructive trusts fall into three categories: (1) those arising from actual fraud; (2) those arising from constructive fraud (appropriation of property by fiduciaries or others in confidential relationships); and (3) those based on equitable principles other than fraud. Regal, at 705; Loschen v. Clark, 256 Iowa 413, 419, 127 N.W.2d 600, 603 (1964); Hillman, Contract Remedies, Equity and Restitution in Iowa, § 3.3 at 64 (1979). One seeking the remedy must establish the right by clear, convincing and satisfactory evidence. Regal, at 705; Copeland v. Voge, 237 Iowa 102, 107, 20 N.W.2d 2, 5 (1945). The evidence is clear and satisfactory that a constructive trust should be imposed to prevent the defendant firm from being unjustly enriched by allowing it to retain fees that equitably belong to plaintiff.

We agree with the trial court with regard to plaintiff's claim of tortious interference with clients' contracts. The evidence clearly shows that Watson carried out the plan to take the clients with him without the knowledge of Seery & Dollar. Although Watson had made contact and even finalized an agreement with the defendant firm prior to July 1, 1980, the fact that Watson had any specific clients or where they came from were unknown to defendant Seery & Dollar.

In fact, Watson received a two week paid vacation by plaintiff Stevens after June 15, 1980, and did not start with Seery & Dollar until after that. In short, the plaintiff failed to carry the burden as a matter of law that defendant Seery & Dollar tortiously interfered with his client's contractual relations.

III. Measure of Damages. Defendant Watson, as an employee of the Stevens firm, agreed to give up any right to retain fees received from clients in exchange for a sure and steady salary and a two-thirds share of the conservatorships he had brought into the firm. This, very simply, meant that he had no personal right to any of the fees earned by employees or members or partners of the Stevens firm. Upon his departure, nothing regarding this arrangement was changed. As we stated before, plaintiff Stevens' concession was with regards to the "files" and not to the fees earned from them. We find nothing in the record that would support a gratuitous gesture on Stevens' part to allow Watson to suddenly become entitled to work done by other members of the Stevens firm, especially when that entitlement would arise from the unilateral actions of defendant Watson himself. Nor can we find any support in the record where Watson might have given any consideration to Stevens on a contract theory that would in turn allow Watson to benefit from the labors of other members of Stevens firm.

Therefore, we remand this issue back to the trial court for the determination of damages in light of this opinion.

IV. Dismissal of Plaintiff's Appeal. Defendant Seery & Dollar filed a motion to dismiss plaintiff Stevens' appeal on the basis that they have executed on the judgment granted Stevens against defendant Watson (pursuant to its counterclaim against Stevens). They have reasoned that a chose in action is a chose in action and that this chose in action was purchased by them at a sheriff's sale after plaintiff Stevens failed to post a supersedeas bond. Therefore, as

owners of the cause of action, they wish to dismiss the appeal and all issues involved in plaintiff Stevens' appeal. Defendant Seery & Dollar cite no authority in support of this proposition nor have we found any.

The failure to post a supersedeas bond, though it allows execution upon a judgment entered, does not affect the judgment debtor's right to appeal though the judgment is paid and satisfied under compulsion during the course of the appeal. Hegtvedt v. Prybil, 223 N.W.2d 186, 188-89 (Iowa 1974).

A chose in action or thing in action has been defined in Iowa as:

[A] right to receive or recover a debt or money or damages or for a tort connected with contract but which cannot be enforced without action . . . a right not reduced to possession, or a right under a contract which, in case of nonperformance, can only be reduced to beneficial possession by an action or suit . . . all debts and all claims for damages for breach of contract or for tort connected with contract.

Brenton Bros. v. Dorr, 213 Iowa 725, 729, 239 N.W. 808, 811, 812 (1931). A right of appeal to the appellate courts in Iowa is not a chose in action or a thing in action that can be purchased and thereby effectively deprive the judgment debtor of any avenue of appeal. The motion to dismiss plaintiff Stevens' appeal is denied.

We have reviewed all of the evidence and conclude that the trial court erred in refusing to dismiss defendant Seery & Dollar's counterclaim for failure to state a claim upon which relief can be granted. Therefore, the judgment awarded defendant Seery & Dollar is vacated. We also hold that the trial court erred in not finding defendant Seery & Dollar liable on the theories of money had and received and conversion, and, failure to impose a constructive trust upon the fees that are due the plaintiff. Because we reverse the trial court on the aforementioned theories, we remand the issue of determination of damages back to the trial court. We affirm the trial court's disposition of the tortious interference with clients' contracts issues.

Costs of the trial court as well as on appeal are assessed against the defendants.

REVERSED IN PART; AFFIRMED IN PART.

Oxberger, C.J., concurs; Sackett, J., specially concurs.

SACKETT, J. (specially concurring)

I agree with the majority in their determination that the trial court erred in not finding Seery and Dollar liable for money had and received. I do not find Stevens to have made improper use of process.

I find that the pleadings in the file are proper pleadings in the regular prosecution of a claim to recover money had and received. Under such circumstances, an ulterior motive on Stevens' part would not be actionable as an abuse of process. See Froning & Deppe v. South Story Bank and Trust, 327 N.W.2d 214, 216 (Iowa 1982).

Having found there is no abuse of process, I find it unnecessary to address the issue of whether the petition stated a cause of action for abuse of process.