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The Nature of the Property is an Important Consideration when Advancing a Claim for Conversion

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Introduction

The Court of Appeal for Ontario's recent decision in *Tar Heel Investments Inc. v. H.L. Staebler Company Limited* stands for the proposition that the tort of conversion may not apply to intangible property. As such, when bringing a claim relating to theft of intangible property, it is important to plead alternative causes of action in case the tort of conversion is found not to apply.

The Facts

Lisa Arseneau ("Arseneau") worked in the transportation insurance industry.¹ While working at a brokerage firm prior to her employment with the plaintiff, Arseneau developed a book of business (the "First Book of Business").² When Arseneau joined the plaintiff in 2009, she brought the First Book of Business with her.³

While working at the plaintiff for several years, Arseneau developed a second book of business (the "Second Book of Business").⁴ The Second Book of Business was "augmented" by one of the plaintiff's principals, who transferred transportation clients and their corresponding premiums into it in its initial years.⁵

In 2015, Arseneau sold both books of business to H.L. Staebler Company Limited ("Staebler") and commenced employment with the firm.⁶ The plaintiff

¹ *Tar Heel Investments Inc. v. H.L. Staebler Company Limited* ("Tar Heel"), 2022 ONCA 842, at [para. 3](#).

² *Tar Heel*, at [para. 3](#).

³ *Tar Heel*, at [para. 3](#).

⁴ *Tar Heel*, at [para. 4](#).

⁵ *Tar Heel*, at [para. 4](#).

⁶ *Tar Heel*, at [para. 4](#).

brought a claim against Arseneau and Staebler seeking, amongst other relief, damages for conversion, breach of and inducing breach of contract, conspiracy, breach of confidence, and breaches of fiduciary duty.⁷

The Trial Decision

The trial judge found that Arseneau was entitled to sell the First Book of Business to Staebler because she had never sold it to the plaintiff (so, “by default”, she “continued to own it”).⁸ He found, however, that she never owned the Second Book of Business and, therefore, committed the tort of conversion by selling it.⁹

The trial judge did not address the other causes of action advanced by the plaintiff, stating that the other claims “come around full circle to the act or omissions making up the conversion”.¹⁰

As the two books of business (the “Books”) were comingled at Staebler, it was difficult to separate them for the purpose of calculating damages.¹¹ Ultimately, damages were calculated based on the value of the Second Book of Business at the time of the conversion.¹² Arseneau and Staebler were held jointly and severally liable for those damages.¹³

The Appeal

Staebler and Arseneau appealed the trial judge’s decision, arguing that Arseneau was entitled to sell the First Book of Business and that the trial judge had erred in finding that the sale had constituted a conversion. Among other things, they claimed that Arseneau had the right to solicit clients on her departure from PDI, and that there was no restrictive covenant preventing her from doing so. As a result, the law of conversion did not apply.¹⁴

The plaintiff cross-appealed, arguing that although the trial judge properly concluded that Arseneau had committed the tort of conversion by selling the First Book of Business, he erred by failing to find that she had converted the

⁷ *Tar Heel*, at [para. 5](#).

⁸ *Tar Heel*, at [para. 8](#).

⁹ *Tar Heel*, at [para. 8](#).

¹⁰ *Tar Heel*, at [para. 8](#).

¹¹ *Tar Heel*, at [para. 9](#).

¹² *Tar Heel*, at [para. 9](#).

¹³ *Tar Heel*, at [para. 9](#).

¹⁴ *Tar Heel*, at [para. 10](#).

Second Book of Business as well.¹⁵

Conversion Not Established

The Court of Appeal overturned the trial judge's findings, concluding that his focus "on ownership of the [First Book of Business] caused him to view the case through the lens of the tort of conversion, despite the nature of the property in question".¹⁶

On behalf of a unanimous Court, Justice Huscroft stated that "it is not settled whether intangible property such as the information in a book of business can be the subject of a conversion claim". While "some trial courts have held that the tort does not apply to intangible property", "other trial courts have held that it can apply". There is "no authoritative guidance" from the Court of Appeal on this issue.¹⁷

According to the Court, the trial judge was wrong to conclude that "selling that which one does not own constitutes the tort of conversion". The trial judge failed to consider the nature of the property in question and, notably, did not appreciate "that information is unlike chattel property" in the context of a conversion claim.¹⁸

In the normal sort of case involving conversion, an owner is deprived of the use of property because it is taken by another. However, in the case of intangible property, like a book of business, the information remains with the original owner. For instance, the First Book of Business remained in the plaintiff's possession, it was simply copied and provided to Staebler. As a result, the trial judge's findings were insufficient to support the conclusion that conversion of the First Book of Business had occurred; he "did not make the findings necessary to support the application of the tort in this case".¹⁹

The Other Causes of Action

The Court also noted that the trial judge's failure to separately analyze the other causes of action asserted by the plaintiff was an error.²⁰

Those causes of action "did not depend on the conversion claim" but, instead, "required separate findings in accordance with the law that governed each of

¹⁵ *Tar Heel*, at [para. 11](#).

¹⁶ *Tar Heel*, at [para. 17](#).

¹⁷ *Tar Heel*, at [para. 19](#).

¹⁸ *Tar Heel*, at [para. 20](#).

¹⁹ *Tar Heel*, at [para. 20](#).

²⁰ *Tar Heel*, at [para. 24](#).

them”.²¹

Key Takeaways

The Court of Appeal’s decision signals that the law respecting the tort of conversion as it applies (or not) to information is uncertain and is likely to be further developed in future cases.

The key related takeaways from the Court of Appeal’s decision are:

- the tort of conversion may not apply to the theft of information;
- the tort of conversion requires a wrongful interference with the goods of another, such as by taking, using or destroying those goods in a manner inconsistent with the owner’s right of possession;
- more than mere ownership is required to ground a conversion claim; and
- when claiming in respect of theft of information, a plaintiff should consider (as the plaintiff had in this case) alternative causes of action that might be made out even if the conversion claim fails.

²¹ *Tar Heel*, at [para. 24](#).