

11-1135

IN THE SUPREME COURT OF OHIO

<b>JEFF EYSOLDT,</b>	:	<b>On Appeal from the Hamilton County</b>
<b>MARK EYSOLDT,</b>	:	<b>Court of Appeals, First Appellate</b>
<b>JILL EYSOLDT,</b>	:	<b>District</b>
<b>Plaintiffs-Appellees,</b>	:	<b>Court of Appeals</b>
<b>and</b>	:	<b>Case No. C-100528</b>
<b>KATHERINE EYSOLDT, et al.</b>	:	
<b>Plaintiffs,</b>	:	
<b>v.</b>	:	
<b>PRO SCAN IMAGING LLC, et al.</b>	:	
<b>Defendants,</b>	:	
<b>and</b>	:	
<b>GO DADDY.COM, INC.</b>	:	
<b>Defendant-Appellant.</b>	:	

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT GO DADDY.COM, INC.

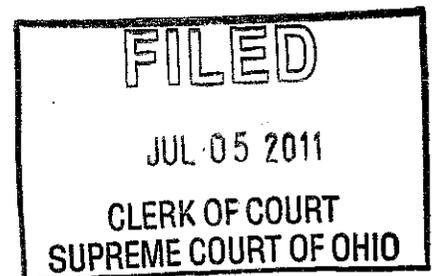
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**EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST**

This action presents two critical issues that may alter the course of Ohio tort law. The first issue, whether intangible property such as domain names and emails are “property” that may form the basis of a conversion claim, is one of first impression for the Supreme Court of Ohio. The second issue is whether conversion and invasion of privacy causes of action are torts that can result from negligent, rather than intentional, conduct, and, therefore, may be barred by the economic loss doctrine.

With respect to the first issue, the court of appeals correctly acknowledged the general, common law rule that only tangible chattels can be converted, but in Ohio there are few types of intangible property that also can be converted. However, the court of appeals ignored the clear limitations placed on the type of intangible property that can be the subject of conversion claims. These limitations include such factors as the intangible property must have (i) a fair market value, (ii) a relationship to documents such as drafts, deeds, and passbooks that legally identify the intangible property and (iii) the ability to be subject to a forced judicial sale. In a drastic departure from these limitations, the court of appeals inexplicably ruled that internet domain names and email accounts are intangible property that can be converted merely because they are “readily identifiable.”

The decision of the court of appeals to permit conversion claims involving internet domain names and emails, which are merely products of contracts for services, ignores longstanding Ohio law governing conversion claims and radically alters the application of conversion law. In so ruling, the court of appeals has extended conversion claims beyond any meaningful scope. This decision by the court of appeals will not only effectively eliminate any meaningful distinction between tangible and intangible property for conversion claims in Ohio,

but, in addition, will permit conversion of intangible property that (i) is not owned by a party; (ii) is a product of a service contract; (iii) lacks any fair market value and (iv) exists primarily as electronic data. In short, this ruling undermines the well-settled principles of conversion law in Ohio and has far-reaching implications at a time when electronic data is freely exchanged over ever-changing phone, internet, cable and wireless accounts. Certainly, the application of traditional conversion law to intangible property consisting of products of contracts for service is a case of public or great general interest as it will shape the public's rights for years to come.

With regards to the second issue involving the application of Ohio's economic loss doctrine to conversion and invasion of privacy claims, the court of appeals ruled that the doctrine does not apply in this case because the claims at issue are "intentional torts". In essence, the court of appeals determined that under Ohio law, all intentional torts are of the same type and character despite the fact that certain intentional torts, such as conversion and invasion of privacy, can arise from negligent, rather than intentional conduct. The decision of the court of appeals sets the precedent of treating intentional acts with unintended consequences the same as intended acts with intended consequences. Ohio courts, however, have always recognized the distinction in these two types of torts and have held that conversion and invasion of privacy claims, although labelled intentional torts, can be predicated upon mere negligence.

Ensuring consistency in Ohio tort law for conversion and invasion of privacy claims is a matter of public or great interest. If the court of appeals decision is allowed to stand, then any tort labelled "intentional," even if the conduct is merely negligent, will result in the inapplicability of the economic loss doctrine to such claims. This is contrary to well

established Ohio tort law. It is imperative, therefore, that this Court grant jurisdiction to hear this case in order to correct this ruling.

### **STATEMENT OF THE CASE AND FACTS**

This case arises from Appellee Jeff Eysoldt's ["Jeff Eysoldt"] opening of a free internet account with Go Daddy.Com, Inc. ["Go Daddy"] for his personal use and use by his family members, Appellees Jill Eysoldt and Mark Eysoldt [collectively "Eysoldts"]. When Jeff Eysoldt set up the Account in the Fall of 2002, he agreed to the terms of Go Daddy's Domain Name Registration Agreement ["DNR Agreement"], which subsequently was replaced in relevant part by Go Daddy's Universal Terms of Service Agreement ["UTOS Agreement"]. But for Jeff Eysoldt's agreeing to the DNR and UTOS Agreements, he could not have purchased any services from Go Daddy.

Jeff Eysoldt used the Account to register, not purchase, various personal and business related domain names as well as associated email accounts for those domain names.<sup>1</sup> Each time Jeff Eysoldt purchased any services from Go Daddy, he was required to agree to Go Daddy's DNR or UTOS terms and conditions.

Jeff Eysoldt was the sole registrant of the Account and its associated domain names and email accounts. Jill and Mark Eysoldt never opened their own Go Daddy accounts, never registered any domain names, never set up any email accounts, and never paid Go Daddy any monies for their use of Go Daddy's services.

In February 2007, Ruth Wallace, who was an officer with a company affiliated with Jeff Eysoldt's business partner, Rejuvenate Aesthetic Laser Centers ["Rejuvenate"], called Go

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<sup>1</sup> A party is not permitted to purchase a domain name. Rather, like a phone number, a party can become the registered user of a domain name by paying an annual fee to maintain said registration.

Daddy to inquire about getting a domain name and its associated website and email account transferred from Jeff Eysoldt to Rejuvenate<sup>2</sup>. The person at Go Daddy's call in center who randomly took Ms. Wallace's phone call followed Go Daddy's standard automated validation process and required that she validate herself as an account administrator by providing the last four to six digits of one of the methods of payment that was being used to pay for the services in the Account. Once Ms. Wallace validated herself as an account administrator, Go Daddy was then able to discuss the Account with Ms. Wallace. Ms. Wallace was advised that since Jeff Eysoldt was the registered user for Myrejuvenate.com and its associated email account, it could not be transferred without Jeff Eysoldt's permission. However, access to the Account could be provided to Ms. Wallace since she had validated herself as an account administrator. Access to the Account was accomplished by providing Ms. Wallace with a webpage that permitted her to reset the password to access the Account. The domain names and emails in the Account at all times through the present have always been and remain registered exclusively to Jeff Eysoldt.

The Eysoldts asserted, inter alia, claims for conversion and invasion of privacy against Go Daddy for following its standard procedures to validate an account administrator. These claims against Go Daddy were tried to a jury. The jury returned a verdict in favor of the Eysoldts, which the trial court upheld. Go Daddy then appealed to the First District Court of Appeals. The court of appeals affirmed the judgment of the trial court and found in relevant part that: (1) the intangible property at issue, domain names and emails, is property that can be converted and (2) the economic loss doctrine, which would otherwise have barred the

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<sup>2</sup> This request by Ms. Wallace was precipitated by a business dispute between Rejuvenate and Jeff Eysoldt concerning, inter alia, use of the domain name Myrejuvenate.com and direct access to the emails associated with that domain name.

Eysoldt's conversion and invasion of privacy claims due to the DNR and UTOS Agreements, does not apply to such claims because they are "intentional torts".

The court of appeals erred in extending conversion law to intangible property such as domain names and emails. The court of appeals also erred in ruling that the Eysoldt's claims for conversion and invasion of privacy were intentional torts, and, therefore, not barred by the economic loss doctrine.

### **ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW**

#### **Proposition of Law No. I: Ohio law does not permit a cause of action for the conversion of intangible property such as domain names and emails.**

Ohio courts do not generally recognize a cause of action for conversion of intangible property. *Firststar Bank v. Prestige Motors, Inc.*, Huron App. No. 04-037, 2005-Ohio-4432 (dismissing conversion cause of action involving intangible rights); *see also, Davis v. Flexman* (S.D. Ohio 1999), 109 F. Supp.2d 776 (limiting plaintiff's conversion claims to only tangible funds wrongfully received and excluding damages resulting from conversion of intangible property); *Propper Demonstration Sales of Ohio, Inc. v. F.W. Woolworth Co.* (Nov. 29, 1990), N.D. Ohio No. 88-4149 (finding that good will cannot be converted because it is intangible property). As the court in *Wiltberger v. Davis* stated:

Conversion of an intangible would seem impossible in the nature of things. So it is generally held that an action for conversion [of intangible property] cannot be maintained.

(1996), 110 Ohio App. 3d 46, 673 N.E. 2d 628 (citing *Brod v. Cincinnati Time Recorder Co.* (1947), 82 Ohio App. 26, 49 Ohio L. Abs. 558, 37 Ohio Op. 357, 77 N.E. 2d 293).

Ohio courts have been very reluctant to extend conversion claims beyond the realm of tangible property, but have recognized that certain types of intangible property can be converted. The types of intangible property rights that Ohio courts do recognize as property

that can be converted are property rights that have an intrinsic or fair market value. *See, e.g., Cincinnati Finance Co. v. Booth* (1924), 111 Ohio St. 361, 145 N.E. 543 (conversion of stock); *Elias v. Gammel* (2004), Cuyahoga App. No. 83365, 2004-Ohio-3464 (conversion of a dental practice with good will); *Schafer v. RMS Realty* (2000), 138 Ohio App. 3d 244, 741 N.E.2d 155 (conversion of partnership interest in a viable business.)

*Zacchini v. Scripps-Howard Broadcasting Co.*, the case on which the court of appeals relied, is instructive on this point. (1976), 47 Ohio St. 2d 224, 226-227, 352 N.E.2d 454, reversed on other grounds (1977), 433 U.S. 562, 97 S.Ct. 2849. In *Zacchini*, the plaintiff alleged that his image was converted when it was filmed and shown to others. *Id.* This Court recognized that although “the original rule at common law was that only tangible chattels could be converted, it is now generally held that intangible rights which are customarily merged in or identified with some document may also be converted. Examples include drafts, bank passbooks, and deeds.” *Id.*, 227. However, this Court was careful to note that “conversion does not apply to any intangible right” and that “[t]he distinguishing characteristic of conversion is the forced judicial sale of the chattel or right of which the owner has been wrongfully deprived.” *Id.* This Court then stated that the forced sale of the intangible rights of the person’s image at issue in *Zacchini* “would be largely absurd, because of the doubtfulness of determining what has been “taken.” and that “to extend the ambit of conversion to rights such as those claimed by plaintiff, which are more appropriately considered under wholly distinct legal principles, is confusing, unnecessary, and improper.” *Id.*

There is no reported case law wherein an Ohio court has held that a domain name or emails associated with the domain name are anything other than intangible property that cannot be converted. However, using well-settled Ohio law as a guide, it is clear that this is not the

type of intangible property that can be “taken.” A domain name or email is not an intangible right that can be merged with a document that represents its value, such as a draft, passbook, or deed. Nor are they intangible rights that have intrinsic or fair market value. As in *Zacchini*, these are the types of intangible rights that are more appropriately considered under other legal theories and applying conversion principles involving forced judicial sale of a chattel or right to a domain name or emails is “confusing, unnecessary, and improper.”

No Supreme Court of any other state has ever held that domain names and emails are intangible property that can be converted by a party. *Id.* at 772. Recently, in *Robin Singh Educational Services, Inc. v. Test Masters Educational Services, Inc.*, however, the Court of Appeals of Texas examined whether conversion law encompasses emails. (2011), No. 14-09-00974-CV, 2011 Tex. App. LEXIS 1624, \*3-5. The court declined to extend the law of conversion and held that because the “emails are intangible, they cannot support a conversion claim.” *Id.*, \*4-5. Similarly, in *Network Solutions, Inc. v. Umbro International, Inc.* (2000), 259 Va. 759, 529 S.E. 2d 80, the Supreme Court of Virginia noted in the context of a garnishment proceeding:

Irrespective of how a domain name is classified, we agree with Umbro that a domain name registrant acquires the contractual rights to use the unique domain name for a specified period of time. However, the contractual right is inextricably bound to the domain name services that NSI provides. In other words, whatever contractual rights the judgment debtor has in the domain names at issue in this appeal, those rights do not exist separate and apart from NSI services that made the domain names operational internet addresses. Therefore, we conclude that “a domain name registration is the product of a contract for services between the registrar and the registrant.”

It is well settled law that a contract for services is a type of intangible property that cannot be the subject of a conversion claim. The court of appeals ruling that domain names and emails

are intangible property that can be converted is an unprecedented and unwarranted departure from Ohio conversion law. Such a decision, if permitted to stand, will only serve to confuse the well-established principle of law protecting definable and fair market valued tangible property. If the court of appeals decision on this issue is not reversed, it will irrevocably alter Ohio conversion law and permit for the first time products of contracts for service to be subject to claims of conversion.

**Proposition of Law No. II: Claims for conversion and invasion of privacy are torts that can result from negligent conduct, and, therefore, may be barred by the economic loss doctrine.**

This Court has held that the economic loss doctrine bars tort claims where the parties' relationship and duties are based upon contractual agreements and requires that in those instances, any tort claims be resolved under contract law. *Floor Craft Floor Covering, Inc. v. Parma Community General Hospital Association* (1990), 54 Ohio St.3d 1, 560 N.E.2d 206 (applying economic loss doctrine to bar negligence claims where contract existed that governed dispute between the parties); *Visintine & Co. v. New York, Chicago, & Saint Louis Rd. Co.* (1959), 169 Ohio St. 505, 160 N.E.2d 311. The economic loss doctrine protects the parties' right to negotiate contract provisions addressing liability for economic harms resulting from the conduct of other parties. *Floor Craft Floor Covering, Inc.*, 54 Ohio St.3d at 4.

The court of appeals refused to apply the economic loss doctrine to the Eysoldt's claims for conversion and invasion of privacy because it held that these causes of action were "intentional torts" which are not subject to the economic loss doctrine. The Court of Appeals made this decision notwithstanding the fact that the trial court determined that there was no evidence that Go Daddy acted with malice towards the Eysoldts or intended to convert any of their domain names or invade their privacy.

The premise on which the court of appeals based its ruling – that conversion and invasion of privacy are intentional tort claims – is inconsistent with Ohio law. In Ohio, invasion of privacy “can result from either negligent or intentional acts of another.” 35 O. Jur. Defamation and Privacy § 178, citing *Lind v. Allied Corp.* (1987), 41 Ohio App. 3d 392, 536 N.E.2d 25; *Prince v. St. Francis-St. George Hosp., Inc.* (1985), 20 Ohio 3d 4, 44 N.E.2d 265. Similarly, it is well-settled Ohio law that for a claim for conversion “wrongful purpose or intent is not a necessary element, one is liable for conversion even if the act is under a mistaken assumption.” *Erie Ins. Exchange v. Lansbury* (7<sup>th</sup> App. Columbina Cty. 2008), No. 07CO6, 2008-Ohio-1553 (emphasizing that “conversion law is not concerned with whether the alleged tortfeasor intended to interfere with the property owner’s rights).

Moreover, while Ohio courts have not specifically dealt with the application of the economic loss doctrine to conversion claims, other jurisdictions have applied the economic loss doctrine to such claims. See, e.g. *PNC Bank v. Colonial Bank* (Jul 24, 2008), D. Fla. No. 8:08-611 (applying economic loss doctrine to conversion claim where the conversion is “exactly coextensive with the nonperformance of an agreement between the parties”); *Scarff Brothers, Inc. v. Bischer, Farms, Inc.* (E.D. Mich. 2008), 546 F. Supp. 2d 473, 487-88 (noting that the economic loss doctrine “does not permit recovery for a claim that sounds in contract under tort theory” and applying doctrine to conversion claims); *Anapoell v. American Express Business Finance Corp.*, (Nov. 29, 2007), D. Utah. No. 2:07-198 (determining economic loss doctrine applies to conversion claims arising out of contractual obligations).

By way of example, in *Hubbard v. Geostar Financial Services* (April 17, 2007), D. Mich. No. 06-14231, the plaintiff investors agreed to sell the defendant financial services company shares of common stock pursuant to a schedule. When the defendant failed to pay

for the common stock or return the common stock to investors, the plaintiffs filed suit and asserted breach of contract and conversion claims. *Id.* at \*5-7. The defendant filed a motion to dismiss under the economic loss doctrine. *Id.* at \*8-9. The court granted the motion and stated:

Defendant's only duty to plaintiffs is set by contract; the parties have no independent relationship, at least based on the allegations. Plaintiffs have, thus, not established any duty separate and distinct from a contractual duty and, so, cannot sustain either claim of conversion.

*Id.* at \*9.

Likewise, in *Essex Insurance Co. v. Lutz* (Mar. 20, 2007), D. Ill. No. 06-0114, the plaintiff insurance company issued a liability insurance policy to the defendant medical service provider. Without informing the plaintiff of the claims bar date in the defendant's pending bankruptcy proceeding, the defendant submitted, and plaintiff paid, claims under the insurance policy. *Id.* at \*3-5. When the plaintiff asserted conversion claims against the defendant, the defendant filed a motion to dismiss based on the economic loss doctrine. *Id.* at \*16-17. The court granted the motion and stated that "any duty owed to [the plaintiff] during the Bankruptcy proceedings arose as a direct result of the [insurance] contract between [plaintiffs] and [the defendant]." *Id.* at \*17.

In addition, in *Titan Stone, Tile & Masonry, Inc. v. Hunt Construction Group, Inc.* (Jan. 22, 2007), D.N.J. 05-3362, the defendant contractor subcontracted with the plaintiff subcontractor to have the subcontractor perform services on a construction project. The defendant was paid for its work on the project but refused to pay the plaintiff. The plaintiff then asserted conversion claims against the defendant. *Id.* at \*11. In response, the defendant argued that the plaintiff's conversion claim was barred by the economic loss doctrine because the agreement between the parties governed the terms of payment, and there was no independent tort duty. *Id.* at \*11-13. The court agreed and stated that "it is clear to the Court

that the damages sought by Plaintiff under [the conversion] counts are damages to which they are entitled, if at all, under the Agreement.” *Id.* at \*13.

The court of appeals refusal to apply the economic loss doctrine to the conversion and invasion of privacy claims solely because they are labeled intentional torts ignores Ohio law which states that such claims can arise from negligent conduct. If resulting from negligent conduct, the economic loss doctrine would apply to such claims. Thus, a blanket ruling prohibiting the application of this doctrine to all conversion and invasion of privacy claims is contrary to Ohio law and inconsistent with the fundamental principals underlying the economic loss doctrine. Furthermore, it was incorrect for the court of appeals to disregard the extensive line of cases from other jurisdictions which have held that conversion claims are barred by the economic loss doctrine. Proper application of Ohio law would lead to the same result in this case – the economic loss doctrine barring conversion and invasion of privacy claims based upon negligent conduct.

### **CONCLUSION**

For the reasons discussed above, this case involves matters of public and great general interest. The Appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,  
Christopher M. Bechhold, Counsel of Record

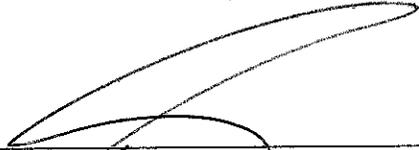


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Christopher M. Bechhold  
COUNSEL FOR APPELLANT,  
GO DADDY.COM, INC.

**CERTIFICATE OF SERVICE**

A copy of the foregoing Notice of Appeal was served via U.S. Mail and email upon counsel for Appellees, William M. Gustafson, Esq., 778 Old State Route 74, Cincinnati, Ohio 45245 on July 5<sup>th</sup>, 2011.



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GO DADDY.COM, INC.

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APPENDIX

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

JEFF EYSOLDT, : APPEAL NOS. C-100528  
MARK EYSOLDT, : C-100529  
JILL EYSOLDT, : TRIAL NO. A-0703129  
: *DECISION.*

Plaintiffs-Appellees/Cross-  
Appellants,

and

KATHERINE EYSOLDT, ET AL.,

Plaintiffs,

vs.

PROSCAN IMAGING, ET AL.,

Defendants,

and

GO DADDY.COM., INC.,

Defendant-Appellant/Cross-  
Appellee.

PRESENTED TO THE CLERK  
OF COURTS FOR FILING

MAY 18 2011

COURT OF APPEALS

Civil Appeals From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: May 18, 2011

ENTERED

MAY 18 2011

*William M. Gustavson*, for Plaintiffs-Appellees/Cross-Appellants,

*Thompson Hine LLP, Christopher M. Bechhold, and Heather M. Hawkins*, for  
Defendant-Appellant/Cross-Appellee.

Please note: This case has been removed from the accelerated calendar.

**DINKELACKER, Presiding Judge.**

{¶1} Defendant-appellant/cross-appellee, Go Daddy.com, Inc., appeals from a judgment entered upon jury verdicts in favor of plaintiffs-appellees/cross-appellants, Jeff Eysoldt, Mark Eysoldt, and Jill Eysoldt. The Eysoldts appeal that part of the trial court's judgment granting Go Daddy's motion for a directed verdict on the issue of punitive damages. We affirm the trial court's judgment.

***I. Facts and Procedure***

{¶2} The record shows that, in November 2002, Jeff Eysoldt opened account number 1165490 with Go Daddy and transferred his domain name, Eysoldt.com, into that account. When he set up the account, he agreed to the terms of Go Daddy's Domain Name Registration Agreement, which was subsequently replaced by Go Daddy's Universal Terms of Service Agreement ("UTOS").

{¶3} Though he could have opened multiple accounts, Jeff used account number 1165490 to register various personal and business domain names and the associated email accounts. He paid fees for those services with his credit card. He also opened email accounts for his sister, Jill, and his brother, Mark. He helped Jill develop a website for her business, Good Karma Cookies. He locked all his domain names, which, according to Go Daddy, meant that the only way a third party could access any of the domain names was if the third party knew Jeff's user name and password.

{¶4} Subsequently, Jeff began a business relationship with the owners of Proscan Imaging to operate cosmetic surgery centers called Rejuvenate Aesthetic Laser Centers ("Rejuvenate"). During the negotiations, he registered the domain name Myrejuvenate.com through his Go Daddy account. He paid the monthly fee for

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the website and its associated email through an automatic monthly withdrawal from Rejuvenate's checking account.

{¶5} Ruth Wallace was ProScan's chief financial officer and a minority owner of Rejuvenate. When Rejuvenate did not perform as anticipated, the relationship between Jeff and his business partners began to sour. Jeff and his partners began negotiations to remove Jeff from the business. But they had difficulty coming to an agreement, and Jeff refused to turn the website over to Rejuvenate.

{¶6} Consequently, Wallace called Go Daddy's customer service. Daniel Baranowsky, a call-center employee, randomly answered her call. Wallace told Baranowsky that she wanted to put Myrejuvenate.com into her name. Baranowsky testified that he had been trained that when a third party asked to change a domain name, the registrant was required to request the change.

{¶7} Wallace did not know Jeff's user name or password. Baranowsky asked Wallace to validate the account by providing the last four to six digits of the method of payment for the account. Since Wallace was the chief financial officer of ProScan, she knew the last four digits of the bank account number used to pay for the Myrejuvenate.com website.

{¶8} Baranowsky testified that validating an account only meant that he, as a customer-service representative, could access the account on his computer. When Baranowsky accessed the account after speaking to Wallace, he saw a screen that showed that Jeff was the owner of account number 1165490. It also listed his address, phone number, and e-mail address.

{¶9} Jeff testified that he had contacted Go Daddy on a number of occasions because he was worried that people associated with ProScan might try to steal his account. A representative from Go Daddy had told him that no one could take his

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account unless that person had his user name and password or PIN. Jeff stated that nobody but him knew the user name and password for account number 1165490. Baranowsky testified that he had looked through the log of telephone contacts during his conversation with Wallace and would have seen Jeff's contacts with Go Daddy.

{¶10} Baranowsky walked Wallace through every step that she needed to complete to take control of all of account number 1165490, including all the domain names and email accounts that Jeff had paid for over the years. Baranowsky knew that he was transferring complete control of all the domain names to Wallace, even though she had only inquired about Myrejuvenate.com, and that Jeff would be completely excluded from his own account.

{¶11} Wallace was given access to Jeff and his family's email accounts. Those accounts included communications with doctors, lawyers, the Internal Revenue Service, and others. They contained medical records, credit card numbers, bank records and other private information.

{¶12} Jeff first learned that something was wrong when he received an email from Go Daddy informing him that his account had been changed. He tried to log in and saw that he was completely excluded from the account. He immediately contacted Go Daddy, and a representative told him that if he thought that his account had been taken fraudulently, he could fill out a form called "Request for Change of Account/Email Update" and fax it, along with a copy of his driver's license, to Go Daddy.

{¶13} Jeff sent Go Daddy the form and a photocopy of his driver's license. The faxed form was readable and clearly showed his name and address. Nevertheless, Go Daddy sent him an email stating that it could not identify the person pictured on the copy of the driver's license it had received. It went on to state that "our legal department requires a clear, readable copy of government-issued photo identification in order for us

to make any changes to an account.” It told him to scan or take a digital photograph of his photo identification and email it to Go Daddy. Jeff did not do so, instead filing this lawsuit.

{¶14} When Wallace discovered that Jeff and his family’s websites and email accounts were included in the account that Baranowsky had given her control over, she sent an email to Baranowsky asking him to transfer everything but Myrejuvenate.com back to Jeff. Baranowsky did not do so. Instead, he ignored the email. Go Daddy never allowed Jeff to access the account and never returned control of his and his family’s websites or email accounts. Since Jeff could no longer access the account, he stopped paying for it.

{¶15} The Eysoldts filed a complaint for invasion of privacy and conversion against Go Daddy. The trial court overruled Go Daddy’s motion for summary judgment, and the case proceeded to a jury trial. The jury found in favor of the Eysoldts and awarded each of them compensatory damages on all their claims. It also awarded each of them punitive damages.

{¶16} Go Daddy filed motions for directed verdicts, for judgment notwithstanding the verdicts (“JNOV”), and for a new trial. The trial court granted Go Daddy’s motion for a directed verdict as to the punitive damages, concluding that the evidence did not show actual malice. It overruled the motion for directed verdicts in all other respects, as well as the other motions. Both parties have filed timely appeals from the trial court’s judgment.

## ***II. Standards of Review***

{¶17} In its appeal, Go Daddy presents three assignments of error for review. In its first assignment of error, it contends that the trial court erred in denying its motions for summary judgment, for directed verdicts, for JNOV, and for

a new trial on the conversion and invasion-of-privacy claims. We find no merit in this assignment of error.

{¶18} An appellate court reviews a trial court's rulings on motions for summary judgment, for directed verdicts and for JNOV de novo.<sup>1</sup> They involve questions of law that concern whether the evidence is legally sufficient to proceed to a jury.<sup>2</sup> In considering these motions, a court does not weigh the evidence or test the credibility of the witnesses.<sup>3</sup> Additionally, we review a ruling on a motion for a new trial under an abuse-of-discretion standard.<sup>4</sup>

### III. Economic-Loss Doctrine

{¶19} Go Daddy first argues that the Eysoldts could not recover on their claims for conversion and invasion of privacy under the economic-loss doctrine. The economic-loss doctrine generally prevents recovery of damages in tort for purely economic loss.<sup>5</sup> The Eysoldts argue that it only applies in negligence cases, not in cases involving intentional torts. We agree.

{¶20} The cases discussing the economic-loss doctrine are negligence cases.<sup>6</sup> The rationalization for the doctrine has its roots in negligence law. The Ohio Supreme Court has stated, "This rule stems from the recognition of a balance between tort law, designed to redress losses suffered by *breach of a duty imposed by law* to protect societal interests, and contract law, which holds that 'parties to a commercial transaction should remain free to govern their own affairs.'" It went on

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<sup>1</sup> *Yeager v. Carpenter*, 3rd Dist. No. 14-09-19, 2010-Ohio-3675, ¶18; *Blair v. McDonagh*, 177 Ohio App.3d 262, 2008-Ohio-3698, 894 N.E.2d 377, ¶44; *Burns v. Prudential Securities, Inc.*, 167 Ohio App.3d 809, 2006-Ohio-3550, 857 N.E.2d 621, ¶18.

<sup>2</sup> *Burns*, supra, at ¶18.

<sup>3</sup> *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 347, 504 N.E.2d 19; *Blair*, supra, at ¶46.

<sup>4</sup> *Blair*, supra, at ¶44.

<sup>5</sup> *Corporex Dev. & Constr. Mgmt., Inc. v. Shook*, 106 Ohio St.3d 412, 2005-Ohio-5409, 835 N.E.2d 2386, ¶6; *Trustcorp. Mtge. Co. v. Zajac*, 1st Dist. No. C-060119, 2006-Ohio-6621, ¶12.

<sup>6</sup> See, e.g., *Corporex Dev.*, supra, at ¶6; *Caruso v. Natl. City Mtge. Co.*, 187 Ohio App.3d 220, 2010-Ohio-1878, 931 N.E.2d 1167, ¶13; *Trustcorp Mtge.*, supra, at ¶12.

to state, “Tort law is not designed to \* \* \* compensate parties for losses suffered as a result of a breach of duties assumed only by agreement.’”<sup>7</sup>

{¶21} We find no Ohio cases specifically addressing the issue, but federal courts interpreting Ohio law have held that the economic-loss doctrine does not apply to intentional torts.<sup>8</sup> One of them stated that “the fundamental policy consideration underlying the economic loss rule—the inevitable absence of a duty independent of that created by a contract in a negligence action for purely economic loss—is missing in the intentional tort context, where duty is not an element of the claim.”<sup>9</sup> Other federal courts interpreting other states’ economic-loss rules have reached the same conclusion.<sup>10</sup> We agree with the reasoning of these courts.

{¶22} Go Daddy also argues that the economic-loss doctrine applies because no independent duty existed outside of the UTOS. We disagree. In overruling Go Daddy’s motion for a directed verdict on this issue, the trial court stated, “[T]he tort claims here did not arise out of the agreement of the parties, but went beyond the agreement and were independent of the agreement. Since the Plaintiffs’ intentional tort claims did not arise from the UTOS, the economic loss doctrine has no application.” The trial court was correct. Here, the tort claims went beyond the failure to perform promises contained in the contract; they involved separate injuries.<sup>11</sup>

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<sup>7</sup> *Corporex Dev.*, *supra*, at ¶6 (citations omitted and emphasis added).

<sup>8</sup> See, e.g., *Reengineering Consultants, Ltd., v. EMC Corp.*, (2009), S.D. Ohio No. 2:08-cv-47; *Myvitane.com v. Kowalski* (2008), S.D. Ohio No. 2:08-cv-48.

<sup>9</sup> *Reengineering Consultants*, *supra*.

<sup>10</sup> See, e.g., *SMI Owen Steel Co., Inc. v. Marsh USA, Inc.* (C.A.5, 2008), 520 F.3d 432, 441-442; *Giles v. General Motors Acceptance Corp.* (C.A.9, 2007), 494 F.3d 865, 875-876; *Martin v. Ford Motor Co.* (2011), E.D. Pa. No. 10-2203.

<sup>11</sup> See *Giles*, *supra*, at 876; *Martin*, *supra*.



{¶23} We hold that the economic-loss doctrine does not apply in this case because the causes of actions are for intentional torts. Consequently, the trial court did not err in overruling Go Daddy's various motions on that basis.

**IV. Conversion of Intangible Property**

{¶24} Go Daddy next argues that the trial court should have granted its motions relating to the Eysoldts' conversion claims because Ohio law does not recognize a cause of action for conversion of intangible property. At common law, the general rule was that only tangible chattels could be converted.<sup>12</sup> But the law has changed, and courts have held that identifiable intangible property rights can also be converted.<sup>13</sup>

{¶25} In this case, the converted property was readily identifiable. It was Jeff's account with Go Daddy and its accompanying domain names and email accounts. At least one federal court has held that domain names are intangible property subject to conversion.<sup>14</sup> Other federal courts have held that emails and computer programs can be converted.<sup>15</sup> Consequently, we hold that the trial court did not err in submitting the conversion claims to the jury.

**V. Conversion—Ownership of the Property**

{¶26} Next, Go Daddy contends that the trial court should have granted its motion for directed verdicts as to Mark and Jill's conversion claims because they testified that they lacked any ownership interest in or control over the account. Conversion is the wrongful exercise of dominion over property in exclusion of the

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<sup>12</sup> *Zacchini v. Scripps-Howard Broadcasting Co.* (1976), 47 Ohio St.2d 224, 226-227, 351 N.E.2d 454, reversed on other grounds (1977), 433 U.S. 562, 97 S.Ct. 2849.

<sup>13</sup> *Id.*; *Schafer v. RMS Realty Co.* (2000), 138 Ohio App.3d 244, 285-286, 741 N.E.2d 155.

<sup>14</sup> *CRS Recovery, Inc. v. Laxton* (C.A.9, 2010), 600 F.3d 1138, 1144.

<sup>15</sup> *Precision Air Parts, Inc. v. Avco Corp.* (C.A.11, 1984), 736 F.2d 1499, 1501; *Meridian Fin. Advisors, Ltd. v. Pence* (2011), S.D.Ind. No 1:07-cv-00995-LJM-TAB.

owner's right, or the withholding of property from the owner's possession under a claim inconsistent with the owner's rights.<sup>16</sup>

{¶27} While Jill and Mark acknowledged that the account was registered to Jeff, the evidence showed that each of them had email accounts set up within Jeff's account. Additionally, Jeff and Jill had created content for Jill's website for her business, Good Karma Cookies. When Go Daddy gave control of the account to Wallace and ProScan, Jill could not access her website. Likewise, Jill and Mark could not access their email accounts. Thus, as the trial court stated, "there was sufficient evidence produced at trial that would support the jury finding that Go Daddy converted the conditional and private email communications of Mark and Jill Eysoldt that were contained in the GoDaddy account."

**VI. Invasion of Privacy**

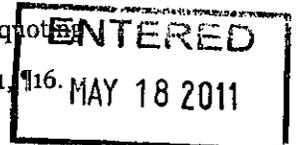
{¶28} Finally, Go Daddy contends that the Eysoldts' invasion-of-privacy claims should have failed because they presented no evidence that Go Daddy had ever accessed or read any of their emails. The Eysoldts each raised an invasion-of-seclusion type of invasion-of-privacy claim. These types of claims arise when a "wrongful intrusion into one's private activities" occurs "in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities."<sup>17</sup> To establish a claim, a plaintiff must produce evidence that the intrusion was unwarranted and offensive or objectionable to a reasonable person.<sup>18</sup>

{¶29} The Eysoldts did not have to prove that Go Daddy accessed their emails, although Jeff testified that someone had viewed his emails. Go Daddy took

<sup>16</sup> *Zacchini*, supra, at 226; *Norwell v. Cincinnati* (1999), 133 Ohio App.3d 790, 811, 729 N.E.2d 1223.

<sup>17</sup> *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051, ¶15-16, quoted in *Housh v. Peth* (1956), 165 Ohio St. 35, 133 N.E.2d 340, paragraph two of the syllabus.

<sup>18</sup> *Miller v. Cincinnati Children's Hosp. Med. Ctr.*, 1st Dist. No. C-050738, 2006-Ohio-3861, ¶16.



private domain names and private email accounts and turned them over to a third party who had no right to access them and who easily could have viewed their contents. The Eysoldts testified to the distress that those intrusions had caused them. Thus, the evidence, when viewed a light most favorable to the Eysoldts, was sufficient to send the issue to the jury.

{¶30} In sum, we hold that the trial court did not err in overruling Go Daddy's motions for summary judgment, directed verdicts, and JNOV on the Eysoldts' claims for conversion and invasion of privacy. Further, the court did not abuse its discretion in overruling its motion for a new trial. We overrule Go Daddy's first assignment of error.

**VII. Best-Evidence Rule**

{¶31} In its second assignment of error, Go Daddy argues that the trial court erred in admitting into evidence the Eysoldts' exhibit 16, which was a summary of the contents of their email accounts. It argues that the admission of this exhibit violated the best-evidence rule. This assignment of error is not well taken.

{¶32} Evid.R. 1002 sets forth the "best evidence" or the "original document" rule. It provides that, "to prove the content of a writing, recording or photograph, the original writing, recording, or photograph is required."<sup>19</sup>

{¶33} But Evid.R. 1006 allows "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court" to be "presented in the form of a chart, summary or calculation." That rule also states that "the originals, or duplicates, shall be made available for examination or copying, or

<sup>19</sup> *Hofmeier v. Cincinnati Inst. of Plastic & Reconstructive Surgery, Inc.*, 1st Dist. No. C-000274, 2002-Ohio-188, ¶16.

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both, by other parties at a reasonable time and place. The court may order that they be produced in court.”

{¶34} Thus, for a summary to be admissible, the documents on which it was based must be admitted or offered into evidence or their absence explained.<sup>20</sup> Go Daddy’s argument ignores the fact that, at the time of trial, the emails were under its control. The proponents of the summary, the Eysoldts, did not have access to the e-mails. Thus the absence of the documents was adequately explained.

{¶35} Further, [t]he original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if \* \* \* [a]t a time when the original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be subject of proof at the hearing, and that party does not produce the original at the hearing[.]”<sup>21</sup> If Go Daddy insisted on having the originals at trial, it could have produced them.

{¶36} Go Daddy also argues that Jeff had some of the emails on his computer’s hard drive. But Jeff had testified that his computer had “crashed” and that he had lost those emails. Other evidence of the contents of a writing is admissible if the originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith.<sup>22</sup> Nothing in the record showed that Jeff had acted in bad faith.

{¶37} Even if the trial court had erred in admitting exhibit 16, the error was not prejudicial. The Eysoldts testified about the contents of their emails and stated that those emails were private. An error is harmless where “it does not affect substantial rights of the complaining party, or where the court’s action is not

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<sup>20</sup> *Marder v. Marder*, 12th Dist. No. CA2007-Ohio-2500, ¶52.

<sup>21</sup> Evid.R. 1004(3).

<sup>22</sup> Evid.R. 1004(1).

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inconsistent with substantial justice.”<sup>23</sup> Consequently, we overrule Go Daddy’s second assignment of error.

**VIII. Jury Demand**

{¶38} In its third assignment of error, Go Daddy contends that the trial court erred in denying its motion to strike the Eysoldts’ jury demand. It argues that, under the terms of the UTOS, the Eysoldts had waived their right to a jury trial. This assignment of error is not well taken.

{¶39} The record shows that the Eysoldts filed a jury demand with their original complaint on April 7, 2007. Go Daddy also demanded a jury trial in its answer to the Eysoldts’ complaint. On October 30, 2008, it filed a motion to strike the Eysoldts’ jury demand. It argued that it had only included its own jury demand because of a possible class-action suit, which did not come to pass.

{¶40} Civ.R. 38(D) states that a jury demand “may not be withdrawn without the consent of the parties.” Once a party has demanded a jury trial, it may not withdraw its jury demand absent one of the grounds set forth in Civ.R. 39(A).<sup>24</sup>

{¶41} In this case, the trial court found that Go Daddy’s motion to strike was not timely filed. It stated, “Go Daddy did not raise the issue in its Answer, and in fact Go Daddy made a Jury Demand in its Answer to the Second Amended Complaint filed March 17, 2008. Further this case was set for a Jury Trial in the Case Scheduling Order of July 5, 2007 and again in the Amended Case Scheduling Order of April 23, 2008, without any objection by Go Daddy. For all of those reasons, the court believes Go Daddy \* \* \* waived the right to raise the issue.”

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<sup>23</sup> *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 164, 407 N.E.2d 490; *Hofmeier*, supra, at ¶13.  
<sup>24</sup> *Cleveland v. Lancaster*, 2nd Dist. No. 02CA0123, 2003-Ohio-4976, ¶11-14.

{¶42} Civ.R. 39(A) does not place a time limit on the filing of a motion to strike a jury demand.<sup>25</sup> But we cannot hold that the trial court abused its discretion in finding that Go Daddy had waived its right to raise the issue, particularly given that it had twice filed a jury demand of its own and had repeatedly agreed to set the case for a jury trial.<sup>26</sup> In our view, the issue goes beyond waiver; any error in holding a jury trial was invited error.<sup>27</sup> Consequently, we overrule Go Daddy's third assignment of error.

#### IX. Punitive Damages

{¶43} In their cross-appeal, the Eysoldts present one assignment of error. They contend that the trial court erred in granting Go Daddy's motion for a directed verdict on the issue of punitive damages. They argue that the evidence supported the jury's finding of actual malice. This assignment of error is not well taken.

{¶44} To be awarded punitive damages, the plaintiff must show actual malice.<sup>28</sup> "Actual malice, necessary for an award of punitive damages, is (1) that state of mind under which a person's conduct is characterized by hatred, ill-will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm."<sup>29</sup>

{¶45} We first note that the trial court instructed the jury only on the first part of that definition. It refused to instruct the jury on the second part because it viewed that part of the definition as being "aimed at punishing callous conduct that

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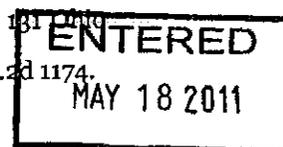
<sup>25</sup> *Brunecz v. Houdaille Indus., Inc.* (1983), 13 Ohio App.3d 106, 107, 468 N.E.2d 370.

<sup>26</sup> See *Stevenson v. Prettyman*, 8th Dist. No. 94873, 2011-Ohio-718, ¶13; *Meyer v. United Parcel Serv., Inc.*, 174 Ohio App.3d 339, 2007-Ohio-7063, 882 N.E.2d 31, ¶40, reversed on other grounds, 122 Ohio St.3d 104, 2009-Ohio-2463, 909 N.E.2d 106; *Ferguson v. Strader* (1994), 94 Ohio App.3d 622, 625-627, 641 N.E.2d 728.

<sup>27</sup> See *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, 502 N.E.2d 590, paragraph one of the syllabus; *Blair*, supra, at ¶39.

<sup>28</sup> R.C. 2315.21(C)(1); *Blair*, supra, at ¶65; *Meyers v. Hot Bagels Factory, Inc.* (1999), 131 Ohio App.3d 82, 97-98, 721 N.E.2d 1068.

<sup>29</sup> *Blair*, supra, at ¶65, quoting *Preston v. Murty* (1987), 32 Ohio St.3d 334, 336, 512 N.E.2d 1174.

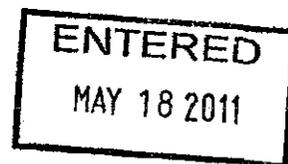


was likely to cause substantial physical injury to persons.” This court has applied the second part of the definition regarding “a conscious disregard” for the rights and safety of other persons in a business setting<sup>30</sup> and in a conversion case.<sup>31</sup>

{¶46} But while the Eysoldts argued the issue in the trial court, they have not raised it in this court. They only argue that Go Daddy’s conduct satisfied the first part of the test. Consequently, they have waived the issue.<sup>32</sup>

{¶47} In granting the directed verdicts, the trial court stated, “The Court finds no evidence in the record from which actual malice could be inferred on the part of GoDaddy in this case. Plaintiffs contend that Baranowsky’s conduct in failing to follow procedures when he gave Ruth Wallace access to Jeff Eysoldt’s account and walked her through the steps to take control of the information in the account rise to the level of malice necessary to support the finding of punitive damages. In addition, according to Plaintiffs, doing nothing to return the account to Jeff Eysoldt demonstrates malice by GoDaddy. Those actions of GoDaddy and its employees may rise to the level of recklessness, or arguably even intentional conduct, and support the findings on the conversion and invasion of privacy claims. They do not, however, rise to the level of malice.”

{¶48} Generally, we are reluctant to overturn a jury verdict. Also, much about Go Daddy’s conduct causes us concern, particularly Baranowsky’s inaction when Wallace emailed him and asked him to return to Jeff everything in the account but Myrejuvenate.com.



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<sup>30</sup> See *Blair*, supra, at ¶66.

<sup>31</sup> See *R&S Dist., Inc. v. Hartge Smith Nonwovens, LLC*, 1st Dist. No. C-090100, 2010-Ohio-3992, ¶43.

<sup>32</sup> *Fed. Financial Co. v. Turner*, 7th Dist. No. 05 MA 134, 2006-Ohio-7072, ¶13; *Nickell v. Gonzalez* (1986), 34 Ohio App.3d 364, 367, 519 N.E.2d 414.

{¶49} Nevertheless, reckless or intentional conduct is not sufficient to justify the imposition of punitive damages. Plaintiffs must show more than the elements of an intentional tort. They must demonstrate that the “wrongdoing is particularly gross or egregious.”<sup>33</sup> We ultimately agree with the trial court that Go Daddy’s conduct was not egregious enough to rise to the level of actual malice under the first part of the definition. Consequently, the trial court did not err in granting Go Daddy’s motion for directed verdicts on the issue of punitive damages, and we overrule the Eysoldts’ assignment of error.

**X. Summary**

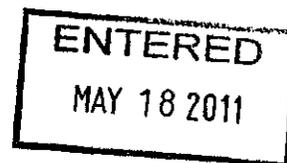
{¶50} In sum, we find no merit in any of the assignments of error presented in the appeal or in the cross-appeal. We affirm the trial court’s judgment.

Judgment affirmed.

**HILDEBRANDT and FISCHER, JJ., concur.**

Please Note:

The court has recorded its own entry this date.



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<sup>33</sup> *Charles R. Combs Trucking, Inc. v. Internatl. Harvester Co.* (1984), 12 Ohio St.3d 241, 466 N.E.2d 883, paragraph three of the syllabus; *Cook v. Newman Motor Sales*, 6th Dist. No. E-09-028, 2010-Ohio-2000, ¶40-41.

