

[Cite as *Mattress Matters, Inc. v. Trunzo*, 2016-Ohio-7723.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 104249**

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**MATTRESS MATTERS, INC.**

PLAINTIFF-APPELLEE

vs.

**GENO TRUNZO**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-15-845336

**BEFORE:** E.T. Gallagher, J., Keough, P.J., and Stewart, J.

**RELEASED AND JOURNALIZED:** November 10, 2016

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Geno Trunzo (“Trunzo”), appeals an order granting summary judgment in favor of plaintiff-appellee, Mattress Matters, Inc. (“Mattress Matters”) and denying Trunzo’s motion for summary judgment. Trunzo raises one assignment of error:

The trial court erred in granting appellee’s motion for summary judgment and in denying appellant’s motion for summary judgment as it pertains to appellee’s conversion and fraud claims.

{¶2} We find no merit to the appeal and affirm the trial court’s judgment.

### **I. Facts and Procedural History**

{¶3} The facts in this case are undisputed. In 2004, Joseph Amato (“Amato”), president and owner of Mattress Matters, hired Trunzo, on recommendation of his chief financial officer, Robert Stewart (“Stewart”). Trunzo was hired to assist Stewart in preparing financial statements and reconciling accounts payable and receivable. Stewart left Mattress Matters in 2005 and was succeeded by two other financial officers between 2005 and 2008. In 2008, Trunzo became responsible for managing the corporate finances. Amato consulted with his brother-in-law, Dean Falvo (“Falvo”), who advised Amato on Mattress Matters’ finances, but he was never employed by Mattress Matters.

{¶4} Mattress Matters had a business checking account at PNC Bank. Between 2008 and 2014, Trunzo prepared daily spreadsheets of Mattress Matters’ expenditures. Trunzo’s daily spreadsheets itemized check numbers drawn on Mattress Matters’ account

at PNC, payment amounts, and named payees. It is undisputed that between January 2, 2006, and December 5, 2014, Trunzo made payments to himself and to his personal creditors on Mattress Matters' PNC checking account, but did not show these payments in the daily spreadsheets.

{¶5} Over the course of approximately eight years, Trunzo converted \$1,116,423.44 of Mattress Matters' funds for his personal use. Trunzo concealed the embezzlement by under-reporting Mattress Matters' gross sales to the state of Ohio thereby causing Mattress Matters to underpay the required amount of Ohio sales tax. It was not until after Trunzo left his employment at Mattress Matters in December 2014, and a new financial officer took over, that the embezzlement was discovered.

{¶6} Although PNC Bank statements were mailed to Amato's home, neither Amato nor Falvo ever compared the bank statements with Trunzo's spreadsheets or otherwise requested verification of Trunzo's representations. Amato admitted at his deposition that he never reviewed Mattress Matters' checkbook. Falvo testified at his deposition that Mattress Matters operated on a "system \* \* \* based on trust." (Falvo Depo. 11.)

{¶7} In May 2015, Mattress Matters filed a complaint against Trunzo seeking to recover the embezzled funds. Mattress Matters alleged claims of fraud, conversion, and the faithless servant doctrine. Trunzo filed a motion for summary judgment, arguing that Mattress Matters' claims were barred by the applicable statute of limitations. Trunzo maintained that although the embezzlement was not discovered until December 2014, the

“discovery rule” that ordinarily tolls the statute of limitations until an injury is discovered does not apply because Amato could have discovered the thefts sooner if he had exercised reasonable care.

{¶8} The trial court rejected Trunzo’s argument and denied his motion for summary judgment on Mattress Matters’ fraud and conversion claims. However, the trial court granted Trunzo’s motion with respect to Mattress Matters’ faithless servant claim on grounds that the faithless servant doctrine is not a cognizable right of recovery. The trial court granted Mattress Matters’ motion for summary judgment on its fraud and conversion claims and denied it on its faithless servant claim. The court entered judgment in favor of Mattress Matters in the amount of \$1,116,423.44.

{¶9} Trunzo now appeals the trial court’s judgment.

## **II. Law and Argument**

### **A. Standard for Summary Judgment**

{¶10} We review an appeal from summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). The party moving for summary judgment bears the burden of demonstrating the absence of a genuine issue of material fact as to the essential elements of the case with evidence of the type listed in Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). Once the moving party demonstrates entitlement to summary judgment, the burden shifts to the nonmoving party to produce evidence related to any issue on which the party bears the burden of production at trial. Civ.R. 56(E). Summary judgment is appropriate when,

after construing the evidence in a light most favorable to the party against whom the motion is made, reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998).

## **B. Statute of Limitations**

{¶11} In his sole assignment of error, Trunzo argues the trial court erred in denying his motion for summary judgment on Mattress Matters' conversion and fraud claims. He contends these claims are barred by the applicable statute of limitations.

{¶12} R.C. 2305.09 provides that fraud and conversion claims "shall be brought within four years after the cause accrued." A cause of action "accrues" when the tortious acts are committed. *Lynch v. Dial Fin. Co.*, 101 Ohio App.3d 742, 747, 656 N.E.2d 714 (8th Dist.1995). However, because a plaintiff may have no knowledge that a tort has been committed, the discovery rule tolls the statute of limitations until a plaintiff discovers or, in the exercise of reasonable diligence, should have discovered, the injury. *O'Stricker v. Jim Walter Corp.*, 4 Ohio St.3d 84, 447 N.E.2d 727 (1983), paragraph two of the syllabus; *Melnyk v. Cleveland Clinic*, 32 Ohio St.2d 198, 290 N.E.2d 916 (1972).

{¶13} Trunzo argues the discovery rule does not toll the statute of limitations in this case because Amato failed to use reasonable diligence to discover that his employee was stealing from him. He contends Amato should have inspected Mattress Matters' checkbook and bank statements and compared them with Trunzo's spreadsheets. In other words, Trunzo believes Mattress Matters had a duty to investigate Trunzo's thefts even

though neither Amato nor Falvo ever suspected that Trunzo was stealing from the company. He contends Amato had a duty to investigate Trunzo's tortious behavior even though there was no cognizable event to put him on notice that Trunzo was committing fraud or conversion.

{¶14} However, "[a]n injured party has a right to assume that the other party will obey the law, and has the right to govern himself accordingly." *Vayto v. River T. & R. Co.*, 18 Ohio N.P. 305, 28 Ohio Dec. 401, 1915 Ohio Misc. LEXIS 51 (C.P. 1915), quoting *Jacobs v. Fuller & Hutsinpillar Co.*, 67 Ohio St. 70, 75, 65 N.E. 617 (1902); *Tone v. Columbus*, 39 Ohio St. 281, 299 (1883) (a citizen has a right to assume that the law is being obeyed instead of violated).

{¶15} Thus, the statute of limitations is tolled until a "cognizable event \* \* \* leads or should lead the plaintiff to believe that he has been injured and thus places him on notice of the need to pursue his remedies." *Barley v. Fitchard*, 8th Dist. Cuyahoga No. 91458, 2008-Ohio-6159, ¶ 13, citing *Flowers v. Walker*, 63 Ohio St.3d 546, 549, 589 N.E.2d 1284 (1992); *Kiefer v. Mark Domo, D.D.S., Inc.*, 8th Dist. Cuyahoga No. 86262, 2006-Ohio-445. A plaintiff need not have discovered all the relevant facts necessary to file a claim in order to trigger the statute of limitations. Rather, the "cognizable event" puts the plaintiff on notice to investigate the facts and circumstances relevant to the claim in order to pursue available remedies. *Id.*

{¶16} This court's decision in *Barley* illustrates how a cognizable event puts one on notice that an injury may be occurring and triggers a duty to investigate potential

malfeasance in order to halt or prevent further damage. In *Barley*, the appellant filed a conversion claim against the administrator of his father's estate, alleging that his aunt and her children converted funds from the estate during the decedent's lifetime. The decedent was incompetent during his life and was the ward of a guardianship estate. This court found that the four-year statute of limitations barred appellant's recovery because he admitted at deposition that he knew five years before filing the complaint that his father's funds had been taxed using someone else's social security number and that he knew this was an indicator "he was going to have a huge problem and \* \* \* that there was a pretty messed up situation." *Id.* at ¶ 15. Although appellant had no notice of any actual injury, his knowledge of suspicious activity was sufficient to trigger the running of the statute of limitations.

{¶17} In this case, it is undisputed that there was no cognizable event that should have put Amato on notice that Trunzo was stealing from Mattress Matters. As previously stated, Trunzo argues Amato and Falvo should have investigated potential wrongdoing even in the absence of any apparent misdeed. Although it is prudent for business owners to closely examine their employee's activities, particularly where the employee has access to corporate funds, there is no rule that requires the owner to police his employees. An employer has the right to trust that his employee is a law-abiding citizen. *Vayto*, 18 Ohio N.P. at 305, 28 Ohio Dec. 401, 1915 Ohio Misc. LEXIS 51 (C.P. 1915).



{¶18} In the absence of any cognizable event that would have alerted Amato to potential wrongdoing, the statute of limitations was tolled until after Trunzo left his employment at Mattress Matters and a new financial officer discovered the embezzlement.

{¶19} Accordingly, the sole assignment of error is overruled.

{¶20} The trial court's judgment is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, P.J., and  
MELODY J. STEWART, J., CONCUR