

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2016 IL App (4th) 150391-U

NO. 4-15-0391

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 22, 2016
Carla Bender
4th District Appellate
Court, IL

DECATUR EARTHMOVER CREDIT UNION,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Macon County
KEVIN L. CORMAN,)	No. 14SC1785
Defendant-Appellee.)	
)	Honorable
)	Scott B. Diamond,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court
Justices Turner and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in finding for defendant where plaintiff's contributory negligence was not a valid defense to the intentional tort of conversion.

¶ 2 In October 2014, plaintiff, Decatur Earthmover Credit Union (DECU), filed a small claims complaint for conversion against defendant, Kevin L. Corman, alleging defendant refused to return funds inadvertently disbursed to him by plaintiff. Following a bench trial, the trial court found in favor of defendant on the basis plaintiff was 52% contributorily negligent.

¶ 3 Plaintiff appeals, arguing the trial court erred in finding for defendant where (1) contributory negligence is not a defense to conversion and (2) it proved each element of conversion. We reverse and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 On June 16, 2014, defendant entered the Mt. Zion branch of DECU and asked to withdraw \$11,700 from his checking account, which, at the time, contained \$12,284.73. The teller inadvertently gave defendant \$17,000. Defendant took the money and left the branch. Thereafter, DECU discovered the error and contacted defendant, requesting he return the extra \$5,300. Defendant refused and the funds were not returned.

¶ 6 On October 14, 2014, plaintiff filed a complaint against defendant for conversion of \$5,300.

¶ 7 During the March 9, 2015, bench trial, Katy Blakey, the Mt. Zion branch manager, testified she was working at a different branch on June 16, 2014, when the assistant manager for the Mt. Zion branch called her to get approval for defendant's \$11,700 withdrawal. According to Blakey, when she returned to the Mt. Zion branch the next morning, she discovered the vault balance was short \$5,300. Blakey recreated the cash transactions for the previous day and determined Debbie Patterson, the DECU teller who performed defendant's transaction, gave him an extra \$5,300. Blakey reviewed the surveillance video, which showed Patterson counting the money out to defendant in one thousand dollar increments. According to Blakey, the video showed Patterson disbursing \$17,000 to defendant, not \$11,700. (We note the video was not played for the trial court, introduced into evidence, or included in the record on appeal.) Blakey testified defendant had \$12,284.73 in his account on the day of the transaction in question.

¶ 8 Blakey contacted defendant and informed him of the error. Defendant told Blakey he had handed the envelope containing the money directly over to another individual without counting it. On June 19, 2014, defendant came to the branch to discuss the matter in person. Defendant reported he contacted the man to whom he gave the envelope, but he told defendant it

contained just \$11,700. Blakey testified she showed defendant the video of the transaction. According to Blakey, defendant admitted to her the video showed Patterson counting out \$17,000 to him.

¶ 9 Blakey testified when defendant came in the second time to discuss the matter, he "was still trying to put his mind around it in that he did not feel that he was responsible for repaying the funds." Thereafter, Blakey sent defendant a certified letter, which was returned as unclaimed. The letter noted defendant had not reimbursed the \$5,300 and if he did not do so by July 14, 2014, the bank would have to take further action to collect the funds.

¶ 10 Debbie Patterson, the DECU teller who performed defendant's transaction, testified tellers do not maintain significant amounts of funds at their stations. As a result, she had to obtain the requested amount from the bank's vault. Patterson prepared a money order for \$11,700 and took it to the vault. When asked why she was given more money than she requested from the vault, Patterson responded, "I'm assuming that it was probably just a transposition type error." Patterson testified she learned of the error the next day and was suspended for several days as a result.

¶ 11 Patterson testified the head teller, Kim Nailer, got the money from the vault for her. Patterson did not count it at the time Nailer gave it to her. According to Patterson, Nailer made a mistake when she gave Patterson the money. (Nailer was not called to testify.) Patterson acknowledged she also made a mistake when she counted the money out to defendant. Patterson testified she talked with defendant during the transaction, but no one interrupted her while she actually counted the money out to defendant. Defendant asked Patterson to place the money in

an envelope for him, which she did. Defendant did not say anything to Patterson regarding the amount of money disbursed.

¶ 12 Defendant, a member of the credit union, testified he went to the bank to withdraw \$11,700. Defendant explained he was employed at a shop that repaired and sold motorcycles. According to defendant, "individuals would come in and put bikes on consignment." Defendant would get a flat-rate commission prior to the sale. In this case, defendant had sold a motorcycle to a buyer in Indonesia for a customer. Defendant testified the buyer wired the funds to his checking account. Plaintiff's exhibit No. 2, a snapshot of defendant's transaction history, shows an electronic deposit made to his checking account the morning of the withdrawal from an individual named "Rico Tedkajusum" in the amount of \$11,700. Defendant testified he went to the bank to withdraw the cash to give to the seller, who was coming from St. Louis to the bike shop to get his money. Defendant testified he just gave the seller the envelope of cash without counting it. According to defendant, "[t]he only thing [he] looked at was the receipt." The receipt for defendant's withdrawal, which he signed, showed he requested and withdrew \$11,700.

¶ 13 Defendant admitted it was unusual for the sale to go through his personal checking account. After the mistake was brought to his attention, defendant contacted the seller, who told defendant the envelope contained just \$11,700. During the hearing, defendant did not recall the seller's name.

¶ 14 While defendant testified he lost track as Patterson was counting out the money due to interruptions, he did not remember her counting beyond \$11,700. When asked why he did not ask Patterson to start over when he lost track, defendant testified, "It wasn't uncommon for us

to do business [transactions] of that size there before. I've never had a mistake before, even [a] penny."

¶ 15 Defendant testified he watched the surveillance video with Blakey but denied admitting to her he received more than \$11,700. When asked what he saw on the video, defendant testified, "I'm not an expert. You know, you can see—you can see the counting of money. Um—I didn't watch the video close enough, you know, I'm trusting [Blakey] on her saying that she—she knows that there was seventeen thousand there, I guess. Um—I don't know, me personally, if I could tell [she] counted seventeen thousand dollars."

¶ 16 At the conclusion of the bench trial, the trial court ruled as follows: "Show finding by the Court the bank was 52 percent contributory negligent. Judgment entered in favor of the defendant against the plaintiff."

¶ 17 On March 25, 2015, plaintiff filed a motion to reconsider, arguing contributory negligence is not a defense to conversion and it sufficiently proved each element of conversion.

¶ 18 Following a May 4, 2015, hearing, the trial court denied plaintiff's motion and stated the following:

"I was kind to these people. I said that they made an error. How do I know that either the officer or the teller didn't steal the money themselves?

They were talking to—the bank counted the money twice. The teller was talking to [defendant]. He wasn't—he didn't know what he got. He got it in an envelope. He gave it to the person.

It seems to me they're the ones that made the mistake, not him. So in my discretion, I'm denying the motion."

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, plaintiff argues the trial court erred in finding for defendant where (1) contributory negligence is not a defense to conversion and (2) it proved each element of conversion.

¶ 22 We note defendant did not file a brief. However, that failure does not require automatic reversal as plaintiff bears the burden of establishing error. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-32, 345 N.E.2d 493, 494-95 (1976). "When the record is simple, and the claimed errors are such that this court can easily decide them on the merits without the aid of an appellee's brief, this court should decide the appeal on its merits." *Plooy v. Paryani*, 275 Ill. App. 3d 1074, 1088, 657 N.E.2d 12, 23 (1995). Because plaintiff's brief sufficiently presents the issue and the record is relatively simple, we will address the merits of the appeal.

¶ 23 Ordinarily, "[t]he standard of review we apply when a challenge is made to the trial court's ruling following a bench trial is whether the trial court's judgment is against the manifest weight of the evidence." *Judgment Services Corp. v. Sullivan*, 321 Ill. App. 3d 151, 154, 746 N.E.2d 827, 830 (2001). However, the question of whether the doctrine of contributory negligence applies at all to this case presents a question of law, which we review *de novo*. See *American Federation of State, County & Municipal Employees, Council 31 v. Illinois State*

Labor Relations Board, State Panel, 216 Ill. 2d 569, 577, 839 N.E.2d 479, 485 (2005)

("Questions of law are reviewed *de novo*.").

¶ 24 Conversion is an unauthorized act which deprives a person of his property permanently or for an indefinite time. *In re Thebus*, 108 Ill. 2d 255, 259, 483 N.E.2d 1258, 1260 (1985). "The essence of conversion is the wrongful deprivation of one who has a right to the immediate possession of the object unlawfully held." *Bender v. Consolidated Mink Ranch, Inc.*, 110 Ill. App. 3d 207, 213, 441 N.E.2d 1315, 1320 (1982). To prove conversion, the plaintiff must establish the following elements by a preponderance of the evidence: (1) the plaintiff has a right to the property; (2) the plaintiff has an absolute and unconditional right to immediate possession of the property; (3) the plaintiff has made a demand for possession; and (4) the defendant wrongfully and without authorization assumed control, dominion, or ownership over the plaintiff's property. *Cirrincone v. Johnson*, 184 Ill. 2d 109, 114, 703 N.E.2d 67, 70 (1998).

¶ 25 Plaintiff argues the trial court erroneously found in favor of defendant on the basis it was 52% contributorily negligent. We agree. Conversion is an intentional tort. *Thebus*, 108 Ill. 2d at 259, 483 N.E.2d at 1260. It has been long recognized in Illinois contributory negligence is not a defense to an intentional tort. *Rusher v. Smith*, 70 Ill. App. 3d 889, 893, 388 N.E.2d 906, 910 (1979). Accordingly, the trial court erred in deciding the case in that manner. Plaintiff contends we should also find in its favor on the merits, arguing it proved all the elements of conversion. However, we decline plaintiff's invitation in light of the fact the trial court itself did not rule on the merits. In fact, the record does not reflect the court made any findings regarding whether plaintiff satisfied any of the elements of conversion.

¶ 26 Moreover, the resolution of this case involves questions of fact and credibility. For

example, Blakey testified defendant admitted to her the video showed him receiving \$17,000. During his testimony, however, defendant denied admitting that to her. Blakey also testified she could see from the video Patterson counted \$17,000 out to defendant. However, defendant testified he could not tell from the video Patterson counted out \$17,000. "When the testimony of witnesses is conflicting, it is within the exclusive province of the trial court, as the trier of fact [in a bench trial], to determine the witnesses' credibility and the weight to be given their testimony." *M.J. Oldenstedt Plumbing Co. v. Kmart Corp.*, 257 Ill. App. 3d 759, 766-67, 629 N.E.2d 214, 219 (1994). We will not preempt the trial court's duty in this regard. Accordingly, we remand this matter to the trial court for a ruling on the merits and the entry of factual findings supporting its judgment.

¶ 27

III. CONCLUSION

¶ 28 For the reasons stated, we reverse the trial court's judgment and remand with directions.

¶ 29 Reversed; cause remanded with directions.