

IN THE SUPREME COURT OF OHIO

11-1891

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|---------------------------|---|---------------------|
| NORMAN R. CROWE, JR. | : | Case No. _____ |
| | : | |
| Appellant | : | On Appeal from the |
| | : | Holmes County Court |
| v. | : | of Appeals, Fifth |
| | : | Appellate District |
| FIRSTENERGY CORP., et al. | : | |
| | : | Court of Appeals |
| Appellees | : | Case No. 10-CA-023 |

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT, NORMAN R. CROWE, JR.**

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| <u>Proposition of Law No. 1:</u> A bailee, agent, or servant who makes an unauthorized delivery of a chattel is subject to liability for conversion to his bailor, principal, or master unless he delivers to one who is entitled to immediate possession of the chattel. (The Restatement of the Law 2d, Torts (1965), Section 234, adopted) | | 4 |
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| (a) it was converted in good faith and under a reasonable mistake, and | | |
| (b) its value to the one entitled to possession is not substantially impaired, and | | |
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damages is the market value of the stock at the time the right of action accrued, if the stock had a market value, and the owner does not elect to accept and accepts a return of his stock rights (Cincinnati Finance v. Booth, 111 Ohio St. 361, 145 N.E. 543 (1924), Syllabus, approved and modified) 7

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION

This case presents to the Court the opportunity to lay out the law of conversion to protect shareholders when they transfer their ownership in corporations.

Shareholders must be able to trust corporations to protect their property rights in transactions involving their shares of stock. Shareholders must have faith in the law to provide a remedy for the value of their shares at the time if they are wrongfully taken. Corporations must follow the proper requests by shareholders to transfer their shares of stock. When they do not, and transfer all the shareholder's shares to a third party, instead of only part of them as requested, the corporation should be answerable to the shareholder for conversion. Such is this case.

Conversion is a common law tort. Its purpose is to compensate a property owner for loss due to a voluntary act by another inconsistent with his ownership rights (Fouldes v. Willoughby, 8 M&W 540 (1841) (English law)).

At stake in this matter is whether an owner whose shares have been transferred to another by the corporation without his authority or consent is required to demand return of his share rights to establish a claim for conversion against the corporation. Must he accept a tender of shares by the corporation to him if the value of the shares have depreciated?

The law of Ohio regarding the tort of conversion should be expressed so that all who are involved in stock transactions on corporate books have guidance as to their legal duties and rights.

STATEMENT OF THE CASE AND FACTS

In a divorce settlement, Norman R. Crowe, Jr. ("Norman"), agreed to transfer 50% of his shares of stock in FirstEnergy to his wife, Mary Lou Crowe ("Mary Lou"). He complied by delivering to Mary Lou his stock certificate and stock power for one-half of his shares.

FirstEnergy's Shareholder Service Department ("FirstEnergy") received the signed certificate and stock power, but instead of following instructions, it transferred all of Norman's shares to Mary Lou on September 13, 2008. Norman had 850.558 shares. At the time of transfer, the price of the stock was \$69.42 per share with a total value of \$59,045.736. Norman lost his half valued at \$29,522.87.

Norman discovered his loss in April of 2009 and immediately notified Mary Lou's attorney. Norman followed up on May 1, 2009, by contacting FirstEnergy and sent a letter to Mary Lou demanding payment of \$30,749.80 or he would sue her for conversion. On May 1, 2009, the stock closed at \$42.38. Meanwhile, Mary Lou had sold all her FirstEnergy shares in March of 2009.

FirstEnergy placed 425 shares of its shares in a new account for Norman on August 7, 2009. Norman had not consented to this transfer and did not accept it. No certificate was issued to him. Norman filed suit on August 20th against FirstEnergy and Mary Lou for conversion. FirstEnergy offered to pay Norman for the quarterly dividends for the period after his shares were taken. Norman rejected this offer. He also returned the quarterly check issued on September 1, 2009.

The lawsuit in the Common Pleas Court of Holmes County was decided by summary

judgments in favor of Mary Lou and FirstEnergy. Norman appealed to the Fifth District Court of Appeals which affirmed (2011 Ohio 5092). In so doing, the Appellate Court found that Norman “failed to demonstrate a genuine issue of material fact exists as to two of the elements of the tort of conversion: refusal to return and damages.” (Id.).

The Decision and Judgment is legally wrong. To prove conversion Norman did not have to demonstrate he demanded a return of his property. His remedy was the value of the stock on the date it was wrongfully transferred by FirstEnergy to Mary Lou.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:

A bailee, agent, or servant who makes an unauthorized delivery of a chattel is subject to liability for conversion to his bailor, principal, or master unless he delivers to one who is entitled to immediate possession of the chattel. (The Restatement of the Law 2d, Torts (1965), Section 234, adopted).

Conversion has been defined as the 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 (State ex rel. Toma v. Corrigan, 92 Ohio St. 3d 589, 592, 2001 Ohio 1289, 752 N.E.2d 281 (2001); Joyce v. Gen Motors Corp., 49 Ohio St. 3d 93, 96, 551 N.E.2d 172 (1990); Zacchini v. Scripps-Howard Broadcasting Co., 47 Ohio St. 2d 224, 226, 1 Ohio Ops. 3d 129, 351 N.E.2d 454 (1976), reversed on other grounds, 433 U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977); and, Railroad Co. v. O'Donnell, 48 Ohio St. 489, 32 N.E. 476 (1892), Syllabus No. 2). In the Railroad Co. case the Court used the word "chattels" instead of "property" (Id.). Intangible rights which are customarily merged in or identified with some document may be converted (Zacchini...., supra., p. 227).

Shares of stock in a private corporation are personal property; and may be the subject of an action for conversion (State ex rel Bross v. Carpenter, 51 Ohio St. 83, 88 (1894)).

FirstEnergy had a duty to transfer the shares of stock in compliance with the written instructions presented to it (R.C. 1308.37 and R.C. 1701.28). In doing so, it had some immunity. However, the statutory protection to the corporation does not apply to the "transferring to or vesting in another person such relationships or right of ownership of the shares or other securities..." (R.C. 1701.28 (G)).

One remedy of Norman is to elect to seek the value of his stock by a lawsuit against the corporation for conversion. The adoption of the Restatement of the Law 2d, Torts (1965), Section 234, will express the standard of law that should be applied in such cases.

Proposition of Law No. 2:

When a person as agent of owner in possession or control of personal property, including intangible rights, transfers it to a third party without the authority or consent of the owner, no demand is necessary by owner to prove conversion.

The Court of Appeals held that Norman had to prove he made a demand upon FirstEnergy to return his shares to him (2011 Ohio 5092, Pars. 27, 29). It failed to understand the nature of FirstEnergy's acts. The transfer of Norman's shares to Mary Lou was without authority and consent of Norman. The transfer was wrongful. No demand to return was necessary as the cause of action accrued at the time of the wrongful transfer.

Although a demand and a refusal to return the property are ordinarily necessary to prove conversion, acts by a defendant that are inconsistent with the right of the plaintiff's ownership are sufficient to satisfy this requirement (Tinter v. Lucik, 172 Ohio App. 3d 692, 700, 2007 Ohio 4437, ¶ 36, 876 N.E.2d 1026 (Ct. App. Cuyahoga Co., 2007); City of Findlay v. Hotels Com. L.P., 441 F. Supp.2d 855, 865 (N.D. Ohio, 2006); Baird v. Howard, 51 Ohio St. 57, 36 N.E. 732 (1894), Syllabus No. 2; and, Baltimore & O.R. Co. v. O'Donnell, 49 Ohio St. 489, 32 N.E. 476, 21 L.R.A. 117 (1892), Syllabus Nos. 1 and 2).

The sole object of a demand in a conversion action is to turn an otherwise lawful possession into an unlawful one, by reason of a refusal to comply with it, and thus to supply evidence of a conversion (City of Findley . . ., *supra.*; and, Fidelity & Deposit Co. of Maryland v. Farmers & Citizens Bank, 72 Ohio App. 432, 477, 27 Ohio Ops. 344, 52 N.E.2d 549 (Ct. App.

Fairfield Co., 1943)). In other words, if the original taking was rightful and no act of dominion or control inconsistent with the plaintiff's ownership has taken place, a demand and refusal is necessary (18 Ohio Jur. 3d, Conversion and Replevin, § 16; Fosdick v. Greene, 27 Ohio St. 484 (1875); and, Fidelity & Deposit . . . , supra.). However, if the defendant obtained possession rightfully and wrongfully disposed of the property, no demand or refusal is needed (Id.).

Of course, when personal property is taken unlawfully, the demand for refusal to return is not necessary (Kelly v. Kelly, 163 Ohio App. 3d 260, 264, 2005 Ohio 4740, ¶ 21, 837 N.E.2d 811 (Ct. App. Clark Co., 2005); Fidelity & Deposit . . . , supra., Syllabus No. 1).

FirstEnergy wrongfully disposed of Norman's stock. No demand to return was necessary.

Proposition of Law No. 3:

(1) The amount of damages for the conversion of a chattel is diminished by its recovery or acceptance by a person entitled to its possession.

(2) The amount of damages may, in the discretion the court, be diminished by a tender of return of the chattel to one entitled to its possession if

(a) it was converted in good faith and under a reasonable mistake, and

(b) its value to the one entitled to possession is not substantially impaired, and

(c) the tender is made promptly after discovery of the mistake and is kept open. (The Restatement of the Law 2d, Torts (1965), Section 922, adopted).

FirstEnergy set up an in house account for Norman with 425 shares. Norman did not accept this offer and rejected it by filing suit. It is clear why he did not take the tender of the house account. The value of the shares of FirstEnergy had substantially dropped. This Court has

stated that after the conversion has taken place, the owner is under no obligation to receive the property (Baltimore & O. R. Co. v. O'Donnell, *supra* p. 498).

The Restatement of Law places the risk where it belongs; on the wrongdoer. One of the illustrations for Section 922 fits our factual situation:

A steals from B share certificates and sells and delivers them to C. C has no reason to suspect that the certificates have been stolen. B sues C for conversion. C tenders return of the certificates to B but B refuses to accept them because the market value has greatly depreciated between the time of the theft and the time of the tender. The tender is ineffective to mitigate the damages which B may recover from C. (Restatement of the Law 2d, Torts (1965), Comment on Subsection (2) f. 2.).

The same is true when A, FirstEnergy, by mistake transfers shares belonging to B, Norman, to C, Mary Lou. Norman does not have to accept the tender and retains his full claims for damages which are the share value at the time of the transfer.

The Court of Appeals erred by finding that Norman was bound by the attempted tender of shares by FirstEnergy.

Proposition of Law No. 4:

In an action for conversion for wrongfully transferring stock on the books of the corporation, the measure of damages is the market value of the stock at the time the right of action accrued, if the stock had a market value, and the owner does not elect to accept and accepts a return of his stock rights (Cincinnati Finance v. Booth, 111 Ohio St. 361, 145 N.E. 543 (1924), Syllabus, approved and modified).

This Court has set forth the measure of damages in an action for conversion for wrongfully refusing to transfer stocks on the books of the corporation, on application of the bona fide owner and holder thereof (Cincinnati Finance v. Booth, 111 Ohio St. 361, 145 N.E. 543

(1924), Syllabus, which approved and followed; Fosdick v. Greene, 27 Ohio St. 484, 22 Am. Rep. 328 (1875); and, Freon v. Carriage Co., 42 Ohio St. 30, 51 Am. Rep. 794 (1884)). The measure of damages is the market value of the stock at the time the right of action accrued, if the stock had a market value (Id.). If the stock had no market value, then the measure of damages is its actual value to be determined by all the circumstances, such as dividend earning capacity, good will of the corporation, or any other element going to make up its actual value (Id.).

This standard to measure damages to one whose corporate shares have been wrongfully transferred on the corporate books should apply today. Who should bear the economic loss? If the share value goes down, then the loss should fall on the wrongdoer. If the value goes up, then the wrongdoer should not have a windfall. FirstEnergy's share value went down after the conversion. Ohio follows the general rule which is stated in the Restatement of the Law: "In a conversion the measure of damages is the full value of the chattel at the time and place of the tort." (Restatement of the Law Torts, 2d (1965), Section 222A, Comment c).

The general rule provides the distinguishing characteristic of conversion which is the forced judicial sale of the chattel or right of which the owner has been wrongfully deprived (Zacchini v. Scripps-Howard Broadcasting Co., 47 Ohio St.2d 224, 227, 1 Ohio Ops.3d 129, 351 N.E.2d 454 (1976); and, Elias v. Gammel, supra., ¶ 15). When First Energy wrongfully transferred Norman's shares of stock to Mary Lou, he had the right to damages. The value of the stock at the time of the transfer is the measure of damages. He had the right to elect by "judicial sale" to those damages. Such is the remedy for conversion.

However, the Court of Appeals while recognizing the general rule refused to apply it, but instead, used an exception applicable to situations where the converted chattels have tendered and accepted back by the rightful owner (2011 Ohio 5092, Par. 28). As noted above, Norman did

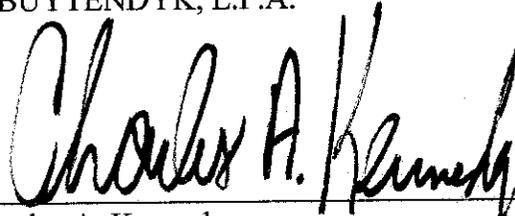
not accept FirstEnergy's offer to return his shares, and elected to pursue his damages he sustained at the time of the conversion. The Court of Appeals erred.

CONCLUSION

For the reasons set forth above, this case involves matters of public and great general interest. Accordingly, Appellant, Norman R. Crowe, Jr., requests that this Court exercise its discretion to accept jurisdiction of this matter.

Respectfully submitted,

KENNEDY, CICONETTI, KNOWLTON
& BUYTENDYK, L.P.A.

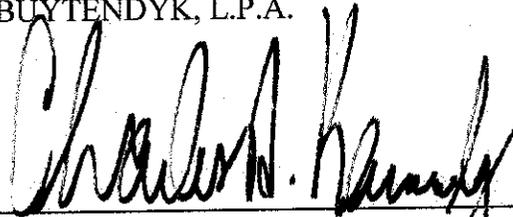
A handwritten signature in black ink, reading "Charles A. Kennedy". The signature is written in a cursive style and is positioned above a horizontal line.

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PROOF OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction of Appellant, Norman R. Crowe, Jr., was sent by ordinary U.S. mail November 7, 2011, to Mr. Paul W. Lombardi, Attorney for Appellee, FirstEnergy Corp., 222 South Main Street, Suite 400, Akron, OH 44308, and Mr. Robert P. DeSanto, Attorney for Appellee, Mary Lou Crowe, 432 Center Street, Ashland, OH 44805.

KENNEDY, CICCONE, KNOWLTON
& BUYTENDYK, L.P.A.

A handwritten signature in black ink, appearing to read "Charles A. Kennedy", written over a horizontal line. The signature is cursive and somewhat stylized.

Charles A. Kennedy
Attorney for Appellant, Norman R. Crowe, Jr.

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

2011 SEP 29 AM 10:33

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HOLMES COUNTY, OHIO

NORMAN R. CROWE, JR.

Plaintiff-Appellant

-vs-

FIRSTENERGY CORP., ET AL.

Defendants-Appellees

JUDGES:

Hon. Sheila G. Farmer, P.J.
Hon. Julie A. Edwards, J.
Hon. Patricia A. Delaney, J.

Case No. 10CA023

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Holmes County Court of
Common Pleas, Case No. 09 CV 144

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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Delaney, J.

{¶1} Plaintiff-Appellant, Norman R. Crowe, Jr. appeals the November 16, 2010 decision of the Holmes County Court of Common Pleas that granted summary judgment to Defendants-Appellees FirstEnergy Corp. and Mary Lou Crowe on plaintiff's claim for conversion of FirstEnergy Corp. stocks.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant, Norman R. Crowe, Jr. and Appellee, Mary Lou Crowe were divorced on July 28, 2008. Per the terms of the parties' Separation Agreement, Mr. Crowe agreed to transfer 50% of his shares of common stock in FirstEnergy Corp. to Ms. Crowe. At the time of the divorce, Mr. Crowe owned 844.137 shares of common stock in FirstEnergy Corp.

{¶3} FirstEnergy's Shareholder Services Department received from Mr. Crowe a stock power dated August 28, 2008, requesting FirstEnergy to transfer one-half of Mr. Crowe's FirstEnergy shares of common stock to Ms. Crowe. Given that a dividend reinvestment was due to be made on or about September 1, 2008, FirstEnergy waited to transfer the shares of the stock until September 13, 2008, after the reinvested shares were purchased and posted to all accounts. On September 13, 2008, FirstEnergy mistakenly permitted the transfer of all of Mr. Crowe's shares of stock to Ms. Crowe (850.558 shares at that time). At the time of transfer, the transfer price of the stock was \$69.42 per share.

{¶4} Ms. Crowe was unaware that FirstEnergy had mistakenly transferred 100% of Mr. Crowe's shares of FirstEnergy stock to her. On September 26, 2008, Ms. Crowe's broker took all 850 whole shares into a brokerage account through a direct

registration system option and left the 0.558 share at FirstEnergy in a reinvestment account. The 0.558 fractional share had grown to 0.587 fractional share as of September 1, 2009. In March 2009, Ms. Crowe sold the whole shares of FirstEnergy stock.

{¶15} On April 29, 2009, Mr. Crowe became aware that FirstEnergy had transferred 100% of his FirstEnergy stock to Ms. Crowe. Mr. Crowe notified Ms. Crowe's attorney of the error and demanded that Ms. Crowe transfer ownership of 50% of the shares back to Mr. Crowe.

{¶16} Mr. Crowe contacted FirstEnergy on May 1, 2009 and informed it that it had mistakenly transferred all of his FirstEnergy shares of stock to Ms. Crowe. On May 1, 2009, FirstEnergy's stock closed at \$42.38 per share.

{¶17} Mr. Crowe submitted a letter to Ms. Crowe on May 1, 2009 demanding Ms. Crowe pay him \$30,749.80 immediately or he would sue her for wrongful conversion. Thereafter, FirstEnergy and Ms. Crowe worked together to transfer the shares of stock back to Mr. Crowe and on August 7, 2009, Ms. Crowe's broker delivered to FirstEnergy's transfer agent 425 shares of FirstEnergy stock, which were placed in a new account for Mr. Crowe. FirstEnergy's stock closed on August 7, 2009 at \$42.87 per share.

{¶18} Because of the mistaken transfer, FirstEnergy told Mr. Crowe that it would reimburse him for quarterly dividends issued by FirstEnergy to shareholders during the period that the shares of stock were not in his account. Mr. Crowe declined FirstEnergy's offer and did not accept a September 1, 2009 dividend check from FirstEnergy.

{¶9} On August 20, 2009, Mr. Crowe filed his complaint against FirstEnergy and Ms. Crowe in the Holmes County Court of Common Pleas. FirstEnergy filed a motion for summary judgment on November 30, 2009. Mr. Crowe filed an opposing motion for summary judgment and a response to FirstEnergy's motion for summary judgment on December 16, 2009. Ms. Crowe filed a motion for summary judgment on December 22, 2009. On January 19, 2010, the trial court denied the motions of summary judgment by FirstEnergy and Mr. Crowe. In a separate judgment entry issued January 19, 2010, the trial court granted Ms. Crowe's motion for summary judgment.

{¶10} On July 9, 2010, Mr. Crowe filed a motion to reconsider the trial court's January 19, 2010 judgment entry granting Ms. Crowe's motion for summary judgment. During the pendency of the case, the matter was assigned to a visiting judge.

{¶11} The trial court held an oral hearing on the motion for reconsideration on November 2, 2010. There is no transcript of the hearing in the record. On November 16, 2010, the trial court ruled on Mr. Crowe's motion for reconsideration. The trial court determined that based on Mr. Crowe's motion for reconsideration, the trial court sua sponte reviewed both decisions issued on January 19, 2010. The trial court denied Mr. Crowe's motion for reconsideration as to Ms. Crowe's motion for summary judgment. However, the trial court reconsidered the denial of FirstEnergy's motion for summary judgment and found that pursuant to Civ.R. 56, the motion for summary judgment should be granted and the January 19, 2010 judgment entry should be vacated as such. The trial court dismissed Mr. Crowe's complaint with prejudice.

{¶12} It is from this decision Mr. Crowe now appeals.

ASSIGNMENTS OF ERROR

{¶13} Appellant raises three Assignments of Error:

{¶14} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY GRANTING SUMMARY JUDGMENT TO FIRST ENERGY.

{¶15} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING SUMMARY JUDGMENT TO NORMAN.

{¶16} "III. THE TRIAL COURT ERRED AS A MATTER OF LAW BY GRANTING SUMMARY JUDGMENT TO MARY LOU, AND DENYING NORMAN'S MOTION FOR RECONSIDERATION, FOR THE REASON THERE EXISTS QUESTIONS OF MATERIAL FACT TO BE DETERMINED AT TRIAL."

STANDARD OF REVIEW

{¶17} We will first address the standard of review applicable to Mr. Crowe's Assignments of Error. Summary judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶18} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing

Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.”

{¶19} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

I., II.

{¶20} We review Mr. Crowe's first and second Assignments of Error together because they are interrelated. Mr. Crowe argues that the trial court erred in granting FirstEnergy's motion for summary judgment and denying his motion for summary judgment.

{¶21} In Mr. Crowe's complaint, Mr. Crowe alleged against FirstEnergy:

{¶22} “9. On August 4, 2008, [FirstEnergy] negligently and beyond the authorization and consent of the Plaintiff and in violation of his instructions, transferred 100% of the shares of stock owned by Plaintiff * * * to the Defendant * * *.

{¶23} * * *

{¶24} “12. [FirstEnergy] wrongfully transferred shares of stock of the Plaintiff * * * to the Defendant * * *

{¶25} FirstEnergy responded to Mr. Crowe's complaint through summary judgment based on the theory of negligence. Mr. Crowe stated in his motion for summary judgment and opposition to FirstEnergy's motion for summary judgment that his complaint alleged a claim of conversion against FirstEnergy, not negligence.

Reviewing the motions in a light most favorable to the non-moving party, we will analyze Mr. Crowe's claim against FirstEnergy under the tort of conversion.

{¶26} 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.

{¶27} In 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. *Taber v. Charlie's Towing Service, Inc.* (1994) 97 Ohio App.3d 423, 427, 646 N.E.2d 1132, citations omitted.

{¶28} "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. "The general rule as to value as the measure of damages in actions for conversion is not inflexible, but is governed by such special circumstances as are disclosed by the record. (Citation omitted). The general rule is subject to exceptions as well established as the rule itself and founded upon the same equitable principle, namely, the recovery by the plaintiff of such damages as he has actually sustained, and no more. Thus, if the property has been retaken or returned, after taking, in whole or part, such fact is always regarded as an exception to the general rule that full value of the property should be regarded as the amount of

damages to be recovered. (Citation omitted)". *Pence v. Jordan*, Clark App. No. 1536, 1981 WL 5347.

{¶29} Upon our de novo review of the parties' motions for summary judgment and related Civ.R. 56 evidence supporting the motions, we find that Mr. Crowe's claim of conversion against FirstEnergy must fail as a matter of law because Mr. Crowe has failed to demonstrate a genuine issue of material fact exists as to two of the elements of the tort of conversion: refusal to return and damages.

{¶30} As stated above, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record * * * which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292, 662 N.E.2d 264. Once the moving party meets its initial burden, the nonmovant must then produce competent evidence, as set forth in Civ.R. 56(C) and (E), showing that there is a genuine issue for trial. *Id.*

{¶31} Competent evidence to be submitted in support of the nonmoving party's claim is described in Civ.R. 56(C) and (E). Civ.R. 56(C) states, "[s]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact

and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule." Civ.R. 56(E) further states, "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶32} FirstEnergy submitted affidavit testimony with its motion for summary judgment to support its contention that Mr. Crowe suffered no damages. FirstEnergy transferred 100% of his stocks to Ms. Crowe on September 13, 2008. It was not until May 1, 2009 that Mr. Crowe contacted FirstEnergy to inform them that the erroneous transfer had occurred. When FirstEnergy and Ms. Crowe learned of the error, FirstEnergy and Ms. Crowe attempted to rectify the error by returning 50% of the shares to Mr. Crowe and paying Mr. Crowe the dividends he was owed as if the stocks were in account during that period of time.

{¶33} Mr. Crowe's motion for summary judgment and response to FirstEnergy's motion for summary judgment makes a conclusory statement that Mr. Crowe is entitled to damages in his motion, but does not provide any Civ.R. 56 evidence, affidavit or otherwise, to demonstrate there is a genuine issue of material fact on this element. Under the facts of this case, the Court can infer how Mr. Crowe was damaged, but that is not the Court's burden. It is the burden of Mr. Crowe to provide Civ.R. 56 evidence to set forth specific facts as to his damages to show there is a genuine issue for trial. Mr.

Crowe has not provided affidavit evidence, financial statements, or expert testimony to show a genuine issue of material fact of damages. FirstEnergy has provided Civ.R. 56 evidence to show that the shares have been returned to Mr. Crowe and FirstEnergy has offered to pay Mr. Crowe the missing dividends.

{¶34} We find our conclusion is supported by the trial court's statement granting FirstEnergy's motion for summary judgment and denying Mr. Crowe's motion for summary judgment:

{¶35} "Defendant First Energy Corporation is entitled to judgment as a matter of law and that Norman R. Crowe, Jr. has failed to produce a sufficient quantum of evidence on the issues postured for Summary Judgment, for which Norman R. Crowe Jr., bears the burden of production at Trial. More specifically, the undersigned concludes that Defendant First Energy Corporation did not proximately cause any damages to Norman R. Crowe, Jr. as a result of the mistaken transfer of shares of stock..." (Judgment Entry, November 16, 2010).

{¶36} Accordingly, we overrule Mr. Crowe's first and second Assignments of Error.

III.

{¶37} Mr. Crowe contends in his third Assignment of Error that the trial court erred when it granted Ms. Crowe's motion for summary judgment and denying his motion for reconsideration of the same. We disagree.

{¶38} Mr. Crowe also alleged the tort of conversion against Ms. Crowe. In this case, FirstEnergy transferred Mr. Crowe's stocks to Ms. Crowe upon Mr. Crowe's direction and FirstEnergy transferred the incorrect amount to Ms. Crowe.

{¶39} As stated above, Mr. Crowe must prove two elements of conversion: (1) that he demanded the return of the property after she exercised dominion or control over the property and (2) that she refused to deliver the property to him. The Civ.R. 56 evidence shows on April 29, 2009, Mr. Crowe demanded the FirstEnergy shares back from Ms. Crowe. When Ms. Crowe became aware that she possessed Mr. Crowe's shares, she repurchased the FirstEnergy shares and with FirstEnergy's assistance, opened a new account for Mr. Crowe with 425 shares of FirstEnergy stock.

{¶40} Upon our de novo review, we agree with the trial court's conclusion to grant Ms. Crowe's motion for summary judgment and deny Mr. Crowe's motion for reconsideration of the trial court's decision.

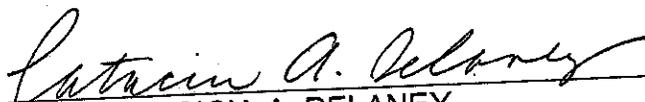
{¶41} Mr. Crowe's third Assignment of Error is overruled.

{¶42} The judgment of the Holmes County Court of Common Pleas is affirmed.

By: Delaney, J.

Farmer, P.J. and

Edwards, J. concur.


HON. PATRICIA A. DELANEY


HON. SHEILA G. FARMER


HON. JULIE A. EDWARDS

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

NORMAN R. CROWE, JR.

Plaintiff-Appellant

-vs-

FIRST ENERGY CORP., et al.

Defendants-Appellees

JUDGMENT ENTRY

Case No. 10CA023

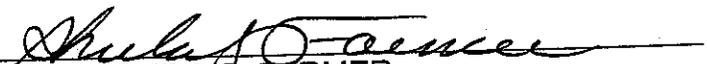
FILED
RONDA P. STEINEL, CLERK
CLERK OF COURTS
HOLMES COUNTY, OHIO

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5TH DISTRICT APPEALS COURT

For the reasons stated in our accompanying Opinion on file, the judgment of the Holmes County Court of Common Pleas is affirmed. Costs assessed to Appellant.


HON. PATRICIA A. DELANEY


HON. SHEILA G. FARMER


HON. JULIE A. EDWARDS