

Opet v. Mobil Oil Micronesia Inc.

Supreme Court, Appellate Division
Benson J.A., Nakamura and Soll Temp JJ.
27 February 1987

Evidence - burden of proof requiring clear and convincing evidence asserted as consistent with Micronesian conditions customs and traditions - usual civil standard of preponderance of evidence accepted.

Appeals - only clearly erroneous findings of fact can be set aside.

Conversion - Civil action for conversion - contributory negligence as bar to recovery rejected.

The appellant was found to have conspired with fellow-employees of Mobil to convert property of the appellee valued at over \$50,000 by systematic irregularities in the preparation of invoice and cash receipts. The trial court relied upon the preponderance of evidence as the standard of proof in a case of civil conspiracy. It was alleged that the appellee was negligent in the conduct of its affairs in failing to insist that its own procedures were followed by employees.

HELD: Judgment of the trial court affirmed:

- (1) The burden of proof in a case of civil conspiracy in the F.S.M. is the usual standard of a preponderance of the evidence. The defendant's assertion was that in the conditions of Micronesia there is little emphasis on individual guilt and great emphasis on the family or community group and that as a consequence there should be a strict standard of proof requiring clear and convincing evidence. The court found nothing in the trial record concerning Micronesian custom or tradition to support the policy reasons advanced. The implied invitation to take judicial notice of Micronesian custom or tradition in the work setting prevailing in this case was declined.
- (2) Only findings of fact that are clearly erroneous can be set aside on appeal. All the challenged findings were adequately supported in the record and cannot be set aside.
- (3) Authority from the law of Georgia on contributing negligence as a defence concerns fraud not embezzlement and represents a minority view of the law which has been subject to criticism. Contributory negligence is not a defence in actions for conversion.

Cases referred to in judgment:

Cole v. Cates 149 S.E. 2d 165 (Ga. 1966)

Hannah v. Belger 436 F. 2d. 96 (5th Cir. 1971)

Lewis Pacific Dairymen's Association v. Turner 314 P.2d. 625 (Wash. 1957)

Miranda v. Arizona 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966)

Ray v. Electrical Contracting Corp. 2 F.S.M. Intrm. 21 (App. 1985)

Santosky v. Kramer 455 U.S. 745, 102 S.Ct. 1388, 71 L. Ed. 2d 599 (1982)

Other sources referred to in judgment:

18 Am. Jur. 2d *Conversion* (1965)

W. La Fave & A. Scott *Criminal Law* (1972)

McCormick *Evidence* (2nd ed. 1972)

9 Wigmore *Evidence* (3rd ed. 1940)

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Public Defender Office for the appellant
State Attorney's Office for the appellee

BENSON A.J.**Judgment:**

The defendant, Iakopus Opet, appeals from the money judgment awarded by the trial division in favour of the plaintiffs.

The issues presented by the defendant concern the sufficiency of the evidence, the burden of proof in cases of civil conspiracy, and whether the negligence of the plaintiff Mobil Oil in failing to discover the losses bars recovery.

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We hold that:

- (1) There is substantial evidence to support the findings of the trial court,
- (2) The proper burden of proof to establish civil conspiracy is a preponderance of the evidence, and
- (3) The alleged negligence of the plaintiff in failing to discover the losses does not bar recovery.

The judgment is therefore affirmed.

I. Facts

This civil action proceeded against five defendants. All were alleged to have conspired to take the property of Mobil Oil while working in Pohnpei. Judgment was entered against each. The defendant, Iakopus Opet, was also found to have converted money of Mobil during the period he was an employee of Mobil in Truk. Judgment was entered against him as to both the Pohnpei and the Truk takings.

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What follows are the findings of fact entered by the trial court, edited to eliminate findings as to the other defendants.

Plaintiff Mobil Oil is a corporation duly licensed to conduct business in the Federated States of Micronesia. Mobil is engaged in the sale of petroleum products at various locations throughout Micronesia including Pohnpei and Truk. Mobil's head administrative office is located in Guam although its inventory is located in various bulk plants including Pohnpei and Truk.

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Staffing at the bulk plants consists of a bulk plant superintendent and, usually, an assistant bulk plant superintendent who are both employees of Mobil. Mobil also enters into a contract relationship with a contractor who is required to provide manpower for the purposes of the day-to-day operations and maintenance at the bulk plant. The contractor employs a contract clerk who works in the bulk plant office. The contract clerk has a responsibility for the receipt of payments, the receipt of orders, the preparation of invoices and cash receipts, and other routine office matters.

The bulk plant superintendent has overall responsibility for the day-to-day operations of the bulk plant. The bulk plant superintendent receives payment

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for product, approves the delivering of product, makes bank deposits, and transmits proof of the bulk plant sales transactions to the head office on Guam frequently and regularly. The assistant bulk plant superintendent assists the bulk plant superintendent in the performance of his duties.

The contract clerk has responsibility for the preparation of invoice and cash receipts (hereinafter "I.C.R.s") for each purchase, the receipt of money from customers, and the delivery of the receipts to the bulk plant superintendent for his approval and reconciliation prior to transmission of the information to Guam.

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The contractor has responsibility over the delivery equipment, maintenance of the facility, the occasional receipt of payment, and other general responsibilities in the day-to-day operation of the bulk plant.

The bulk plant superintendent, the assistant bulk plant superintendent, the contractor, and the contract clerk in Pohnpei had overlapping functions during the period of time from October of 1978 through and including May of 1982. Due to the small number of Mobil employees and contract employees and the close working conditions in the Pohnpei Bulk Plant, each had high accessibility to the activities of his co-workers.

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Billy Jonas was employed by Mobil as the bulk plant superintendent in Pohnpei from October of 1978 through and including May of 1982. Iakopus Opet was employed initially as the contract clerk and subsequently as the assistant bulk plant superintendent in Pohnpei from October of 1978 through and including September of 1980.

During the period of time from October of 1978 through and including May of 1982, irregularities occurred in the reporting of sales at the Pohnpei Bulk Plant. Sales of Mobil products were made to customers and the money for said sales was collected by the bulk plant personnel. I.C.R.s were altered so that the copies submitted to Mobil indicated a smaller volume of sales than had actually occurred or the company copies were not submitted at all.

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Billy Jonas had primary responsibility to remit sale proceeds to Mobil. During the entire period of time from October 1978 through and including May of 1982, Jonas conspired to fraudulently convert money which was the property of Mobil to his own use and to the use of others.

Iakopus Opet was employed in the Pohnpei Bulk Plant from October of 1978 through September of 1980 and during that period of time prepared or assisted in the preparation of all but one of the irregular I.C.R.s Iakopus Opet and Billy Jonas conspired and agreed to alter I.C.R.s and convert cash which was the property of Mobil to their own use and to the use of others. Pursuant to the conspiracy, Opet and Jonas succeeded in converting cash which was the property of Mobil.

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From September of 1980 through and including April of 1982, Iakopus Opet was employed by Mobil as its bulk plant superintendent at the Truk Bulk Plant. Irregularities of the type which had occurred in Pohnpei commenced shortly after Opet took over the operations in Truk. The same embezzlement scheme

utilized in Pohnpei was employed in Truk. Opet's signature appears on all but one of the ICRs involved in the Pohnpei irregularity. As bulk plant superintendent in Truk, Opet was aware of all financial transactions and sales which took place the the bulk plant. He was also aware of and responsible for the remittance of funds and records to Mobil's head office on Guam.

140 During his period of employment at the Truk Bulk Plant, Opet converted, assisted others in converting, or allowed and acquiesced in the conversion of funds belonging to Mobil in the total amount of \$31,984.74.

During the period of time in which the embezzlements in Pohnpei occurred, Mobil maintained a fidelity insurance policy with New Hampshire Fire Insurance Company (hereinafter "New Hampshire") which provided a maximum policy limit of \$25,000 in coverage for embezzlement losses. Mobil made claim against its New Hampshire policy for the losses which occurred in Pohnpei. New Hampshire paid the full policy limits of \$25,000 to Mobil and received a written assignment of Mobil's cause of action against responsible individuals up to the amount of said payment. The fidelity policy provided that 150 Mobil is entitled to full recovery of its losses in excess of the insurance payment prior to New Hampshire being allowed to recover from the responsible parties.

During the period of time in which the embezzlements in Truk occurred, Mobil maintained a fidelity insurance policy with New Hampshire which provided a maximum policy limit of \$25,000 in coverage for embezzlement losses. Mobil made claim against its New Hampshire policy for the losses which occurred in Truk. New Hampshire paid the full policy limits of \$25,000 to Mobil and received in consideration a written assignment of Mobil's cause of action against responsible individuals up to the amount of said payment. The fidelity policy provided that Mobil is entitled to full recovery of its losses in 160 excess of the insurance payment prior to New Hampshire being allowed to recover from the responsible parties.

From these findings the court conclude:

- (1) Iakopus Opet is indebted to the plaintiffs pursuant to Count I (the Pohnpei conspiracy) in the total amount of \$20,770.54, and judgment should issue therefor.
- (2) Iakopus Opet is indebted to the plaintiffs pursuant to Count II (the Truk conversion) in the total amount of \$31,984.74, and judgment should issue therefor.

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II. Reasoning

A. *Burden of Proof in Civil Conspiracy*

In a timely fashion, the defendant has contended that the burden of proof that is proper in a case of civil conspiracy in the Federated States of Micronesia is clear and convincing, rather than the usual preponderance of the evidence.

The defendant asserts that conditions in Micronesia - of little emphasis on individual guilt and of great emphasis on the family or community group - mitigates in favour of a strict standard of proof.

The defendant also relies upon authority found in cases from the United States in

180 which the standard of proof is clear and convincing. See *Lewis Pacific Dairymen's Association v. Turner* 314 P.2d 625, 631 (Wash. 1957).

We are not persuaded by these points.

First, there is nothing in the record concerning Micronesian custom or tradition in the workplace to support the defendant's policy reasons favouring adoption of a burden of clear and convincing evidence. We decline the implied invitation to take judicial notice of Micronesian custom or tradition in the work setting prevailing in this case.

190 Second, the United States authority cited by the defendant represents the minority view. Generally, a higher standard has been approved in the United States for certain cases – not including civil conspiracy – where there is felt to be a special danger of deception. 9 *Wigmore Evidence* section 2498 (3d ed. 1940); *McCormick Evidence* section 340 (2d ed. 1972).

In addition, a higher standard than a preponderance of the evidence is sometimes employed because of the value of the interests at issue. *Santosky v. Kramer* 455 U.S. 745, 102 S.Ct. 1388, 1391-2, 71 L. Ed. 2d 599 (1982) (terminating parental rights); *Miranda v. Arizona* 384 U.S. 436, 86 S.Ct 1602, 16 L. Ed. 2d 694, 724 (1966) (waiver of constitutional rights).

Such concern for deception and for carefully guarded interests is not present in this case.

200 For the reasons stated, we decline the defendant's invitation that civil conspiracy require proof by clear and convincing evidence, and accept the usual standard of a preponderance of the evidence as satisfactory.

B. Sufficiency of the Evidence

The defendant contends that the court erred in arriving at its findings in that:

- (1) The plaintiffs failed to prove that the defendant was one of the conspirators in Pohnpei,
- (2) The plaintiffs failed to prove that the defendant converted funds of Mobil on Truk, and
- 210 (3) The plaintiffs failed to prove its losses upon which its claim for damage rests.

All elements must be proved to the court by a preponderance of the evidence. The standard of review on appeal is very limited: only findings that are clearly erroneous can be set aside on appeal. *Ray v. Electrical Contracting Corp.* 2 F.S.M. Intrm. 21, 24 (App. 1985).

These findings are adequately supported in the record and cannot be set aside.

220 The defendant also argues that Mobil failed to show the losses it suffered. The defendant points out that the record fails to show that a loss was suffered by Mobil from its inventory. Mobil's soundings of its tanks did not show a loss of product as a result of the embezzlements. There were not measuring devices on the delivery trucks which revealed a loss. Under these circumstances the defendant asserts the findings as to damages are in error.

The damages found by the trial court are the cash losses reflected as the difference in what the customers paid to the employees of Mobil and the amount transmitted to Mobil. We find this method is reasonable and the findings as to damages adequately supported in the record.

C. *Does the Plaintiff's Negligence Bar Recovery in an Action for Conversion?*

230 The defendant alleged in his affirmative defence that the plaintiff was negligent in the conduct of its affairs and such negligence bars recovery by it of any money unlawfully taken by defendant.

In support of this defence the defendant draws our attention to portions of the record which, he says, show the plaintiff failed to insist that its own procedures be followed by its employees and that the audits showed no loss to Mobil. Further the plaintiff did nothing to prevent the irregularities or disregarded irregularities which could with care have been discovered by the plaintiff.

240 The authority cited in support for this defence is derived from Georgia. In that state, in cases of fraud, the party to whom the representation is made has a duty to investigate and use ordinary care to verify the statement. *Hannah v. Belger* 436 F.2d 96, 98, 99 (5th Cir. 1971).

We decline to accept the defendant's position. First, the authority cited concerns fraud not embezzlement. Second, the authority cited represents a minority view subject to criticism.

In the Georgia authority fraud is the basis of the action. In the present case the money was lawfully in the hands of the defendant and he thereafter fraudulently converted it. Thus the facts and the legal theory of the Georgia authority are distinguishable from this case.

250 "In seeking to choose between a fraudfeasor and a negligent party, the Georgia law unfortunately goes with the alleged crook." *Cole v. Cates* 149 S.E. 2d 165, 169 (Ga. 1966) (Hall J., concurring). See also W. LaFave and A. Scott, *Criminal Law*, 668-69 (1972) for a discussion of this defence in cases of false pretences.

We find no authority that contributory negligence is a defence in actions for conversion. 18 Am. Jur. 2d *Conversion* sections 69-81 (1965).

Under these circumstances we find no error in the trial court in its failure to accept defendant's affirmative defence.

For the reasons given, the judgment of the trial court is affirmed.

Reported by: D.V.W.