

ORIGINAL

IN THE SUPREME COURT OF OHIO

JEFF EYSOLDT, et al.,

Appellees,

v.

Go Daddy.Com, Inc.,

Appellants.

On Appeal from the Hamilton County
Court of Appeals, First Appellate
District, Case No. C-100528

Case No. 11-1135

MEMORANDUM OF APPELLEES
IN OPPOSITION TO JURISDICTION

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FILED
JUL 26 2011
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
JUL 26 2011
CLERK OF COURT
SUPREME COURT OF OHIO

WHY THIS CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST

Appellant Go Daddy.com, Inc. (“Go Daddy”) raises two issues. The first is whether intangible property such as domain names and emails are property that may serve as the basis for a conversion claim. In addition to the Ohio cases that have recognized that intangible property can be converted as cited below, the First District Court of Appeals pointed out that at least one federal court has held that domain names are intangible property subject to conversion, and that other federal courts have held that emails and computer programs can be converted. Under the facts of this case, the First District Court of Appeals held that the trial court did not err in submitting the conversion claims to the jury. That decision was in accord with the prior rulings of this Court and other courts of Ohio and is not of public or great general interest.

Go Daddy also raises the issue whether conversion and invasion of privacy are torts that can result from negligent conduct and therefore may be barred by the economic loss doctrine. However, the facts in this case did not show negligent conduct. The First District Court of Appeals characterized the conduct of Go Daddy under the facts of this case. The First District stated that “much about Go Daddy’s conduct causes us concern” but “[n]evertheless, 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.” Under the facts of this case, there was no showing of negligence by Go Daddy, and both the jury and the Court of Appeals found Go Daddy’s conduct an intentional tort, not a negligent tort. Likewise, there is no issue of public or great general interest.

Statement of Facts.

In approximately November of 2003, Jeff Eysoldt opened an account with GoDaddy and transferred his registered domain name, Eysoldt.com, to his GoDaddy account, #1165490. Jeff

opened e-mail accounts under the Eysoldt.com domain name for family members and friends, including his sister Jill Eysoldt and Mark Eysoldt. Over time, Jeff also developed websites for Jill and Mark to operate their business interests.

Over the next couple of years Jeff registered many domain names, one of which was myrejuvenate.com, all of which were registered in his GoDaddy account, #1165490.

In early 2006, Jeff entered into a business relationship with various owners of Proscan Imaging in Cincinnati to operate aesthetic laser centers called Rejuvenate Aesthetic Laser Centers ("RALC"). Jeff operated RALC under a contract which included compensation as set out in the agreement. In setting up RALC, the ProScan parties asked, and Jeff agreed, to allow RALC to use one of Jeff's registered domain names, myrejuvenate.com, as the business domain name for RALC.

Ruth Wallace was the chief financial officer of ProScan and a minority owner of RALC. When RALC did not perform as anticipated, the business relationship between Jeff and the ProScan parties began to sour. Jeff and the ProScan parties began to negotiate to remove Jeff from the business.

According to Daniel Baranowsky, a Go Daddy employee and call-taker, Wallace called him on the telephone and said she wanted to change ownership of myrejuvenate.com into her name. Baranowsky testified that he had been trained that when a third party made a request to change a domain name into their name, the registrant, Jeff Eysoldt, must request the change. Baranowsky testified that this was GoDaddy policy. Baranowsky knew that Wallace was trying to change a domain name from the domain registrant's name (Jeff Eysoldt) into her name. Baranowsky knew that under Go Daddy Policy, only Jeff Eysoldt could request that the myrejuvenate.com domain name be transferred into Wallace's name.

Wallace did not know the password or pin number for account #1165490. Baranowsky testified that Wallace “validated” the account because (as CFO for ProScan she had access to the RALC banking records) she knew the last 4 digits of the bank account number used to pay for the myrejuvenate.com web site. But, Baranowsky testified that validating an account only meant that he, Baranowsky, could access the account on his computer. When he did, he saw that Jeff Eysoldt was the owner of the account, saw Jeff’s address, phone number and e-mail address. Wallace’s name was not on the account.

Jeff testified that he had contacted GoDaddy on several occasions over the preceding months because he was worried that the ProScan parties might try to steal his account. Go Daddy records showed that GoDaddy employees told Jeff that it couldn’t happen. Baranowsky testified that he looked back through the log of telephone contacts so he would have seen Jeff’s concern about his account being stolen.

An employee of GoDaddy testified that it was not GoDaddy policy to allow an account to be validated by using the last 4 digits of a bank account used to make a payment on any domain name in the account, but GoDaddy employees did it anyway.

Baranowsky helped Wallace take complete control of Jeff’s entire Go Daddy account even though he knew that she was not the registrant and didn’t know any access information to the account. Baranowsky walked Wallace through every step for Wallace to take complete control of account #1165490, including all of its domain names, web sites, and e-mail communications. Baranowsky knew that he was transferring complete control of the entire Go Daddy account including the domain names such as Eysoldt.com, Eysoldt.info and Eysoldt.biz, as well as myrejuvenate.com, to Wallace and that Jeff was being completely excluded from his own account.

On February 28, 2007, Jeff Eysoldt learned that Ruth Wallace had called GoDaddy on the telephone and taken complete control of his GoDaddy account #1165490, including all of his domain names, some of which were Eysoldt.com, Eysoldt.biz and Eysoldt.org, and web sites and e-mail communications, as well as the myrejuvenate.com domain name. Wallace called GoDaddy and Daniel Baranowsky, and in a matter of minutes, transferred complete control of account #1165490 to Wallace. Baranowsky also locked Jeff out of account #1165490. Not only did account #1165490 include all of the domain names that Jeff had bought and paid for over the years and web sites, by taking control of account #1165490, Wallace had control of Eysoldt.com and all of the Eysoldt family e-mails in their private Eysoldt.com e-mail accounts. Those e-mail accounts included communications with doctors, lawyers, medical records, credit card numbers, bank records, and communications with the IRS. Also included in the e-mail communications were the similar e-mail communications of Jeff's, Mark's and Jill's recently deceased father, Vincent Eysoldt. Jeff later learned that virtually all of his e-mail communications had been opened and read.

When Jeff received an e-mail on February 27, 2007, from Go Daddy that his account had been changed, he tried to log-in and saw that he was entirely excluded from the account. He immediately contacted GoDaddy and was instructed that if he thought his account had been fraudulently taken, he could fill out a form called the "Request for Change of Account/Email Update" and fax it, along with a copy of his driver's license, to GoDaddy. Jeff immediately did so. Although the faxed form was readable, clearly showing Jeff's name and address, GoDaddy sent Jeff a response e-mail stating : "[w]e are not able to identify of the person pictured on the photo id we received" and that "[o]ur legal department requires a clear, readable copy of

government-issued photo identification in order for use to make **any changes** to an account.”

(Emphasis added).

GoDaddy requested Jeff to resend the form to them. He resent the form on March 3, 2007. GoDaddy never responded and never returned Jeff’s account #1165490 to him. GoDaddy also never returned control of Jeff’s, Jill’s and Mark’s e-mail accounts to them, or their family domain names for their business websites.

When Wallace learned that Jeff’s family domain names and private e-mail communications were included in what Baranowsky had given her, she immediately sent an e-mail to Baranowsky telling him to transfer everything except myrejuvenate.com back to Jeff. Baranowsky ignored the e-mail. This suit followed.

The jury found that it was a conversion and invasion of privacy for GoDaddy to participate and give account #1165490 and complete control of the account and all of its contents, including private and confidential e-mails, to Wallace and awarded compensatory, punitive damages, and attorney fees. The trial court later granted a directed verdict on the punitive damages claim. The decision of the trial court was affirmed by the First District Court of Appeals.

Proposition of Law No. 1.

GoDaddy argues that there is no viable claim of conversion in Ohio of intangible property. That is not the rule.

Conversion is a wrongful exercise of dominion over property in exclusion of the right of the owner, or withholding it from his possession under a claim inconsistent with his rights. *Railroad Co. v. O'Donnell* (1892), 49 Ohio St. 489, 497, 32 N. E. 476. Although the original rule at common [*227] law was that only tangible chattels [**457] could be converted, it is now generally held that intangible rights which are customarily merged in or identified with some document may [***6] also be converted. Examples

include drafts, n1 bank passbooks, n2 and deeds. n3 See Prosser, The Law of Torts (4th ed. 1971), at pages 81-82. See, generally, Annotation, 44 A. L. R. 2d 927.¹

The Appellant cites to *Zacchini* and urges that the distinguishing characteristic of a conversion is the ability of the asset to be subject to a forced judicial sale. In this case, on January 29, 2010, in a filing in the trial court, the Appellant objected to a motion of the Eysoldts seeking to have the trial court order Go Daddy to return the Eysoldts' family domain names to them. In that filing, Appellant stated: "Consequently, if the jury verdict ultimately is affirmed, and a final, non-appealable judgment is entered on Jeff Eysoldt's conversion claim, then the judgment will constitute 'a forced judicial sale' of those domain names to Go Daddy, and Go Daddy, not Jeff Eysoldt, will be the 'owner' of the domain names." Go Daddy conceded in the trial court that the intangible property of the Eysoldts was sufficiently clear and identifiable so as to be subject to a "forced judicial sale," thereby falling squarely within *Zacchini*.

Ohio courts have routinely upheld conversion actions for property deemed intangible or that might be deemed intangible.² The main issue in such a case is deciding exactly what has been taken. As *Schafer*³ noted, "the Ohio Supreme Court has not rejected conversion as a potential cause of action for all intangible assets. * * * Furthermore, the court's comments indicate that it was concerned mainly with the difficulty in deciding exactly what had been taken,

¹ *Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St. 2d 224, 226-227 (Ohio 1976); reversed on other grounds, 433 U.S. 562, 97 (1977).

² *Cincinnati Finance Co. v. Booth* (1924), 111 Ohio St. 361, 145 N.E. 543: Action for conversion for wrongfully refusing to transfer stock on the books of the corporation, on application of the bona fide owner; *Elias v. Gammel*, 2004 Ohio 3464, P33 (Ohio Ct. App., Cuyahoga County July 1, 2004), Appeal denied, 104 Ohio St. 3d 1409, 2004 Ohio 6364, 818 N.E.2d 71: Conversion of a dental practice; *Schafer v. RMS Realty* (2000), 138 Ohio App.3d 244, 741 N.E.2d 155: Conversion of a partnership interest.

³ *Schafer v. RMS Realty* (2000), 138 Ohio App.3d 244, 283, 741 N.E.2d 155.

as a basis for assessing damages.” *Schafer* further commented, “we believe the correct approach is to analyze the particular type of intangible asset, to see if allowing a conversion claim makes sense.”⁴

In *Resource Ventures*,⁵ the court allowed a claim for conversion of proprietary information because the plaintiff had a property interest in the information, which included plans, designs, technology, and specifications. In *Lucas*,⁶ a conversion claim for intangible property was allowed where the interest was evidenced by computerized book entries rather than a written document held by the plaintiff. Further, in *Lucas*, the ownership of securities was not evidenced by stock certificates, but by a computerized book entry.⁷ The court allowed the conversion claim because the owner held the exclusive right to collect dividends, accumulate equity, transfer to a different broker, and dispose of the security.⁸ The property at issue in this case is similar to the intangible property in the cited cases.

Here, the property that is subject to the conversion claim is readily identifiable. It is the account 1165490, bought and paid for by Jeff Eysoldt; it is the domain names bought and paid for by Jeff Eysoldt, including the domain names based on his family name, including Eysoldt.com; and it is the e-mail accounts and the confidential and proprietary e-mail communications, including, but not limited to credit card information, business and tax records, and medical information included in the emails, taken out of the Eysoldts’ control by GoDaddy

⁴ Id., at p. 285.

⁵ **Error! Main Document Only.** *Resource Ventures, Inc. v. Resources Mgt. Int., Inc.* (D. Del. 1999), 42 F. Supp. 2d 423, 38.

⁶ *Lucas v. Lucas* (C.A. 8, 1991), 946 F.2d 1318.

⁷ Id., p. 1323.

⁸ Id.

and given to Ruth Wallace. The value of this property to the Eysoldts was supported by the testimony and the jury based its award on that testimony. Such property was converted and is subject to a claim of conversion.

The First District Court of Appeals pointed out that at least one federal court has specifically held that domain names are intangible property subject to conversion, and that other federal courts have held that emails and computer programs can be converted.⁹ The decision of the First District Court of Appeals was in accord with the prior rulings of this Court and other courts of Ohio and is not of public or great general interest.

Proposition of Law No. 2.

The economic loss doctrine does not apply in this case. In Ohio, the economic loss doctrine has been defined by the Supreme Court: "For actions sounding in negligence, '[t]he well established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable.'" (Citations omitted).¹⁰ In this case, the Eysoldts did not bring a claim in negligence and were not suing for economic loss, such as a return of the cost of purchasing domain names, managing web sites and monthly fees. Rather, the Eysoldts sued for damages for the value of their property that was converted, which value was the subject of testimony, and for damages for emotional distress from an invasion of privacy.

The conduct of Go Daddy was not negligent. The First District Court of Appeals stated that "much about Go Daddy's conduct causes us concern" but "[n]evertheless, reckless or

⁹ Decision, attached as Appendix 1 to the Memorandum in Support of Jurisdiction of Appellant Go Daddy.com, Inc., at par. 25.

¹⁰ *Floor Craft Floor Covering, Inc. v. Parma Community General Hosp. Ass'n* (1990), 54 Ohio St. 3d 1, 3, 560 N.E.2d 206.

intentional conduct is not sufficient to justify the imposition of punitive damages.”¹¹ The economic loss doctrine does not apply where damages are sought for an intentional breach of a tort duty, separate and distinct from a claimed contract. The First District Court of Appeals held that “the economic-loss doctrine does not apply in this case because the causes of actions are for intentional torts.”¹² That holding was based on the record that showed the conduct of Go Daddy was an intentional tort, not a negligent tort. The decision of the First District Court of Appeals was in accord with Ohio law and does not present an issue of issue of public or great general interest.

CONCLUSION.

This case does not involve issues of public or great general interest. The Appellees request the Court to decline jurisdiction in this case.

Respectfully submitted,



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¹¹ Decision, attached as Appendix 1 to the Memorandum in Support of Jurisdiction of Appellant Go Daddy.com, Inc., at par. 48, 49.

¹² Decision, attached as Appendix 1 to the Memorandum in Support of Jurisdiction of Appellant Go Daddy.com, Inc., at par. 23.

CERTIFICATE OF SERVICE

This is to certify that a copy of this brief was served by regular mail, postage prepaid, on this 20th day of July, 2011, upon the following counsel of record:

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