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SUPREME COURT OF THE STATE OF ARIZONA

ROY MCALISTER, KATHLEEN MCALISTER and MCALISTER TECHNOLOGIES, an Arizona corporation, Petitioners, v. LOEB & LOEB, L.L.P., a California limited liability partnership, Respondent.	Arizona Supreme Court No. CV 24-0048 Court of Appeals Case No. 1 CA-CV 23-0212 Maricopa County Superior Court Case No. CV 2018-012158 **PETITIONERS' RESPONSE TO CROSS PETITION FOR REVIEW**

Petitioners respectfully respond to the Cross Petition for Review as follows.

I. THERE IS REASONABLE CERTAINTY DONAL O'FLYNN WOULD HAVE MADE AN INITIAL $5 MILLION LICENSING PAYMENT

At pp. 1-10, Respondent/Cross Petitioner ("Respondent") argues there is no evidence to provide reasonable certainty that Donal O'Flynn would have made an initial, non-contingent $5 million licensing payment.

A. Donal O'Flynn

O'Flynn built and sold a $250 million clean energy company. (Index of

Record on Appeal ("IR") 445, Exh. 2, pp. 73-74). In 2014-15, he personally invested $3.8 million to license technology from Petitioners and also loaned Petitioners $500 thousand on some of their technology. (IR 394, Exh. 4, p. 202).

When O'Flynn learned that additional technology of Petitioners had become available for licensure in 2015, he and the co-founder of his prior company began negotiations on leasing a vacant plant that had the zoning necessary to employ the new technology. (IR 445, Exh. 2, pp. 87-88).

O'Flynn later testified by affidavit that in 2015, he and his partner were going to pay Petitioner McAlister Technologies ("MT") $20 million annually for ten years in order to license certain patents. (IR 394, Exh. 12).

At deposition, O'Flynn reaffirmed his affidavit and clarified that at the time Respondent's tortious conduct destroyed the deal negotiations, O'Flynn was at $18 million per year, Petitioners were at $20 million per year and it was more likely than not they would close a deal. (IR 445, Exh. 2, p. 204). O'Flynn also identified by application number fifty patents he intended to license. (IR 407, Exh. 2, pp. 211-14 and Exh. J).

Petitioners also produced a draft license agreement from 2015. (IR 231, Exh. 4). O'Flynn testified the document was from 2015 (IR 369, Exh. 9, pp. 180-81) and produced contemporaneous emails from 2015 reciting similar terms. (IR 445, Exh. 5).

In his deposition, O'Flynn testified that $5 million of the first $20 million patent license payment was to be paid to Petitioner MT immediately and without contingencies. (IR 394, Exh. 4, p. 82). Counsel for Respondents clearly understood the testimony and pressed O'Flynn on it. (Id.)

The Court of Appeals held that on this evidence, there was reasonable certainty O'Flynn would have made the initial $5 million licensing payment. Court of Appeals Memorandum Opinion ("Opinion") at p. 12.

B. Respondent Mischaracterizes the Record and Ignores Controlling Law

Respondent seeks to discredit the foregoing by mischaracterizing the record and ignoring controlling case law. Specifically, Respondent asserts:

1) **there was "no product"** (Cross Petition ("CP") at p. 10) – Petitioner MT's products were patents which they sought to license to third parties. O'Flynn specifically identified by application number more than fifty patents he intended to license (IR 407, Exh. 2, pp. 211-14 and Exh. J);

2) **there were "no customers"** (Id.) – Petitioners identified numerous customers and produced sworn affidavits from six interested customers who intended to license the patents (IR 394, Exh. 12; IR 247, Exh. 20);

3) **there was "not a single contemporaneous email…discussing a license agreement with these terms"** (Id. at p. 4) - O'Flynn produced two emails from

2015 stating that MT would own all the patents, O'Flynn's company would license them, MT would receive an annual licensing fee and O'Flynn's company was putting together $150 million, to pay licensing fees (IR 445, Exh. 5). This mirrors the draft license;

4) **there was "no evidence that the Potential Investors had the funds to make the investments"** (Id. at p. 10) – Chris Haver heads a private equity group that invested $63 million to license Petitioners' technology during 2010-15. (IR 445, Exh. 4, p. 197). Donal O'Flynn built and sold a $250 million clean energy company (IR 445, Exh. 2, pp. 73-74) and personally invested $3.8 million to license Petitioners' technologies the previous year. (IR 394, Exh. 4, p. 202); and

5) **"McAlister…had never developed a product capable of being commercialized…"** (Id. at p. 3) - this statement is false, there is not a shred of evidence that suggests this is true and Respondent has never cited anything to support this statement.

C. Respondent Ignores Controlling Case Law

U.S. Fidelity & Guarantee v. Davis, 3 Ariz. App. 259 (App. 1966), *Short v. Riley*, 150 Ariz. 583 (App. 1986), *Rhue v. Dawson*, 173 Ariz. 220 (App. 1992), *Felder v. Physiotherapy Associates*, 215 Ariz. 154 (App. 2007), *County of La Paz v. Yakima Compost*, 224 Ariz. 590 (App. 2010) and *Great Western Bank v. LJC Dev.*, 238 Ariz. 470 (App. 2015) are all cases where a new business venture

claimed lost profits (as is the case here) and the Court of Appeals held there was reasonable certainty of lost profits.

Respondent cites none of these cases, which are controlling. None of these cases offer evidence of a "business plan" or a "management team," which Respondent argues is required to show reasonable certainty. (CP at p. 10).

Unlike the case herein, *Short, Rhue, Felder* and *Great Western* offered no evidence of either interested customers or written evidence of the terms of the agreement.

Unlike the case herein, *U.S. Fidelity, Rhue* and *Great Western* offered no evidence potential customers had the financial capability to purchase the product, which in each case was extremely expensive.

Respondent ignores these six on point cases and cites to a federal case (*S. Union Co. v. S.W. Gas*, 180 F. Supp.2d 1021 (D. Ariz. 2002)) and *Rancho Pescado v. Northwestern Mutual Life*, 140 Ariz. 174 (App. 1984).

S. Union states that lost profits must be proved with reasonable certainty, which is not in dispute. *Id.* at pp. 1050-51. *S. Union* is otherwise inapposite.

Rancho Pescado found a lack of reasonable certainty because:

1) the aspiring catfish farmer was self-taught and had never worked in any industry related to fish, *Id.* at pp. 177, 185;

2) he had never sold a single fish and was claiming one buyer would

purchase an amount equal to over 11% of the total national market, *Id.* at pp. 185-86; and

3) that same buyer was bankrupt by the time the anticipated payments would have started. *Id.*

Petitioner Roy McAlister had fifty years experience in the industry, there is unrebutted evidence O'Flynn could make a $5 million payment and MT had just licensed closely related technology to O'Flynn for $3.8 million. *Rancho Pescado* has no relevance.

This Court should decline review on the issues raised at pp. 1-10 of the Cross Petition.

II. THE COURT OF APPEALS' HOLDING REGARDING CALCULATION OF COSTS DOES NOT REQUIRE REVIEW

At pp. 11 and 21, Respondent makes an argument without citation to cases or the record that because Petitioners did not net costs against the $5 million O'Flynn payment, review is required.

A. Facts

Petitioner MT's owners and employees were Roy and Kathleen McAlister (IR 72, Exh. 1) and MT's sole purpose was to act as a holding company for Roy's patents. (IR 407, Exh. 10). MT therefore had no expenses outside of Roy and Kathleen's home, other than the cost of maintaining the patents. (Id.)

O'Flynn sent Roy an email in 2015 stating that O'Flynn's company would

pay all costs related to maintaining MT's patents: "Carbongistics will be responsible for the upkeep and defence of the patents…" (IR 445, Exh. 5). Therefore, there were no costs to net against the initial $5 million O'Flynn payment, which was unconditional.

B. Law

Arizona law is clear that disputes over whether a party accounted for costs in calculating future lost profits go only to weight. In a case involving future lost profits for a new business, the court held: "Appellees argue that the evidence did not properly allocate property rental and labor expenses attributable to Short's management of the restaurant. This argument merely goes to the weight of the evidence…" *Short* at p. 586.

A second case involving future lost profits for a new venture held: "(d)isagreements as to the evidence used to establish the amount of damages will go to the 'weight of the evidence.'" *Felder* at p. 887.

C. Court of Appeals' Holding

The Court of Appeals held that the evidence was unrebutted that the $5 million payment from O'Flynn was without contingencies and therefore, issues of cost were for the fact finder. Opinion at p. 12.

Given the foregoing, this holding does not require review.

III. THE $5 MILLION PORTION OF THE O'FLYNN LICENSING PAYMENT WAS NOT FIRST DISCLOSED AT APPELLATE ORAL

ARGUMENT AND WAS NOT WAIVED

At pp. 11-14, Respondent asserts that the $5 million initial O'Flynn payment was first disclosed at appellate oral argument on November 9, 2023 and was therefore waived. The following are just a couple of several such assertions:

* "At oral argument, Plaintiffs argued for the first time that they had a standalone claim for $5 million in lost profits…" (CP at p. 6);
* "never timely disclosed that they had a standalone damages claim separate and apart from Epperson's opinion…" (Id. at p. 11).

A. Facts

On February 22, 2019, Petitioners disclosed an affidavit wherein O'Flynn testified that he intended to pay Petitioners $20 million to license Petitioners' technology for the first year, with additional payments following thereafter. (IR 394, Exh. 12).

On October 1, 2019, Petitioner disclosed the report of damages expert Epperson. (IR 322, Exh. 1). Epperson's report described the potential payment and credited it in his calculations. (Id.)

On November 11, 2020, counsel for Respondent asked O'Flynn in deposition if the $20 million licensing payment would have been in a lump sum or installments. O'Flynn testified the payment would have been $5 million up front without contingencies and $15 million thereafter, if certain contingencies were

met. (IR 394, Exh. 4, p. 82). Respondent's counsel understood the testimony and pressed O'Flynn on it. (Id.)

On November 3, 2022, Petitioners cited this exact testimony to Respondent and highlighted it, in the argument on dispositive motions. (IR 394, p. 14, l. 4).

On May 22, 2023, Petitioners cited this precise exhibit, which is five pages long, at pp. 12, 17 and 42 of the Appeal Brief.

On August 22, 2023, Petitioners cited this exhibit, at pp. 25 and 27 of the Reply Brief. Appellate oral argument was three months thereafter.

B. Disposition by the Court of Appeals

Responding to the same argument Respondent is making here, the Court of Appeals cited these facts and held: "by advancing that legal principle now, the plaintiffs are not changing their damages theory or raising new issues—they are relying on the same evidence, just without the expert's imprimatur. Even though they did not emphasize the 'initial payment' testimony in the proceedings below, Epperson not only described this potential payment in the body of his report, but he also credited it in his calculations. Because evidence of the potential 'initial payment' was before the court, we decline to find that the plaintiffs have waived the argument…" Opinion at p. 5.

Respondent's argument has no merit and the Court of Appeals' holding does not require review.

IV. THE COURT OF APPEALS' HOLDING REGARDING TRESPASS TO CHATTELS DOES NOT REQUIRE REVIEW

At pp. 14-16, Respondent argues that Trespass to Chattels cannot apply on these facts.

A. Facts

Petitioner Roy McAlister invented new technology and applied for patents over the technology, which he would then assign to his holding company, Petitioner MT.

Petitioners had recently cancelled the licensing agreement of licensee Advanced Green Technologies ("AGT"), for repeated material violations of the license agreement. In addition to being a licensee of Petitioners, AGT was also a paying client of Respondent at that time.

Respondent had previously done legal work for Petitioners. Respondent took advantage of its access to Petitioners' filings and falsified ownership on over fifty patent applications, changing ownership from MT to Respondent's client, AGT, three months after admitting in writing AGT was not the owner. It took Petitioners three years to correct these false filings by Respondent.

Respondent now argues this cannot be a basis for Trespass to Chattels because Trespass "requires a tangible, physical object…" (CP at p. 14) and a patent application confers no ownership rights. (Id.)

B. The Court of Appeals' Holding is Correct

The Court of Appeals cited *Miller v. Hehlen*, 209 Ariz. 462 (App. 2005), which held Trespass to Chattels applies to "intangible property that is merged in, or identified with, some document," such as "a stock certificate or an insurance policy." *Id.* at p. 472, cited in Opinion at p. 13.

This holding brought Arizona law into harmony with the Restatement, which states liability exists where "(o)ne…effectively prevents the exercise of intangible rights of the kind customarily merged in a document…" Restatement (Second) of Torts 242.

But, Respondent argues, gross falsification of a patent application cannot be actionable under this theory, because applications have not yet conferred ownership. (CP at pp. 14-16).

As an initial matter, *Miller* requires interference with a "document" that "intangible property" is "identified with," such as "an insurance policy." *Id.* at p. 472. Similarly, Restatement 242 requires an effective prevention of "the exercise of intangible rights of the kind customarily merged in a document…"

Neither authority limited Trespass to Chattels to interference with a finalized document conferring full ownership over a tangible piece of property. Furthermore, the facts of this case satisfy both legal tests. Regarding *Miller*, Respondent changed ownership on a "document" (patent applications) that

"intangible property" (right to exclude others from infringing an invention) were "identified with." Regarding the Restatement, changing ownership prevented the future exercise of all potential intangible rights that could have arisen from a patent application.

Only one case has addressed the argument Respondent is making and that court rejected the argument, holding: "while the rights flowing from the patent do not begin until the date on which the patent issues, Celeritas has taken affirmative steps to obtain a patent by filing the applications. Celeritas has also assumed the right of ownership, if not a present right, at a minimum a future contingent ownership…" *Paradigm Alliance v. Celeritas Techs*, 659 F.Supp.2d 1167, 1189 (D. Kan. 2009).

Respondent's argument not only contradicts *Hehlen* and the Restatement, its sole effect would be to insulate wrongdoers from liability for fraudulently interfering with documents filed to obtain patents, property titles, securities certificates and insurance policies. The Court of Appeals' holding does not require review.

V. THERE IS NO BASIS TO RULE AS A MATTER OF LAW THAT CHRIS HAVER WOULD NOT HAVE MADE AN INITIAL LICENSING PAYMENT UNTIL AFTER THERE WERE PRODUCT SALES

At pp. 17-22, Respondent asks the Court to deny Petitioners' Petition for Review. Respondent argues therein:

1) the Court should uphold a finding that as a matter of law, Chris Haver would not have made an initial licensing payment until after there were product sales; and

2) there is no evidence that Petitioners and Haver would have finalized a deal or that Haver's fund could make an initial payment.

A. Facts

1. Affidavit

In an affidavit, Haver testified that Petitioners would have two revenue streams: (1) an agreed "technology licensing plan" of $20 million per year from Haver's group, independent of any sales (IR 394, Exh. 12, Haver aff., pars. 5-7); and (2) part of an "annual royalty" from sub-licensees, which was contingent on the patented technology generating sales. (Id.)

2. First Deposition Testimony

In his deposition, Haver again testified that Petitioners would receive two revenue streams: 1) a non-contingent license fee for the Texas territory; and 2) a contingent share of any royalties in the event of sales:

"Q. What was the framework?

A. It was more of an equitable, you know, joint venture relationship than a

licensing. If I agreed to raise the capital, **that Richard and Roy and I would have shared in, you know, the upside**, and then **I'd also have the opportunity to be a licensee for the state of Texas**, **which would have been the mother lode of areas in a licensing agreement structure**. So it would have been really good for me if we'd have kicked off the ground because **I would have been able to share on the – kind of the licensing side and then on the distributor side**." (Emphasis added). (IR 361, Exh. 9, pp. 83-84.)

Haver cannot speak clearly, but his meaning is clear: "Roy" "would have shared in" "the upside" (i.e. contingent royalties in the event of sales) and would "also" grant Haver a license "for the state of Texas" (i.e. an agreed licensing fee). Haver testified there would be a "licensing side" separate from "the distributor side."

3. Second Deposition Testimony

Respondent's counsel then tried to bait Haver into saying there would be only contingent payments conditioned on sales, but Haver shot that down:

"Q. And as I understood from your testimony earlier today, it would have been a joint arrangement with more of a split rather than payment –

A. Well **I was going to get part of the royalty fee** and **then I would be a distributor and have exclusivity in the state of Texas**…But anyway, yeah, **I would have been getting paid on a royalty deal with Roy and Richard for**

helping to set up the company, but then I would have had the distributorship for Texas, which would have been the home run…" (Emphasis added) (IR 445, Exh. 4, p. 189).

Frustrated, Respondent's counsel then tried to get Haver to disavow the $20 million initial licensing fee or to testify it was contingent. Haver refused, testifying: "It would probably be more like $50 million a year now…This was woefully undervalued." (IR 445, Exh. 4, p. 188).

4. Ability to Pay and Likelihood the Deal Would Close

From 2010-15, Haver's hedge fund invested $63 million to license closely related technology and this is unrebutted. (IR 445, Exh. 4, p. 197). Haver testified in his affidavit the deal would have closed but for Respondent's actions (IR 394, Exh. 12, Haver aff.) and reiterated this in deposition. (IR 445, Exh. 4, p. 204).

5. Summary

In *Orme School v. Reeves*, 166 Ariz. 301 (1990), this Court held that (1) all justifiable inferences must be drawn in the nonmoving party's favor; (2) courts may not weigh evidence or determine questions of credibility; and (3) courts must defer to the jury on disputed facts. *Id.* at p. 308-11.

Respondent argues that this Court should uphold a ruling that all licensing fees were wholly contingent on future sales. The only "evidence" Respondent can cite is a single comment from Haver's deposition, which is easily explained in

context and the meaning Respondent attributes to that comment is contradicted by the previously cited four sworn statements. (See, CP at pp. 18-19).

Adopting Respondent's argument is a violation of *Orme School.*

VI. THE INITIAL LICENSING PAYMENT IS NOT "A STANDALONE CLAIM"

At pp. 22-24, Respondent argues that "during the four plus years litigating this case before the trial court, (Petitioners) never asserted a standalone claim for $20 million in damages," but that Petitioners are now doing so.

This is false. Haver testified that, but for Respondent's actions, Haver's fund would have agreed to pay Petitioners $20 million per year for ten years. (IR 394, Exh. 12, Haver aff.).

The Court of Appeals characterized this as too speculative and provided two bases for its holding:

1) referring to other investors, the Court stated "O'Flynn, Karl and Burns each testified that they did not anticipate paying any royalty fees for years, until operations were underway and commercialization was achieved…" Opinion at p. 7; and

2) the "factfinder would have to speculate either that the potential investors would have reversed their unwillingness to make immediate royalty payments or that the unknown technologies would have been successfully commercialized." Id. at pp. 11-12.

In seeking review, Petitioners have argued neither rationale applies to Haver's initial $20 million license payment.

There is no evidence that Haver would not pay an initial licensing fee "until…commercialization was achieved." Id. at p. 7. Haver's group had just paid $63 million for related technology prior to any operations or commercialization.

There is also no evidence that Haver would need to reverse his "unwillingness to make immediate" license payments, since the evidence indicates Haver had no such unwillingness. Id. at pp. 11-12.

Petitioners are not offering a new "standalone claim," they are pointing out that the Court of Appeals threw out $20 million in claimed lost profits from Haver's initial license payment and provided no evidentiary basis for doing so, in violation of *Orme School*.

VII. CONCLUSION

Petitioners respectfully move the Court to order further briefing on their Petition for Review and to deny Respondent's Cross Petition.

Dated May 14th, 2024.

THE ENTREKIN LAW FIRM

/s/ B. Lance Entrekin, Esq.
B. Lance Entrekin
Counsel for Petitioners

Certificate of Compliance

Pursuant to Rule 23(c) of the Arizona Rules of Civil Appellate Procedure, the undersigned attorney for the Appellants hereby certifies that the foregoing Petition: (1) is, with the exception of headings and footnotes, double spaced; (2) uses Times New Roman 14-point proportionately spaced typeface for text *and* footnotes; (3) contains 3498 words (by computer count). The document to which this Certificate is attached does not exceed the word limit set by Rule 23 of the Arizona Rules of Civil Appellate Procedure.

Certificate of Service

Under Rule 4(c) of the Arizona Rules of Civil Appellate Procedure, the undersigned attorney for Petitioners hereby certifies that two copies of the foregoing Petition were hand delivered to the following:

- Amy Abdo, Esq., Jessica L. Post, Esq., and Brett C. Gilmore, Esq., **FENNEMORE**, 2394 E. Camelback Rd., Ste. 600, Phoenix, AZ 85016, (602) 916-5000, amy@fennemorelaw.com, jpost@fennemorelaw.com, bgilmore@fennemorelaw.com, Attorneys for Respondent Loeb & Loeb LLP.

/s/ B. Lance Entrekin, Esq.
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