[Cite as *Bush v. Signals Power & Grounding Specialists, Inc.*, 2009-Ohio-5095.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WILLIAM BUSH

Plaintiff-Appellee

-vs-

SIGNALS POWER AND GROUNDING SPECIALISTS, INC.

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 08 CA 88

O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 06 CV 651

JUDGMENT: Affirmed in Part; Reversed in Part and Remanded

DATE OF JUDGMENT ENTRY: September 25, 2009

APPEARANCES:

For Plaintiff-Appellee

JOHN TARKOWSKY
JOHN A. BOYD
BARAN, PIPER, TARKOWSKY, FITZGERALD & THEIS
3 North Main Street, Suite 500
Mansfield, Ohio 44902

For Defendant-Appellant

MICHAEL L. INSCORE
INSCORE, RINEHARDT, WHITNEY AND ENDERLE
13 Park Avenue West
Suite 400
Mansfield, Ohio 44902-1741

Wise, J.

{¶1} Appellant Signals Power and Grounding Specialists, Inc. appeals the decision of the Court of Common Pleas, Richland County, which awarded Appellee William Bush the sum of $16,543.90 in unpaid wages, and further dismissed appellant's counterclaim for conversion of company property. This case presents the opportunity to analyze traditional principles of property law in the realm of the modern workplace, where the economic utility of computerized information continues to increase. The relevant facts leading to this appeal are as follows.

{¶2} Appellant SPGS is engaged in the business of analyzing buildings for electrical issues such as power surge and grounding. The company president is George Ziegler. Appellee Bush was employed by appellant from August 2003 until May 2006. He was a salaried employee whose main job duties included designing and giving promotional presentations for appellant at industry conferences, as well as conducting certain training. As such, he frequently travelled at company expense. Appellee also built up a research library of industry data and information, some of it downloaded from the internet, which he used and stored on a computer owned by the company. Appellee also commonly ported some of the data to use in offsite PowerPoint presentations. See Tr. at 64.

{¶3} On or about May 3, 2006, appellee removed or deleted almost all of the aforesaid computerized work product from the hard drive. Appellee also changed his computer password on or about that date without disclosing the new one to company president Ziegler. He then gave notice via email that he was leaving employment with SPGS.

{¶4} On May 5, 2006, Ziegler sent the following email to appellee upon discovering the removal and deletion of the computer data:

{¶5} "If [sic] seems that you knew what you were going to do when you left on 4/28/06. You had already cleaned out your office, erased the 200 gig hard drive, password protected the SPGS computer you were using. It seems you have some type of software on the computer that erases any history of what internet sites and other things you have done on the computer. You did not leave me the password as I had requested in the past. You never entered any of your telephone activities in our customer contact file. You copied all files from SPGS's computer to some type of portable hard drive. I can only guess what else you had already had decided to take and taken. [sic] . . .

{¶6} "You will get the monies due you but only after we can get things straightened out." Plaintiff's Exhibit 4.

{¶7} On May 26, 2006, appellee filed a complaint against Appellant SPGS and Ziegler in the Richland County Court of Common Pleas, seeking unpaid wages, unpaid vacation pay, and unreimbursed expenses. Appellant and Ziegler duly answered the complaint, and appellant set forth a counterclaim alleging conversion of computerized documents and data owned by the company.

{¶8} The matter proceeded to a bench trial before a magistrate on January 11, 2008. During the trial, at the conclusion of appellee's case, the magistrate dismissed Ziegler as a defendant. On May 8, 2008, the magistrate issued a decision recommending judgment in favor of appellee in the amount of $14,218.58, plus interest. In regard to appellant's counterclaim, the magistrate found that the counterclaim must

fail, on the basis that appellant had failed to offer evidence that it had made a demand to appellee for return of the property.

{¶9} Both sides filed objections to the decision of the magistrate. The trial court, upon review, approved the decision of the magistrate, except that the judgment in favor of appellee was increased to $16,543.90, plus interest. Judgment Entry, August 25, 2008.

{¶10} Appellant filed a notice of appeal on September 24, 2008, and herein raises the following three Assignments of Error:

{¶11} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT DEFENDANT [APPELLANT] UPON ITS COUNTERCLAIM AGAINST ITS FORMER EMPLOYEE FOR CONVERSION WAS REQUIRED TO PROVE THAT IT DEMANDED RETURN OF ITS DATA AND MATERIALS INTENTIONALLY AND KNOWINGLY REMOVED BY THE FORMER EMPLOYEE FROM THE DEFENDANT'S [APPELLANT'S] PREMISES AND COMPUTER HARD DRIVES AND THAT THE FORMER EMPLOYEE REFUSED.

{¶12} "II. THE TRIAL COURT'S FINDINGS THAT DEFENDANT [APPELLANT] UPON ITS COUNTERCLAIM FOR CONVERSION WAS REQUIRED TO AND FAILED TO PROVE BOTH A DEMAND FOR RETURN OF THE DATA AND MATERIALS REMOVED BY ITS FORMER EMPLOYEE AND THE REFUSAL TO RETURN THE ITEMS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW.

{¶13} "III. THE TRIAL COURT'S JUDGMENT UPON THE COMPLAINT IN FAVOR OF PLAINTIFF [APPELLEE] BELOW IS CONTRARY TO LAW AND AGAINST

THE MANIFEST WEIGHT OF THE EVIDENCE WHICH SUPPORTS A NET JUDGMENT IN FAVOR OF DEFENDANT [APPELLANT] SPGS UPON THE COMPLAINT AND COUNTERCLAIM."

I.

{¶14} In its First Assignment of Error, appellant argues the trial court erred in ruling that appellant, in order to succeed on its civil counterclaim for conversion, was required to prove it had demanded return of the computer data allegedly removed by appellee, its former employee. We disagree.

{¶15} The tort of conversion is defined as "the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights." *Heflin v. Ossman*, Fairfield App.No. 05CA17, 2005-Ohio-6876, ¶20, quoting *Joyce v. General Motors Corp.* (1990), 49 Ohio St.3d 93, 96, 551 N.E.2d 172. Thus, the elements required for conversion are: (1) a defendant's exercise of dominion or control; (2) over a plaintiff's property; and (3) in a manner inconsistent with the plaintiff's rights of ownership. Id., citing *Cozmyk Ent., Inc. v. Hoy* (June 30, 1997), Franklin App. No. 96APE10-1380.

{¶16} Generally, "[i]n order to prove the conversion of property, the owner must demonstrate (1) he or she demanded the return of the property from the possessor after the possessor exerted dominion or control over the property, and (2) that the possessor refused to deliver the property to its rightful owner. The measure of damages in a conversion action is the value of the converted property at the time it was converted." *Congress Lake Club v. Witte*, Stark App.No. 2007CA00191, 2008-Ohio-6799, ¶66, quoting *Tabar v. Charlie's Towing Serv., Inc.* (1994), 97 Ohio App.3d 423, 427-428, 646

N.E.2d 1132 (additional citations omitted). However, "Ohio law recognizes two types of conversion. The first type is where the wrongful possessor properly acquires the property but then refuses to return it upon demand and the second is where the wrongful possessor simply unlawfully acquires the property." *In re Panel Town of Dayton, Inc*. (S.D. Ohio 2006), 338 B.R. 764, 774, citing *Petefish v. Haselberger*, Ashland App.No. 2005-COA-012, 2005-Ohio-5638. Thus, the aforesaid demand and refusal elements are conditional, and are necessary "if the original taking was rightful and no act of dominion or control inconsistent with the [owner's] ownership had taken place." See *Ohio Telephone Equipment & Sales, Inc. v. Hadler Realty Co.* (1985), 24 Ohio App.3d 91, 93.

{¶17} We note the case sub judice was tried before a magistrate without a jury, and then went before the judge upon Civ.R. 53 objection. In a bench trial, a trial court judge is presumed to know the applicable law and apply it accordingly. *Walczak v. Walczak,* Stark App.No. 2003CA00298, 2004-Ohio-3370, ¶ 22, citing *State v. Eley* (1996), 77 Ohio St.3d 174, 180-181, 672 N.E.2d 640. Upon review, we agree with appellee's response that the record does not support that his exertion of control over the data and files, during his career as a salaried employee, was inconsistent with Appellant SPGS's ownership rights. Appellee, in pursuit of his job responsibility of preparing presentations to promote the company, had periodically built up his computerized information "library," and thus had lawfully gained possession of same before his removal or purging in the waning moments of his employment.

{¶18} We therefore hold under these facts and circumstances that the trial court did not err in concluding that appellant had the burden to show it had made a demand

for the return of appellee's computerized work product. Accordingly, appellant's First Assignment of Error is overruled.

II.

{¶19} In its Second Assignment of Error, appellant maintains the trial court's finding that there had been no demand for return of the property allegedly taken by appellee was against the manifest weight of the evidence. We agree.

{¶20} As a general rule, we neither weigh the evidence nor judge the credibility of the witnesses in analyzing manifest weight arguments in civil cases. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base his or her judgment. *Witt v. Watson*, Stark App.No. 2004 CA 00297, 2005-Ohio-3290, ¶ 18, citing *Cross Truck v. Jeffries* (February 10, 1982), Stark App.No. CA-5758. See, also, *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280, 376, 376 N.E.2d 578. However, under the unusual circumstances of this case, the only evidence before the trial court as to the issue of "demand for return" was the email that appellant's president, George Ziegler, sent to appellee two days after appellee's resignation. Said email ends with the statement: "[Y]ou will get the monies due you but only after we can get things straightened out." Plaintiff's Exhibit 4.

{¶21} Because of the written statement, we find this situation involves a mixed question of fact and law. In other words, whether the email was sent is a factual question, but the determination of whether the written statement therein is a true demand for return is a legal question which we review de novo. Cf., e.g., *Omerza v. Bryant & Stratton*, Lake App.No. 2006-L-092, 2007-Ohio-5215, ¶ 12. Under the circumstances presented, we find the interpretation of the email herein is akin to the

review of a written instrument. “As in the case of all contracts, deeds or other written instruments, the construction of the writing is a matter of law which is reviewed de novo.” *Martin v. Lake Mohawk Property Owner's Ass'n.*, Carroll App.No. 04 CA 815, 2005-Ohio-7062, ¶32, citing *Long Beach Assn., Inc. v. Jones* (1998), 82 Ohio St.3d 574, 576, 697 N.E.2d 208.

{¶22} Accordingly, upon review, we find as a matter of law that the language of the Ziegler email demonstrates that appellant properly made a demand for return, for purposes of a conversion action, of whatever property appellee had retained.

{¶23} Appellant’s Second Assignment of Error is therefore sustained, and the matter will be remanded to the trial court for a determination of damages on the counterclaim.

III.

{¶24} In its Third Assignment of Error, appellant argues, in light of its conversion counterclaim, that the trial court’s judgment in favor of appellee on his suit for unpaid wages is erroneous as a matter of law and against the manifest weight of the evidence. We disagree.

{¶25} As previously stated, our role as an appellate court is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base its judgment. *Cross Truck*, supra.

{¶26} The gist of appellant’s argument is that appellee should not recover his back wages where he allegedly has failed to act loyally and in good faith toward his former employer. In support he cites *Roberto v. Brown County General Hosp.* (1989), 59 Ohio App.3d 84, 86, 571 N.E.2d 467, wherein the Twelfth District Court of Appeals

adopted the "faithless servant doctrine" enunciated by the Kansas Supreme Court in *Bessman v. Bessman* (1974), 214 Kan. 510, 520 P.2d 1210.

{¶27} However, even if we were to herein adopt the faithless servant doctrine, such doctrine holds that "an employee's compensation will be denied only during his period of faithlessness." *Roberto* at 86. In the case sub judice, appellee's acts of removing or destroying his computerized library was an abrupt act performed at the end of his service to the company, unlike the employee in *Roberto*, who had embezzled funds over time and was also convicted of a criminal offense. As such, we find appellant's argument herein unpersuasive.

{¶28} Appellant's Third Assignment of Error is therefore overruled.

{¶29} For the foregoing reasons, the judgment of the Court of Common Pleas, Richland County, Ohio, is hereby affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

By: Wise, J.

Gwin, P. J., concurs.

Hoffman, J., concurs separately.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

_____

JUDGES

JWW/d 724

Hoffman, J., concurring

{¶30} I concur in the majority's analysis and disposition of Appellant's Assignment of Error III.

{¶31} I disagree with the majority's decision to sustain Appellant's Assignment of Error II. While I agree the construction of a writing is a matter of law reviewed de novo, if the writing is ambiguous or unclear, it is a question for the trier of fact to determine the parties' intent in resolving the ambiguity. I do not find the e-mail clearly constitutes a demand for return and, accordingly, would defer to the trial court's determination on this issue under a manifest weight standard of review. I would overrule Appellant's second assignment of error.

{¶32} I also disagree with the majority's disposition of Appellant's Assignment of Error I. As noted in the majority opinion, "the aforesaid demand and refusal elements are conditional, and are necessary 'if the original taking was rightful and no act of dominion or control inconsistent with the [owner's] ownership had taken place.' See *Ohio Telephone Equipment & Sales, Inc. v. Hadler Realty Co.* (1985), 24 Ohio Ap.3d. 91, 93."[1]

{¶33} Because Appellee deleted the information from Appellant's computer and changed the password, I find such acts constituted dominion or control inconsistent with Appellant's ownership, rendering demand for return unnecessary. I would sustain Appellant's first assignment of error.

[1] Majority Opinion at ¶16.

{¶34} Because I agree with the majority to reverse the trial court's dismissal of Appellant's conversion claim, albeit for a different reason, I concur in the majority's Judgment Entry.

/S/ WILLIAM B. HOFFMAN_____
HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WILLIAM BUSH	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
SIGNALS POWER AND GROUNDING SPECIALISTS, INC.	:	
	:	
Defendant-Appellant	:	Case No. 08 CA 88

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Richland County, Ohio, is affirmed in part and reversed in part and remanded for further proceedings consistent with this opinion.

Costs to be split equally between the parties.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ WILLIAM B. HOFFMAN_____

JUDGES