NEW YORK COURT OF APPEALS ROUNDUP:

CONVERSION OF ELECTRONIC DATA, TORTIOUS INTERFERENCE WITH CONTRACT, AND LEGAL MALPRACTICE

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This term the Court of Appeals has accepted and answered a significant number of questions on New York law certified to it by the United States Court of Appeals for the Second Circuit, under § 500.27(a) of the Court of Appeals Rules of Practice. This month we discuss two decisions answering certified questions, one finding the tort of conversion applicable to electronic data, and the other clarifying the limits on the "economic interest" defense to an action for tortious interference with a contract. We also discuss a recent decision addressing the causation element of a legal malpractice cause of action.

Electronic Data Conversion

In Thyroff v. Nationwide Mut. Ins. Co., the Second Circuit certified the question of whether a cause of action lies for the conversion of electronic computer records and data. The Court of Appeals unanimously answered the question with a resounding "yes." While the Court carefully limited its decision to the intangible property involved in the matter, the case represents a recognition that the common law must respond "cautiously and intelligently, to the demands of commonsense justice in an evolving society."[1] Judge Victoria A. Graffeo's scholarly opinion, which has drawn favorable comment,[2] traces the historical development of the tort of conversion from causes of action such as "trespass de bonis asportatis" and "trover," likely not considered by today's lawyers since law school.

Thyroff was an insurance agent with Nationwide, for many years, during which he entered into an agreement required by Nationwide to lease from the company certain hardware and software, together referred to as the agency office-automation system ("AOA"). Thyroff entered into the hard drives of the AOA computers business data and information, as well as personal material, and each day these would be uploaded onto Nationwide's centralized computers.

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On September 18, 2000, Thyroff received a letter cancelling his agreement to act as Nationwide's agent, and on the following day, without notice, the company denied him access to the AOA and reclaimed it. Nationwide also took with it software programs that Thyroff had stored on the system, such as Microsoft Word, PowerPoint and Excel, and various files containing personal e-mail, documents, and assorted data, including information compiled on Nationwide customers that Thyroff needed in order to retain his customers' business.

In responding to the Circuit Court's question, the Court (as had the Second Circuit itself), surveyed New York law on whether the tort of conversion applied to electronic data, and found it unsettled. While the conversion of goods would give rise to a cause of action in New York, when the property involved was intangible and thus no physical item was misappropriated, usually no cause of action would lie. The Court also reviewed the gradual development of case law supporting the expansion of the tort to include intangible property, including its early application of a "merger" theory under which shares of stock are so merged into stock certificates that conversion of the certificates could be treated as conversion of the shares represented thereby, *see* Agar v. Orda, 264 N.Y. 248 (1934), and more recently, in Sporn v. MCA Records, 58 N.Y. 2d 489 (1983), where the Court concluded that infringing an intangible property right (to a musical performance) by misappropriating the physical object in which it could be found (a master recording) constituted conversion.

The absence of any substantial reason for prohibiting conversion actions involving intangible property, coupled with society's reliance on computers and electronic data and the fact that electronic records stored on a computer hard drive have the same value as printed documents containing such data, persuaded the Court that the law should be applied to protect both the "physical and virtual" forms of information.

Although the outcome in Thyroff perhaps could ultimately be seen likely, *see* the opinion of Justice Herman Cahn in Shmueli v. Corcoran Group, 9 Misc. 3d 589 (Sup. Ct. N.Y. Co. 2005), it is nonetheless a significant event, as it represents a clear change in New York's common law.

Tortious Interference

In an action for tortious interference with a contract, does a defendant's status as a competitor, by itself, suffice to invoke the defense that the party acted to protect its own legal or financial interest? In White Plains Coat & Apron Co. v. Cintas Corp., the Court of Appeals ruled that is does not. In doing so, the Court had to balance New York's public policy of protecting contracts with its policy of fostering competition, an equation that demands a lesser showing of misconduct for liability when the defendant has interfered with an existing contract than when it has interfered with the plaintiff's prospective business relationships.

Plaintiff White Plains Coat & Apron filed an action in federal court against Cintas for interference with dozens of five-year, exclusive rental linen supply contracts. White Plains Coat & Apron had sent Cintas a letter demanding that it cease soliciting and servicing White Plains contract customers, and provided a list of customers that, it asserted, had been

improperly solicited. Cintas did not desist. On appeal from the District Court's grant of summary judgment in Cintas' favor on the company's economic justification defense, the Second Circuit sought guidance from the Court of Appeals as to whether a competitor's "generalized economic interest in soliciting business for profit" constitutes a defense where (as here) the alleged tortfeasor had no economic relationship with the breaching counterparty to plaintiff's contract.

Chief Judge Judith S. Kaye's opinion set forth the elements of a tortious interference cause of action: existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's "intentional and improper" procuring of a breach by the third party, and damages. The Court was not called upon to decide whether those elements had been satisfied in this case, and thus it did not reach the issue of whether Cintas' solicitation methods were legitimate. The opinion did state, however, that merely "[s]ending regular advertising and soliciting business in the normal course" would not constitute a tort. Instead, the defendant's conduct must "exceed[] a minimum level of ethical behavior in the marketplace" (quotation omitted), a question that the federal court will have to resolve upon return of the matter.

State law recognizes a defense to a claim of tortious interference that the party inducing a breach of contract was acting to protect its own legal or financial stake in the breaching party's business. The defense has been allowed when the defendant was the parent of, or otherwise held a substantial interest in the breaching party, had a managerial contract with the breaching party, or was that party's creditor. But when the defendant has no stake in the breaching party and is merely a competitor seeking that party's business, the Court unanimously held, the defense may not be invoked.

Legal Malpractice

The Court, in *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, unanimously upheld a compensatory damages award on a legal malpractice claim equal to the fees incurred by plaintiff's new counsel in successfully pursuing the right to a new trial, as well as the expert witness fees and expenses incurred during the retrial of the underlying personal injury action. The Court also held, however, that plaintiff was not entitled to interest on the sum he allegedly would have recovered in the first trial but for his former counsel's malpractice, declaring the damages sought to be speculative, and therefore did not find it necessary to decide whether there may be circumstances in which pre-decision interest is recoverable in legal malpractice.

The malpractice defendants did not deny that they had been negligent in conducting plaintiff's first trial. The plaintiff had been struck by a car while crossing the street at an intersection with a traffic light. Rather than requesting a jury instruction on the statutory requirements of Vehicle and Traffic Law § 1111, which governs intersections with traffic signals, plaintiff's counsel requested an instruction on the requirements of § 1151, which is applicable to intersections without signals and imposes upon pedestrians a duty not to "suddenly" walk or run into the path of a vehicle that is "so close that it is impractical for the driver to yield." The jury found both the driver and the pedestrian negligent, and awarded damages of $255,000, to

be reduced by half for plaintiff's 50% portion of the fault.

Plaintiff then retained new counsel, who moved to set aside the verdict based upon the erroneous jury instruction. The trial court denied that motion, but the Appellate Division, Second Department reversed on the ground that the jury charge constituted "fundamental error." In the bifurcated retrial, the jury in the liability phase found that plaintiff's negligence was not a substantial factor in causing the accident and thus the driver was held solely responsible, and before the jury decided the damages phase the parties settled the action for $750,000.

Plaintiff sought to recover from his initial counsel $28,703, the cost of prosecuting the motion to set aside the verdict through appeal, together with the expert fees and expenses of the second trial. He also sought approximately $190,000 in interest that would have accrued on $750,000 had it been paid at the conclusion of the first trial. The Second Department dismissed the complaint, holding plaintiff had not established the essential element of "actual damages" caused by defendant's malpractice. Plaintiff had recovered more in the second trial, rendering any recovery in the malpractice action a "windfall," the Appellate Division reasoned. Moreover, the comparatively low $255,000 award of the first trial could not be attributed to counsel's negligence because the erroneous jury charge related to the issue of fault, not the amount of damages.

The Court of Appeals, in an opinion by Judge Victoria A. Graffeo, agreed that a malpractice plaintiff's damages must be proximately caused by his attorney's negligence, but took a less strict view of causation, upholding a $28,703 award. Malpractice damages may include litigation costs incurred "in an attempt to avoid, minimize, or reduce the damage caused by the attorney's wrongful conduct,"[3] and the $28,703 would not have been incurred "but for" defendant attorneys' negligence. The Court rejected the claim for interest on $750,000 running from the date of the first verdict, however. The contention that the initial jury would have awarded $750,000 rather than $255,000 had it not been incorrectly instructed as to a liability issue was "pure speculation."

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[1] Quoting Madden v. Creative Serv. Inc., 84 N.Y. 2d 738, 744 (1995).

[2] See Michael A. Ciaffa, Perspective, "The Common Law Lives," N.Y.L.J. (April 25, 2007).

[3] Quoting DePinto v. Rosenthal & Curry, 237 A.D.2d 482, 482 (2d Dept. 1997).