

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
In the Court of Common Pleas
Sixteenth Judicial Circuit

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2018-001040

Docket No. 2015-CP-46-03011

RECEIVED

OCT 15 2018

SC Court of Appeals

Therese Emry and Dakine Elite Automobiles, LLC, Appellants,

v.

Andrew Michael Carpenter, Bendell Moore, Manage My Success and Larry D. Wylie, Defendants,

Of Whom Vashti Encarnacion d/b/a Manage My Success and Bendell Moore are the Respondents.

INITIAL BRIEF OF APPELLANTS

October 12, 2018

Daniel D. D'Agostino
D'Agostino Law Firm
25 W. Liberty St.
York, SC 29745
(803) 628-6509
Attorney for Appellants

TABLE OF CONTENTS

	<i>Page</i>
Table of Authorities	ii
Statement of Issues on Appeal.....	1
Statement of the Case	1
Statement of Facts	2
Argument.....	7
I. The Appellant is entitled to a judgment against Respondent Moore who was in default on the basis that he was in default as well as the fact the evidence support the elements of the Appellant’s claims.....	7
II. The trial court erred in not finding that the Respondent Encarnacion, along with the other co-defendants, converted the Appellant’s personal property.....	10
Conclusion.....	11

TABLE OF AUTHORITIES

Statutes and Rules

Page

Island Car Wash, Inc. v. Norris, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987) .9

Owens v. Andrews Bank & Trust Co., 265 S.C. 490, 496, 220 S.E.2d 116 (1975)8

Vaught v. Waites, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989)9

Rule 8(d) of the SCRCP..... 7, 8

Rule 558

Rule 59(a) of the SCRCP8

Rule 59(e) of the SCRCP.....8

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in not awarding the Appellants a judgment against the Respondents Vashti Encarnacion and Bendell Moore on the conversion cause of action when the Respondent Moore was in default and the Respondent Encarnacion was involved in the transfer of ownership of the multiple vehicles for little to no consideration?

STATEMENT OF THE CASE

On October 1, 2015 the Appellants sued multiple Defendants alleging conversion, breach of the duty of loyalty and duty of good faith, claim and delivery and for this court to disassociate a member from the business. The Defendant Andrew Michael Carpenter filed an answer and counterclaim through counsel. The Respondent Bendell Moore was served and was in default. The Respondent Vashti Encarnacion d/b/a Manage My Success filed an answer (Answer). The Defendant Larry D. Wylie filed basically the same answer (Answer). The Defendants Wylie and Encarnacion denied the allegations as did the Defendant Carpenter. Prior to trial, the court struck the Defendant Carpenter's answer (Order) and granted partial summary judgment as to the titles to the vehicles on the claim and delivery cause of action against Respondents Encarnacion and Moore (Order).

The case came before the court for a bench trial on March 19, 2018 for a damages hearing on default as to Defendant Carpenter and Respondent Moore. The Appellants also presented evidence as to the conversion claim and damages against Respondent Vashti Encarnacion d/b/a Manage My Success. The case was scheduled as a jury trial but both the Appellants and Respondent Encarnacion agreed for the court to make a decision with a bench trial. The trial judge granted a judgment against Defendant Carpenter in the amount of \$187,245.00 and dismissed the claims against Respondents Moore and Encarnacion d/b/a Manage My Success. The Appellants filed a Motion to Alter or Amend as well as a

motion for a new trial. The hearing came before the court on April 20, 2018 and the court denied the motion (Order; Tr. pp. 4-27). The court issued the order denying the post-trial motions on May 1, 2018 (Order). The Appellants served Notice of Appeal on May 30, 2018.

STATEMENT OF FACTS

The Appellant incorporated the business Dakine Elite Automobiles, LLC on February 10, 2015 (Exhibit 2; Tr. p. 16, line 2 - p. 17, line 20). The Appellant entered an agreement with Carpenter whereby she owned 93% of the business and Carpenter owned 7% of the business. The agreement was signed on March 16, 2015 (Exhibit 4 p. 17, line 21 - p. 19, line 4). Subsequent to beginning business, the Defendant Carpenter and Respondent Encarnacion appeared at the Appellant's home with a new partnership agreement and had the Appellant sign the second page as did defendant Carpenter. Respondent Encarnacion witnessed and notarized this statement (Exhibit 6 p. 20, line 8 - p. 25, line 12). The new partnership agreement was executed on May 10, 2015 and changed the ownership to each owning 50% of the business. Appellant, at trial, intended and explained that this document was false and she had no idea that she was signing a change of ownership. The Appellant provided all funds and monies for the purchase of the vehicles or the car lot (Exhibit 9; Tr. p. 29, lines 5 - 7). Subsequent to signing the new partnership agreement, the Respondent Carpenter locked the Appellant from the business, barricaded himself in the building, trashed the building and took the inventory of the car business. The Appellant was able to recover most of the vehicles except for those listed in the complaint consisting of seven vehicles. The Appellant provided photographs of the business location showing the condition of the office and the cars barricaded and blocking the entrance (Tr. p. 26; Exhibits 6 and 7).

The Respondent Encarnacion and Defendant Carpenter began a course of conduct

of transferring the titles to these vehicles between themselves and to Respondent Bendell Moore as well as defendant Wiley. The Respondent Encarnacion and Defendant Carpenter also attempted to obtain a new title to a 2014 Jeep Wrangler to take it out of Appellant's name (Exhibit 10). At trial, the Appellant provided the following (Tr. pp. 33 – 42)

- A. Title history to the 2007 Range Rover SUV, Exhibit 12, which shows the vehicle transfer from Dakine Elite Automobiles, LLC with Carpenter signing it to Larry Wylie and from Larry Wylie to Vashti Encarnacion (Manage My Success) for \$1.00. The Respondent Encarnacion signed the title as the owner of the vehicle. The Appellant testified that the value of the Range Rover was \$15,465.00.
- B. Title history for the 2004 Cadillac Escalade as Exhibit 13 which demonstrated a transfer from Dakine (Carpenter) to Defendant Wiley with Respondent Encarnacion notarizing this document on June 10, 2015. Respondent Encarnacion received this vehicle from Defendant Wiley on July 23, 2015 for \$1.00. Appellant testifies that the Cadillac Escalade was worth \$11,135.00.
- C. Title history for the 2002 Grand Marquis as Exhibit 14 which demonstrated a transfer from Dakine (Carpenter) to Respondent Moore for \$500.00. The Appellant testified that the Grand Marquis was worth \$7,000.00.
- D. Title history for the 2007 Toyota FJ Cruiser as Exhibit 15. The title history showed this vehicle transferred from Dakine (Carpenter) to Respondent Moore on June 11, 2015 for \$1,800.00. Respondent Moore transferred this vehicle to respondent Encarnacion on August 14, 2015 for \$1.00. Respondent Encarnacion sold this vehicle to Harrelson Nissan of South Charlotte for \$15,000.00 on August 19, 2015. A representative from Harrelson Nissan testified as to the transaction and provided a copy of the check for \$15,000.00 and the records

showing it cleared the bank for the amount of \$15,000.00. The business records of Harrelson included a copy of Respondent Encarnacion's driver's license with her photograph. (Exhibit 21) Appellant testified the Cruiser was worth \$17,405.

- E. Title history for the 2008 Ford F-150 as Exhibit Number 16. Dakine (Carpenter) transferred this vehicle to Respondent Moore on June 11, 2015 for \$1,500.00. The Appellant testified that this vehicle was worth \$12,580.00.
- F. Title history for the 2006 Hummer H2 as Exhibit Number 17. Dakine (Carpenter) transferred this vehicle to Respondent Moore on June 5, 2015 and Respondent Encarnacion notarized the transaction. Respondent Moore conveyed it to Respondent Encarnacion on August 29, 2015 for \$1.00. The Appellant testified that the vehicle was worth \$18,910.00.
- G. Title history for the 2011 G37 Infiniti as Exhibit Number 18. The title history demonstrates that the vehicle was transferred from Dakine (Carpenter) to Defendant Wylie on June 10, 2015. Respondent Encarnacion notarized this transaction. Appellant testified this vehicle was worth \$31,000.00.

The title histories provided from the South Carolina Department of Motor Vehicles in February 2017 demonstrated that Respondent Encarnacion had title to at least the 2007 Range Rover (Exhibit 20). In 2016 she had title to the Range Rover and the 2006 Hummer H2.

At a hearing on November 17, 2016 in a motion for partial summary judgment and motion to strike Defendant Carpenter's answer and counterclaims, the court entered an order on December 8, 2016. In the order, the court found that the Defendant Moore was in default and granted Appellants claim and delivery against Respondent Moore as to the Grand Marquis, Toyota FJ Cruiser and the Ford F-150 and ordered the vehicles returned

and retitled in the Appellant's name. The Court left the remaining claims against Moore as to damages for trial as he was in default.

As to Respondent Encarnacion, the court entered an order that Respondent Encarnacion claimed no interest in and did not have ownership interest in the Range Rover, Cadillac Escalade and Hummer and granted claim and delivery as to those vehicles. The Respondent Encarnacion denied that the vehicles should have been titled in her name and asserted that she never signed for any titles and/or transfer of ownership of the vehicles. The Court granted summary judgment against Respondent Encarnacion on the claim and delivery cause of action as to the Range Rover, Cadillac Escalade and Hummer and left the remaining claims against her for trial (Order).

The court denied Appellant's summary judgment motion as to Defendant Wiley (Order).

In an order filed March 2, 2017, the court struck Defendant Carpenter's answer and counterclaim and held Defendant Carpenter in default ordering a hearing for damages (Order).

At trial, the Appellants testified and presented all the exhibits referenced above. The Appellants further provided the testimony of Mary Carpenter who verified the issues relating to a transfer of the vehicles, the formation of the business and her son, Defendant Carpenter's, conduct in basically stealing the vehicles from the Appellant. In addition, Appellants provided testimony of Wendy Lowery, a representative from Harrelson Nissan who verified the transaction associated with the Cruiser and that Respondent Encarnacion received \$15,000.00 for that vehicle (Exhibit 21; Tr. p.p. 81-91). Respondent Encarnacion did not present any evidence and did not refute any of the evidence. She, at trial, did not

testify or deny the signatures on the titles, the transfers or any of the evidence which was admitted without objection and consisted of certified copies of all the title histories.

At the conclusion of the trial, the Appellant requested a judgment against Carpenter, Moore, and Encarnacion for monetary damages and for the return of the Infiniti in Defendant Wiley's possession. Court granted the Appellants' request for the delivery of the Infiniti from Wiley to the Appellants (T. p. 107)

The court, at the conclusion of the trial, kept referring to the Appellants proving a conspiracy to defraud. The Appellants tried to request the court to reconsider its ruling based upon all the physical evidence and the title transfers. The court even set forth that it agreed the evidence demonstrated that Respondent Encarnacion was notarizing and transferring vehicles from the business. Despite this, the court declined to enter a judgment against her. The court also declined to enter a judgment against Respondent Moore despite the fact that he was in default and all allegations of the complaint were therefore deemed admitted (Affidavit of Default and Court Order). The hearing as to Respondent Moore was for the damages.

In an attempt to modify the order, the Appellants filed a Motion to Alter or Amend and for a new trial (Motion). The Appellants specifically asked the court to reconsider the judgment as to Respondent Moore since he was in default but the court declined to do the same. The Court was asked to reconsider as to Respondent Encarnacion as all the evidence demonstrated that she took vehicles and had no authority to do so. The motion was argued on April 20, 2018. The Appellants pointed out in the title histories for each vehicle, which were introduced at trial, how the Respondents Encarnacion and Moore along with Carpenter converted the Appellants' property (T. 4- 7). Appellants pointed out and the court

acknowledged that the evidence demonstrated that Respondent Encarnacion was involved in the transfer of the vehicles.

ARGUMENT

1. The Appellants are entitled to a judgment against Respondent Moore, who was in default, because he was in default as well as the fact the evidence support the elements of the Appellants' claims.

Respondent Moore was in default. He failed to plead to any of the allegations in the complaint and as such, pursuant to Rule 8(d) of the South Carolina Rules of Civil Procedure, the averments in the complaint to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. In the Complaint, the Appellants alleged that Respondent Moore was a resident of York County, South Carolina and was employed by Defendant Carpenter for various reasons. The Appellants further alleged that certain vehicles including the 2002 Mercury Grand Marquis, the 2007 Toyota FJ Cruiser, the 2008 Ford F150, and the 2006 Hummer H2 were all transferred to Moore and set forth the value of the vehicles. The Appellants further alleged that Respondent Moore had title to the vehicles and that he did not pay consideration for the vehicle and that his acquisition of title and possession of the vehicle was accomplished through fraud and theft. The Appellants requested immediate possession of the vehicles from the Respondent Moore in the claim and delivery cause of action. (Complaint, First Cause of Action). The Appellants, in the fourth cause of action, alleged that the Defendants (including the Respondent Moore) jointly and severally assumed and took the unauthorized ownership and dominion over the vehicles above referenced. The Appellants alleged that the Respondents' acts were inconsistent with the Appellants' right of possession, title and control of the property. The Appellants alleged that the Respondents' conduct constituted a conversion of the Appellants' property. The Appellants claimed that the Defendants were

jointly and severally liable to Appellants for the value of the vehicles wrongfully taken and for punitive damages. As to Respondent Moore, all these were deemed admitted since Respondent Moore failed to answer or otherwise plead. The Master in Equity granted partial summary judgment on the claim and delivery on the basis that Respondent Moore was in default. The only issue for the trial judge was the amount of damages.

The trial court ignored Rule 8(d) of the South Carolina Rules of Civil Procedure as well as Rule 55 as it relates to default judgments. The allegations of the complaint established liability. The Court failed to follow the procedure and the law of the case which required it to enter a judgment against Respondent Moore. The trial court disregarded the prior court order which found that Respondent Moore was in default and the issue was damages. The trial court did not find that Appellants did not prove damages, but that Appellants did not prove the conversion. The Court erred as the conversion was deemed admitted.

The trial judge's reasoning on the record at the conclusion of the trial as well as during the Motion to Alter or Amend pursuant to Rules 59(a) and (e) demonstrate that the court disregarded the Rules of Civil Procedure and the law of the case because the court refused to find that Respondent Moore was liable despite the fact that liability was not an issue.

Even assuming that the court could analyze the issue of liability in the posture of the case, the court erred in failing to find Respondent Moore liable and grant a judgment against him. The Appellant alleged that the Respondents jointly and severally took unauthorized ownership and dominion over the vehicles and converted the vehicles. "Conversion has been defined in our case law as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the exclusion of the owners' rights." **Owens v. Andrews Bank & Trust Co.**, 265 S.C. 490, 496, 220 S.E.2d 116

(1975). In addition, in South Carolina a civil conspiracy requires: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) which cause the plaintiff special damages. Vaught v. Waites, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989). “[I]n order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the **joint** assent of the minds of two or more parties.” Island Car Wash, Inc. v. Norris, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987).

The Appellants alleged joint and several liability on the part of the Respondents, including Encarnacion and Moore. The evidence demonstrates the Respondents were acting together to take possession and control of the vehicles. The DMV records demonstrate that Respondent Moore and Respondent Encarnacion were signing titles back and forth for little to no consideration. The evidence is also clear that both Encarnacion and Moore had possession of the vehicles. The evidence from a third party demonstrated that Respondent Encarnacion sold a vehicle to a third party for \$15,000.00. In addition to the certified records from the Department of Motor Vehicles, there was testimony from the witnesses, Mary Carpenter and the Appellants, which established a relationship between Encarnacion, Defendant Carpenter and Respondent Moore. There was no testimony presented to refute any of these facts. Finally, the Court granted judgment against Carpenter on the same claim and facts for \$187,245.00. The trial judge’s decision as to Respondent Moore is without factual basis. The trial judge made a mistake in believing that the Appellants were attempting to demonstrate the conversion of money. The entire case and argument presented at trial was that the Respondents Encarnacion and Moore converted the vehicles. The Appellants presented both direct and circumstantial evidence as to these facts.

As such, the trial court erred in not granting a judgment against Respondent Moore

in the amount of \$187,245.00 because Appellants were entitled to damages based upon the law of the case as Moore was in default as well as the fact that all the unrefuted evidence of record substantiates that Respondent Moore, jointly and severally with Carpenter, took possession and control of vehicles to the exclusion of the Appellant.

2. The trial court erred in not finding that the Respondent Encarnacion, along with the other co-defendants, converted the Appellant's personal property.

The Appellants' cause of action against Respondent Encarnacion is for conversion of automobiles. Appellants sued Encarnacion jointly and severally with the other Defendants. As set forth above, liability can be established through direct and/or circumstantial evidence. The evidence clearly established that Respondent Encarnacion was liable for the conversion of the vehicles. Exhibits 12 through 17, the DMV records, establish the Defendant Carpenter and Respondents Encarnacion and Moore made multiple transfers on the same day. The transfers were not sales. Once the title was out of Appellants' name, she no longer has ownership of the vehicle. The evidence also established the Defendant Carpenter and Respondents also took physical possession of the vehicle as well. The Appellant Emry testified that she did not authorize the transfers nor receive monies for these vehicles. The prior order from the Master in Equity establishes the right to claim and delivery from Respondent Encarnacion and left open the issue of damages on the conversion. The records clearly demonstrated that Respondent had title and possession to the vehicles at one time.

At trial, the Respondent did not testify nor did she present any evidence to refute her signature on the titles. She did not deny the transfers and she did not deny that she received the \$15,000.00 from the sale of the FJ Cruiser. She did not present evidence of purchasing any of the vehicles. The evidence established that the Respondent and Defendant Carpenter knew each other and were working together in getting titles. No evidence exists to support

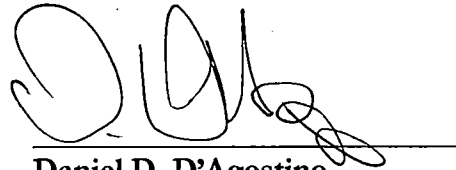
the court's conclusion of dismissing the claim as to Respondent Encarnacion. The trial court acknowledged at the conclusion of the trial it was clear that the Respondent was signing and transferring titles but said Appellants could not prove who got the money. The Respondent with Defendant Carpenter was transferring titles to avoid the Appellants. The taking of the vehicles, taking title to expensive vehicles for little to no consideration clearly demonstrated the conversion of Appellants' property.

The trial court erred in not granting a judgment against the Respondent and Appellant requests the court either remand for entry of a judgment in the same amount as judgment against Carpenter or for a new trial.

CONCLUSION

The Appellants request the Court to enter judgment against Respondents Encarnacion and Moore in the amount of \$187,245.00 or remand for a new trial.

October 12, 2018



Daniel D. D'Agostino
D'Agostino Law Firm
25 W. Liberty St.
York, South Carolina 29745
(803) 628-6509
Attorney for Appellants