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SUPREME COURT OF THE STATE OF ARIZONA

ROY MCALISTER, KATHLEEN MCALISTER and MCALISTER TECHNOLOGIES, an Arizona corporation,

Petitioners/Cross Respondents,

v.

LOEB & LOEB, L.L.P., a California limited liability partnership,

Respondent/Cross Petitioner.

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

CROSS RESPONDENTS' SIMULTANEOUS SUPPLEMENTAL BRIEF

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Issues Presented for Review

1. Did the Court of Appeals err by partially reversing the Superior Court's grant of summary judgment in Loeb's favor on the McAlister parties' lost profits claim based on a prospective $5 million initial payment by O'Flynn for a licensing agreement?

2. Did the Court of Appeals err by recognizing a claim for Trespass to Chattels based on the "electronic touching" of an intangible patent application?

Issue #1

1. Law Relevant to Issue #1

A. Summary Judgment Standard

Cross Petitioners have the burden of showing the evidence that Donal O'Flynn would have made his initial licensing payment has so little probative value that reasonable people could not conclude it is more than less likely O'Flynn would have made the initial payment. *Orme School v. Reeves*, 166 Ariz. 301, 309 (Ariz. 1990).

B. Supreme Court Jurisprudence on the Evidence Required to Prove Lost Profits

1. Evidentiary Standard to Prove Lost Profits

In 1948, this Court adopted a distinction between the evidentiary burden required to show that lost profits occurred and the evidentiary burden required to

establish the amount of lost profits. *Jacob v. Miner*, 67 Ariz. 109, 116 (Ariz. 1948).

In *Jacob*, the Court established a distinction between the evidence required to prove the existence of lost profits and the evidence required to prove the amount, but did not provide much guidance on what evidence was required to prove the existence of lost profits.

2. The "Reasonable Certainty" Standard

Seven years later, in *McNutt Oil and Refining Company v. D'Ascoli*, 79 Ariz. 28, 33-34 (Ariz. 1955), this Court provided further guidance. The Court held that the level of proof required to show that lost profits occurred was "reasonable certainty."

The phrase "reasonable certainty" is not especially helpful by itself, but the Court elaborated further, holding that "reasonable certainty" exists when the alleged lost profits arise from a discrete event that causes a measurable loss. *Id.* at pp. 33-34. The Court offered the example of a farmer evicted from land who has lost one season's crop as constituting a discrete event (the eviction) that causes measurable loss (the value of one season's crop) and therefore, provides "reasonable certainty" that lost profits occurred. *Id.*

3. Clarity to a Reasonable Person

Eight years later, this Court in *Gilmore v. Cohen*, 95 Ariz. 34, 37 (Ariz. 1963) focused primarily on the evidence required to establish the amount of lost

profits, but regarding the proof necessary to establish the existence of lost profits, the Court took issue with the fact that the plaintiffs themselves "seemed uncertain that…future profits were likely to accrue." *Id.* at p. 37. The Court then cited excerpts from the plaintiffs' testimony, wherein the plaintiffs repeatedly stated they had no real factual basis for their lost profits claim. *Id.*

The Court held that evidence of lost profits could not be solely based on confusing and unclear evidence, but had to provide at least some clarity regarding lost profits. *Id.* *Orme School* at p. 309 is clear that the evidence would need to provide said clarity to a "reasonable person."

Five years later, in *Coury Bros. Ranches v. Ellsworth*, 103 Ariz. 515, 521 (Ariz. 1968), this Court rendered a similar holding. The entire argument for lost profits was premised on the theory there was a well-established custom that wheat or barley would be planted by February. The Court found this evidence inadequate, holding: "(t)hat there was a custom and usage as to the time for planting wheat or barley for feed by sheep in February finds no support whatsoever in the record." *Id.* at p. 521.

C. The Restatement on the Evidence Necessary to Prove Lost Profits

Further guidance from this Court on the topic has been somewhat sparse. In the absence of law to the contrary, Arizona follows the Restatement. *Webster v. Culbertson*, 158 Ariz. 159, 162 (Ariz. 1988).

Restatement (Second) of Torts 912 ("Certainty"), Comment D ("Loss of Earnings and Profits"), states "if a person has tortiously prevented another from entering into…a particular transaction" which is a wholly new transaction without prior profits that could potentially produce profit or loss, the plaintiff must show the new transaction "was likely to be profitable…See illustration…8…"

Illustration 8 involved tortious interference with a completely new transaction and stated the plaintiff would be entitled to a lost profits award "if he proves that it is more probable than not that the (transaction) would have been made by him and would have been a financial success…"

D. Type of Evidence: Witness Testimony

This Court has held repeatedly "(n)o rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury." *State v. Clemons*, 110 Ariz. 555, 556-57 (Ariz. 1974); *State v. Cox*, 217 Ariz. 353, 357 (Ariz. 2007).

E. Summary

In summary, in order to defeat summary judgment on the existence of lost profits, Cross Respondents have the burden to offer:

1) some evidence (*Coury Bros.* at p. 521);

2) that is clear to a reasonable person (*Gilmore* at p. 37; *Orme School* at p. 309);

3) of a discrete event that a reasonable person could conclude caused a measurable loss (*McNutt Oil* at pp. 33-34; *Orme School* at p. 309);

4) said evidence would allow a reasonable person to conclude it is more probable than not that the event at issue would have produced financial gain (Restatement (Second) of Torts 912, Comment D; *Orme School* at p. 309); and

5) regarding witness testimony, the credibility of said testimony is for the jury. (*Clemons* at pp. 556-57; *Cox* at p. 357).

2. Discussion Regarding Issue #1

A. Evidence at Issue

Donal O'Flynn had sold in the previous eighteen months a huge, clean energy company that he co-founded and co-owned called OpenHydro and that sale was widely publicly reported. (Index of Record on Appeal ("IR") 445, Exh. 2, pp. 73-74). During the prior year, he had personally invested $3.8 million in Cross Respondents' clean energy technology and had also loaned a Cross Respondent $500 thousand, in order to patent related clean energy technologies. (IR 394, Exh. 4, p. 202). Under oath, he identified fifty specific patents he intended to license from Cross Respondent McAlister Technologies. (IR 407, Exh. 2, pp. 211-14 and Exh. J attached thereto).

At deposition, O'Flynn testified that in order to license the fifty patents he

identified, he would pay "five (million) for the initial upfront" and the remaining approximately fifteen million balance as an "ongoing royalty fee post-construction." Defense counsel immediately honed in on the up-front payment and O'Flynn's testimony then went as follows:

"***Q. Okay. And when you say five upfront, was that 5 million upfront to Roy McAlister?***

A. To McAlister Technologies, yeah.

Q. Okay. And was that a number that you were still negotiating or was that the highest you were willing to consider?

A. No, that was fine. It was more the -- it was more the -- the post-construction royalty fee that – that we were negotiating on.

Q. And so in your mind, it would have been 5 million upfront, and then any further fees would come once the business was revenue-generating; correct?

A. Post-construction, yeah." (IR 394, Exh. 4, p. 82).

B. Rebuttal Evidence

Cross Petitioners have put no evidence in the record that would tend to suggest: 1) O'Flynn had not just sold a huge clean energy company he co-owned; 2) had not just invested $3.8 million in Cross Respondents' clean energy technology; 3) had not just loaned a Cross Respondent $500 thousand to patent clean energy technology; and/or 4) had no intention of licensing the fifty patents he

identified, with an up-front payment of $5 million and the balance due post construction.

Assuming *arguendo* Cross Petitioners had offered contradictory evidence on each of these points and also evidence that O'Flynn was untrustworthy, whether O'Flynn was telling the truth in this instance is a question for the jury, not for a trial or appellate judge. "No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury." *Clemons* at pp. 556-57; *Cox* at p. 357.

C. Cross Respondents Have Met Their Burden

The evidence described carries Cross Respondents' burden on lost profits. Unlike the proponents of lost profits in *Coury Bros.* at p. 521, Cross Respondents herein offered sworn testimony that was subject to no objection and is admissible.

Unlike the proponents in *Gilmore* at p. 37, who testified they did not know if they had suffered lost profits and if they had, could not calculate them, Cross Respondents' evidence is understandable by a reasonable person. A fourth grader could read the transcript and understand O'Flynn is testifying he would pay $5 million up front to license the patents and the balance of licensing fees after the factory was constructed.

Consistent with the requirement of *McNutt Oil* at pp. 33-34, the payment of an up-front fee was a discrete event and a reasonable person could conclude that

the prevention of that payment cost Cross Respondent McAlister Technologies the measurable sum of $5 million, the face amount of the up-front payment.

Consistent with Restatement (Second) of Torts 912, Comment D, given that there is no dispute the patent application fees had already been paid and Cross Respondent Roy McAlister's testimony regarding the minimal ongoing costs, a reasonable person could conclude it is more likely than not that a licensing fee of $5 million would have produced financial gain for Cross Respondents.

D. Summary

The Minute Entry dismissing lost profits claims at the trial level stated repeatedly that all payments were to be made far into the future and based upon many highly speculative contingencies and therefore, lacked reasonable certainty. (IR 570 at pp. 2-7). This reasoning does not apply to the $5 million O'Flynn up-front payment to license the fifty patent applications O'Flynn identified. All evidence indicates that payment was to be made up front, not in the distant future and subject only to one contingency: that Cross Respondent McAlister Technologies had its name on the patent documents as owner. (IR 394, Exh. 4, p. 82). These are the same terms that governed the $3.8 million licensing payment O'Flynn had just made.

On these facts, there is no credible way to grant summary judgment that as a matter of law, Donal O'Flynn would not have made the up-front licensing

payment, without a judicial finding that O'Flynn, a fact witness, lacked credibility. Such a judicial finding would set a new precedent, inviting all judges at both the trial and Court of Appeals levels throughout Arizona to regularly usurp the jury's fact finding role as it applies to witness credibility.

E. Other Issues Raised by Cross Petitioners and Relevant to Issue #1 - Waiver

Four years before the trial court ruling that was appealed, Cross Respondents disclosed that O'Flynn intended to pay $20 million dollars to license fifty patents for the first year. (IR 394, Exh. 12).

More than two years before the ruling that was appealed, counsel for Cross Petitioners asked O'Flynn during two days of deposition if the $20 million was to be paid as a lump sum and O'Flynn testified no, it would be $5 million up front and the balance after construction of the factory. Counsel for Cross Petitioners clearly understood this testimony and pressed O'Flynn on it repeatedly. (IR 394, Exh. 4, p. 82).

The trial court later ruled that all payments were in the distant future and contingent on speculative events. (IR 570 at pp. 2-7). Cross Respondents attached to both their Appeal Brief and their Reply Brief the precise testimony stating the $5 million was to be up front and contingent only on Cross Respondents' name being on the patent paperwork as owner. At oral argument, Cross Respondents' counsel pointed out that Cross Petitioners' counsel had solicited this testimony and

this testimony contradicted the basis for the trial court's holding. Cross Petitioners argue that this constitutes waiver.

"Waiver is either the express, voluntary, intentional relinquishment of a known right or such conduct as warrants an inference of such an intentional relinquishment." *Am. Cont. Life Ins. v. Ranier Constr.*, 125 Ariz. 53, 55 (Ariz. 1980). Nothing on these facts suggests the express, voluntary, intentional relinquishment of a known right.

Issue #2

1. Law Relevant to Issue #2

A. Summary Judgment Standard

Cross Petitioners have the burden of showing that Trespass to Chattels cannot encompass the "electronic touching" of an intangible patent application as a matter of law. *Orme School* at p. 305.

B. Supreme Court Jurisprudence on Trespass to Chattels

This Court's jurisprudence in the area of Trespass to Chattels is somewhat limited. In *Mountain States Telephone v. Kelton*, 79 Ariz. 126 (Ariz. 1955), a dairy hired a contractor. The contractor hit a buried telephone line with a bulldozer. The telephone company sued for trespass and negligence and the Court cited an out of state case and remarked in passing that since the company did not

have a possessory interest in the property, Trespass to Chattels might have been a more appropriate cause of action. *Id*. at p. 132.

Six years later, the Court drew a distinction between "chattels real," which consists of real property and "chattels personal," which generally consists of non-real estate personal property. *Gomez v. Dykes*, 89 Ariz. 171, 174 (Ariz. 1961). The Court has not defined what property does or does not constitute a "chattel personal."

C. Arizona Statutes and the Restatement

"Chattel" and "chattels personal" are not defined in Arizona state statutes.

Surprisingly, "chattel" and "chattels personal" are not defined in the Restatement (Second) of Torts either. Restatement (Second) of Torts 221(c) does say that "barring the possessor's access to a chattel" is a Trespass to Chattels.

Electronically changing the name of the owner on a patent application has the very practical effect of barring the prior owner's access to that application, so clearly trespass occurred. That still leaves unanswered the question: are intangible rights in a patent application a "chattel," for purposes of Trespass to Chattels?

D. Treatises and Black's Law Dictionary

On many occasions, this Court has cited Black's Law Dictionary as being either authoritative or at least highly relevant to the definition of legal terms. See for instance, *Business Realty of Arizona v. Maricopa County*, 181 Ariz. 551, 553

(Ariz. 1995); *Estate of Walton v. Arizona Department of Revenue*, 164 Ariz. 498, 499 n. 1 (Ariz. 1990); *McCutcheon v. Sup. Ct.*, 150 Ariz. 312, 314 (Ariz. 1986).

Black's Law Dictionary (12th ed. 2024) defines "chattel personal" as follows: "**a tangible good or an intangible right (such as a patent)**."

In order to support the inclusion of "an intangible right (such as a patent)" as a "chattel," Black's Law Dictionary cites Joseph J. Darlington, "A Treatise on the Law of Personal Property," pp. 6-10 (1891), which states in relevant part that during the reign of Henry VI (1421-61), "the taking of interest for money, which had previously been unlawful, was rendered legal to a limited extent. Loans and mortgages soon became common, forming a kind of incorporeal personal property unknown to the ancient law."

In other words, classifying intangible property as a "chattel" for purposes of Trespass to Chattels has been standard in Anglo/American jurisprudence for over five centuries.

The classification of intangible rights as chattels for purposes of Trespass to Chattels is not only venerable, it has been nearly universal, among all courts that have addressed the issue, for a long time. Forty years ago, the definitive treatise of that time stated Trespass to Chattels and Conversion did not initially apply to intangible rights, but "**this hoary limitation has been discarded to some extent by all of the courts**. The first relaxation of the rule was with respect to the

conversion of a document in which intangible rights were merged…The final step was to find conversion of the rights themselves, where there was no accompanying conversion of anything tangible…" "Prosser and Keeton on Torts," p. 91 (West Publishing, 5th ed. 1984) (emphasis added).

At the Court of Appeals level, Arizona adopted the "first relaxation of the rule" two decades ago, holding that interference with "a document in which intangible rights were merged" constituted Conversion and would therefore also encompass the less stringent form of Conversion, which is Trespass to Chattels. See, *Miller v. Hehlen*, 209 Ariz. 462, 472 (App. 2005) (Conversion and Trespass to Chattels apply to interference with "intangible property that is merged in, or identified with, some document…")

E. Federal Preemption

Applying Trespass to Chattels to Cross Petitioners' act of changing the names of owners on patent paperwork has no implications for federal preemption and will not run afoul of federal law. The Federal Circuit has been very clear for decades that ownership of patents and transfer of patents is governed exclusively by state, not federal, law. *Jim Arnold Corp. v. Hydrotech Sys., Inc.*, 109 F.3d 1567, 1572 (Fed. Cir.1997) ("the question of who owns the patent right and on what terms typically is a question exclusively for state courts"); *Ethicon v. United States Surgical*, 135 F.3d 1456, 1471 (Fed. Cir. 1998) ("Even when the property is the

creation of federal statute, private rights are usually defined by state laws of property. This has long been recognized with respect to patent ownership and transfers.")

2. Discussion Regarding Issue #2

Black's Law Dictionary defines a "chattel personal" as including "an intangible right (such as a patent)." It bases this in part on a legal treatise from the 19th century, which states that Trespass to Chattels has included intangible property rights in Anglo/American law since the fifteenth century. Joseph J. Darlington, "A Treatise on the Law of Personal Property," pp. 6-10 (1891).

The definitive legal treatise from four decades ago stated that "all of the courts" that have considered the matter have extended Trespass to Chattels to intangible property rights. "Prosser and Keeton on Torts," p. 91 (West Publishing, 5th ed. 1984). Federal law provides no cause of action covering a dispute over ownership of a patent application. *Jim Arnold* at p. 1572; *Ethicon* at p. 1471.

It is also better policy that Trespass to Chattels should encompass intangible patent rights. Trespass to Chattels is one of only two well recognized common law causes of action that cover interference with personal property, the other being Conversion. "Prosser and Keeton on Torts," pp. 89-93 (West Publishing, 5th ed. 1984).

Per capita holdings of intellectual property in the United States have

increased spectacularly in the last fifty years. Per capita, citizens of the United States today have registered more than ten times as many trademarks as they did a half century ago (https://www.macrotrends.net/global-metrics/countries/USA/united-states/population - https://en.wikipedia.org/wiki/United_States_Patent_and_Trademark_Office); more than three times as many patents (https://www.macrotrends.net/global-metrics/countries/USA/united-states/population - (https://www.uspto.gov/web/offices/ac/ido/oeip/taf/h_counts.htm); and nearly 10% more copyrights. (https://www.macrotrends.net/global-metrics/countries/USA/united-states/population - https://www.copyright.gov/reports/annual/2023/ar2023.pdf at p. 24.

With United States citizens holding far more intangible intellectual property on a per capita basis as personal property than they did in the past, there is no good reason to eliminate one of two recognized common law causes of action covering interference with personal property, particularly considering that: 1) the trend has been in this direction for five centuries; 2) as of forty years ago, all the courts that had considered the issue extended Trespass to Chattels in this manner; and 3) in situations involving a dispute over ownership, federal law provides no guidance.

Conclusion

On the basis of the foregoing, Cross Respondents respectfully urge the Court

to find that Trespass to Chattels applies to this type of interference with patent filings and that whether it is more likely than less likely that O'Flynn would have made the $5 million up front payment is an issue of fact for the jury.

Dated December 20th, 2024.

THE ENTREKIN LAW FIRM

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Certificate of Compliance

This document: 1) uses Times New Roman 14-point proportionately spaced typeface for text and there are no footnotes; 2) contains 3509 words (by computer count), exclusive of tables; 3) averages less than 280 words per page; and 4) is less than 20 substantive pages in length.

Certificate of Service

The undersigned attorney for Cross Respondents hereby certifies that two copies of the foregoing Supplemental Brief were hand delivered to the following:

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