

STATE OF MICHIGAN
COURT OF APPEALS

POLY BOND, INC., and ROBERT LAFAVE,
Individually and on behalf of LAMINATE
PRODUCTS, INC., and BOLA SYSTEMS, INC.,

UNPUBLISHED
July 27, 2010

Plaintiffs-Appellees/Cross-
Appellants,

v

JEN-TECH CORP., d/b/a JEN-LAY, and
ROBERT BOWLING,

No. 290429
Tuscola Circuit Court
LC No. 07-024023-CK

Defendants-Appellants/Cross-
Appellees,

and

LAMINATE PRODUCTS, INC., and BOLA
SYSTEMS, INC.,

Defendants.

Before: M.J. KELLY, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Defendants, Jen-Tech Corp., d/b/a Jen-Lay (Jen-Lay) and Robert Bowling, appeal as of right from a judgment for plaintiffs entered after a jury trial. On cross-appeal, plaintiffs challenge the trial court's subsequent order denying, in part, their motion for additur. We affirm in part, vacate in part, and remand for further proceedings.

I.

Robert LaFave and Bowling purchased Laminate Products, Inc. (LPI) in the 1990s, financing the purchase, in part, with a \$200,000 bank loan. The company provided laminating

services out of a building in Kingston, Michigan.¹ LaFave served as vice president of LPI and he received a salary for managing the company's sales. Several other laminating companies also operated out of the Kingston building, including Jen-Lay, which was solely owned and managed by Bowling, and Poly Bond, Inc. (PBI) which was owned by Bob's Holding Company.

LaFave testified that he had been considering buying Bowling's interest in LPI following a failed buyout of LPI and Jen-Lay by an unrelated entity, Rowmark, in the spring of 2006. LaFave and Bowling met on October 19, 2006. LaFave testified that he did not inform Bowling of his desire to buy LPI, but rather advised Bowling that he would no longer be devoting 100 percent of his time to LPI sales. In contrast, Bowling testified that he was under the impression after the meeting that LaFave had resigned from LPI. An employee testified that, after LaFave left the meeting, Bowling advised her to answer the LPI telephone with the name Jen-Lay. In addition, Bowling contacted LPI customers and suppliers and instructed them to transfer their business from LPI to Jen-Lay. LaFave had a suspicion from the tenor of their conversation that Bowling might have made efforts to remove LPI's equipment from the Kingston building, so LaFave visited the building later that evening and discovered that Bowling had secured the doors with ratchet straps. Later Bowling changed the locks to the doors. LPI's equipment was never removed from the business site, but in November 2006, Bowling sold LPI's equipment to Jen-Lay for \$100,000 and he sold PBI's equipment to Jen-Lay for \$50,000. Bowling testified that he used the proceeds of the sale to pay the debt remaining on the bank loan for the LPI purchase, but subsequently offered to cancel the sale and return the equipment to LPI and PBI. LaFave declined this offer.

LaFave subsequently instituted an action on behalf of LPI and PBI alleging, inter alia, common law and statutory conversion against Bowling and Jen-Lay.² At the completion of the proofs and following oral argument, the jury was instructed by the trial court and given a verdict form prepared by plaintiff. The jury found for LPI and against Bowling in the amount of \$158,000 for common law conversion in Count I. The jury found for LPI and against Jen-Lay in the amount of \$65,000 for statutory conversion under MCL 600.2919a in Count II. Finally, the jury found for PBI and against Jen-Lay in the amount of \$83,000 for common law conversion in Count III, but the jury awarded zero dollars in damages for PBI's statutory conversion claim against Jen-Lay in Count VI.³ Plaintiffs subsequently filed a motion for additur, requesting that

¹ Initially, LPI rented space in this building, but after several years, it was purchased by Bola Systems, Inc., which was owned by Bob's Holding Company, which was in turn owned by LaFave and Bowling.

² Bob's Holding Company, LPI, Bola Systems, Inc., PBI, and Bowling also filed a counter-complaint against LaFave for breach of fiduciary duty and tortious interference, which is not relevant to this appeal.

³ The jury's verdict and the judgment with respect to the conversion claims are outlined in the following chart. The jury verdict form did not direct the jury to reach a conclusion as to each defendant on each conversion claim on behalf of LPI and PBI. For example, the verdict form presented a single claim on behalf of LPI for common law conversion and four options to find in favor of Bowling or Jen-Lay, or against Bowling or Jen-Lay. Consequently, the jury entered findings as to one defendant on these conversion claims, but left the verdict form blank as to the

(continued...)

the trial court enter a judgment awarding additional statutory conversion damages, attorney fees, and costs. The trial court denied the motion as to damages and attorney fees, but found that plaintiffs were entitled to recover costs. The parties' claims for appeal followed.

II.

(...continued)

other. Plaintiffs failed to object when the jury returned its verdict in open court and the trial court accepted it. MCR 2.512(B). The trial court made no reference in the judgment to claims submitted to the jury where the jury left the verdict form blank. Because plaintiffs submitted the jury verdict form, they have waived any argument regarding the inadequacy of the judgment where the jury left the verdict form blank. *Dedes v Asch*, 233 Mich App 329, 334-335; 590 NW2d 605 (1998), rev'd on other grounds 469 Mich. 487 (2003) (the defendant waived the issue by failing to object to the verdict form).

<u>Plaintiff</u>	<u>Common Law Claim</u>	<u>Statutory Claim</u>	<u>Defendant</u>
LPI	158,000	<i>Blank</i>	Bowling
LPI	<i>Blank</i>	\$65,000	Jen-Lay
PBI	<i>Blank</i>	<i>Blank</i>	Bowling
PBI	\$83,000	\$0	Jen-Lay
Bola Systems, Inc.	No Cause of Action	No Cause of Action	Bowling

On appeal, defendants make several arguments regarding the trial court's admission of evidence, the trial court's instructions to the jury, and the trial court's ruling on a motion for directed verdict of plaintiff's conversion claims. "Conversion is any distinct act of dominion wrongfully exerted over another's personal property. It occurs at the point that such wrongful dominion is asserted." *Trail Clinic, PC v Bloch*, 114 Mich App 700, 705; 319 NW2d 638 (1982). In *Gum v Fitzgerald*, 80 Mich App 234, 238-239; 262 NW2d 924 (1977), this Court held that a plaintiff must show a reasonable attempt to recover the property to establish the right to possession was refused. If conversion has occurred, no further demand is necessary. *Id.* at 239. Otherwise, as defendants argue, if property is returned in mitigation of damages, the damages would only be nominal, "unless injury to the property, or, possibly, by reason of the detention, be shown." *McGraw v Sampliner*, 107 Mich 141, 143; 64 NW 1060 (1895).

Generally, "the proper measure of damages for conversion . . . is the value of the property converted in the open market at the time and place of conversion." *Bowen v Detroit United R*, 212 Mich 432, 437; 180 NW 495 (1920). Fair market value is defined as "The price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction; the point at which supply and demand intersect." Black's Law Dictionary (8th ed). For an item to have market value, there must be a demand for the item and the ability to sell it. 22 Am Jur 2d, Damages, § 282.

If the converted property does not have a regular market value, however, the measure of damages is the value of the property to the owner at the time of the conversion. *Ehman v Libralter Plastics*, 207 Mich App 43, 45; 523 NW2d 639 (1994), citing *Barbrick v White Sewing Machine Co*, 180 Mich 535; 147 NW 493 (1914). In *Ehman*, the defendant was unable to return two plastic injection molds that the defendant had possession of and the plaintiff owned. *Id.* Because the trial court found that there was no regular market for the molds, this Court affirmed the trial court's award of damages for the replacement cost at the time of the conversion. *Id.*

Defendants first claim that the plaintiffs were limited to nominal damages for their conversion claims and the trial court consequently erred by admitting evidence of the cost to replace the equipment that plaintiffs alleged was converted. Moreover, defendants claim that the trial court should have instructed the jury that plaintiffs were only entitled to nominal damages. We disagree. Defendants did not preserve these arguments at trial and review is limited to plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008).

The record demonstrates that Bowling foreclosed LPI's opportunities to conduct business by routing LPI's customers and suppliers to Jen-Lay, changing the locks at the Kinston building, and selling LPI's and PBI's equipment to Jen-Lay. Even though Bowling later offered to cancel the sale and return the equipment, LaFave testified that he declined this offer because the companies had lost their customers and suppliers by that time. We conclude that questions of fact existed regarding whether the right to possess the LPI and PBI equipment was refused and whether plaintiffs suffered more than nominal damages by reason of defendants' detention of the equipment. *Gum*, 80 Mich App at 239; *McGraw*, 107 Mich at 143. For these reasons, it was not plain error to admit testimony regarding the parties' damages calculations, including market value and replacement value, which exceeded nominal damages. The trial court instructed the jury regarding the distinctions between these calculations. It also instructed the jury that, in the event of the return or tender of the equipment, "the damages suffered by the plaintiff[s] would be]

mitigated to the extent that such damages would be nominal only.” Any further instructions limiting the award to nominal damages would have usurped the jury’s fact-finding role.⁴

Defendants’ second claim on appeal is that the trial court erred when it denied their motion for directed verdict of plaintiffs’ conversion claims. Defendants argue that plaintiffs failed to satisfy their burden to prove the market value of the equipment allegedly converted because plaintiffs only offered evidence of the equipment’s replacement value. We disagree. This Court reviews de novo a trial court’s ruling on a motion for a directed verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). A motion for directed verdict should be granted only if the evidence viewed in the light most favorable to the nonmoving party fails to establish a claim as a matter of law. *Id.*

Irwin Green is the machinist who built much of the LPI equipment. Green testified that there is a market for some second-hand equipment in the laminating industry. However, Bowling testified that the converted equipment was custom made to the companies’ specifications and he stated that he had never seen similar equipment sold in laminating trade magazines. Bowling further testified that the equipment was “pretty bear [sic]-bones.” Even if these facts limited plaintiffs’ recovery to market value damages for the converted equipment, Bowling opined that the equipment was worth \$150,000. “In nearly all jurisdictions, including Michigan, the owner of a chattel is competent to testify as to its value.” *Kailimai v Firestone Tire & Rubber Co (On Remand)*, 87 Mich App 144, 152; 273 NW2d 906 (1978). Moreover, Duane Jebbett, the owner of the company that attempted to buy LPI in the spring of 2006, testified that the opportunity to purchase LPI’s and PBI’s equipment for \$150,000 would have been a “pretty good buy.” Viewing this evidence in the light most favorable to plaintiffs, a question of fact existed regarding the extent of plaintiffs’ damages for the conversion claims. *Sniecinski*, 469 Mich at 131. Therefore, the trial court properly denied defendants’ motion for directed verdict.

III.

On cross-appeal, plaintiffs argue that the trial court abused its discretion in several respects by denying their motion for additur of statutory conversion damages and attorney fees. We agree, in part. We review a trial court’s decision on a motion for additur for an abuse of discretion. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 595; 708 NW2d (2005). “The trial court abuses its discretion if its decision is outside the range of principled outcomes.” *Morales v State Farm Mut Automobile Ins Co*, 279 Mich App 720, 729; 761 NW2d 454 (2008). This Court gives deference to the trial court’s decision because it has a “superior ability to view

⁴ In their brief, defendants also suggest that any testimony regarding the parties’ calculations of damages beyond nominal damages should have been limited to the market value of the equipment and should have excluded the replacement value of the equipment. Further, defendants suggest that they could not be liable for conversion because the sale from LPI to Jen-Lay was fair to the corporation. Because defendants do not include these arguments in the statement of questions presented, defendants have abandoned review of the arguments. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008).

the evidence and evaluate the credibility of the witnesses.” *Weiss v Hodge*, 223 Mich App 620, 637; 567 NW2d 468 (1997). To the extent that plaintiffs’ argument involves a question of statutory construction, we review de novo. *McManamon v Redford Charter Twp*, 273 Mich App 131, 134; 730 NW2d 757 (2006).

MCR 2.611(A) provides, in relevant part:

(1) A new trial may be granted to all or some of the parties, on all or some of the issues, whenever their substantial rights are materially affected, for any of the following reasons:

* * *

(c) Excessive or inadequate damages appearing to have been influenced by passion or prejudice.

(d) A verdict clearly or grossly inadequate or excessive.

In the alternative, MCR 2.611(E), Remittitur and Additur, provides, in relevant part:

(1) If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support.

Plaintiffs argue that the jury’s award for statutory treble damages under MCL 600.2919a was subjective, contrary to the intent of the statute, and inadequate. MCL 600.2919a provides:

(1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:

(a) Another person’s stealing or embezzling property or converting property to the other person’s own use.

(b) Another person’s buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.

(2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise.

Plaintiffs argue that the trial court should have entered a judgment in the amount of \$249,000 for LaFave’s statutory conversion claim on behalf of PBI and against Jen-Lay. The jury awarded \$83,000 in actual damages for PBI and against Jen-Lay for common law

conversion, but it awarded zero damages for PBI and against Jen-Lay for statutory conversion. The court correctly reasoned that treble damages were not mandatory under MCL 600.2919a.

We give effect to the Legislature’s intent, as expressed in the terms of the statute, by giving the words of the statute their plain and ordinary meaning. *In re Kostin Estate*, 278 Mich App 47, 57; 748 NW2d 583 (2008). Generally, Michigan courts have held that the term “may” is “permissive,” whereas the term “shall” is “mandatory.” *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008). As the trial court concluded, the phrase “may recover” in MCL 600.2919a indicates that treble damages are permissive, not mandatory. Thus, a trier of fact has discretion to decide whether to award them when a person has sustained actual damages as a result of another person converting property, for example. This interpretation is consistent with the general rule that a jury need not “award one item of damages merely because it has awarded another item.” *Kelly v Builders Square, Inc*, 465 Mich 39; 632 NW2d 912 (2001). We defer to the trial court’s finding that the jury’s decision not to award damages for PBI and against Jen-Lay under MCL 600.2919a “was not unsupported by the evidence.” *Weiss*, 223 Mich App at 637. Therefore, the trial court’s order denying the motion for additur of statutory conversion damages for PBI and against Jen-Lay was not an abuse of discretion.

Next, plaintiffs argue that the trial court should have entered a judgment in the amount of \$474,000 for LaFave’s statutory conversion claim on behalf of LPI in Count II. The verdict as to common law conversion in Count I and statutory conversion in Count II was two-fold, involving the claims against Bowling and the claims against Jen-Lay.

First, the jury awarded \$158,000 in actual damages against Bowling for LaFave’s common law conversion claim on behalf of LPI, but it did not enter a finding for or against Bowling for LaFave’s statutory conversion claim on behalf of LPI. As we concluded above, plaintiffs have waived any argument regarding the adequacy of the judgment as to the statutory conversion claim against Bowling. *Dedes*, 233 Mich App at 334-335. Nevertheless, absent a verdict in favor of LPI and against Bowling for the statutory conversion claim, *Heaton v Benton Constr Co*, 286 Mich App 528, 538; 780 NW2d 618 (2009) (“a trial court may offer the prevailing party an opportunity to consent to judgment in the highest amount the court finds is supported by the evidence”), the trial court properly declined to enter a judgment awarding treble damages against Bowling pursuant to plaintiffs’ motion for additur.

Second, the jury awarded \$65,000 against Jen-Lay for LaFave’s statutory conversion claim on behalf of LPI. As we concluded earlier in this opinion, treble damages were not mandatory under MCL 600.2919a, but by awarding \$65,000, the jury clearly exercised its discretion under that statute. However, plaintiffs now challenge the amount of the award. The jury determined the actual damages suffered to be \$158,000—the value of LPI’s property, which was converted by Bowling and received by Jen-Lay. Consequently, plaintiffs argue that LPI was entitled to three times the amount of actual damages or \$474,000. We agree with plaintiffs’ argument that, once the jury exercised its discretion to award treble damages under MCL 600.2919a, it could not award \$65,000, an amount less than three times the actual damages suffered. Had the Legislature so intended, it would have provided that a person may recover *up to* three times the amount of actual damages sustained. Instead, the plain language of the statute provides that a person “may recover 3 times the amount of actual damages sustained.” See *McGhee v Helsel*, 262 Mich App 221, 226; 686 NW2d 6 (2004). Because the jury ignored uncontroverted damages for LaFave’s statutory conversion claim on behalf of LPI and against

Jen-Lay, *Burtka v Allied Integrated Diagnostic Services, Inc*, 175 Mich App 777, 780; 438 NW2d 342 (1989), we conclude that the trial court abused its discretion by denying that portion of plaintiffs' motion for additur.

Finally, plaintiffs argue that the trial court should have awarded attorney fees pursuant to MCL 600.2919a. We agree. Following the motion for additur, the trial court declined to award attorney fees to plaintiffs, reasoning that an award for attorney fees was deemed to be included in the jury verdict. However, the jury was not instructed on how to determine the reasonableness of attorney fees, and the parties did not present argument to the jury about this issue. In addition and perhaps more importantly, it is the trial court's obligation to determine the reasonableness of requested attorney fees. *Smith v Khouri*, 481 Mich 519, 529-534; 751 NW2d 472 (2008). Accordingly, we remand for the trial court to reconsider whether plaintiffs are entitled to reasonable attorney fees under MCL 600.2919a.

We affirm in part, but vacate the portions of the trial court's order denying plaintiffs' motion for additur with respect to 1) LaFave's statutory conversion claim on behalf of LPI and against Jen-Lay and 2) reasonable attorney fees. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder