

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DONALD D. CABALA AND SUSAN CABALA,  
  
Plaintiffs/Counter-  
Defendants/Appellees,

UNPUBLISHED  
September 27, 2012

V

JAMES L. ALLEN, d/b/a LARKIN FOOD  
CENTER & HARDWARE, AND EUNICE A.  
ALLEN,

Defendants/Counter-  
Plaintiffs/Appellants.

No. 305250  
Midland Circuit Court  
LC No. 09-006089-CH

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Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Defendants appeal as of right an order of judgment entered by the trial court, following a bench trial, finding in favor of plaintiffs on defendants' counterclaims of embezzlement and conversion. We affirm.

Defendant, James L. Allen (hereafter "defendant"), purchased Larkin Food Center and Hardware ("the Store") in 1973. Plaintiff, Susan Cabala (hereafter "plaintiff"), was first hired as a clerk at the Store around 1992, and over time her responsibilities grew until she was named manager around 2002. Her managerial duties included scheduling, banking, ordering, invoices, accounts payable, payroll, and sales.

During the time that plaintiff managed the Store, the Store began to experience financial difficulties and had problems meeting its obligations. There was testimony that this problem stemmed from financial mismanagement on plaintiff's part and/or because plaintiff took items and cash from the Store for her personal use without accounting for the same. To try to resolve the issue, defendant directed that all business, including payment to vendors and employees was to be made in cash for a period of time. Financial difficulties, however, remained, as did suspicions that plaintiff was stealing from the Store.

In 2004, plaintiff and defendant discussed plaintiff's potential purchase of the Store, and plaintiff made several payments toward that end to defendant. In March 2004, plaintiff and defendant signed an agreement documenting that plaintiff and her husband had invested \$29,500.00 in the Store as of that date, which would be refunded if they, for any reason, did not

purchase the Store, as well as \$1800.00 for an upright freezer. The Store was eventually sold to another buyer in 2010 (apparently with the upright freezer in it), but plaintiffs were not refunded the \$29,500.00.

Plaintiffs thereafter initiated the instant lawsuit, alleging that defendant breached the parties' contract and converted funds by withholding the \$29,500.00 and the \$1800.00 they had paid for the freezer, as well as additional payments they had made toward the purchase of the Store. Defendant filed a counter-complaint alleging that plaintiff converted Store funds to her own use, engaged in embezzlement, and, because she negligently mismanaged the Store, should be accountable for the significant bank overdraft fees the Store incurred. At the conclusion of a bench trial, the trial court entered a judgment in plaintiff's favor for the return of the \$29,500.00 and \$1800 paid under the parties' written agreement. The trial court rejected plaintiffs' remaining claims for damages as well all of defendants' counterclaims. Defendants now appeal the trial court's judgment with respect to their counterclaims for embezzlement and conversion.

On appeal from a bench trial, this Court reviews the trial court's factual findings for clear error and its conclusions of law de novo. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW 2d 900 (2007). A trial court's factual findings are clearly erroneous when there is no supporting evidence for the findings or the reviewing court is left with a definite and firm conviction that a mistake was made. *Hill v Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007).

Defendants first argue on appeal that the trial court erred in finding that there was no civil cause of action for embezzlement. They further contend that they are entitled to judgment as a matter of law regarding liability on their counterclaim for embezzlement because the un rebutted evidence clearly demonstrated that plaintiff embezzled and converted the Store's money and property.

Embezzlement is a statutory offense, not an offense at common law. *People v Bergman*, 246 Mich 68, 71; 224 NW 375 (1929). The embezzlement statute, MCL 750.174(1) provides as follows:

A person who as the agent, servant, or employee of another person, governmental entity within this state, or other legal entity or who as the trustee, bailee, or custodian of the property of another person, governmental entity within this state, or other legal entity fraudulently disposes of or converts to his or her own use, or takes or secretes with the intent to convert to his or her own use without the consent of his or her principal, any money or other personal property of his or her principal that has come to that person's possession or that is under his or her charge or control by virtue of his or her being an agent, servant, employee, trustee, bailee, or custodian, is guilty of embezzlement.

The statute then lists the various criminal punishments applicable. The trial court is correct that the plain language of MCL 750.174, contains no indication that a civil remedy is available for violation of MCL 750.174. Notably, however, the statutory conversion statute, 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. [Emphasis added.]

The plain language of MCL 600.2919a(1)(a) indicates that the Legislature thus intended a method of recovery for a civil claim of embezzlement, albeit cloaked in the conversion statute.

Moreover, Michigan law provides that a private right of recovery may be read into a criminal statute. In *Gardner v Wood*, 429 Mich 290, 301-302; 414 NW2d 706 (1987), for example, our Supreme Court held that a new civil cause of action may be inferred from a bare criminal statute where there is no civil action sufficient to remedy a violation of the statute. The *Gardner* Court indicated that a civil remedy can be inferred from a criminal statute where the statute is found to be designed, entirely or in part:

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results. [*Id.* at 302 (quotation marks and citations omitted).]

If, then, the conversion statute were not read as sufficient to provide a civil remedy for a claim of embezzlement, we would find that a civil remedy can be inferred from the embezzlement statute, MCL 750.174, based upon the criteria set forth in *Gardner, supra*. In either event, the trial court erred in finding that there was no civil cause of action for embezzlement. Despite this error, however, defendants are not entitled to the relief sought because they failed to establish a sufficient factual basis for their claim for embezzlement, as discussed below. Error that did not affect the outcome of the proceedings is harmless, and the Court will not reverse on the basis of harmless error. *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 529; 730 NW2d 481 (2007).

The trial court did not determine whether plaintiff embezzled money and property from defendants because it determined that there was no civil claim for embezzlement. However, the

trial court did make extensive findings regarding defendants' counterclaim that plaintiffs converted money and property from defendants. Specifically, the trial court concluded that defendants did not demonstrate that plaintiffs converted defendants' property. Because defendants' counterclaims for embezzlement and conversion both depend on whether it was demonstrated that plaintiff took and used money and property from the Store for personal use, the trial court essentially considered all material facts relevant for a determination on the embezzlement cause of action.

“Common law conversion . . . consists of any ‘distinct act of domain wrongfully exerted over another’s personal property in denial of or inconsistent with the rights therein.’” *Dep’t of Agriculture v Appletree Marketing, LLC*, 485 Mich 1, 13-14; 779 NW2d 237 (2010), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). The elements of embezzlement were set forth in *People v Lueth*, 253 Mich App 670, 683-684; 660 NW2d 322 (2002) (citations omitted), as such:

(1) the money in question must belong to the principal, (2) the defendant must have a relationship of trust with the principal as an agent or employee, (3) the money must come into the defendant’s possession because of the relationship of trust, (4) the defendant dishonestly disposed of or converted the money to his own use or secreted the money, (5) the act must be without the consent of the principal, and (6) at the time of conversion, the defendant intended to defraud or cheat the principal.

First addressing the claim of embezzlement, the relationship between plaintiff and defendants, as well as her responsibility as manager for the financial operations of the Store, is not in dispute. Therefore, the first three elements are not at issue.

The fourth element of embezzlement, whether “defendant dishonestly disposed of or converted the money to his own use or secreted the money,” is determinative to defendants’ counterclaim for embezzlement. Defendants cite the testimony of a number of store employees as proof that plaintiff took money and property from the Store for her own use. However, as the trial court noted, none of these witnesses could state that plaintiff took Store money for her own use.

Due to the Store’s financial difficulties, defendant decided to implement a cash system for paying the Store’s obligations, and plaintiff was solely responsible for managing the Store’s finances, including paying vendors and other expenses in cash. Witnesses testified that cash was often seen lying around in various odd places and that plaintiff was not careful with how she handled the cash. One employee testified that she once found hundreds of dollars simply lying on a windowsill and on another occasion found money under a bag. Witnesses testified that plaintiff personally purchased goods for the Store from places such as Gordon Food Services and that they would help unload the goods from plaintiff’s truck. Therefore, witnessing plaintiff leaving the Store with cash was not certain evidence that she was converting money for her own use.

The lack of invoices for items that plaintiff was supposed to have purchased with cash is also not dispositive of her converting cash. Several employees testified to the haphazard way

that invoices were kept, indicating that invoices were often hard to find, and vendor invoices often could not be found at all. Further, defendant himself testified that while he suspected that plaintiff was stealing because the Store had gone downhill in the years she was manager, he did not have any proof that plaintiff was, in fact, embezzling.

Similarly, while witnesses testified that they saw plaintiff filling her family vehicles with fuel and taking lottery tickets, there is no indication whether she accounted for these items in her cash system or whether she made payment for these items. Moreover, plaintiff testified that she received gasoline from the Store in order to run errands for the Store. No one contradicted this testimony. True, a CPA hired to investigate the Store's books testified that there was a discrepancy in the books of over \$1,100,000 from March 2003 through December 2006 and that plaintiff's expenses far exceeded her salaried income during those years. The CPA also acknowledged, however, that she was unaware that consultants and employees were paid in cash during that time period and that her account of plaintiff's income did not take into account a \$65,000 trust disbursement that plaintiff received in 2004 or a \$95,000 home equity loan that plaintiff had access to during that time period.

With respect to the fifth element of embezzlement, consent, we note that consent involves agreement, approval, or permission for an act. *People v Buie*, 285 Mich App 401, 417; 775 NW2d 817 (2009). Although the trial court did not find that defendant consented to any personal use of store money by plaintiff, the trial court did discuss the fact that defendant did not confront or take any action toward plaintiff despite having some suspicion about her misappropriating Store funds. The trial court also noted that defendant implemented a cash system for paying the Store's obligations, and left plaintiff solely responsible for managing the Store's finances, including paying vendors and other expenses in cash. Defendant also refused to take his hired experts and others' advice to implement safekeeping measures to prevent potential embezzlement, suggesting at least acquiescence on defendant's part, if not consent.

Finally, concerning the last element, an intent to defraud, because it is difficult to prove an individual's state of mind, intent may be inferred from all of the facts and circumstances of a case, and minimal circumstantial evidence is sufficient. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). It was not demonstrated that plaintiff took money from the store and converted it. Consideration of her state of mind is thus unnecessary.

Turning to defendants' conversion claim, it is notable that conversion, in addition to requiring an act of domain wrongfully exerted over another's personal property also requires that the defendant had an obligation to return the specific money entrusted to his care. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111-112; 593 NW2d 595 (1999), citing *Check Reporting Services, Inc v Michigan Nat'l Bank-Lansing*, 191 Mich App 614, 626; 478 NW2d 893 (1991). As indicated above, there was no testimony identifying with specificity what money plaintiff may have converted. Because the Store utilized a cash system for meeting its obligations and plaintiff was entirely responsible, without oversight, for the financial operations of the Store, defendants were not able to specifically identify what money, or what amount of money, that she may have converted.

The trial court was able to hear the entirety of testimony and evaluate the credibility of the witnesses in making its determination on defendants' counterclaims. We defer to the trial

court's findings because the trial court had a superior ability to judge the credibility of the witnesses and the evidence presented. *People v Smelley*, 285 Mich App 314, 335; 775 NW2d 350 (2009), vac'd in part on other grounds 485 Mich 1023 (2010). Affording the proper deference, the trial court did not clearly err in finding that defendants did not demonstrate that plaintiff converted defendants' cash or property for her personal use. This finding was determinative for both an embezzlement claim and a conversion claim such that the trial court properly found in plaintiffs' favor on the conversion claim and such finding rendered its finding on the embezzlement claim harmless error.

Because the trial court did not clearly err in determining that plaintiffs were not liable on defendants' counterclaims for embezzlement and conversion, we need not consider defendants' request for a remand to determine damages due on their counterclaims.

Affirmed.

/s/ Deborah A. Servitto  
/s/ E. Thomas Fitzgerald  
/s/ Michael J. Talbot