[Cite as *Perez Bar & Grill v. Schneider*, 2010-Ohio-1352.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

PEREZ BAR & GRILL Appellee v. GEORGE SCHNEIDER Appellant	C. A. No. 09CA009573 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 07CV153775

DECISION AND JOURNAL ENTRY

Dated: March 31, 2010

Per Curiam

INTRODUCTION

{¶1} When George Schneider changed the locks on a commercial building he bought at a sheriff's sale, he inadvertently excluded a tenant from the premises. When the tenant, Josue Perez, contacted him, requesting access to his operating equipment, Mr. Schneider refused, claiming that everything inside the building belonged to him. The tenant, through his company, Perez Bar and Grill LLC, sued Mr. Schneider for replevin and conversion of 40 items of restaurant and bar equipment. After Perez attempted to dismiss the replevin claim, the remaining claim was tried to the court. The trial court entered judgment for the plaintiff in the amount of $9333. Mr. Schneider has attempted to appeal, arguing that the trial court incorrectly held that: (1) Perez had proven its conversion claim, (2) Mr. Schneider acquired no interest in the personal property by purchasing the real estate, (3) none of the disputed items are fixtures, (4) all of the disputed items are trade fixtures, (5) none of the disputed items were abandoned, (6) equitable

estoppel does not apply, and (7) the value of the disputed property is $9333. This Court dismisses the attempted appeal because the trial court's order is not a final, appealable order.

PROCEDURAL BACKGROUND

{¶2} Perez sued Mr. Schneider, alleging conversion and replevin of the furniture, decorations, and equipment left inside the building when Mr. Schneider changed the locks. On the morning of trial, Perez's lawyer notified the trial court of his client's intent to voluntarily dismiss its replevin claim via Rule 41(A) of the Ohio Rules of Civil Procedure. Perez's lawyer told the court that "[his] client is going to go ahead and drop its claim for replevin . . . [and] proceed on the conversion claim." The trial court responded by confirming, on the record, that the replevin claim was being voluntarily dismissed under "[Rule] 41(A)(1)(a)." Perez did not file either a notice or a stipulation of dismissal. The parties tried the case to the bench, proceeding only on the theory of conversion.

{¶3} Immediately after the trial court issued its November 5, 2008, judgment entry ordering Mr. Schneider to pay Perez $9333 as damages for conversion of the property, Mr. Schneider moved for findings of fact and conclusions of law. When the trial court ruled on that motion on March 26, 2009, it did not include a certification under Rule 54(B) of the Ohio Rules of Civil Procedure that there was no just reason for delay. After Mr. Schneider moved for supplemental findings of fact and conclusions of law, he, on April 24, 2009, filed a notice of appeal from the trial court's orders of November 5, 2008, and March 26, 2009.

{¶4} Following a show cause order from this Court regarding jurisdiction, Mr. Schneider moved the trial court for an order "dismissing the replevin claim in [c]ount [o]ne of [its] complaint for want of prosecution" or, in the alternative, a certification that there is no just reason for delay under Civil Rule 54(B). In June 2009, the trial court ruled on the motion for

supplemental findings of fact and conclusions of law, but did not include a certification under Rule 54(B) that there was no just reason for delay. Three days later, the trial court issued another journal entry indicating that its supplemental findings of fact and conclusions of law issued on June 19, 2009, "determines all claims and issues remaining before this Court" and certifying that there is no just reason for delay.

FINAL, APPEALABLE ORDER

{¶5} Before this Court may address the merits of any appeal, it must be convinced that it has jurisdiction. Section 3(B)(2), Article IV of the Ohio Constitution provides that courts of appeals "shall have such jurisdiction as may be provided by law to review . . . judgments or final orders . . . ." Under Rule 54(B) of the Ohio Rules of Civil Procedure, a trial court "may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay." Under Rule 54(B), "[w]hen more than one claim for relief is presented in an action . . . the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay." "[A]n appellate court may not review an order disposing of fewer than all claims" in the absence of Rule 54(B) language. *Int'l Bhd. of Elec. Workers, Local Union No. 8 v. Vaughn Indus. L.L.C.*, 116 Ohio St. 3d 335, 2007-Ohio-6439, at ¶8.

{¶6} Under Section 2505.04 of the Ohio Revised Code "[a]n appeal is perfected when a written notice of appeal is filed . . . ." "Once a case has been appealed, the trial court loses jurisdiction," *In re S.J.*, 106 Ohio St. 3d 11, 2005-Ohio-3215, at ¶9, except insofar as its continuing jurisdiction is "not inconsistent with the court of appeals' jurisdiction to reverse, modify, or affirm the judgment." *Yee v. Erie County Sheriff's Dep't,* 51 Ohio St. 3d 43, 44 (1990) (quoting *In re Kurtzhalz,* 141 Ohio St. 432, paragraph two of the syllabus (1943)).

{¶7} The first question for this Court is whether Perez successfully voluntarily dismissed its replevin claim under Civil Rule 41(A)(1) so that it did not remain pending when the trial court entered judgment on November 5, 2008. On the morning of trial, Perez attempted to dismiss the replevin claim against Mr. Schneider by orally dismissing it via the notice provision of Rule 41(A)(1)(a). Civil Rule 41(A)(1)(a), however, requires the "filing [of] a notice of dismissal." In any event, the attempted dismissal is a nullity because Rule 41(A)(1) does not permit a party to voluntarily dismiss anything less than all of its claims against any one party. *Pattison v. W.W. Grainger Inc*., 120 Ohio St. 3d 142, 2008-Ohio-5276, at ¶18. Therefore, Perez could not have used Rule 41(A)(1) to dismiss the replevin claim while pursuing the conversion claim against the same party. Thus, the replevin claim remained pending in the trial court.

{¶8} Immediately after the trial court issued its November 5, 2008, judgment entry ordering Mr. Schneider to pay Perez $9333 as damages for conversion of the contested property, Mr. Schneider moved for findings of fact and conclusion of law. See Civ. R. 52. Because Mr. Schneider filed a timely request for findings of fact and conclusions of law, his time for appeal did not begin to run until the trial court ruled on that motion. App. R. 4(B)(2). When the trial court ruled on that motion on March 26, 2009, it did not include a certification under Civil Rule 54(B), indicating that, despite the pending replevin claim, there was no just reason for delay in entering final judgment as to the conversion claim. Therefore, the trial court's order was not final. After Mr. Schneider moved for supplemental findings of fact and conclusions of law, he filed a notice of appeal on April 24, 2009, referencing the trial court's orders of November 5, 2008, and March 26, 2009.

{¶9} Mr. Schneider's notice of appeal deprived the trial court of jurisdiction to act on the motion for supplemental findings of fact and conclusions of law that he filed after the notice

of appeal. "If a trial court lacks jurisdiction, any order it enters is a nullity and is void." *Fifth St. Realty Co. v. Clawson,* 9th Dist. No. 94CA005996, 1995 WL 353722 at *2 (June 14, 1995). Neither the November 5, 2008, nor the March 26, 2009, order Mr. Schneider appealed from contains a certification under Rule 54(B) of the Ohio Rules of Civil Procedure. Thus, Mr. Schneider filed a notice of appeal from an interlocutory order on the conversion claim while the replevin claim remained pending. Because the trial court added the Rule 54(B) certification to a nullity, it too, is a nullity. Therefore, this Court does not have jurisdiction over the attempted appeal.

CONCLUSION

{¶10} This Court does not have jurisdiction to hear this attempted appeal because the trial court's order was not final and appealable. The appeal is dismissed.

Appeal dismissed.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CARLA MOORE
FOR THE COURT

CARR, J.
MOORE, P. J.
CONCUR

DICKINSON, J.
DISSENTS, SAYING:

{¶11} I disagree with the majority's conclusion that this Court does not have jurisdiction to hear the merits of this appeal. Although the majority has correctly stated that Rule 41(A)(1) of the Ohio Rules of Civil Procedure does not permit a party to voluntarily dismiss anything less than all of its claims against any one party, *Pattison v. W.W. Grainger Inc.*, 120 Ohio St. 3d 142, 2008-Ohio-5276, at ¶18, I do not agree that replevin and conversion are separate "claims" for purposes of Rule 54(B) of the Ohio Rules of Civil Procedure. As Perez filed only one "claim" to vindicate just one legal right, Civil Rule 54(B) does not apply to bar this appeal. See Civ. R. 54(B).

A PROCEDURAL QUAGMIRE:
CIVIL RULE 54(B) & MULTIPLE CLAIMS

{¶12} In order for a court order to be final and appealable, it must satisfy the requirements of Section 2505.02 of the Ohio Revised Code. Once the statute has been satisfied, if the action involves multiple claims and the order does not enter a judgment on all of them, the order must also satisfy Rule 54(B) of the Ohio Rules of Civil Procedure by certifying that "there is no just reason for delay." *Int'l Bhd. of Elec. Workers, Local Union No. 8 v. Vaughn Indus. L.L.C.*, 116 Ohio St. 3d 335, 2007-Ohio-6439, at ¶7 (quoting Civ. R. 54(B)); *Gen. Acc. Ins. Co. v. Ins. Co. of North Am.*, 44 Ohio St. 3d 17, 21 (1989) (explaining that only "[i]f the court finds that the order complies with R.C. 2505.02" must the court "take a second step to decide if Civ.R. 54(B) language is required").

{¶13} Under Rule 54(B), "[w]hen more than one claim for relief is presented in an action . . . whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay." If, as in this case, there are only two parties, then Rule 54(B) is limited by its terms to situations involving "more than one claim for relief." Civ. R. 54(B). The Rule "does not apply if all claims have been adjudicated and the rights and liabilities of all of the parties have been determined." *Grable v. Sprinfield Twp. Bd. of Zoning Appeals*, 9th Dist. No. 18185, 1997 WL 576386 at *6 (Sept. 10, 1997). If Civil Rule 54(B) applies, then this Court does not have jurisdiction to hear this appeal. Whether the rule applies depends on whether Perez's complaint contained one or two "claims for relief" for purposes of Civil Rule 54(B).

{¶14} Since Civil Rule 54(B) was amended in 1992, it has been clear that the rule applies not only to multiple claims arising from separate transactions, but also to multiple claims arising out of the same transaction. *State ex rel. Wright v. Ohio Adult Parole Auth.*, 75 Ohio St. 3d 82, 86 (1996) (citing Staff Note to July 1, 1992 Amendment to Civ. R. 54(B)). If, as in this case, a party ostensibly asserts multiple claims for relief against the same defendant relating to the same transaction, it can be difficult for courts to determine whether there are multiple "claims for relief" for purposes of Civil Rule 54(B). There is no definition of the term "claim for relief" in the Civil Rules, and courts have struggled to define the term for purposes of Rule 54(B).

{¶15} Ohio's Civil Rules introduce the term "[c]laim[ ] for relief" as a title for Rule 8(A) found under the heading of "[g]eneral rules of pleading." Civil Rule 8(A) provides that a pleading sets forth a "claim for relief" if it contains: "(1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which

the party claims to be entitled." Civ. R. 8(A). A "claim for relief" is a claim that facts exist that show that the party has been legally wronged and is "entitled to relief" in the form of judicial action to vindicate the legal right that has been violated. *Id.* Parties asserting "claims for relief" via complaints, counter-claims, or third-party claims are given broad discretion under Rule 8(A) to organize their allegations in whatever manner they choose, provided the allegations meet the two requirements of the pleading rule.

{¶16} When it comes to pleadings, courts do not always allow the plaintiff's choices to dictate what law applies. For instance, the Ohio Supreme Court has held that courts must consider the true substance of the allegations rather than allowing a plaintiff to take advantage of a longer statute of limitations through creative pleading. *Love v. City of Port Clinton*, 37 Ohio St. 3d 98, 99 (1988) ("[C]ourts must look to the actual nature or subject matter of the case, rather than to the form in which the action is pleaded. The grounds for bringing the action are the determinative factors, the form is immaterial.") (quoting *Hambleton v. R.G. Barry Corp.*, 12 Ohio St. 3d 179, 183 (1984)). Similarly, this Court has held that the manner of pleading does not necessarily dictate the number of claims for purposes of Civil Rule 54(B). "In deciding whether the parties presented at least two distinct claims for relief in Civ.R. 54(B) parlance, courts do not necessarily rely on how a party posits such claims in filing the action." *Grable v. Springfield Twp. Bd. of Zoning Appeals*, 9th Dist. No. 18185, 1997 WL 576386 at *6 (Sept. 10, 1997) (citing *State ex rel. Wright v. Ohio Adult Parole Auth.*, 75 Ohio St. 3d 82, 86 (1996)). "Rather, [courts] analyze the factual circumstances and contentions in each particular case." *Id.*

{¶17} The Ohio Supreme Court has held that, because Rule 54(B) of the Ohio Rules of Civil Procedure is based on Rule 54(b) of the Federal Rules of Civil Procedure, courts seeking to interpret the Ohio rule should look to authorities interpreting the federal rule for guidance. *State*

ex rel. Wright v. Ohio Adult Parole Auth., 75 Ohio St. 3d 82, 86 (1996). There is, however, no generally accepted test for determining whether a party has presented more than one claim for relief for Civil Rule 54(B) purposes. 10 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 2657 (3d ed. 1998). At one extreme, "[i]f claims are factually separate and independent, multiple claims are clearly present." *State ex rel. Wright*, 75 Ohio St. 3d at 86 (citing 10 Federal Practice and Procedure, at § 2657). The Ohio Supreme Court has also held that "[t]wo legal theories that require proof of substantially different facts are considered separate claims for purposes of Civ.R. 54(B)." *Id.* (citing *N.A.A.C.P. v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 292 (7th Cir. 1992)). This Court has determined that, "to constitute the 'same claim,' there must be some significant legal and factual overlap between the issues decided and those retained." *Grable v. Springfield Twp. Bd. of Zoning Appeals*, 9th Dist. No. 18185, 1997 WL 576386 at *6 (Sept. 10, 1997).

RULE 54(B): A TEST FOR MULTIPLE CLAIMS

{¶18} Federal courts and commentators have suggested that "[t]he ultimate determination of multiplicity of claims must rest in every case on whether the underlying factual bases for recovery state a number of different claims which could have been separately enforced." 10 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 2657 (3d ed. 1998) (quoting *Rieser v. Baltimore & Ohio R.R. Co.*, 224 F.2d 198, 199 (2d Cir. 1955), cert. denied, 350 U.S. 1006 (1956)); see also *In re Berman*, 69 Ohio App. 3d 324, 328-29 (1990) (Fourth District Court of Appeals approving the test of separate enforcement of multiple recoveries). Under this test, "[a] single claimant presents multiple claims for relief . . . when the possible recoveries are more than one in number and not mutually exclusive [that is] . . . [if] the facts give rise to more than one legal right . . . ." 10 Federal Practice and Procedure, at

§ 2657 (citing, e.g., *Samaad v. City of Dallas*, 940 F.2d 925, 932 (5th Cir. 1991) (concluding that equal protection and "takings" claims were separate for Civil Rule 54(b) purposes because the two grounds of recovery were not mutually exclusive)). On the other hand, "[if] a claimant presents a number of legal theories, but will be permitted to recover only on one of them, the bases for recovery are mutually exclusive, or simply presented in the alternative, and plaintiff has only a single claim for relief for purposes of Rule 54(b)." *Id.* (citing, e.g., *Gen. Acquisition Inc. v. GenCorp Inc.*, 23 F.3d 1022, 1029 (6th Cir. 1994) (claimant presented single claim because three theories of liability were mutually exclusive and sought to redress common injury)). "Similarly, [if] a plaintiff is suing to vindicate one legal right and alleges several elements of damage, only one claim is presented . . . ." *Id.*; see also *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 n.4 (1976) (where plaintiff alleged employer's policies discriminated against women in violation of Title VII of the Civil Rights Act of 1964 and sought an injunction, damages, and costs, Supreme Court declined to define "claim for relief" in relation to Civil Rule 54(b), but stated that "a complaint asserting only one legal right, even if seeking multiple remedies for the alleged violation of that right, states a single claim for relief.")).

{¶19} In this case, Perez's complaint begins with two paragraphs describing the parties and continues with four additional paragraphs describing the facts. In these introductory sections, Perez alleged that, as a lessee of commercial real estate, he "installed and stored equipment and other personal property . . . at the [p]remises." The facts section also includes allegations that, without notice to Mr. Perez, Mr. Schneider purchased the building, changed the locks, and refused, after a request, to return the personal property and other equipment to Mr. Perez. After the facts section, the complaint contains two additional sections entitled, "Claim for Relief." The first of these sections appears under the heading of "First Claim for Relief

Replevin" while the second is introduced as "Second Claim for Relief Conversion." Each of these sections "adopts, reaffirms, [and] incorporates . . . all of the allegations contained in [all previous paragraphs of the complaint]." The sole plaintiff presented what it saw as two separate "claims for relief" against the sole defendant, but both were aimed at vindicating the same legal right. That is, Perez accused Mr. Schneider of refusing to return its property on demand.

{¶20} Under the test outlined above, Civil Rule 54(B) does not apply in this case because, despite Perez's method of drafting the complaint, the replevin and conversion "claims for relief" are but a single claim for relief for purposes of the rule. See *Grable v. Sprinfield Twp. Bd. of Zoning Appeals*, 9th Dist. No. 18185, 1997 WL 576386 at *6 (Sept. 10, 1997). The complaint places only one legal harm at issue. Perez asserted that it was "entitled to relief" in order to vindicate just one legal right, that is, it was deprived of its property. Civ. R. 8(A). Perez sued to obtain either a return of the property along with incidental damages and costs under Section 2737.14 of the Ohio Revised Code or the fair market value of the property at the time of the conversion. See *Erie R.R. Co. v. Steinberg*, 94 Ohio St. 189, paragraph two of the syllabus (1916). It would not have been possible for Perez to obtain double recovery by separately enforcing a replevin judgment for permanent possession of the property and a conversion judgment for the fair market value of the same property. The two theories of recovery led to the same goal, i.e., vindication of the same legal right, and only one path could be taken to get there.

{¶21} In drafting the complaint, Perez separated his two theories of recovery and captioned them "claims for relief." But, the manner of pleading does not determine how many "claims for relief" have been asserted for purposes of Rule 54(B) of the Ohio Rules of Civil Procedure. *Grable v. Sprinfield Twp. Bd. of Zoning Appeals*, 9th Dist. No. 18185, 1997 WL 576386 at *6 (Sept. 10, 1997) (holding this Court will "analyze the factual circumstances and

contentions in each particular case" rather than relying on the form of the pleadings to determine whether there are multiple claims under Civil Rule 54(B)). In this case, the replevin and conversion allegations create a single claim for relief for purposes of Rule 54(B) because they are two alternative theories for two mutually exclusive recoveries seeking vindication of one legal right.

FINAL, APPEALABLE ORDER

{¶22} Under Section 2505.02 of the Ohio Revised Code, an order is final and "may be reviewed, affirmed, modified, or reversed" if it "affects a substantial right in an action that in effect determines the action and prevents a judgment." R.C. 2505.02(B)(1). The trial court's November 5, 2008, order requiring Mr. Schneider to pay Perez $9333 affected a substantial right and, in effect, determined the action and prevented Mr. Schneider from obtaining a favorable judgment. Therefore, it was final under the statute. Because Civil Rule 54(B) does not apply in a situation involving just one claim for relief, it is not relevant that the trial court did not include a certification in that order under Rule 54(B). The order was final and appealable because it met the requirements of Section 2505.02 of the Ohio Revised Code and Rule 54(B) did not apply. Under Rule 4(A)(2) of the Ohio Rules of Appellate Procedure, because Mr. Schneider filed a timely request for findings of fact and conclusions of law, his time for appeal did not begin to run until the trial court ruled on that motion. Accordingly, his April 24, 2009, notice of appeal was effective to invoke this Court's jurisdiction, and the trial court's actions following that notice of appeal were nullities. *In re S.J.*, 106 Ohio St. 3d 11, 2005-Ohio-3215, at ¶9 (citing R.C. 2505.04). There is, however, one other procedural issue that must be addressed before I would consider the merits of Mr. Schneider's assignments of error.

CIVIL RULE 41(A)(1)

{¶23} The majority has correctly stated that Rule 41(A)(1)(a) of the Ohio Rules of Civil Procedure prohibits a party from orally dismissing its claims unilaterally because Rule 41(A)(1)(a) requires the "filing [of] a notice of dismissal." Even if Perez had complied with the rule in that regard, however, its attempted dismissal was a nullity because Rule 41(A)(1) does not permit a party to voluntarily dismiss anything less than "all" of its claims against any one party. *Pattison v. W.W. Grainger Inc.*, 120 Ohio St. 3d 142, 2008-Ohio-5276, at ¶18 (quoting Civ. R. 41(A)(1)). In this case, Perez attempted to voluntarily dismiss less than all of its claims against Mr. Schneider. Perez attempted to dismiss a theory of recovery before going to trial on its one claim for relief, presenting only an alternative theory of recovery. Thus, Perez attempted to use Rule 41(A)(1) to voluntarily dismiss only a part of its sole claim against Mr. Schneider, which the rule will not permit. The entire effort was unnecessary and accomplished nothing. Having discussed the various procedural difficulties, I would consider the merits of the appeal.

THE MERITS:
FACTUAL BACKGROUND

{¶24} In 2005, Thomas Patrick owned a three-story brick building on Broadway Avenue in Lorain. Josue Perez began renting the building without a written lease, intending to open a bar and grill called Josh's Place. For ten months before he opened the bar, Mr. Perez worked to prepare the space on the first floor of the building. He and his father put significant work into building a large wooden bar with a substantial back bar capable of holding a large quantity of liquor. He also installed a number of coolers, freezers, sinks, refrigerators, and other restaurant equipment and furniture. He had an awning installed outside the front door and a large ventilation hood with a fire suppression system and a stainless steel backsplash installed over the

stove. In May 2006, Josh's Place opened to the public. In August 2007, Mr. Perez installed a new central air conditioning unit on the roof of the building.

{¶25} Mr. Patrick lost the building to a tax foreclosure auction in September 2007. He testified that, in 2006, he told Mr. Perez that he had a tax problem but had avoided foreclosure by entering into a payment plan with the City. Later, when he fell behind on those payments, he did not tell Mr. Perez. Although Mr. Patrick knew the building was scheduled to be sold at a sheriff's sale in early September 2007, he again failed to tell Mr. Perez. Mr. Schneider bought the building at the sheriff's sale on September 5, 2007.

{¶26} Mr. Perez and Mr. Patrick both testified that, prior to the tax sale, Mr. Perez had decided to close the bar for a short time while he remodeled and made some changes to his business style. Mr. Perez testified that he had decided to stop serving food so, after he closed the bar, he began removing the kitchen equipment and attempting to sell it, mostly on Ebay. He testified that he had sold some items and had offers on others when he realized that he was unable to enter the building because the locks had been changed. He testified that he did not realize the ownership of the building had changed until the day he was locked out. When he contacted the new owner about getting inside the building to recover his belongings, Mr. Schneider refused to allow it. Mr. Schneider told Mr. Perez that he had purchased everything in the building when he bought the real estate at the sheriff's sale.

{¶27} At trial, Mr. Schneider testified that he believed Mr. Perez attended the sheriff's sale and even bid against him. He further testified that he changed the locks on October 18, 2007, and the sheriff's deed reflects that the sale was finalized and the deed recorded on November 2, 2007. Mr. Schneider testified that he was never inside the building before he

bought it. He said, however, that he had gone to the building a couple of times before the sale and had not seen anything that made him believe it housed any active businesses.

{¶28} Mr. Perez's company, Perez Bar & Grill LLC, sued Mr. Schneider, alleging conversion and replevin. The parties conducted a bench trial limited to the theory of conversion. The trial court ordered Mr. Schneider to pay Perez $9333 as damages for conversion of the property, ruling that: (1) 39 of the 40 contested items were trade fixtures and not fixtures, (2) none of the items had been abandoned, (3) Mr. Schneider did not acquire an interest in the items by buying the real estate, and (4) equitable estoppel did not apply. I would affirm the trial court's judgment with the limited exception of its conclusion regarding the air conditioner. I would hold it is a fixture rather than a trade fixture. With that exception, I would hold the trial court correctly determined that the contested items are trade fixtures and not fixtures, they were not abandoned, Mr. Schneider acquired no interest in them via the sheriff's sale, Perez proved conversion, and the doctrine of equitable estoppel does not apply.

MR. SCHNEIDER'S INTEREST

{¶29} Mr. Schneider's second assignment of error is that the trial court incorrectly concluded that he had not acquired ownership of the disputed personal property by virtue of the sheriff's sale. He has argued that he purchased the building without realizing a tenant had left business equipment inside and, as an innocent third-party purchaser, Ohio law should protect him from conversion claims. He has argued that his purchase of the real estate in fee simple should have included "any interest in any personal property which remain[ed]" in the building when he bought it. He has not pointed to any authority supporting his position. He has, however, offered policy arguments, urging this Court to create such a rule to protect buyers at auctions. In response, Perez has cited a Third District case for the proposition that "[p]ersonal

property does not pass with the land upon judicial sale of real estate." *Hance v. Reeder*, 3d Dist. No. 1-82-13, 1983 WL 7220 at *1 (Mar. 16, 1983).

{¶30} In this case, Mr. Patrick lost the building to a tax sale and Mr. Schneider purchased it at auction. The contested personal property did not belong to the former building owner, but to his tenant. Although the parties disagree about whether the tenant was aware of the impending tax sale, the trial court held that the tenant had no prior knowledge of the sale. That determination was based on competent, credible evidence from two different witnesses.

{¶31} Mr. Schneider has failed to cite any authority for the proposition that a month-to-month commercial tenant who has failed to record a memorandum of lease should lose business equipment if the building is sold without his prior knowledge. Mr. Schneider has merely argued that "the better rule" would be that a purchaser at a sheriff's sale who is without knowledge of a third-party claim to personal property located on the premises lawfully comes into possession of the chattels and, therefore, cannot be sued for conversion. There is no need to shield such buyers from conversion suits. According to the settled law of conversion, if the defendant lawfully comes into possession of the chattels, such as, for example, through the purchase of a commercial building at a sheriff's sale, the plaintiff must prove two additional elements beyond a normal conversion claim in order to recover for his property. *Ferreri v. Goodyear Local No. 2 United Rubber, Cork, Linoleum & Plastic Workers of Am. Home Ass'n*, 9th Dist. No. 16311, 1994 WL 45740 at *2 (Feb. 9, 1994) (quoting *Ohio Tel. Equip. & Sales Inc. v. Hadler Realty Co.*, 24 Ohio App. 3d 91, 94 (1985)). That is, the plaintiff must prove that he requested return of his property and that the defendant denied his request without justification. *Id.* This additional hurdle provides sufficient protection for buyers in Mr. Schneider's position. I would overrule Mr. Schneider's second assignment of error.

FIXTURES VS. TRADE FIXTURES

{¶32} Mr. Schneider's third and fourth assignments of error are that the trial court incorrectly determined that none of the contested items are fixtures and that all of them are trade fixtures. "A fixture is an article [that] was a chattel, but [that] by being physically annexed or affixed to the realty, became accessory to it and part and parcel of it." *Teaff v. Hewitt*, 1 Ohio St. 511, 527 (1853). Classification as a fixture requires three elements: (1) "[a]ctual annexation to the realty, or something appurtenant thereto;" (2) "[a]ppropriation to the use or purpose of that part of the realty with which it is connected;" and (3) "[t]he intention of the party making annexation, to make the article a permanent accession to the freehold . . . ." *Id.* at 530.

{¶33} Over the years, "flesh [has been] added to the bare bones of the tripartite *Teaff* test." *Masheter v. Boehm*, 37 Ohio St. 2d 68, 73 (1974). "The factor of physical annexation of personal property to the realty has come to be regarded as less determinative of fixture status than was formerly the case at common law." *Id.* In fact, the Ohio Supreme Court has described it as "the least important" of the three *Teaff* factors. *Id.* (quoting *Holland Furnace Co. v. Trumbull Sav. & Loan Co.*, 135 Ohio St. 48, 53 (1939)). "Thus, a chattel may be considered a fixture even though only slightly attached . . . but will not necessarily be considered a fixture because of a high degree of attachment to the realty unless the other criteria are met." *Id.*

{¶34} Thus, the focus of fixture classification has shifted to the second and third prongs of the *Teaff* test. *Masheter v. Boehm*, 37 Ohio St. 2d 68, 73-74 (1974). In evaluating the purpose or use of the item under the second element of the test, courts will consider "the distinction between the business [that] is carried on . . . upon the premises, and the premises [itself]. The former is personal in nature, and articles that are merely accessory to the business, and have been put on the premises for this purpose, and not as accessions to the real estate, retain [their]

personal character . . . . But articles [that] have been annexed to the premises as accessory to it, whatever business may be carried on upon it, and not peculiarly for the benefit of a present business . . . become subservient to the realty . . . ." *Zangerle v. Republic Steel Corp.*, 144 Ohio St. 529, paragraph seven of the syllabus (1945). The Supreme Court has also considered whether removal of the item would adversely affect the utility of the premises and/or necessitate replacement of the item. *Holland Furnace Co. v. Trumbull Sav. & Loan Co.*, 135 Ohio St. 48, 53 (1939). For example, because a furnace is "an integral and necessary part" of any residence in this climate and it would have to be replaced in order for someone to live in the home, the second prong of the *Teaff* test would be satisfied as to a furnace, but not necessarily as to a single-room heating stove. *Id.*

{¶35} If an item fails to meet the second prong of the *Teaff* test because it is peculiar to the business being operated on the premises, it is likely to be deemed a trade fixture. Black's Law Dictionary defines a trade fixture as "[r]emoveable personal property that a tenant attaches to leased land for business purposes," for example, a display counter. Black's Law Dictionary 669 (8th ed. 2004). Trade fixtures are an exception to the general rule regarding fixtures because they may be removed by the tenant during his lease term provided that their removal will not result in great damage to the premises. *Donohoe v. Elliott*, 2d Dist. No. 2804, 1991 WL 233856 at *3 (Nov. 8, 1991).

{¶36} Regarding the third element of the *Teaff* test, the intention of the party affixing the item to the realty is to be "inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made." *Teaff v. Hewitt*, 1 Ohio St. 511, 530 (1853) (emphasis omitted). "[I]t is not necessarily the real intention of the owner of the chattel

which governs. His apparent or legal intention to make it a fixture is sufficient" and that "ought to be apparent, from the situation and surroundings." *Holland Furnace Co. v. Trumbull Sav. & Loan Co.*, 135 Ohio St. 48, 53-54 (1939).

{¶37} Following a site visit, the trial court found that, with the exception of the stainless steel backsplash glued to the wall above the stove, Perez had not "permanently affixed [any contested item] to the premises or 'appropriated' [anything] for use at the premises, and [Perez] did not intend to make any item . . . a permanent accession to the premises." Except for the backsplash, the trial court held that "all of the property affixed to the premises was: (a) for [Perez's] use in the operation of the bar/restaurant at the premises, (b) adapted to [Perez's] business at the premises, and (c) removable with no damage to the premises." The trial court further found that, other than the backsplash, "[e]ach item of the property that is affixed to the premises is done so by nails or screws, and may be removed without causing any damage to the premises." The trial court's decision regarding the backsplash is not at issue in this appeal.

{¶38} Mr. Schneider has admitted that many of the 40 originally contested items "are unquestionably personal property and were never affixed to, or made a part of, the real estate." He has continued to argue, however, that the trial court incorrectly determined that eight of the items are trade fixtures rather than fixtures. The determination of whether an item is a fixture or trade fixture is a mixed question of law and fact. *Kim v. Pyrofax Gas Corp.*, 9th Dist. No. 1619, 1988 WL 14050 at *1 (Feb. 3, 1988). Therefore, this Court must defer to the trial court's factual findings if they are supported by competent, credible evidence. *State v. Burnside*, 100 Ohio St. 3d 152, 2003-Ohio-5372, at ¶8; *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, at ¶24 (quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St. 2d 279, syllabus (1978)); but see *Huntington Nat'l Bank v. Chappell*, 183 Ohio App. 3d 1, 2007-Ohio-4344, at ¶17-75 (Dickinson,

J., concurring in judgment only). The reviewing court "must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Burnside*, 2003-Ohio-5372, at ¶8.

The bar, ventilation hood, and sinks

{¶39} The first contested item is the handmade wooden bar and backbar, which Mr. Perez described as being over 30 feet long. He testified that each section of the bar is merely screwed into the floor and removal would not cause damage to the flooring. Mr. Schneider testified that removal of the bar would cause damage because each section of the bar is "spiked" into the floor. He also testified that the back bar could not be removed without damaging the wall. The trial court disagreed. It held that the bar and back bar could be removed without significant damage to the building and held that Mr. Perez installed them both in furtherance of his business, not as a general improvement to the building.

{¶40} The second contested item is the hood section of the ventilation system over the stove. Mr. Schneider testified that removal of the hood would require removal of bolts that would cause damage to both the wall and the ceiling. Mr. Perez testified that the hood is attached to metal rods that come down from the rafters and pass through the drop ceiling. He said he could remove the hood without causing any damage to the building. He also testified that he installed the hood because it was necessary to operate his business and that he never intended for it to benefit the building apart from the operation of his bar and grill.

{¶41} The third through sixth items involved in this appeal are sinks. They were described at trial as: (1) a three-compartment stainless steel bar sink; (2) a stainless steel bar hand sink; (3) stainless steel kitchen hand sink; and (4) a stainless steel vegetable preparation double sink and table. According to Mr. Perez, both of the bar sinks are free-standing rather than

affixed to the building, but they are connected to the building's water lines. Mr. Perez testified that he had to have the hand sink custom made for the small space behind the bar after he learned that the health department would require it. He testified that the hand sink in the kitchen was attached to the wall and connected to the building's plumbing system. Mr. Schneider testified that all of the sinks were fastened to the building and connected to the building's plumbing system.

{¶42} The bar, ventilation hood, and the sinks all meet the first requirement of the *Teaff* test for a fixture because they are attached to the building by bolts, screws and/or water lines. But, these items fail to meet the second requirement of the test. A bar and its attendant sinks are peculiar to the bar business. The kitchen sinks and ventilation hood are peculiar to the business of food service. None of these items is "an integral and necessary part of the whole premises." *Holland Furnace Co. v. Trumbull Sav. & Loan Co.*, 135 Ohio St. 48, 53 (1939). Over the years, the building had been occupied by various types of business, including a retail store and a photography studio that would have had no use for the bar, the ventilation hood, or the kitchen and bar sinks. Because these items do not fulfill the second element of the *Teaff* test, I agree with the trial court's holding that they are not fixtures. I would affirm the decision of the trial court, holding that the bar, ventilation hood, and bar and kitchen sinks are trade fixtures, because those items were installed by a tenant for purposes peculiar to its business, their removal will cause minimal damage to the building, and none of them is "an integral and necessary part of the whole premises." *Holland Furnace Co. v. Trumbull Sav. & Loan Co.*, 135 Ohio St. 48, 53 (1939).

The awning

{¶43} The seventh contested item is the large awning that says "Josh's Place," located over the front door. Mr. Perez testified that the awning is twenty-four feet by six feet and is screwed into the outside wall above the entrance. He also testified that the lettering is in the form of a sticker that can be easily replaced. Both Mr. Perez and Mr. Patrick testified that removal of the awning would require removal of the concrete screws holding it in place. Mr. Schneider testified that would cause damage to the face of the building.

{¶44} The awning fulfills the first element of the *Teaff* test because it is physically fastened to the face of the building. Although not of a peculiar benefit to the bar and grill business, there was no evidence that removing the awning would impair the utility of the building as a whole. The awning is not an "integral and necessary part of the whole premises." *Holland Furnace Co. v. Trumbull Sav. & Loan Co.*, 135 Ohio St. 48, 53 (1939). Although an awning over the front door may look nice and be of some use in this climate, its removal would not necessitate replacement. The awning fails the second prong of the fixture test.

{¶45} Mr. Perez testified that the awning included signage that reads, "Josh's Place" and that he installed it for the benefit of his business rather than for the benefit of the whole building. Thus, Mr. Perez adapted the awning specifically to the use of his own business and there was evidence supporting the trial court's finding that the awning could be removed with little or no damage to the building. Therefore, I would affirm the decision of the trial court that the awning is a trade fixture and not a fixture. To the extent that Mr. Schneider's third and fourth assignments of error address the awning, I would overrule them.

The air conditioner

{¶46} Mr. Schneider has also contested the removal of the rooftop air conditioning unit, which Mr. Perez had added just before the building was sold at auction. Mr. Patrick testified that, when he leased the building to Perez, there was an air-conditioning system in place, including the necessary ductwork. He also testified that Mr. Perez spoke with him about improving the system. Mr. Patrick testified that he bought a bigger condensing unit and sold it to Mr. Perez. Mr. Perez testified that, sometime during the month before the tax sale, he bought the air-conditioning unit and had it installed. He said the new unit used the existing ductwork and was not even fastened to the rooftop, making its removal a simple task. Mr. Perez testified that he ran the hose through the walls and out to the roof. Mr. Schneider, on the other hand, testified that the unit is fastened to the roof and removal will cause damage.

{¶47} Regardless of whether the air conditioner is fastened to the roof, it is sufficiently attached to the building, via the HVAC system, to fulfill the first element of the *Teaff* test. Strictly speaking, central air conditioning is not necessary for the use of a commercial building in northern Ohio, but it is an integral part of the entire three-story building. See *Holland Furnace Co. v. Trumbull Sav. & Loan Co.*, 135 Ohio St. 48, 53 (1939). Therefore, it meets the second requirement of the *Teaff* test. Thus, the fixture question boils down to Mr. Perez's intention at the time of installation.

{¶48} Mr. Patrick and Mr. Perez testified that Mr. Perez had hoped to buy the building eventually. In fact, they had agreed on a price and had a written land contract, but it had never been executed due to a lack of financing. Mr. Patrick said that, although Mr. Perez generally told him about his plans for additions or alterations to the property, he never placed any limits on Mr. Perez's freedom to alter the building. He also testified that he never had any discussion with

his tenant about any of the contested items becoming a permanent part of the building. Mr. Perez testified that he made the improvements as a tenant in order to improve his bar and grill business, not for the benefit of the building as a whole.

{¶49} The Ohio Supreme Court has written that the intent of the party affixing the item to the realty should be "inferred" from a consideration of various factors, including the nature and purpose of the item, the relation and situation of the party affixing the item, and the structure and mode of annexation. *Teaff v. Hewitt*, 1 Ohio St. 511, 530 (1853). The trial court's decision that Perez did not intend to install the air conditioner permanently was supported by competent, credible evidence in the record. Mr. Perez was a tenant, not the building owner and he said he did not fasten the air conditioner to the rooftop. To the extent that the trial court's finding addressed Mr. Perez's real intention at the time of installation, I would defer to that factual finding. The analysis does not end there, however, because Mr. Perez's apparent or legal intention is also part of the equation. *Holland Furnace Co. v. Trumbull Sav. & Loan Co*., 135 Ohio St. 48, 53-54 (1939).

{¶50} The air conditioner was described as a 200 pound, five-ton capacity rooftop unit, which Mr. Perez connected to the pre-existing HVAC system. The nature and use of the central air conditioning unit tend toward an inference of permanency. That is, as part of the central air conditioning system for the three-story building, it is an integral part of the whole premises and not adapted to benefit only the area of the building occupied by the bar and grill. There was no evidence that the air conditioning unit was adapted for the use of Josh's Place in particular or that it was of peculiar benefit to a bar and grill. Therefore, it is not a trade fixture and it does satisfy the three prongs of the *Teaff* test. Therefore, I would hold that the trial court incorrectly

determined that it was a trade fixture instead of a fixture. To the extent that assignments of error three and four addressed the air conditioner, I would sustain them.

ABANDONMENT

{¶51} Mr. Schneider's fifth assignment of error is that the trial court's decision that none of the contested items was abandoned is against the manifest weight of the evidence. The trial court apparently believed Mr. Perez's testimony regarding his intention to temporarily close the business in order to remodel and open a bar without food service. The trial court found that, "[w]hen [Mr. Schneider] purchased the [building], [Perez's] renovation was underway." It also found that Perez "had solicited offers for the various items . . . and had obtained offers to purchase [them]."

{¶52} Abandoned property has been defined as "property over which the owner has relinquished all right, title, claim, and possession with the intention of not reclaiming it or resuming its ownership, possession or enjoyment." *Doughman v. Long*, 42 Ohio App. 3d 17, 21 (1987). "Abandonment requires affirmative proof of the intent to abandon coupled with acts or omissions implementing the intent. Mere non-use is not sufficient to establish the fact of abandonment, absent other evidence tending to prove the intent to abandon." *Long v. Noah's Lost Ark Inc.*, 158 Ohio App. 3d 206, 2004-Ohio-4155, at ¶35 (quoting *Davis v. Suggs*, 10 Ohio App. 3d 50, 52 (1983)).

{¶53} Mr. Schneider has pointed to testimony from Mr. Patrick indicating that Perez was two to three months behind on its rent at the time of the sheriff's sale and that he thought the bar had been closed for two to three months before the sale. There was evidence that the electricity was turned off shortly after the building was sold and other utilities were turned off within a month of the sale. Mr. Schneider has also argued that the photographs do not show

evidence that remodeling work was underway, supporting his position that Perez had abandoned the property with no plan to remodel or reopen the business.

{¶54} The trial court also heard evidence that Perez had not abandoned the property. Mr. Patrick testified that, while the bar was still operating, Mr. Perez told him that "he was going to close for two or three months to do some remodeling and change some things." Mr. Perez testified that his company had always been current with its rent and utility payments. He said that, once he closed the bar, he "started stripping the kitchen, selling off the pieces . . . [to] gather money to reopen." According to Mr. Perez, he had located Ebay buyers ready to purchase the stove and the ventilation hood, but the deals fell through when Mr. Schneider locked him out of the building. He also testified that he had bought a mechanical bull intended for use in the remodeled bar, but had not had it delivered to the building before the locks were changed. Thus, there was competent, credible evidence supporting the trial court's determination that Perez had not abandoned the property inside the building. I would overrule Mr. Schneider's fifth assignment of error.

EQUITABLE ESTOPPEL

{¶55} Mr. Schneider's sixth assignment of error is that the trial court incorrectly refused to apply the doctrine of equitable estoppel to bar Perez's effort to prove conversion. The affirmative defense of "[e]quitable estoppel prevents relief when one party induces another to believe that certain facts exist and the other party changes his position in reasonable reliance on those facts." *Franklin Twp. v. Meadows*, 130 Ohio App. 3d 704, 711 (1998). Mr. Schneider bore the burden of proving the elements of his affirmative defense. *Id.* He has argued that Mr. Perez knew about the tax sale and should, therefore, be estopped from suing him for conversion

because Mr. Perez failed to do anything to protect his company's interest in the personal property located inside the building.

{¶56} There is no dispute that Mr. Perez did not contact Mr. Schneider until after the locks had been changed. From Mr. Schneider's perspective, if the tenant knew about the sheriff's sale, it seems inequitable to allow him to retain ownership of his operating equipment after a new owner has taken possession of a commercial building. Mr. Schneider's argument is based on a faulty factual assumption. The trial court found that "[Perez] had no knowledge of the sheriff's sale of the premises." There was competent, credible evidence supporting that finding, including testimony to that effect from both Mr. Perez and Mr. Patrick.

{¶57} Furthermore, Mr. Schneider testified that he was never inside the building before he bid on it at the tax sale and he was not aware of the operating equipment located inside it. Thus, he has not claimed that he increased his bid based on a belief that any such equipment was included in the deal. He also testified that he has not attempted to dispose of any of the contested items. Mr. Schneider has not made any effort to point out how he "change[d] his position in reasonable reliance on" Perez's action or inaction. *Franklin Twp. v. Meadows*, 130 Ohio App. 3d 704, 711 (1998). The trial court correctly refused to apply the doctrine of equitable estoppel. I would overrule Mr. Schneider's sixth assignment of error.

CONVERSION

{¶58} Mr. Schneider's first assignment of error is that the trial court incorrectly concluded that Perez had proven each element of conversion. He has argued that the decision is incorrect because he believed he acquired ownership of the items via the sheriff's sale, eight of the items were fixtures and not trade fixtures, the contested items were abandoned by Perez, and

Perez should be equitably estopped from claiming conversion. I have addressed each of those arguments.

{¶59} "[C]onversion is the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights." *State ex rel. Toma v. Corrigan*, 92 Ohio St. 3d 589, 592 (2001) (quoting *Joyce v. Gen. Motors Corp.*, 49 Ohio St. 3d 93, 96 (1990)). The three basic elements of conversion are: "(1) plaintiff's ownership or right to possession of the property at the time of the conversion; (2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) damages." *Keybank Nat'l Assoc. v. Guarnieri & Secrest, P.L.L.*, 7th Dist. No. 07CO46, 2008-Ohio-6362, at ¶15 (quoting *Haul Transport of VA Inc. v. Morgan*, 2d Dist. No. 14859, 1995 WL 328995 at *3 (June 2, 1995)). "It is not necessary that the property be wrongfully obtained." *McCartney v. Universal Elec. Power Corp.*, 9th Dist. No. 21643, 2004-Ohio-959, at ¶14. When property is otherwise lawfully held, "[a] demand and refusal . . . are usually required to prove the conversion . . . ." *Ferreri v. Goodyear Local No. 2 United Rubber, Cork, Linoleum & Plastic Workers of Am. Home Ass'n*, 9th Dist. No. 16311, 1994 WL 45740 at *2 (Feb. 9, 1994) (quoting *Ohio Tel. Equip. & Sales Inc. v. Hadler Realty Co.*, 24 Ohio App. 3d 91, 94 (1985)). The basic measure of damages is the value of the property at the time of conversion. *Erie R.R. Co. v. Steinberg*, 94 Ohio St. 189, paragraph two of the syllabus (1916).

{¶60} The trial court determined that Mr. Schneider converted the property because: (1) Perez owns it and has the right to possession of it, (2) Perez demanded return of the property and Mr. Schneider refused without justification, and (3) Mr. Schneider has exercised dominion and control over the property by refusing to return it. The trial court further determined that only one

of the contested items is a fixture as that term is defined under Ohio law. The parties have not contested the trial court's determination that the stainless steel backsplash is a fixture.

{¶61} Mr. Schneider has not disputed that each of the contested items was present in the building when he changed the locks. Mr. Perez testified that he bought or built each of the 40 items on the list, presented as trial exhibit A, either for use at Josh's Place or for use in a bar he had previously operated. This evidence was uncontroverted. Mr. Schneider admitted that he changed the locks on the building sometime after he purchased it. He also admitted that Mr. Perez later contacted him, asking for access to his equipment, but that he refused to allow Mr. Perez inside the building. Thus, the trial court's decision that Perez proved each of the elements of conversion was supported by competent, credible evidence. I would overrule Mr. Schneider's first assignment of error.

VALUE OF THE DISPUTED PROPERTY

{¶62} Mr. Schneider's seventh assignment of error is that the trial court's decision regarding the value of the disputed property is against the manifest weight of the evidence. Therefore, this Court must apply the civil-manifest-weight-of-the-evidence standard of review. See *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, at ¶24 ("judgments supported by some competent, credible evidence going to all the essential elements will not be reversed as being against the manifest weight of the evidence") (quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St. 2d 279, syllabus (1978)); but see *Huntington Nat'l Bank v. Chappell*, 183 Ohio App. 3d 1, 2007-Ohio-4344, at ¶17-75 (Dickinson, J., concurring in judgment only).

{¶63} The Ohio Supreme Court has held that, "[i]n a suit for conversion, [if] the facts do not authorize the assessment of exemplary damages, the general rule for the measure of damages is the value of the property at the time of the conversion." *Erie R.R. Co. v. Steinberg*, 94 Ohio St.

189, paragraph two of the syllabus (1916); but see *Schaffer v. First Merit Bank, N.A.*, 9th Dist. Nos. 09CA009530, 09CA009531, 2009-Ohio-6146, at ¶29 (explaining that this Court and others have "deviated from [this] bright line rule" in favor of making the plaintiff whole.) This Court has described the general measure of damages as focusing on the market value of the converted items. *Digital & Analog Design Corp. v. N. Supply Co.*, 9th Dist. No. 4213, 1987 WL 25779 at *4 (Nov. 25, 1987), rev'd in part on other grounds, 44 Ohio St. 3d 36 (1989) (citing *Fulks v. Fulks*, 95 Ohio App. 515, 519 (1953). "[F]air market value" is defined as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction . . . ." Black's Law Dictionary 1587 (8th ed. 2004).

{¶64} The parties in this case agree that the trial court should have focused on the fair market value of the converted items, but Mr. Schneider has argued that the trial court failed to do so. He has argued that the trial court relied on the "retail values" of the items, which do not account for the cost of preparing them for resale. Mr. Schneider called Lawrence Treboniak, a former restaurant owner turned used equipment dealer, to testify about the value of the contested equipment. As Mr. Schneider has pointed out, Mr. Treboniak testified that the retail value was the price at which he believed his company could sell each item after it had been retrieved, cleaned, and repaired if necessary. According to Mr. Schneider, the only evidence of fair market value at the time of conversion came from Mr. Treboniak's testimony regarding the price a used equipment dealer would be willing to pay Mr. Perez for each item, which was about 20 percent of the retail value.

{¶65} Mr. Schneider's argument fails because the trial court's judgment was based on competent, credible evidence of fair market value. Mr. Schneider's witness testified in terms of what a used equipment dealer would pay Mr. Perez for each item before taking steps to prepare it

for sale in his warehouse. But, he also testified to the price he would anticipate a restaurant owner paying for each piece of equipment. On the other hand, Mr. Perez testified regarding the price he believed he could obtain for each item on the open market, specifically, on Ebay or other online resale websites. For the most part, Mr. Perez's values were significantly higher than either set of values offered by the used equipment dealer. The trial court did not accept Mr. Perez's suggested values based on Ebay offers. It also did not accept the value a used equipment dealer testified he would be willing to pay for all of the items. With the exception of the air conditioner, the trial court relied on Mr. Treboniak's testimony regarding the retail value of the equipment, that is, the value another restaurant owner would be likely to pay for each item. Mr. Treboniak's opinion regarding the price an end user would pay for the used restaurant and bar equipment was competent, credible evidence of the value of the items at the time of conversion. I would overrule Mr. Schneider's seventh assignment of error.

CONCLUSION

{¶66} I believe this Court has jurisdiction over this appeal because the order appealed is final and appealable under Section 2505.02 of the Ohio Revised Code and Rule 54(B) of the Ohio Rules of Civil Procedure does not apply because the replevin and conversion allegations were merely two theories of recovery supporting a single claim for relief. I would overrule Mr. Schneider's seven assignments of error with the exception of assignments of error three and four to the extent that they address the air conditioner. I would sustain assignments of error three and four to the extent that they address the air conditioner because the trial court incorrectly held it was a trade fixture and not a fixture. With the exception of the air conditioner, the trial court correctly determined that the contested items are trade fixtures and not fixtures, they were not abandoned, Mr. Schneider acquired no interest in them via the sheriff's sale, Perez proved Mr.

Schneider converted the items, and the doctrine of equitable estoppel does not apply. The trial court's determination of the value of the contested items was based on competent, credible evidence. I would affirm the judgment of the Lorain County Common Pleas Court in part, reverse it in part, and remand.

APPEARANCES:

BRENT L. ENGLISH, attorney at law, for appellant.

JEFFREY H. WEIR, II, and JOSHUA E. LAMB, attorneys at law, for appellee.