SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 6D23-36
Lower Tribunal No. 19-CA-002853

SFR SERVICES, LLC, a/a/o DONALD and JANE MARSTON,

Appellants,

v.

TOWER HILL SIGNATURE INSURANCE COMPANY,

Appellee.

Appeal from the Circuit Court for Lee County.
Leigh Frizzell Hayes, Judge.

June 30, 2023

STARGEL, J.

SFR Services, LLC, appeals from the final judgment entered after a jury verdict in favor of Tower Hill Signature Insurance Company.[1] We affirm the final judgment in all respects. However, we write to address SFR's argument that the

[1] This case was transferred from the Second District Court of Appeal to this Court on January 1, 2023.

Concealment or Fraud provision in the subject insurance policy does not apply to SFR as an assignee of the insureds.[2]

Background

In September 2017, the insureds suffered damage to their home during Hurricane Irma. The insureds contracted with SFR to replace their roof and executed an assignment of benefits in favor of SFR. After Tower Hill denied SFR's claim for benefits, SFR filed the underlying lawsuit for breach of contract. Tower Hill raised numerous affirmative defenses, including its Tenth Affirmative Defense, which asserted that coverage was voided under the policy because SFR made "material misrepresentations as to the purported value of the repairs reflected in SFR's estimate" in violation of the policy's Concealment or Fraud provision ("the misrepresentation defense"). The jury ultimately returned a verdict for Tower Hill, finding that although the property was damaged by Hurricane Irma and the losses were not excluded under the policy, Tower Hill had proved its misrepresentation defense. The trial court subsequently denied SFR's renewed motion for directed verdict or motion for new trial.

[2] We reject the remainder of SFR's arguments on appeal without further discussion.

Analysis

SFR argues on appeal that it was entitled to a directed verdict on Tower Hill's misrepresentation defense. The relevant policy language provides:

> **2. Concealment or Fraud**
>
> a. Under Section I - Property Coverages, with respect to all "insureds" covered under this policy, we may not provide coverage for loss under Section I - Property Coverages if, whether before or after a loss, one or more "insureds" have:
>
> (1) Intentionally concealed or misrepresented any material fact or circumstance;
>
> (2) Engaged in fraudulent conduct; or
>
> (3) Made material false statements;
> relating to this insurance.
>
> However, if this policy has been in effect for more than 90 days, we may not deny a claim filed by you or an "insured" on the basis of credit information available in public records.

Based on the language of this provision, along with the definitions contained within the policy,[3] SFR argues that, as an assignee of the insureds, it was not subject to the

[3] As set forth in the policy's definitions section:

> In this policy, "you" and "your" refer to the "named insured" shown in the Declarations and the spouse if a resident of the same household. "We," "us" and "our" refer to the Company providing this insurance. In addition, certain words and phrases are defined as follows:

conditions set forth in the Concealment or Fraud provision. In support, SFR cites the Fifth District's decision in *Shaw v. State Farm Fire & Casualty Co.,* 37 So. 3d 329 (Fla. 5th DCA 2010), *disapproved of on other grounds by Nunez v. Geico Gen. Ins. Co.*, 117 So. 3d 388 (Fla. 2013), which recognized that the assignment of a right to payment does not entail the transfer of contractual duties to the assignee:

> Under Florida law, the assignment of a contract right does not entail the transfer of any duty to the assignee, unless the assignee assents to assume the duty. Assignment of a right to payment under a contract does not eliminate the duty of compliance with contract conditions, but a third-party assignee is not liable for performance of any duty under a contract, unless he was a party to the agreement or has become a party by subsequent agreement. Absent such an event, which is in the nature of a novation, the duty of performance of the conditions to the right of payment remains with the assignor.

Shaw, 37 So. 3d.

Contrary to SFR's argument, *Shaw* does not support the conclusion that the Concealment or Fraud provision should not apply to an assignee of the insured. The

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> . . . .
>
> **3.** "Insured" means you and residents of your household who are:
>
> **a.** Your relatives;
>
> **b.** Other persons under the age of 21 and in the care of any person named above.

insured's duties under a contract are distinguishable from conditions of the contract, the latter of which are not eliminated by the assignment of a right to payment. *See id.* at 332 ("Assignment of a right to payment under a contract does not eliminate the duty of compliance with contract conditions, but a third-party assignee is not liable for performance of any duty under a contract . . . ."); *see also Certified Priority Restoration v. State Farm Fla. Ins. Co.*, 191 So. 3d 961, 962 (Fla. 4th DCA 2016).

In *Webb Roofing & Construction, LLC v. FedNat Insurance Co.*, 320 So. 3d 803 (Fla. 2d DCA 2021), the Second District considered whether a contractor proceeding under an assignment of benefits from the insured was subject to the policy's appraisal provision. The Second District held that the assignment "did not eliminate the duty of compliance with the conditions imposed by the insurance contract, including appraisal." *Id.* at 807. The court also distinguished the insured's duties under the policy from contract conditions like appraisal: "[T]he appraisal provision in this case is not included in the 'Duties After Loss' policy provision. Rather, it is a contract condition that is not eliminated by a post-loss assignment of the contract." *Id.*

Although we recognize that *Webb Roofing* has not been applied outside the appraisal context, we find the analysis instructive in the case at hand. The Concealment or Fraud provision in the subject policy does not outline duties to be performed by the insured but rather provides a remedy for the insurer in the event of

fraudulent conduct. Much like the appraisal provision in *Webb Roofing*, this provision "would be of no value if a party 'could escape the effect of such a clause by assigning a claim . . . to a third party.'" 320 So. 3d at 806 (quoting *Cone Constructors, Inc. v. Drummond Cmty. Bank*, 754 So. 2d 779, 780 (Fla. 1st DCA 2000)). Accordingly, we conclude that SFR was subject to the Concealment or Fraud provision contained in the policy.

AFFIRMED.

NARDELLA and SMITH, JJ., concur.

Melissa A. Giasi and Erin M. Berger, of Giasi Law, P.A., Tampa, for Appellants.

C. Ryan Jones and Scot E. Samis, of Traub Lieberman Straus & Shrewsberry, LLP, St. Petersburg, for Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

GREENSPIRE GLOBAL, INC., and STEVEN M. KNAUSS,

Appellants,

v.

SARASOTA GREEN GROUP, LLC,

Appellee.

No. 2D22-2653

June 23, 2023

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Manatee County; Edward Nicholas, Judge.

James L. Essenson, Barbara J. Welch, and Matthew J. Kelly of Essenson Law Firm, Sarasota, for Appellants.

Hunter G. Norton of Shumaker, Loop & Kendrick, LLP, Sarasota, for Appellee.

NORTHCUTT, Judge.

Greenspire Global, Inc., and its president, Steven M. Knauss (collectively, Greenspire), appeal a nonfinal order permitting Sarasota Green Group, LLC (SGG), to amend its complaint to seek punitive damages. *See* Fla. R. App. P. 9.130(a)(3)(G) (authorizing appeal of nonfinal orders that grant or deny motions for leave to amend to assert

punitive damage claims). We reverse because SGG failed to submit or proffer evidence to support the amendment.

Greenspire licensed its bactericide and fungicide compound known as "Procidic 2" to SGG, a distributor of "green" agricultural products. SGG later sued Greenspire and Knauss for alleged fraudulent inducement, negligent misrepresentation, fraud, violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), and unjust enrichment.

In due course, SGG sought leave to amend its complaint to add demands for punitive damages in the fraud counts, contending that "[t]he conduct causing damages to the Plaintiff was intentional and/or so reckless and wanton in care that it constituted a conscious disregard or indifference to the rights of the Plaintiff." After a hearing, the circuit court granted SGG's motion. We review the ruling de novo. *See Est. of Blakely ex rel. Wilson v. Stetson Univ., Inc.*, 355 So. 3d 476, 481 (Fla. 5th DCA 2022).

In Florida, punitive damages are authorized and governed by statute. *See* § 768.72, Fla. Stat. (2022). "A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence." § 768.72(2). As defined in the statute:

> (a) "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.
>
> (b) "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted

> a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

§ 768.72(2)(a), (b).

Before a punitive damages claim may proceed, there must be "a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages." § 768.72(1). Accordingly, when seeking leave to plead its punitive damage claims, SGG was obliged to produce evidence that Greenspire's conduct, knowledge, and intent reached the level of "intentional misconduct" or "gross negligence." *See* § 768.72(2)(a), (b).

For this purpose, SGG relied solely on the unverified allegations within and attachments to its complaint, augmented by an affidavit from its managing member, Bruce Cassidy. SGG maintained that those documents showed that Greenspire intentionally made false and misleading statements regarding Procidic 2, intentionally failed to disclose an out-of-state regulatory action regarding the product, and knowingly misrepresented that SGG would grant Greenspire an exclusive license. But those filings were inadequate to justify SGG's punitive damages claims for several reasons.

First, SGG's unverified complaint was not evidence. *See Harrold v. Schluep*, 264 So. 2d 431, 435 (Fla. 4th DCA 1972) ("Pleadings are not admissible in evidence to prove or disprove a fact in issue."). As such, it could not support the circuit court's determination that SGG made an *evidentiary* showing sufficient to substantiate its punitive damages claims. Similarly, the circuit court could not rely on the unauthenticated attachments to the unverified complaint because they, too, lacked any evidentiary weight on their own. *See Eco-Tradition, LLC v. Pennzoil-Quaker State Co.*, 137 So. 3d 495, 496 (Fla. 4th DCA 2014) (holding that

unauthenticated attachments to an unverified complaint have no evidentiary value).

Second, SGG's attempt to imbue the complaint and exhibits with evidentiary import by submitting Cassidy's affidavit was ineffective. The affidavit represented that Cassidy had read SGG's second amended complaint and that "[t]he statements made therein are correct to the best of my personal knowledge, information, *and belief*." (Emphasis added.) A "verification which is improperly based on information and belief is insufficient to entitle the verifying party to relief because the verification is qualified in nature." *Ballinger v. Bay Gulf Credit Union*, 51 So. 3d 528, 529-30 (Fla. 2d DCA 2010) (declining to give weight to other words like "knowledge" within the verification when the verification was already qualified by the inclusion of the word "belief"). Thus, insofar as Cassidy's affidavit simply reflected that he believed the unverified accusations in the complaint, it failed to lend evidentiary support to SGG's proposed punitive damage claims.

Finally, Cassidy's affidavit asserted that Greenspire intentionally misrepresented or withheld material information in direct communications with him. These allegations were fatally flawed because Cassidy failed to disclose how he could have personal knowledge of Greenspire's intent. *See W. Edge II v. Kunderas*, 910 So. 2d 953, 954-55 (Fla. 2d DCA 2005) (holding that an averment in an affidavit from an affiant who "could not have had personal knowledge of what [another organization] knew or did not know" was insufficient as a matter of law). Cassidy's mere *belief* that Greenspire intentionally misrepresented the attributes of Procidic 2 and otherwise behaved fraudulently was not *evidence* that they did so. *See id.* (citing *Fla. Dep't of Fin. Servs. v.*

Associated Indus. Ins. Co., 868 So. 2d 600, 602 (Fla. 1st DCA 2004) (holding that opinions are not statements based on personal knowledge)).

Because there was no showing by evidence in the record or proffered by SGG to support claims for punitive damages in this case, we reverse the order permitting it to add such claims to its pleadings. Our holding is without prejudice to SGG's filing a new motion to amend with proper evidentiary support.

Reversed and remanded.

CASANUEVA, J., and CASE, JAMES R., ASSOCIATE SENIOR JUDGE, Concur.

Opinion subject to revision prior to official publication.

SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 6D23-83
Lower Tribunal No. 19-CA-007281

DOUGLAS HANNAH a/k/a DOUGLAS J. HANNAH,

Appellant,

v.

MALK HOLDINGS, LLC,

Appellee.

Appeal from the Circuit Court for Lee County.
Alane Laboda, Judge.

June 23, 2023

TRAVER, C.J.

Douglas Hannah appeals a final judgment for civil theft and conversion in favor of Malk Holdings, LLC.[1] We affirm the trial court's ruling on conversion because competent, substantial evidence supports it. But we reverse as to civil theft.

[1] This case was transferred from the Second District Court of Appeal to this Court on January 1, 2023.

As a condition precedent to a civil theft proceeding, a would-be plaintiff must send a demand letter to its potential defendant, who then has thirty days to "comply" under the civil theft statute by returning the amount allegedly owed. *See* § 772.11(1), Fla. Stat. (2018). Here, Hannah unquestionably sent a check drawn on his attorney's trust account, which Malk Holdings received within the statutory time frame. Because Malk Holdings demanded payment in cash or a cash equivalent, the parties contest whether Hannah indeed "complied" with the civil theft statute. But we need not answer this question. Malk Holdings' conduct upon receiving the full amount it demanded waived any subsequent arguments it might have had about Hannah's compliance with its demand letter. Thus, we conclude that the trial court should have entered a directed verdict on Malk Holdings' failure to satisfy a condition precedent and Hannah's affirmative defense of payment.

Hannah is an investor who specializes in structured investments. This means that he identifies investment opportunities, and then procures investors to raise the necessary capital to pursue them. Dr. Sunil Malkani is Malk Holdings' primary owner and manager. At the time their relationship soured, Malkani and Hannah had collaborated in more than seventy-five investments.

At issue in this case were two structured investments. The first, Distressed Capital II, LLC ("DCII"), purchased distressed assets, sold them for a profit, and then distributed those profits to its investors. Hannah co-managed DCII and ran its

daily operations. DCII had multiple investors, including Malk Holdings. The second, Tamiami Square, involved a real estate purchase. Hannah and Malk Holdings solely participated in this investment, whereby Hannah lent money to a Malk Holdings subsidiary to purchase the property. The parties disputed whether Malk Holdings pledged any collateral to back the Tamiami Square loan. Hannah insisted that he and Malkani had entered into an oral agreement whereby Malk Holdings would collateralize the Tamiami Square loan with the DCII profit distributions. But Malkani did not recall any pledge agreement, and when DCII distributed its next round of profits to everyone but Malk Holdings, he instructed his lawyer to send Hannah two civil theft demands. These thirty-day demands, for a combined $91,347 in cash, issued on June 21, 2018.

At Hannah's direction, his lawyer drafted a check from the law firm's trust account for $91,347 payable to Malk Holdings. On July 2, 2018, Hannah's lawyer sent this check via certified mail to the same Malk Holdings lawyer who sent the civil theft demand letters. On July 5, 2018, the Malk Holdings' lawyer received the full payment requested, albeit not in cash. But the lawyer said nothing. He did not contact Hannah's lawyer to contest the form of payment. The record is silent whether he told Malkani. But Malkani testified that as of July 11, 2018, he did not know where the check was, which certainly implies that his lawyer did not tell Malkani he had full payment in hand for nearly a week.

The ensuing events are likely irreplicable. Malkani personally called Hannah's lawyer's office on July 11, 2018, and said he had never received a check, suggesting that it might have been sent to the wrong address. At Malkani's direction, a legal assistant put a stop payment on the first check. This assistant offered to wire the funds directly to Malk Holdings that day, but Malkani declined because he did not wish to share his banking information. Instead, Malkani asked for another check, which issued the next day. Malkani then waited nineteen more days—ten days after the expiration of the thirty-day deadline—to try to deposit the check. The check was rejected, not because of a lack of funds, but due to an input error made by the legal assistant. Malkani did not seek to remedy this error. Instead, he filed a bar grievance against Hannah's lawyer and sued Hannah for civil theft and conversion.

Thereafter, Malk Holdings accepted $91,347 from Hannah, subject to its right to pursue its claims against him at trial, including treble damages under the civil theft statute. Before the trial court submitted the matter to the jury, Hannah twice moved for directed verdict, arguing that he had complied with Malk Holdings' demand letters. He explained that even if he had not strictly followed directions on the payment's form, Malk Holdings waived its right to make this argument by its subsequent actions. Accordingly, Hannah reasoned that the trial court should direct a verdict in his favor on Malk Holdings' failure to comply with a condition precedent to suit and his affirmative defense of payment. The trial court denied both motions,

and the jury returned a verdict in Malk Holdings' favor for civil theft and conversion. After trebling the $91,347 verdict and setting off the $91,347 Hannah had already paid, the trial court entered a final judgment of $182,964.

We review de novo the trial court's denial of Hannah's motions for directed verdict on Malk Holdings' civil theft claim. *See Christensen v. Bowen*, 140 So. 3d 498, 501 (Fla. 2014). We will affirm the trial court's decisions "if any reasonable view of the evidence could sustain a verdict in favor of [Malk Holdings]." *See Kopel v. Kopel*, 229 So. 3d 812, 819 (Fla. 2017) (quoting *Meruelo v. Mark Andrew of Palm Beaches, Ltd.*, 12 So. 3d 247, 250 (Fla. 4th DCA 2009)). We "view the evidence and all inferences of fact in the light most favorable to [Malk Holdings]." *See id*. (citing *Christensen*, 140 So. 3d at 501).

Before filing a civil theft action, a "person claiming injury must make a written demand for $200 or the treble damage amount of the person liable for damages under this section." § 772.11(1), Fla. Stat. (2018). "If the person to whom a written demand is made complies with such demand within 30 days after receipt of the demand, that person shall be given a written release from further civil liability for the specific act of theft or exploitation by the person making the written demand." *Id*.

This pre-suit demand is a condition precedent to a civil theft lawsuit. *See id.*; *see also Cummings v. Warren Henry Motors, Inc.*, 648 So. 2d 1230, 1233 (Fla. 4th

DCA 1995). Malk Holdings generally alleged it complied with this condition precedent, and Hannah offered a specific and particular denial. *See* Fla. R. Civ. P. 1.120(c). Therefore, Malk Holdings had the ultimate burden of proof on this point at trial. *See Palma v. JPMorgan Chase Bank, N.A.*, 208 So. 3d 771, 774–75 (Fla. 5th DCA 2016); *see also Berg v. Bridle Path Homeowners' Ass'n*, 809 So. 2d 32, 34 (Fla. 4th DCA 2002) (stating that rule 1.120 "does not relieve the plaintiff from having to prove every element of its entitlement to a judgment against the defendant once the defendant makes a specific denial of a particular element of a claim"). By contrast, payment is an affirmative defense, on which Hannah bore the burden at trial. *See Ins. Co. of the South v. Kennedy & Ely Ins., Inc.*, 143 So. 2d 199, 201 (Fla. 3d DCA 1962). In either context, the trial court should have granted Hannah's motions for directed verdict.

We note that Malk Holdings does not dispute that it received prompt and full payment of the money it claimed Hannah owed it fifteen days after demand. Indeed, the Malk Holdings lawyer who drafted the demand letter at Malkani's direction testified to receiving the precise amount sought. There is no dispute the original check would have cleared had Malk Holdings deposited it.

No Florida case has discussed what "complies with" means in the context of a pre-suit civil theft demand letter under section 772.11(1). Accordingly, the parties

expend significant energy debating whether an attorney's trust fund check "complies with" a demand for cash payment.

But we need not resolve this issue based on the unique posture of this case. On these facts, we conclude that Malk Holdings waived its right to argue that Hannah failed to comply with its demand letters. Specifically, after issuing the demands at his client's direction, Malk Holdings' lawyer accepted Hannah's check and did not tell Malkani about it at all, much less dispute the form of payment he received. Malkani thereafter refused a wire transfer, and then demanded a second check. If Malk Holdings had the right to demand payment in a specific form under the statute, its subsequent conduct waived this right. *See Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 n.12 (Fla. 2001) (defining waiver as "voluntary and intentional relinquishment of a known right, or conduct which implies the voluntary and intentional relinquishment of a known right").

We decline, however, to disturb the jury's conversion verdict, which is supported by competent, substantial evidence. *See Coba v. Tricam Indus., Inc.*, 164 So. 3d 637, 643 (Fla. 2015). The elements of conversion are: 1) a taking of chattels; 2) with intent to exercise ownership over them an ownership inconsistent with the real owner's right of possession. *E.g.*, *W. Yellow Pine Co. v. Stephens*, 86 So. 241, 243 (Fla. 1920); *Utah Power Sys., LLC v. Big Dog II, LLC*, 352 So. 3d 504, 508 (Fla. 1st DCA 2022). A conversion may be evidenced by a plaintiff's demand and a

defendant's refusal, but proof of these actions is unnecessary when a plaintiff can demonstrate that the unauthorized act constituted a conversion regardless of a demand. *See Goodrich v. Malowney*, 157 So. 2d 829, 832 (Fla. 2d DCA 1963) (citing *Louisville & N.R. Co. v. Citizens' & Peoples' Nat'l Bank of Pensacola*, 77 So. 104, 105 (Fla. 1917)). The trial court instructed the jury on this point, and Hannah did not object. Malkani's and Malk Holdings' lawyer's testimony supported the jury's verdict that no collateral pledge agreement existed, and that Hannah intentionally took Malk Holdings' DCII distributions, over which Malk Holdings had no independent access or control.

Accordingly, we remand this matter to the trial court for the entry of a directed verdict against Malk Holdings on its civil theft claim. We otherwise affirm.

AFFIRMED in part; REVERSED in part; and REMANDED with directions.

WHITE and MIZE, JJ., concur.

Christopher D. Donovan, of Roetzel & Andress, LPA, Naples, for Appellant.

Dineen Pashoukos Wasylik, of DPW Legal, Tampa, for Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF TIMELY FILED