No. 19CAS8

OHIO SIXTH DISTRICT COURT OF APPEALS

CHARLES R. HUTCHINGS,

Plaintiff-Appellee,

v.

JOHN HUTCHINGS,

Defendant-Appellant.

On Appeal from the Sandusky County Court of Common Pleas, Probate Division, Case No. 2016-9001

REPLY BRIEF OF APPELLANT JOHN HUTCHINGS

Emmett E. Robinson (Bar No. 88537)
ROBINSON LAW FIRM LLC
6600 Lorain Avenue #602731
Cleveland, Ohio 44102
Telephone: (216) 505-6900
Facsimile: (216) 549-0508
erobinson@robinsonappeals.com

Attorney for Appellant John Hutchings

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In his opening brief, Appellant John Hutchings identified fundamental, reversible errors committed by the trial court, explaining, case-by-case, rule-by-rule, and fact-by-fact, how things went awry. Appellee's claim did not sound in conversion. There was and is no evidence that appellee owned the allegedly converted property. Conversion is generally limited to tangible personal property and is inapplicable to undifferentiated cash proceeds. The Court erroneously applied a greater-weight-of-the-evidence standard to the "conversion" claim *and* placed the burden of proof upon *John*. Punitive damages require proof of malice by clear-and-convincing evidence, but the trial court applied the watered-down greater-weight-of-the-evidence standard instead. Finally, the trial court wrongly utilized scope-of-authority jury instructions taken from the vicarious-liability context. But even under that test, the jury's conclusion that John exceeded his authority by executing the trust was against the manifest weight of the evidence.

Appellee Charles R. Hutchings ("plaintiff") fails to satisfactorily address *any* of these issues. He ignores some completely and gives short shrift to others. And as to still others, he attempts to neutralize them by ignoring what actually occurred at trial, the rules actually invoked by the trial court, and the facts actually found by the jury, instead relying on how he thinks things *should* have occurred and what "facts" *should* have mattered to the jury (most of the "facts" in plaintiff's brief are unsupported by citation to the record and many are simply wrong).

In short, John's opening brief showed that the proceedings below were fundamentally, prejudicially, and irreparably flawed. Plaintiff's brief gives no reason to conclude otherwise and in places *reinforces* this conclusion. Accordingly, the judgment below should be reversed.

ARGUMENT

I. The Trial Court's Judgment on the Conversion Claim Should Be Reversed Because Plaintiff Did Not Own or Have a Possessory Interest in Tangible Personal Property at the Time of the Alleged Conversion.

Plaintiff does not dispute the fact that a conversion claim must fail absent proof that the

plaintiff actually owned the allegedly converted property. *See* Opening Br. ("OB") at 9-10; Pl.'s Br. ("Pl.") at 4, 5. And he does not dispute the fact that he was at no time owner of the trust assets allegedly converted here. That should be the end of the issue, and John should prevail.

As previously predicted, however, OB at 11-12, plaintiff attempts to muddy the waters by arguing that "[w]hile the execution of the . . . trust was indeed wrongful, the conversion did not occur until John Hutchings wrote checks to himself of the entire trust estate. When he did so, he was taking money that rightfully belonged to plaintiff who was an equal heir to the estate of Charles and Elise Hutchings." Pl. at 5. But this argument fails both for reasons explained in John's opening brief, OB at 11-12, as well as on its own terms.

First, if the trust is valid, then distribution of property in accordance with its terms cannot be wrongful. *See Shinaberry v. Toledo Edison Co.*, 6th Dist. Lucas No. L-97-1389, 1998 Ohio App. LEXIS 3245, at *7 (July 17, 1998) (conversion claim failed where the defendant's "acts" "were in compliance with the rights granted to [the defendant]" pursuant to a governing agreement). Thus, execution of the trust must be the "wrongful" act on which the conversion claim hinges, and plaintiff had no ownership interest in his parents' property when the trust was executed. OB at 11. Second, and far more important, plaintiff's citation-free hypothesis that the wrongful act of conversion was distribution of trust funds pursuant to trust terms is contrary to what the jury *actually found*. The jury based its conversion verdict *entirely* on its (erroneous) conclusion that John's *execution of the trust* was wrongful. *Id.* at 11-12.

Additionally, plaintiff's argument fails on its own terms. Plaintiff alleges that, when John distributed the trust funds according to the terms of the trust, "he was taking money that rightfully belonged to Plaintiff who was an equal heir to the estate . . . ." Pl. at 5. Thus, Plaintiff does not argue—because he cannot—that he owned the trust proceeds at the time of distribution.

Rather, he argues that he *should have* owned them—*i.e.*, that they "rightfully belonged" to him as an "heir." But rightfully or not, there is no dispute that Plaintiff did not *actually* own the trust proceeds at *any* point in time nor did he have a right to possession under the terms of the trust. They were never titled to him, he never possessed them, and he never exerted any control over them. Thus his conversion claim must fail.[1] He was, he says, an "heir" to Charles and Elise's estate. But the fact that one might have had a right to property if, counterfactually, the original owner had died intestate does nothing to create a present ownership interest or present right to possess. *See* Pl. at 5. Accordingly, the judgment on the conversion claim must be reversed.

Separately, plaintiff tries to muddy the waters regarding the *type* of property that may be subject to conversion. Plaintiff states: "Appellant argues conversion claims are limited to the taking of tangible, personal property. Not so." Pl. at 5. But what John *actually* argued in his opening brief was that "'conversion claims are *generally* limited to those based upon the taking of tangible, personal property.'" OB at 12 (emphasis added) (quoting *Kelley v. Ferraro*, 188 Ohio App.3d 734, 2010-Ohio-2771, 936 N.E.2d 986, ¶ 70 (8th Dist.)). After setting up his straw man, plaintiff knocks it down with out-of-context dicta. He cites a case—in which the Ohio Supreme Court held that conversion did *not* apply on the facts—for the proposition that "intangible rights which are customarily merged in or identified with some document may . . . be converted. Examples include drafts, bank passbooks, and deeds." Pl. at 5 (quoting *Zacchini v.*

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[1]Importantly, this is not to say that an individual in a situation like plaintiff's is left without a remedy (assuming the individual can, unlike plaintiff, prove wrongful conduct). While such a claim does not sound in conversion, it may sound, *e.g.*, as a claim for intentional interference with expectancy of inheritance. *See* OB at 12, n.4.

Scripps-Howard Broadcasting Co., 47 Ohio St.2d 224, 227, 351 N.E.2d 454 (1976)). Yet he omits the very next phrase in the opinion: "But conversion does not apply to any [*i.e.*, to any and every] intangible right . . . ." *Id.* In other words, just as John stated in his opening brief, conversion generally applies only to tangible personal property. *Zacchini* confirms this view, while providing that conversion *may* apply where the intangible right at issue is concretized in a deed or other formal document proving ownership. Of course, there is no such document here. The general rule thus applies. Because plaintiff seeks to obtain unparticularized funds, his conversion claim fails for this reason too.[2]

II. The Trial Court Also Committed Reversible Errors with Respect to Both the Burden and Standard of Proof Applied to the "Conversion" Claim.

A. Plaintiff's Attempts to Sidestep the Governing Standard of Proof Fail.

In his opening brief, John discussed at length the carefully crafted standards and burdens of proof that apply in a case like this. Where, as here, "[a] principal has made an express grant of authority to an attorney-in-fact to make gifts to third persons, including the attorney-in-fact, the attorney-in-fact may, in the absence of evidence of undue influence upon the principal, make such gifts." *MacEwen v. Jordan*, 1st Dist. Hamilton No. C-20431, 2003-Ohio-1547, ¶ 12. The party defending the gift thus must initially show that the gift was facially valid by, *e.g.*, pointing "to the express grant of authority in the text of the power of attorney." *MacEwen*, 2003-Ohio-1547, ¶ 14. The court may also consider other factors, *see* OB at 14, all of which weigh in favor of John here, *id.* at 18-20. But the bottom line is that "the party attacking the transfer retains the

[2] Even plaintiff's hand-picked definitions of conversion limit the tort, in one instance, to "goods or personal chattels," and, in another, to "personal property." Pl. at 4.

ultimate burden of proving undue influence by clear and convincing evidence." *MacEwen*, 2003-Ohio-1547 ¶ 13. *See also* OB at 13-14 (citing additional authorities).

The POA here undisputedly contained a valid self-dealing clause; the facial validity of the transfer was beyond question. OB at 17-19. It was thus plaintiff's burden to prove by clear-and-convincing evidence that his father executed the POA as a result of John's undue influence. This plaintiff utterly failed to do. *See* Pl. at 9 ("there was never a claim of undue influence"); *id.* at 6 ("there has never been any allegation the power of attorney was invalid").

Instead of addressing John's arguments on the merits, plaintiff tries to sidestep this entire regime—the proper burdens and standards of proof, the case law discussed in John's brief, and the application of both to the facts of this case—brushing it all aside with the unsupported assertion that "[t]his is not correct." Pl. at 6. He ignores *MacEwen*, *Buckner*, and the other cases discussed at length in John's opening brief. Indeed, the section of plaintiff's brief dedicated to the standard of proof applicable to the "conversion" claim consists of just four paragraphs, only one of which contains any case law. He baldly asserts that he "need only prove the elements of conversion by a preponderance." *Id.* He says, again baldly, that "the discussion of undue influence is unnecessary." *Id.* And he claims "it was the inclusion of the gift balancing provision [in the trust] that resulted in the jury finding John . . . abused the powers given" him. *Id.* at 6-7. These statements are entirely unsupported and thus do not merit consideration. And the last one—that the jury had found inclusion of the "gift balancing provision" to be an abuse of John's power—affirmatively *contradicts* the record. *See infra* at 8.

The one paragraph in this section of plaintiff's brief that does contain citations to authority cites only two cases. First, plaintiff relies on *Estate of Cunningham*, 5th Dist. Knox No. 89-CA-10, 1989 Ohio App. LEXIS 4158 (Oct. 25, 1989), for the proposition that "self[-]

dealing transactions by a fiduciary are presumptively invalid." Pl. at 7 (emphasis omitted). John agrees that this proposition, though not directly stated in *Cunningham*, is true enough in the abstract. Indeed, this is why, under *MacEwen-Buckner*, the party defending the transfer first must make a showing of facial validity by pointing to language in the governing agreement allowing for self-dealing. But unlike the case at bar, the inapposite *Cunningham* didn't involve a clause permitting self-dealing; in that situation, *of course* the presumption is against self-dealing.

The only other case plaintiff cites, *Bacon v. Donnet*, 9th Dist. Summit No. 21201, 2003-Ohio-1301, is even further afield from the facts of this case. There, the attorney-in-fact took control of $3.5 million of his aunt's funds by creating a trust and by removing funds from her bank account. It was "undisputed that [he] created the Trust and transferred the . . . funds without [the principal's] knowledge or agreement." *Id.* ¶ 13. Unlike the case at bar, where the trust was created to protect assets from creditors and assist Charles and Elise in qualifying for government long-term-care benefits, OB at 29, in *Bacon* the defendant's "actions did nothing to protect [the principal's] assets." *Id.* ¶ 41. And unlike here, where Charles himself executed deeds transferring property into the trust after it was created, "there was no evidence that [the principal] ratified" the defendant's conduct in *Bacon*. *Id.* ¶ 50. Quite to the contrary, the aunt personally sued the defendant in an effort to invalidate the trust. *Id.* ¶ 16. Finally, and most importantly, in stark contrast to this case, the power-of-attorney in *Bacon* did *not* contain language giving the defendant "a right to make testamentary dispositions on [his aunt's] behalf." *Id.* ¶ 48 (emphasis added). *Cf.* Charles POA, Jt. Ex. 11, p. 2 (granting John authority "to create a[n] . . . irrevocable inter vivos trust, under whatever terms [he] deems advisable").

Accordingly, plaintiff's brief does nothing to alter the ineluctable conclusion that the trial court's failure to charge the jury regarding the appropriate standard of proof was reversible

error.[3] OB at 21-23. The egregiousness of this error is only compounded by the trial court's misallocation of the *burden* of proof as well, discussed directly below.

B. Plaintiff Does Not Deny—Indeed, Fails to Address the Fact—that the Trial Court Misallocated the *Burden* of Proof As Well.

Plaintiff's brief does not say a word about, and therefore does not dispute, the fact that the trial court, in addition to applying the wrong standard of proof, applied the wrong burden of proof as well. That is, the first verdict form, upon which the remainder of the jury's verdict rested, explicitly placed the burden of proof upon *John*. OB at 22-23. "A misdirection of the jury, as to the burden of proof, is error for which the judgment will be reversed at the instance of the party prejudiced thereby." *McNutt & Ross v. Kaufman*, 26 Ohio St. 127, 127 (1875), paragraph one of the syllabus. *See* OB at 23 (citing additional case law). It is undisputed that the burden of proof was improperly inverted here and also undisputed that the remedy is reversal. Accordingly, even if this Court were, contrary to law, to rule against John on all the other grounds presented on appeal, reversal still is called for based on this issue alone.

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[3] The failure to grant summary judgment in John's favor was also reversible error. Plaintiff's two-sentence argument to the contrary is without merit. *See* Pl. at 8. His quotation of *Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150, 156, 1994-Ohio-362, 642 N.E.2d 615, misses the point. The ill effects of a wrongfully denied summary judgment motion are mooted, the quotation says, only when "a subsequent trial *on the same issues raised in the motion* demonstrates" the motion's futility. (Emphasis added). But due to the trial court's errors, the issues of *MacEwen-Buckner* proof, including the facial validity of the POA self-dealing clause and, crucially, whether John exerted undue influence, were *not* at issue at trial.

C. Plaintiff's Alternative "Proof" Argument Is Incoherent.

Plaintiff's standard-of-proof argument, *e.g.*, Pl. at 9, is not only without legal support, it is factually incorrect and self-contradictory. It's unclear how this constitutes a "proof" regime, but plaintiff says the "key" to his standard-of-proof argument is that "the irrevocable trust was executed by John Hutchings, overreaching the authority granted in" the POA. Pl. at 9 (emphasis omitted). There was no need to prove undue influence, he says, because "his position has always been that John . . . wrongfully exceeded the powers granted." *Id.* at 6 (emphasis omitted). But plaintiff admits that "there has never been any allegation the [POA] was invalid," *id.* at 3, and that the POA "granted John a wide range of authority, including . . . to create trusts and to self[-]deal," *id.* at 3. He thus concedes John acted within the powers granted by the POA. But flip-flopping again, he says John acted in excess of his authority because his father, the *grantor* of the power, himself never met *in person* with the attorney who drafted the trust and because Charles never saw the trust or knew of the gift-balancing clause. *Id.* at 9. This argument has *no* basis in law, and the latter half no basis even in fact. Plaintiff's only other argument is that, "as appellant well knows, it was the . . . gift-balancing provision that resulted in the jury finding John . . . abused the powers given [by the POA]." *Id.* at 6-7. Wrong. The jury made no such finding. *See* OB at 30; Post Jury Trial JE p. 2 ("[b]ased upon their decision on . . . Form #1," the jury did not "decide . . . whether the 'gift balancing' clause was appropriately within the trust").

III. Plaintiff Concedes that the Trial Court Applied the Wrong Standard of Proof to the Punitive Damages Claim.

Ohio law is crystal clear that a party seeking punitive damages must prove actual malice by clear and convincing evidence. *See* OB at 24. Plaintiff does not deny this fact. Plaintiff also does not deny the fact that the trial court instead erroneously applied a greater-weight-of-the-evidence standard here. *Id.* Such standard-of-proof error requires reversal. *See, e.g.*, *Harbine v.*

Hughes, 26 Ohio Law Abs. 685, 1938 Ohio Misc. LEXIS 1262 (2d Dist.1938), syllabus.

Much like his silence on the issue of burden of proof with respect to his "conversion" claim, Plaintiff doesn't say a word to contradict any of this. Rather, the only point he makes in this one-paragraph section of his brief is that John failed to object on these grounds at trial and so, plaintiff says, John "has forfeited any opportunity to argue now the lower court erred." Pl. at 9. Once again, plaintiff doesn't offer a single citation to support this assertion.

For his part, John conceded in his opening brief that he had failed to object to the trial court's application of the wrong standard of proof to the punitive-damages claim. OB at 25. As explained there, however, this was no mere instructional error but rather a fundamental, structural flaw in the trial-court proceedings. *See id.* at 24. As such, reversal of the punitive damages verdict is required even in the absence of explicit objection below. Further, even if this Court were to disagree and "treat this as a mere instructional error and review only for plain error [the standard of review applied to claims of instructional error not objected to in the trial court], reversal would still be warranted." *Id.* at 25. That is, this error meets the requirements for plain-error reversal: The error was "apparent on the face of the record," and its effects were highly prejudicial to John. *Id.* at 25-27. Plaintiff disputes neither point.

IV. Plaintiff Does Not Deny that, Even By the Trial Court's Own Standards, the Judgment Should Be Reversed as Contrary to the Manifest Weight of the Evidence.

True to form at this point, plaintiff does not even address John's final argument in his opening brief: Even applying the erroneous standard utilized by the trial court, the judgment below should be reversed as contrary to the manifest weight of the evidence. This argument, too, is sufficient reason standing alone to reverse the trial court's judgment in its entirety.

The whole of the jury's verdict rests on its (incorrect) determination that John did not act "within his fiduciary duty in executing the . . . Trust[]." OB at 27 (quoting Form #1 (Post Jury

Trial JE p. 3)). Per the trial court's jury instructions, a fiduciary acts outside his authority in four situations, namely, where his action: (1) "was contrary to or went beyond the principal's express authority," (2) "was not reasonably necessary to do the agent's job," (3) "was a complete departure from the business the agent was to do," or (4) "was performed solely for the benefit of the agent." OB at 28 (quoting Court's Final Jury Instr. pp. 8-9). As discussed in John's opening brief, none of these four scenarios occurred here. As to the first, the POA gave John express authority to execute the trust. OB at 28, 29. The second scenario does not apply directly (because this "test" was developed for a completely different scenario, *not* for a conversion claim or even for a claim that an attorney-in-fact exceeded his authority, *see id.* at 28 & n.11, 29), but executing the trust was a core power given to John by his father and therefore was a necessary component of his "job." *Id.* at 29. The trust was needed to meet his parents' long-term-care planning needs and to protect their assets from future creditors (like Chip's daughter's lenders). *Id.* Further, the trust was created with John's father's knowledge and ratification, as evidenced by his consultation with counsel and his execution of deeds transferring assets into the new trust. *E.g., id.* at 4, 5. John's executing the trust thus was by no means "a complete departure" from the "business [he] was to do" under the POA, and it most assuredly was not "performed solely for" John's benefit. The evidence on these points *still* stands uncontradicted. *Id.* at 29.[4]

CONCLUSION

Plaintiff has failed to respond adequately—or, in some cases, at all—to John's assignments of error. Defendant-Appellant John Hutchings respectfully requests that this Court reverse the judgment below or, in the alternative, vacate and remand for a new trial.

[4] Plaintiff also fails to address the *in terrorem* clause argument. OB at 2, 7, 8, 30 n.12.

Dated: July 11, 2019

Respectfully submitted,

Emmett E. Robinson (Bar No. 88537)
ROBINSON LAW FIRM LLC
6600 Lorain Avenue #731
Cleveland, Ohio 44102
Telephone: (216) 505-6900
Facsimile: (216) 649-0508
erobinson@robinsonappeals.com

Attorney for Appellant John Hutchings

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2019, this Reply Brief of Appellant John Hutchings was mailed to Plaintiff-Appellee Charles R. Hutching's counsel via regular and electronic mail at the following addresses:

Jennifer Antonini, Esq.
6600 Sylvania Ave., Suite 260
Sylvania, OH 43560
jennifer@jja-law.com

Emmett E. Robinson

Attorney for Appellant John Hutchings