[Cite as *RAE Assocs., Inc. v. Nexus Communications, Inc.*, 2015-Ohio-2166.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The RAE Associates, Inc.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 14AP-482 (C.P.C. No. 12CV-1103)
Nexus Communications, Inc.,	:	(REGULAR CALENDAR)
Defendant and Third-Party Plaintiff-Appellant,	:	
Joe Clement,	:	
Third-Party Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 4, 2015

Dahman Law, LLC, Samir B. Dahman and *Jonathan N. Olivito*, for appellees.

James R. Leickly, for appellant.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant and third-party plaintiff-appellant, Nexus Communications, Inc., appeals from judgments of the Franklin County Court of Common Pleas in favor of plaintiff-appellee, The RAE Associates, Inc.,[1] and third-party defendant-appellee, Joe Clement.

{¶ 2} This dispute arises out of the course of the business relationship between RAE and Nexus. Nexus is a marketer of cell phone services. It uses large amounts of

[1] This party's name is variously given as Rae Associates or RAE Associates throughout the record. This is inconsistent even within the party's own briefs and memoranda. The latter spelling appears in corporate filings with the Ohio Secretary of State and is used in this decision.

direct-mail and point-of-sale print materials in the course of its sales efforts. RAE acted as an intermediary to obtain printing services for Nexus from independent print shops in exchange for a fee. Clement is the sole owner of RAE and at all times acted as the face of the company in its dealings with Nexus.

{¶ 3} After the business relationship between the parties broke down, RAE sued Nexus for unpaid fees, alleging breach of an oral agreement under which Nexus had agreed to pay 15 percent commission on print jobs brokered by RAE. The complaint states claims for breach of contract and unjust enrichment and alleges a balance due of $31,675.45. Nexus filed an answer generally denying the allegations in the complaint, followed by an amended answer and third-party complaint asserting claims against Clement personally for breach of contract, unjust enrichment, fraud or intentional misrepresentation, conversion, and misappropriation of trade secrets. The claims against Clement personally are based on Nexus's assertion that, throughout the course of dealings between the parties, it dealt directly with Clement and paid for his services through checks made out directly to him, and that it was, in fact, entirely unaware of the existence of RAE Associates, Inc.

{¶ 4} RAE and Clement assert that Clement arranged for a number of Nexus print jobs to go to suitable print shops and managed the details of such print work but that Nexus eventually refused to pay as agreed for these services. Nexus's general position is that it had agreed to the arrangement with Clement with the understanding that Clement would use his contacts in the printing industry to secure a 15 percent discount from a customary "retail price" and that this discount was essential to the deal because it would offset the cost of Clement's broker fee. According to Nexus, Clement in practice failed to secure any discount whatsoever for the print jobs arranged on behalf of Nexus, thereby depriving Nexus of any benefit from the arrangement and merely adding Clement's commission as an additional layer of costs on all print jobs. This failure to secure promised discounts underlies the fraud, breach, conversion, and unjust-enrichment claims. The claim for misappropriation of trade secrets is based upon Clement's disclosure in his own promotional materials of a figure purportedly reflecting Nexus's large subscriber base. Nexus asserts that the number of its subscribers was a carefully

guarded secret even within its own organization, and Clement had a duty to refrain from revealing this privileged information.

{¶ 5} Prior to trial, the trial court denied Clement's motion for summary judgment on Nexus's fraud and conversion claims. On the eve of trial, and after additional discovery, the court revisited that ruling and dismissed Nexus's conversion claim under Civ.R. 12(B)(6) for failure to state a claim, finding that conversion would not lie based on the facts alleged in the third-party complaint. The parties consented to referral of the matter to a magistrate for jury trial, which began on April 9, 2013, and lasted four days.

{¶ 6} RAE and Clement offered Clement's own testimony and that of David Stump. RAE and Clement presented Stump as a purported independent witness with knowledge of the printing industry but now assert that he was never intended to formally qualify as an expert witness. Shortly after Stump concluded his testimony, it became apparent that a courtroom recording malfunction had prevented preservation of his testimony. This 83-minute gap in the record gives rise to some of the contested issues in this appeal.

{¶ 7} Nexus relied on the testimony of its president and owner, Steven Fenker, and Mazan Rabah, who described himself as the executive in charge of marketing during the time that Nexus dealt with Clement and RAE. Although the initial phase of Fenker's testimony was also affected by the recording malfunction, this part of the recording gap is not at issue on appeal.

{¶ 8} At the close of evidence, the magistrate granted Clement's motion for a directed verdict on Nexus's fraud claim. The magistrate found that Nexus had not introduced evidence of any independent tort duty separate from the alleged contract between the parties.

{¶ 9} The jury returned a general verdict in favor of RAE on RAE's claim for breach of contract. The jury also delivered a general verdict in favor of Clement on Nexus's breach of contract and misappropriation of trade secret claims, specifically finding that the actual number of Nexus subscribers did not constitute a trade secret. The jury awarded damages payable by Nexus to RAE of $41,727.61.

{¶ 10} Nexus filed objections to the magistrate's decision. The trial court overruled these and adopted the magistrate's decision in its entirety. Nexus then filed a motion for a new trial, which the trial court denied.

{¶ 11} Nexus brings the following assignments of error on appeal:

> [I.] The trial court erred as a matter of law in granting a directed verdict that precluded Appellant's fraud claim.
>
> [II.] The trial court erred as a matter of law in precluding Appellant's conversion claim during a pretrial held five days before trial and also erred in denying a motion for new trial requested due to this irregularity.
>
> [III.] The trial court erred as a matter of law in failing to grant a new trial when, contrary to the mandate of R.C. 2301.20, the testimony of the case's one independent expert witness was not recorded and also erred in denying a motion for new trial requested due to this irregularity.
>
> [IV.] The trial court erred in permitting an expert witness to testify when discovery responses from the party utilizing the expert indicated that there would be no expert witnesses and also erred in denying a motion for new trial requested due to this irregularity.
>
> [V.] The trial court erred in permitting two attorneys for Appellees to cross examine the main witness for Appellant.

{¶ 12} Nexus's first assignment of error asserts that the magistrate erred in granting a directed verdict on its fraud claim at the close of evidence. A review of a trial court's grant of a directed verdict is de novo. *Wright v. Columbus*, 10th Dist. No. 05AP-432, 2006-Ohio-759, ¶ 9. Pursuant to Civ.R. 50(A)(4), the trial court will grant a motion for a directed verdict when, after construing the evidence most strongly in favor of the nonmoving party, the court finds that reasonable minds could come to only one conclusion, and that conclusion is adverse to the nonmoving party. *Hoeppner v. Jess Howard Elec. Co.*, 150 Ohio App.3d 216, 224 (10th Dist.2002), citing *Nickell v. Gonzalez*, 17 Ohio St.3d 136, 137 (1985).

{¶ 13} The trial court gave two grounds for dismissing the fraud claim. The court observed that the fraud claim was entirely duplicative of the breach-of-contract claim and

also held that, as stated in the complaint, the fraud claim related only to assertions of future conduct, which could not form the basis for fraud. Although we agree that the second basis given by the trial court does not conform to the evidence heard at trial, we conclude that the court's first-cited basis is sufficient to affirm the trial court's dismissal of the fraud claim.

{¶ 14} A tort claim for fraud requires proof of six elements: (1) a representation or, where there is a duty to disclose, concealment of a fact, (2) that is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation, and (6) resulting damages proximately caused by the reliance. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475 (1998); *Martin v. Ohio St. Univ. Found.*, 139 Ohio App.3d 89, 98 (10th Dist.2000).

{¶ 15} A party bringing a claim for fraud is held to a heightened standard of pleading. *West v. West*, 10th Dist. No. 96APE11-1587 (Sept. 2, 1997), citing *Byrd v. Faber*, 57 Ohio St.3d 56, 61 (1991). Under the civil rules, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Civ.R. 9(B); *Lawton v. Howard*, 10th Dist. No. 13AP-878, 2014-Ohio-2660, ¶ 14.

{¶ 16} "Fraud is generally predicated on a misrepresentation relating to a past or existing fact, and not on promises or representations relating to future actions or conduct." *Krukrubo v. Fifth Third Bank*, 10th Dist. No. 09AP-933, 2010-Ohio-1691, ¶ 9. As a result, " '[r]epresentations concerning what will occur in the future are considered to be predictions and not fraudulent misrepresentations.' " *Englert v. Nutritional Sciences, LLC*, 10th Dist. No. 07AP-989, 2008-Ohio-5062, ¶ 25, quoting *Assn. for Responsible Dev. v. Fieldstone Ltd. Partnership*, 2d Dist. No. 16994 (Nov. 13, 1998). "An exception to this rule exists, however, where an individual makes a promise concerning a future action, occurrence, or conduct and, at the time he makes it, has no intention of keeping the promise. In such a case, the individual possesses actual fraudulent intent and a claim for fraud may be asserted against him." *Williams v. Edwards*, 129 Ohio App.3d 116, 124 (1st Dist.1989).

{¶ 17} Nexus argues that the fraud here falls under the exception stated in *Williams* for fraud in the inducement: Clement asserted when soliciting the broker agreement that he could obtain a 15 percent discount from various print suppliers but then later testified at trial that the nature of the printing business made such a discount commercially impossible to obtain. Because Clement acknowledged at trial that his experience in the printing industry made clear that he could never deliver the promised discounts, Nexus asserts that he must have known when the parties entered into their agreement that he would not deliver the benefit of the bargain he had promised Nexus. Under Civ.R. 50(A)(4), Nexus points out that the trial court should have taken note of this aspect of Clement's testimony and drawn the inference in favor of Nexus that the jury would find it credible.

{¶ 18} We agree with Nexus on this point. Weighing the evidence in favor of the nonmoving party, the court should have concluded that the jury could find Clement had no intention of providing the discount promised, and the fraud claim falls under the exception for future conduct spelled out in *Williams,* 129 Ohio App.3d 116.

{¶ 19} Despite this, we affirm the trial court's dismissal on grounds that the tort claim asserts no additional ground for recovery beyond that expressed in the claim for breach of contract. This court has held that a tort claim, such as fraud, generally cannot duplicate the factual and legal elements of a parallel claim for breach of contract: "A tort claim based upon the same actions as those upon which a claim upon contract breach is based will exist independently of contract action only if the breaching party also breaches a duty owed separately from that created by the contract, that is, a duty even if no contract existed." *Testron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App.3d 137, 151 (9th Dist.1996), citing *Battisa v. Lebanon Trotting Assn.*, 538 F.2d 111, 118 (6th Cir.1976).

{¶ 20} To compare the two claims, we begin by examining the language of the complaint. Nexus's breach-of-contract claim states in pertinent part that: "Clement failed to provide Nexus a discount to the retail price of the product, and in fact Clement simply placed standard the orders for the printed materials that comprised each project, and as such breached his duty to negotiate a discount of at least 15 percent off the standard retail purchase price of each project." (Third-Party Complaint, 7.) Nexus's fraud claim states that "Clement affirmatively misrepresented to Nexus that Clement would reduce the price

Nexus would pay print companies by at least fifteen percent (15%). * * * Nexus reasonably relied to its detriment upon Clement's statement." (Third-Party Complaint, 8.) The two claims allege identical damages of $52,112.08. Fenker testified that this figure represented recovery of the sums already paid to Clement for completed print jobs. On the face of the complaint, the fraud claim is based on the same conduct and seeks the same recovery as the breach-of-contract claim.

{¶ 21} Nexus asserts that, at trial, it put on evidence of separate damages in the form of reliance damages that were independent of the contractually based breach-of-contract damages claimed. Nexus points to the testimony of Fenker, who explained his accounting investigation that led him to terminate the agreement with RAE. Fenker identified and explained a chart demonstrating the evolution of prices paid by Nexus for print jobs before, during, and after Clement's tenure as print broker for Nexus. This chart was based on the evolution of actual print invoices paid by Nexus during the relevant period. Fenker testified that the chart demonstrated that Nexus never received the benefit of any promised 15 percent discount that would have offset the cost of Clement's services and, in fact, Nexus sometimes paid less for comparable jobs during the time preceding and succeeding Clement's services than it would have paid through Clement.

{¶ 22} Giving this evidence its full weight, this still does not amount to proof of independent tort damages in addition to those available under the contract. Nexus argues that the jury, had it been allowed to consider the fraud claim, could have evaluated the documentary evidence and generated a figure representing Nexus's forbearance damages as a sum additional to the money paid to Clement. We find that this calls for unduly speculative damages. Although he clearly testified that he believed that Nexus, in addition to avoiding Clement's commission, would actually have saved money on the print work itself, Fenker did not quantify this foregone savings, nor did his testimony develop a firm basis upon which to compute it.

{¶ 23} In general, compensatory damages must be shown with certainty, and damages that are merely speculative will not give rise to recovery. *Moton v. Carroll*, 10th Dist. No. 01AP-772 (Feb. 12, 2002). Although lost profits need not be proven with mathematical precision, the evidence and theory of the case must provide the finder of fact with known, reliable factors that can reasonably guide the computation of damages.

McNulty v. PLS Acquisition Corp., 8th Dist. No. 79025, 2002-Ohio-7220, ¶ 87, fn. 14; *Andrew v. Power Marketing Direct, Inc.*, 10th Dist. No. 11AP-603, 2012-Ohio-4371, ¶ 67-68; *Chefor v. Morgan*, 10th Dist. No. 13AP-100, 2013-Ohio-4213, ¶ 28.

{¶ 24} Commencing with the complaint, Nexus's claim has been that Clement breached the contract by failing to obtain sufficient discounts to justify his participation as an intermediary in the print transactions and that the sums paid to Clement were unearned. The damages prayed for have been consistent with this foundation for the claims, and the evidence discussed at trial regarding additional forbearance losses was insufficient to augment the specific prayer found in the complaint and support an independent award of tort damages. Ultimately, Nexus's complaint is not that it entered into a contract with RAE but that RAE, under the terms of that contract, failed to deliver the promised financial benefits. We find that the trial court did not err in concluding that the fraud claim arose on the same basis as the breach-of-contract claim and could not be maintained independently. On the second of the two grounds relied upon by the trial court, we overrule Nexus's first assignment of error.

{¶ 25} Nexus's second assignment of error asserts that the trial court erred when it dismissed Nexus's conversion claim prior to trial. The trial court determined, both in its pre-trial ruling dismissing the claim and post-trial denial of Nexus's motion for a new trial, that, as a matter of law, the allegations in Nexus's third-party complaint did not state a claim for the tort of conversion but only a claim for breach of contract.

{¶ 26} When reviewing a judgment on a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, an appellate court's standard of review is de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5. A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992), citing *Assn. for Defense of Washington Loc. School Dist. v. Kiger*, 42 Ohio St.3d 116, 117 (1989). A trial court must presume all factual allegations contained in the complaint to be true and must make all reasonable inferences in favor of the nonmoving party. *Garofalo v. Chicago Title Ins. Co.*, 104 Ohio App.3d 95, 104 (8th Dist.1995), citing *Perez v. Cleveland*, 66 Ohio St.3d 397 (1993), *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190 (1988), and *Phung v. Waste*

Mgt., Inc., 23 Ohio St.3d 100 (1986). "[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol,* 60 Ohio St.3d 143, 145 (1991).

{¶ 27} Pursuant to Civ.R. 59(A)(1), a new trial may be granted to all or any of the parties based on the "[i]rregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial." Civ.R. 59(A)(2) through (6) and (8) and (9) provides other specific grounds not applicable here, and Civ.R. 59(A)(7) allows a new trial when "[t]he judgment is contrary to law." The decision to grant or deny a motion for a new trial pursuant to Civ.R. 59 generally lies within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *Salvatore v. Findley*, 10th Dist. No. 07AP-793, 2008-Ohio-3294, ¶ 9. An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Masters v. Masters,* 69 Ohio St.3d 83, 85 (1994); *Rock v. Cabral*, 67 Ohio St.3d 108, 112 (1993).

{¶ 28} "Where a new trial is granted by a trial court, for reasons which involve no exercise of discretion but only a decision on a question of law, the order granting a new trial may be reversed upon the basis of a showing that the decision was erroneous as a matter of law." *Rohde v. Farmer*, 23 Ohio St.2d 82 (1970), paragraph two of the syllabus. Accordingly, an order denying a new trial on grounds that the judgment was not contrary to law is subject to de novo review. *Weinstock v. McQuillan, M.D.*, 10th Dist. No. 09AP-539, 2010-Ohio-1071, ¶ 10; *Sully v. Joyce*, 10th Dist. No. 10AP-1148, 2011-Ohio-3825, ¶ 7-8; *Ferguson v. Dyer*, 149 Ohio App.3d 380, 2002-Ohio-1442, ¶ 10 (10th Dist.) ("[O]ur review of a motion pursuant to Civ.R. 59(A)(9) is de novo.").

{¶ 29} Because Nexus sought a new trial on the basis that the conversion claim was legally tenable, we review both the initial dismissal and the later denial of a new trial under the same de novo standard.

{¶ 30} The tort of conversion represents the wrongful exercise of dominion over property to the exclusion of the rights of the owner or withholding property from the owner's possession under a claim inconsistent with the owner's rights. *Joyce v. Gen.*

Motors Corp., 49 Ohio St.3d 93, 96 (1990). The elements of this cause of action are therefore that: (1) the plaintiff had ownership or right of possession of the property at the time of conversion; (2) the defendant's conversion by a wrongful act or disposition of plaintiff's property or property rights; and (3) damages resulted therefrom. *Dice v. White Family Cos., Inc.*, 173 Ohio App.3d 472, 2007-Ohio-5755, ¶17 (2d Dist.). "It is fundamental that a plaintiff in a conversion action must show title or rightful ownership of the chattel, including money, at the time of the alleged conversion." *Levins Corp. v. Aberth*, 9th Dist. No. 15661 (Feb. 10, 1993), citing Restatement of the Law 2d, Torts, Section 222(A), at 431 (1965), and *Fayette Invest. Corp. v. Jack Johnson Chevrolet Co.*, 119 Ohio App. 111 (2d Dist.1963).

{¶ 31} The property at issue in the present case is money, and this places an additional specific evidentiary burden upon Nexus as the plaintiff. In order to maintain an action for conversion of money, the plaintiff must establish that the funds were "earmarked," that is, that the defendant had an obligation to deliver a specific corpus of money capable of identification and not merely that the defendant had an obligation to pay a certain sum as a general debt. *Haul Transport of Virginia, Inc., v. Morgan*, 2d Dist. No. 14859 (June 2, 1995).

{¶ 32} Nexus argues that the facts alleged in the complaint, if proven, support the conversion claim. Nexus argues that Clement collected via his commission amounts that would normally have been retained by Nexus and that this is the earmarked corpus of money that belonged to Nexus and was converted by Clement. "Clement did not provide Nexus with a discounted price for the printed materials that comprised each project * * *. Clement took possession of the money Nexus would have received if the print jobs were provided to Nexus at a discount, thus intentionally and substantially interfering with Nexus' ownership of the money." (Third-Party Complaint, 9.)

{¶ 33} Despite this attempt to finesse the money path in the case, the factual allegations do not support this characterization of Clement's conduct as conversion. Clement did not "take possession of money Nexus would have received" had discounts been forthcoming from the printers; that money went to the printers via the undiscounted invoices. Nexus is merely finding a new way of stating that Clement, despite being paid as agreed, failed to fulfill his contractual obligation and achieve discounted prices for the

printed materials. Nexus paid its print subscribers as invoiced, and then paid Clement his commission. When Clement failed to achieve the promised discounts, Nexus paid the printers more than expected. No earmarked or sequestered funds are involved.

{¶ 34} The damages claimed are an expectation of economic benefit that Nexus hoped to obtain from its contractual relationship with Clement. The fact that Clement allegedly did not perform adequately under the contract does not mean that the overpaid sums were converted from earmarked funds.

{¶ 35} Nexus cites Tenth District cases involving a claim against an employer for unpaid commissions (*Silverman v. Am. Income Life Ins.*, 10th Dist. No. 01AP-338 (Dec. 18, 2001)), and money overpaid on duplicate invoices (*Cugini and Capoccia Builders, Inc.*, 10th Dist. No. 02AP-1020, 2003-Ohio-2059), as instances in which we have found that conversion could occur through breach of a contractual obligation. Although both cases somewhat loosen the requirement of identifying an earmarked sum, rather than merely identifying a debt, neither case involves recoupment of commissions already paid. We decline to extend those cases to the present facts.

{¶ 36} The allegations in the complaint fail to establish a cause of action for conversion. We find no error in the trial court's dismissal of the conversion claim prior to trial and denial of a motion for a new trial on the same basis, and Nexus's second assignment of error is overruled.

{¶ 37} Nexus's third assignment of error asserts that the trial court erred in refusing to grant a new trial based upon a recording error that prevents the reproduction for the record on appeal of testimony by David Stump, the witness called by RAE and Clement. Because this aspect of the court's decision does not invoke a question of law, we review it under the abuse-of-discretion standard set forth above for a denial of a motion for a new trial. Under this standard, we find no prejudicial error from this defect in the trial recording process.

{¶ 38} Nexus argues that, under R.C. 2301.20 as last amended in 2012, recording of testimony in the court of common pleas is mandatory; whereas, prior to this amendment, proceedings were recorded upon the request of a party. From this, Nexus asks us to infer that any failure to record is now prejudicial error per se. We first observe that requiring a new trial in all cases of recording failure seems to create an unworkable

standard. We hold to the standard stated in the pre-amendment case cited by Nexus: "[E]ven assuming arguendo that the trial court did err in failing to make a record of the proceedings, there were alternatives to recreate the record available to Appellant under App.R. 9(C) or (D), which [appellant] did not timely take advantage of. Thus, even if we had found error on the part of the trial court, we would not have granted Appellant the relief requested, which was to have the matter remanded for new hearing." *Rothwell v. Rothwell*, 4th Dist. No. 12CA-6, 2013-Ohio-457, ¶ 12. We disagree with *Rothwell* only to the extent that the court in *Rothwell* implied that the amended statute might require a less flexible standard; whereas, we would continue to require a showing of prejudice.

{¶ 39} In the present case, Nexus has not attempted to reconstitute the record, nor articulated the alleged prejudice resulting from the inability to point to the probative value of Stump's testimony. Nexus cannot point to the recording failure and ask for a presumption of prejudice but must articulate the reasons for which that specific testimony created error at trial. Nexus's third assignment of error is overruled.

{¶ 40} Nexus's fourth assignment of error asserts that the trial court erred in allowing Stump to testify and in refusing to grant a new trial because this testimony unfairly surprised Nexus and did not comply with the local rules. Again, this evidentiary ruling by the trial court called for an exercise of discretion, and we review the denial of the motion for a new trial on this ground under an abuse-of-discretion standard.

{¶ 41} Loc.R. 43.01 of the Franklin County Court of Common Pleas covers initial and supplemental disclosure of witnesses that a party intends to call at trial. Loc.R. 43.04 covers the consequences of late disclosure: "Any witnesses not disclosed in compliance with [these rules] may not be called to testify at trial, unless the Trial Judge orders otherwise for good cause and subject to such conditions as justice requires." Even assuming, arguendo, that Stump was presented as an expert witness (which RAE and Clement deny), and that his potential testimony was not timely disclosed, we find no error on the part of the trial court in allowing the testimony.

{¶ 42} Our past cases have considered whether a party suffered "undue prejudice or surprise" if the witness was permitted to testify when not properly disclosed prior to trial. *Woodruff v. Barakat*, 10th Dist. No. 02AP-351, 2002-Ohio-5616, ¶ 17. If opposing counsel is on notice of the existence of a potential witness and the content of the

testimony, the court may be reluctant to exclude the witness from testifying. *Basil v. Wagoner*, 10th Dist. No. 94APE12-1716 (Sept. 12, 1995); *Pang v. Minch*, 53 Ohio St.3d 186, 194 (1990). We find no abuse of discretion on the part of the trial court in permitting Stump's testimony. There is no clearly articulated or demonstrated indication of undue prejudice or surprise. The trial court concluded that Nexus was sufficiently aware of the likely content of Stump's testimony based upon affidavits submitted prior to trial.

{¶ 43} The trial court noted that, when it had granted Clement and RAE's motion to allow Stump's testimony at the final pre-trial conference, the trial court had imposed certain conditions to ensure the fairness of allowing his testimony, including the right to depose Stump prior to the start of trial and to call a rebuttal witness at trial. In denying the motion for new trial, the court noted that Nexus did not explain the extent to which any of these advantages were invoked prior to trial. The judge also noted that, again, Nexus did not articulate any specific prejudice from the trial testimony of Stump, only from the alleged procedural error that allowed him to testify. While assessing the impact of Stump's testimony is again complicated by the recording failure that deprives us a transcript, we reassert that we will not presume prejudicial error and that it is incumbent upon Nexus to provide some quantum of prejudice, even if based only upon the described content of that testimony. Nexus's fourth assignment of error is overruled.

{¶ 44} Nexus's fifth assignment of error asserts that the trial court erred in allowing two different attorneys to cross-examine Steven Fenker during his lengthy testimony. Loc.R. 23.02 of the Franklin County Court of Common Pleas governs this aspect of cross-examination: "Except by permission of the Trial Judge * * * only one counsel for each adverse party will be permitted to examine the same witness in any trial or proceeding before the court."

{¶ 45} Although Nexus proposes that this again constituted prejudicial error per se, the rule explicitly provides that the trial judge may grant exceptions. We accordingly review the trial court's decision to allow two attorneys to conduct the cross-examination under an abuse-of-discretion standard. *Winkler v. Winkler*, 10th Dist. No. 02AP-937, 2003-Ohio-2418, ¶ 93; *Mason v. Swartz*, 76 Ohio App.3d 43, 54 (6th Dist.1991) ("A trial court has the discretionary authority to control the mode and order of proof.").

{¶ 46} Nexus presents no legal precedent for the proposition that such serial examination is prejudicial per se. The magistrate appears to have justified this form of examination based upon the duration of the testimony on cross-examination, the inexperience of one of the counsel involved, and Fenker's own status as a licensed attorney in Ohio. While Nexus asserts that combining two different cross-examination styles is "inherently inequitable" (Appellant's Brief, 59), Nexus again articulates no specific prejudice from this permitted dual cross-examination allowed by the magistrate. Nexus's fifth assignment of error is accordingly overruled.

{¶ 47} In summary, the magistrate did not err in dismissing Nexus's conversion claim prior to trial, granting directed verdict on the fraud claim, and making the contested evidentiary rulings during the trial. The trial court did not err when it adopted the magistrate's decision and overruled Nexus's objections and motion for a new trial.

{¶ 48} For the foregoing reasons, Nexus's five assignments of error are overruled, and the judgments of the Franklin County Court of Common Pleas are affirmed.

Judgments affirmed.

TYACK and KLATT, JJ., concur.

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