[Cite as *R&S Distrib., Inc. v. Hartge Smith Nonwovens, L.L.C.*, 2010-Ohio-3992.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

R&S DISTRIBUTION, INC.,	:	APPEAL NO. C-090100 TRIAL NO. A-0302985
Plaintiff-Appellant,	:	*O P I N I O N.*
vs.	:	
HARTGE SMITH NONWOVENS, LLC,	:	
Defendant/Third-Party Plaintiff-Appellee,	:	
	:	
vs.	:	
ROBERT F. ALSFELDER, JR., and STEPHEN P. HAYWARD,	:	
Third-Party Defendants/Appellants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: August 27, 2010

Dinsmore & Shohl LLP, Michael J. Newman and *Mark A. Vander Laan,* for Appellants R&S Distribution, Inc., and Stephen P. Hayward,

Robert F. Alsfelder, Jr., pro se,

The Blessing Law Firm, William H. Blessing, and *David S. Blessing*, for Defendant-Appellee Hartge Smith Nonwovens, LLC.

Note: We have removed this case from the accelerated calendar.

CUNNINGHAM, JUDGE.

{¶1} Plaintiff-appellant R&S Distribution, Inc., ("R&S") and third-party defendants/appellants Stephen P. Hayward, the president of R&S, and Robert F. Alsfelder Jr., R&S's vice-president, appeal from (1) the trial court's entry of summary judgment for defendant-appellee Hartge Smith Nonwovens, LLC, ("HSN") on R&S's claim for unpaid rent, (2) the trial court's judgment, following a five-day bench trial, for HSN on its counterclaim for conversion, and (3) the trial court's denial of the appellants' post-trial motions for a new trial or for judgment notwithstanding the verdict. Both R&S's claim and HSN's counterclaim arose from the protracted refusal of R&S, the operator of a Red Bank Road warehouse, to permit HSN to have access to its football-field-size spunbond manufacturing machine ("the Line") stored in the warehouse.

{¶2} In this appeal, R&S and Hayward[1] challenge three sets of rulings by the trial court, each entered by a separate judge. The first was Judge Mark R. Schweikert's entry of summary judgment for HSN on R&S's unpaid-rent claim. The next was Visiting Judge Thomas Crush's entry of judgment for HSN on its conversion claim, including an award of $1,404,000 in compensatory damages and $25,000 in punitive damages against R&S, Hayward, and Alsfelder. Finally, the appellants' post-trial motions were overruled by Visiting Judge Robert H. Gorman. Because none of the experienced trial judges erred in resolving the factual or legal issues before them, we affirm.

I. Facts

[1]R&S, Hayward, and Alsfelder were represented by the same counsel at trial. Following the entry of the trial court's judgment, current appellate counsel for R&S and Hayward was substituted for the original trial counsel. Current counsel filed the post-trial motions on behalf of all three appellants. And counsel filed a notice of appeal from the trial court's judgment and from the denial of the post-trial motions on behalf of all appellants. Within one month after the denial of the post-trial motions, however, current counsel received permission from the trial court to withdraw from its representation of Alsfelder. Alsfelder, a licensed attorney, has not retained separate counsel. Nor has he filed a separate appellate brief. On November 11, 2009, this court denied Alsfelder's untimely motion to join in the appellate brief filed by R&S and Hayward.

{¶3} The massive, three-story-high Line had been assembled in the Red Bank Road warehouse. Its footprint covered over 24,000 square feet. The Line manufactured polyester spunbond, a nonwoven fabric that was in demand during the period of this litigation. The Line had been owned by Stearns Extruded Textiles, Co., LLC. But Stearns had defaulted on its financial obligations and had surrendered ownership of the Line to CIT Group by court order on October 31, 2001. CIT Group was awarded "the right to enter into the premises where the Collateral is located and repossess the Collateral." On March 20, 2002, HSN purchased the Line from CIT Group for nearly $200,000. HSN, managed by its principals, Perry Hartge and David Smith, received a bill of sale for the purchase.

{¶4} The warehouse where the Line was located was owned by CPA9, a limited partnership. HSN approached CPA9 for a long-term lease of the warehouse space. Due to other, unrelated litigation, CPA9 asked HSN to delay negotiations until mid-May 2002. While still hoping to begin operations at the Red Bank Road warehouse, HSN began discussions with the Mobile, Alabama, Airport Authority about moving the Line to a hangar at an abandoned air base in Mobile.

{¶5} On May 1, 2002, CPA9 hired R&S to conduct operations for the warehouse. The parties entered into a license agreement that granted R&S limited rights in the warehouse. R&S was to pay CPA9 $300,000 per year. In exchange, R&S was permitted to use the property for "public warehousing operations," to enter into sublicensing agreements with users of the warehouse, and to collect the income from those agreements. But the agreement specifically prohibited R&S from obtaining a leasehold interest in the warehouse. As Alsfelder and Hayward later admitted at trial, under the agreement with CPA9, R&S had no authority to lease any part of the warehouse and no right of ownership in any of the tenants' property.

{¶6} HSN began negotiations with R&S. HSN stated that it could not begin operations at the warehouse without a long-term lease. On May 22, 2002, Hayward advised HSN, "The monthly base rent for the space you have requested is $12,380." He offered the possibility of rent reductions when HSN began production. HSN rejected the offer but continued to seek an agreement with R&S.

{¶7} Alsfelder, Hayward, Smith, and Hartge participated in a conference telephone call on June 6, 2002. During that call, Alsfelder declared that R&S had a warehouse lien on the Line and that HSN was not free to have access to the Line until the delinquent rent had been paid. On June 11, 2002, after Alsfelder had permitted Hartge to measure the Line's footprint, Hayward told R&S personnel that HSN was not permitted to remove raw materials, machinery, or tools from the warehouse.

{¶8} On June 18, 2002, HSN's counsel in Atlanta contacted R&S, seeking access to the Line and inquiring whether a long-term lease was forthcoming or whether the machine would need to be moved. He provided R&S with documents showing that HSN owned the Line, including the court order granting CIT Group access and possession and HSN's prior written demand made upon CPA9 for access. Counsel also threatened legal action for conversion if R&S continued to deny HSN's access to the line.

{¶9} HSN had begun to pursue a joint venture with Roberto Baroni to operate the Line in Alabama. Baroni operated an identical spunbond machine in Italy. On June 23, 2002, Hartge and Baroni entered the warehouse to inspect the Line. As Baroni began to work, Alsfelder ordered them to leave the warehouse. At a meeting later that day, Alsfelder again informed HSN that R&S had a warehouse lien on the Line and that HSN would have to satisfy the unpaid rent and agree to restore the space occupied by the Line before the Line could be used or moved.

{¶10} As the likelihood of a long-term lease at the Red Bank Road warehouse diminished, HSN and Baroni reached a preliminary agreement for a joint venture in August 2002. Baroni was to provide technicians to move the machine to Alabama. He was also to provide a $1,370,000 infusion of capital into the venture to be obtained from a private Italian bank. In return he was to receive 75% of the venture's income.

{¶11} HSN had arranged to sell the Line's fabric slitter to a third party. On September 4, 2002, Hartge arrived at the warehouse with a forklift to remove the slitter. Hayward spotted Hartge and alerted Alsfelder. Alsfelder confronted Hartge, told him that he was not to be on the property, and summoned the police, who ultimately denied Hartge access to the warehouse. HSN was unable to complete the $40,000 sale of the slitter.

{¶12} Although it was granted access to the Line on January 7, 2003, HSN sought a possession summons. After the summons had been served by sheriff's deputies, R&S again denied HSN access to the Line in April 2003. On April 17, 2003, R&S filed this action for unpaid rent and storage fees.

{¶13} On May 28, 2003, after HSN had posted $140,000 in performance and cash bonds, Judge Schweikert recognized HSN as the successor-in-interest to CIT Group's rights to the Line and ordered that HSN be granted possession of and removal rights over the Line. HSN then began the 90-day process of disassembling the Line for a move to Mobile.

{¶14} HSN filed a counterclaim and third-party complaint against R&S, Hayward, and Alsfelder for conversion. In August 2004, Judge Schweikert granted summary judgment on R&S's unpaid-rent claim. HSN's conversion claim was tried before Judge Crush in 2006. R&S filed its post-trial motions. Judge Gorman denied the motions. This appeal followed.

{¶15} On July 24, 2009, this court ordered the parties to appear at oral argument on October 26, 2009. On October 21, R&S and Hayward filed a motion in this court for an emergency stay of appellate proceedings and for an order remanding the case to the trial court so that they could file a motion for relief from judgment under Civ.R. 60(B)(3). After holding a hearing on R&S's motion, we overruled the motion and reset the case for oral arguments on the merits of the appeal.

II. Summary Judgment

{¶16} R&S's and Hayward's fifth assignment of error, in which they contend that Judge Schweikert erred in granting summary judgment to HSN on R&S's claim for unpaid rent, is overruled. In April 2003, R&S began this litigation by asserting a claim against HSN for unpaid rent. R&S alleged that it was the "landlord in a Lease Agreement" with HSN, that HSN had entered into an unwritten "Lease Agreement" with R&S, that HSN had defaulted on the lease, and that HSN owed over $100,000 in unpaid rent.

{¶17} HSN moved for summary judgment on R&S's unpaid-rent claim, asserting, in part, that R&S was neither an owner nor a leaseholder of the warehouse and thus that it was not the real party in interest in the litigation. HSN claimed that the failure to join CPA9 as the real party in interest doomed R&S's claim. Judge Schweikert granted summary judgment to HSN. R&S and Hayward now argue that summary judgment was improvidently granted because factual issues remain to be litigated concerning whether they had authority from CPA9 to bring this lawsuit.

{¶18} The function of summary judgment is to determine from the evidentiary materials whether triable factual issues exist, regardless of whether the facts of the case are complex. A court is not precluded from granting summary judgment merely because of

the complexity or length of the factual record.[2] Summary judgment is proper under Civ.R. 56(C) when (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and with the evidence viewed most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.[3] The mere existence of factual disputes between the parties, however, does not necessarily preclude summary judgment. Only disputes over genuine, material factual matters that affect the outcome of the suit will properly preclude summary judgment.[4]

{¶19} R&S and Hayward assert that the affidavit of Thomas Zacharias, the managing director of the warehouse owner, CPA9, confirmed that R&S had commenced this litigation with the knowledge and authority of CPA9. The affidavit had been attached to R&S's motion urging Judge Schweikert to reconsider his oral decision to grant HSN's summary-judgment motion.

{¶20} But reasonable minds could have concluded only that R&S lacked the authority to bring this lawsuit under the powers conferred in its license agreement with CPA9. The express terms of R&S's license agreement denied R&S any leasehold interest in the warehouse. Under section 12(a) of the license agreement, however, R&S was permitted to enter into written sublicense agreements with warehouse occupants. If R&S complied with the requirements of the license agreement with CPA9, it was entitled to retain the income derived from those sublicense agreements. But it was undisputed that

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[2] See *Gross v. Western-Southern Life Ins. Co.* (1993), 85 Ohio App.3d 662, 666-667, 621 N.E.2d 412; see, also, *Southside River-Rail Terminal Inc. v. Crum & Forster Underwriters*, 157 Ohio App.3d 325, 330, 2004-Ohio-2723, 811 N.E.2d 150.
[3] See, also, *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264.
[4] See *Gross v. Western-Southern Life Ins. Co.*, 85 Ohio App.3d at 666-667, 621 N.E.2d 412, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 247-248, 106 S.Ct. 2505.

R&S had not complied. It had not consummated any sublicense agreement with HSN and thus could not have brought suit for breach of a "Lease Agreement."

{¶21} Moreover, section 12(b) of the license agreement with CPA9 required R&S to enter into sublicense agreements with existing warehouse occupants like HSN within 30 days of the effective date of the agreement, or by about June 1, 2002. Without the completion of a timely sublicense agreement, that section provided R&S's sole means, acting jointly with CPA9, to eject an occupant or to collect money due to it. It was also undisputed, as both Alsfelder and Hayward had admitted in their deposition testimony, that R&S had not complied with these terms of the license agreement when bringing this lawsuit. Thus there was no genuine issue of material fact that remained to be litigated, and HSN was entitled to judgment as a matter of law on R&S's unpaid-rent claim.

III. The Trial Court's Conversion Rulings

{¶22} R&S and Hayward next assert that Judge Crush, while presiding over the bench trial, erred in ruling that R&S's conversion of the Line began in September 2002 and continued until June 2003. R&S and Hayward challenge the factual basis of Judge Crush's finding of the date when their conversion of the Line began. They also argue that there could have been no conversion because HSN, the property owner, had not reasonably demanded removal of the Line. In addition, they assert that there had been no actionable conversion of the Line because R&S, as the holder of the property, had made a "qualified refusal" of access and because HSN, the owner of the machine, had delayed seeking possession.

{¶23} Conversion 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."[5] If the defendant in a conversion action had come into possession of the property lawfully, the plaintiff "must prove two additional elements to establish conversion: (1) that it demanded the return of the property after the defendant exercised dominion or control over the property; and (2) that the defendant refused to deliver the property to the plaintiff."[6] These two additional elements are not required where a wrongful possessor has unlawfully acquired dominion over the property. But even if the original taking was lawful, "should an act of dominion or control inconsistent with the plaintiff's ownership occur, a demand and refusal are not necessarily required."[7]

{¶24} We note that both Judge Crush and Judge Gorman found that R&S's conversion of the line had begun not in September 2002, but three months earlier, in June, when R&S had informed HSN that it would not be allowed possession of the line until it had paid rent and storage fees. The conversion continued until June 2003, when, armed with a court order granting unimpeded access, HSN was able to begin disassembling the Line.

{¶25} R&S and Hayward first argue that there was no evidence that HSN had made a proper demand for the Line in September 2002. They note that HSN had not decided to remove the Line to Alabama until after that date. But the requirement that HSN have made a demand for return of the Line was applicable only "if the original taking was rightful and no act of dominion or control inconsistent with plaintiff's ownership had

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[5] *Joyce v. General Motors Corp.* (1990), 49 Ohio St.3d 93, 96, 551 N.E.2d 172, citing *Zacchini v. Scripps-Howard Broadcasting Co.* (1976), 47 Ohio St.2d 224, 226, 351 N.E.2d 454; see also, *State ex rel. Toma v. Corrigan*, 92 Ohio St.3d 589, 592, 2001-Ohio-1289, 752 N.E.2d 281; *Taylor v. First Natl. Bank of Cincinnati* (1986), 31 Ohio App.3d 49, 52, 508 N.E.2d 1006.

[6] *State Farm Mut. Auto. Ins. Co. v. Advanced Impounding & Recovery Servs.*, 165 Ohio App.3d 718, 2006-Ohio-760, 848 N.E.2d 534, ¶9.

[7] *Saydell v. Geppetto's Pizza & Ribs Franchise Sys.* (1994), 100 Ohio App.3d 111, 125, 652 N.E.2d 218, citing *Ohio Tel. Equipment & Sales, Inc. v. Hadler Realty Co.* (1985), 24 Ohio App.3d 91, 94, 493 N.E.2d 289.

taken place * * *."[8] Here, under the terms of the license agreement with CPA9, R&S had only limited authority to enter into sublicense agreements with third parties like HSN. But R&S did not follow the means identified in its agreement with CPA9 to properly exercise that limited authority. R&S never executed a sublicense agreement with HSN.

{¶26} Moreover, its foiled attempts to remove the Line from the warehouse were not the only means by which HSN had demonstrated R&S's wrongful exercise of dominion. HSN's first demand for access was made to the warehouse owner, CPA9. As early as June 18, 2002, in the letter from its Atlanta counsel to R&S, HSN had asserted its right to enter the warehouse and to take possession of the Line. This demand was renewed by HSN's counsel on July 24, 2002. And HSN's attempts to physically enter the warehouse were rebuffed by R&S personnel and by police officers summoned by R&S. R&S's actions were clearly inconsistent with any assertion that HSN had failed to demand possession of the line.

{¶27} Next, R&S and Hayward assert that they possessed a qualified right to deny HSN access to the Line because they could not confirm that HSN was its rightful owner. But the trial testimony of both Hayward and Alsfelder revealed that by May 1, 2002, and June 18, 2002, respectively, each knew that HSN had purchased the line from CIT Group.

{¶28} Finally, R&S argues that its conversion of the Line was cured when HSN "dawdled for seven months" after being ejected from the warehouse by police in September 2002. They assert that HSN waited until March 2003 to obtain a writ of possession. This argument is disingenuous at best. In April 2003, even after HSN had

[8] *Ohio Tel. Equipment & Sales, Inc. v. Hadler Realty Co.*, 24 Ohio App.3d at 94, 493 N.E.2d 289; see, also, *Bush v. Signals Power & Grounding Specialists, Inc.*, 5th Dist. No. 08 CA 88, 2009-Ohio-5095, ¶16.

obtained the writ, R&S again demonstrated its disregard for HSN's legal rights of access and possession by yet again summoning police to deny HSN access to the Line.

{¶29} Thus, there is competent, credible evidence in the record to support HSN's claim for conversion. R&S, without having lawfully obtained dominion over the Line, excluded HSN from access to and possession of the Line. An appellate court will not reverse a judgment of the trial court if it is supported by some competent, credible evidence going to all the essential elements of the case or defense.[9] Even where "the evidence is confusing and * * * subject to more than one interpretation, we are guided by the principle that whether the case is 'civil or criminal, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.' "[10] The rationale for this deference is that "the trier of fact is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and to use these observations in weighing the credibility of the proffered testimony."[11] Therefore, the first assignment of error is overruled.

{¶30} R&S's and Hayward's next assignment of error, in which they argue that the trial court erred in finding Hayward personally liable for the conversion of the spunbond machinery, must also fail. As they correctly note, a finding of conversion against a corporate officer requires active and substantial interference by that individual.[12] R&S and Hayward argue that "HSN's conflicts were directly handled by Alsfelder, an attorney and officer" of R&S. The trial court, they insist, confused the acts of Alsfelder and Hayward and ultimately ascribed many of Alsfelder's actions to Hayward.

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[9] See *Myers v. Garson* (1993), 66 Ohio St.3d 610, 614 N.E.2d 742; *C.E. Morris Co. v. Foley Constr. Co.*
[10] *Fifth Third Bank v. Cooker Restaurant Corp.* (2000), 137 Ohio App.3d 329, 334-335, 738 N.E.2d 817, quoting *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.
[11] *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.
[12] See Appellants Brief at 11; see, e.g., *Cincinnati Bible Seminary v. Griffiths* (Oct. 10, 1984), 1st Dist. No. C-830867.

{¶31} At trial, Hayward denied having ever told Hartge or Smith that they could not have access to the Line, and Hayward indicated that he had only learned of Alsfelder's intransigent acts after the fact. But this denial is contradicted by the record, which reflects a pattern of Hayward's direct involvement in denying HSN access to the Line. Hayward, R&S's president, was a party to the June 6, 2002, conference call in which Alsfelder informed Hartge and Smith that R&S had a warehouse lien on the Line. He admitted receiving communications from HSN's Atlanta counsel declaring HSN's right to have access to the Line and its intention to pursue legal remedies if denied access. R&S's office manager testified that Hayward had told her to prevent HSN's access to the Line. The guards had written instructions to call Alsfelder or Hayward if Hartge attempted to enter the warehouse. At trial, Alsfelder confirmed Hayward's instructions to the office manager. Smith, Hartge, and Baroni also testified about Hayward's active participation in the efforts to deny HSN's access to its property.

{¶32} There was thus ample competent, credible evidence from which Judge Crush could have concluded that Hayward, as a corporate officer, had actively and substantially interfered with HSN's rightful possession of the Line. The second assignment of error is overruled.

IV. Post-Trial Motions on Damages

{¶33} R&S and Hayward next argue that the trial court erred in denying their motions for judgment notwithstanding the verdict (JNOV) or for a new trial on the amount of damages awarded for conversion. R&S's post-trial motions were argued to Visiting Judge Gorman. He conducted a detailed review of the parties' arguments and the trial record. On January 12, 2009, he issued an extensively documented 22-page written decision overruling the motions.

{¶34} R&S now challenges the factual basis of Judge Gorman's rulings on whether R&S's denial of access to the Line had proximately caused Baroni's failure to pay $1.37 million to the joint venture and a ten-month delay in operating the Line. R&S also challenges Judge Gorman's legal conclusion that, in an action for conversion, the trial court had the authority to award additional damages beyond the market value of the Line.

{¶35} R&S argues that under Civ.R. 59(A)(5) it was entitled to a new trial due to an error in the amount of the recovery. Whether to grant or deny a motion for a new trial sought under Civ.R. 59(A)(5) rests with the sound discretion of the trial court, and its judgment will not be disturbed absent an abuse of that discretion.[13] An abuse of discretion is shown when a decision is unreasonable, arbitrary, or unconscionable; that is, when there is no sound reasoning process that would support the decision.[14] In applying this standard, a reviewing court "is not free to substitute its judgment for that of the trial judge,"[15] particularly where the trial court has "resol[ved] issues that are exclusively factual."[16] But where the trial court's ruling is made upon a question of law, we may reverse the ruling upon a showing that it was erroneous as a matter of law.[17]

{¶36} First, we hold that the trial court did not err in ruling that, as a matter of law, HSN was entitled to additional damages. "In a suit for conversion, where 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."[18] But our supreme

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[13] See *McNeese v. Kerry Ford, Inc.* (Jan. 31, 1985), 1st Dist. No. C-840192; see, also, *Rhode v. Farmer* (1970), 23 Ohio St.2d 82, 262 N.E.2d 685; *Yungwirth v. McAvoy* (1972), 32 Ohio St.2d 285, 286, 291 N.E.2d 739.
[14] See *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144; see, also, *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597.
[15] *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.
[16] *Champ v. Wal-Mart Stores, Inc.* (Mar. 22, 2002), 1st Dist. No. C-010283, citing *Kelly v. Clark* (Sept. 3, 1993), 1st Dist. No. C-920440.
[17] See *Rohde v. Farmer*, paragraph two of the syllabus; see, also, *Zerbe v. Zerbe*, 1st Dist. Nos. C-040035 and C-040036, 2005-Ohio-1180, ¶16.
[18] *Erie RR. Co. v. Steinberg* (1916), 94 Ohio St. 189, 113 N.E. 814, paragraph two of the syllabus.

court has recognized that "[i]n Ohio, as elsewhere, it is a rule of universal application in a tort action, that the measure of damages is that which will compensate and make the plaintiff whole."[19] The Ninth Appellate District has held that "[t]here is no inflexible rule as to the measure of damages for a wrongful conversion," and that "[a] plaintiff may recover lost profits for conversion where lost profits may be naturally expected to flow from the conversion and they are reasonably ascertainable."[20] A plaintiff may also be entitled to other compensatory damages beyond the market value of the property, such as "compensation for time lost as a proximate result of the conversion, or for time and money spent in pursuit of the property converted"[21] and for "additional loss suffered due to deprivation of [its] property or compensation for the loss of use of property."[22] As Judge Gorman noted, "the damages sustained by loss of capital investment or income caused by conversion more accurately reflect the damages" incurred in this case. Thus HSN was entitled to plead and to be awarded the damages that were properly supported by the evidence adduced at trial.

{¶37} R&S and Hayward also argue, under Civ.R. 59(A)(5), that the trial court erred in finding that their denial of HSN's access to the Line had caused Baroni's inability to pay $1.37 million to the joint venture and a ten-month delay in operating the Line. In this case, the trial court's decision to deny the motions was consistent with a sound exercise of its discretion.

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[19] *Pryor v. Webber* (1970), 23 Ohio St.2d 104, 107, 263 N.E.2d 235; see, also, *McCaughey v. Shelton* (Jan. 14, 2008), S.D.Ohio Nos. 1:02-cv-732 and 1:02-cv-767.

[20] *Digital & Analog Design Corp. v. N. Supply Co.* (Nov. 25, 1987), 9th Dist. No. 4213, reversed in part on other grounds (1989), 44 Ohio St.3d 36, 540 N.E.2d 1358, quoting *Fulks v. Fulks* (1953), 95 Ohio App. 515, 519, 121 N.E.2d 180; see, also, *Schaffer v. First Merit Bank, N.A.*, 186 Ohio App.3d 173, 2009-Ohio-6146, ___ N.E.2d ___.

[21] See *Fulks v. Fulks*, 95 Ohio App. at 519, 121 N.E.2d 180; see, also, *Schaffer v. First Merit Bank, N.A.*, at ¶29.

[22] *In re Neumann* (N.D.Ohio 1995), 192 B.R. 502, 506.

{¶38} HSN presented considerable evidence at trial that, as a result of R&S's conversion of the Line, HSN had suffered two major losses, in addition to the lost slitter sale and its attorney fees. Judge Gorman's decision was supported by Smith's and Baroni's testimony about the $1.37 million loss of financing. The second major loss of $1,321,458, which represented ten months' lost income occasioned by R&S's intransigence in denying HSN's access, was also well documented in Smith's testimony. Both major losses were identified in Judge Crush's findings of fact and conclusions of law.

{¶39} First, without the ten-month delay from September 2002 until June 2003, when HSN obtained a writ of possession, the removal and reassembly of the Line could have been completed before the expiration of Baroni's financing deadline. Baroni reached an initial agreement on the joint venture with HSN in August 2002. And HSN prepared to move the Line in early September 2002. To obtain the $1.37 million capital infusion for the venture, Baroni had arranged financing through an Italian bank. But with access to the Line denied, the bank's financing deadline came and went.

{¶40} While Baroni's testimony was unclear in places, he was carefully cross-examined by R&S. Smith also buttressed Baroni's testimony. In resolving the essentially factual issues surrounding Baroni's testimony and the loss of financing, Judge Gorman's decision that "because the [Line] was not operational, the bank's financing deadline * * * expired" was supported by a sound reasoning process. This appellate court "is not free to substitute its judgment for that of the trial judge."[23] Moreover, Smith's testimony about the income lost due to R&S's denial of access supported Judge Gorman's conclusion that R&S and Hayward were not entitled to a new trial on the issue of damages.

[23] *Berk v. Matthews*, 53 Ohio St.3d at 169, 559 N.E.2d 1301.

{¶41} Although R&S has not separately explained how Judge Gorman improperly denied the JNOV motion,[24] we nonetheless conclude after viewing the evidence in a light most favorable to HSN—the nonmoving party—that there was substantial evidence to support HSN's side of the case, upon which reasonable minds could have differed.[25] The trial court did not err in overruling the post-trial motions with respect to the conversion damages. The third assignment of error is overruled.

V. Punitive Damages

{¶42} R&S and Hayward's challenge to Judge Crush's award of punitive damages, as well as to the failure to overturn that award in the resolution of the post-trial motions, is also without merit. They argue that Alsfelder and Hayward's mistaken belief that they had a valid warehouse lien on the Line, rather than any ill will towards HSN, had led them to deny HSN access.[26] But Judge Crush, the trier of fact at trial, had found their conduct to have been "persistent, willful, and malicious" and assessed $25,000 in punitive damages—about 1.8% of the compensatory-damage award.

{¶43} Punitive damages may be allowed in a conversion action "when the conversion involves elements of fraud, malice, or insult."[27] After a thorough review of the record, we hold that there was clear and convincing evidence adduced at trial to support an inference of actual malice.[28] As Judge Gorman agreed in his denial of the post-trial

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[24] See, e.g., *Loukinas v. Roto-Rooter Servs. Co.*, 167 Ohio App.3d 559, 2006-Ohio-3172, 855 N.E.2d 1272, ¶9 (to receive consideration on appeal, trial-court errors must be argued in the appellate brief).
[25] See *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶3-4; see, also, *Blair v. McDonagh*, 177 Ohio App.3d 262, 2008-Ohio-3698, 894 N.E.2d 377, ¶44.
[26] See, e.g., *Railroad Co. v. O'Donnell* (1892), 49 Ohio St. 489, 501-502, 32 N.E. 476. (mistake is not a defense to conversion, but "it may be shown to prevent the recovery of exemplary damages").
[27] *Parrish v. Machlan* (1997), 131 Ohio App.3d 291, 296-297, 722 N.E.2d 529, citing *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, 543 N.E.2d 464, overruled on other grounds in *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 635 N.E.2d 331; see, also, R.C. 2315.21; *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, 912 N.E.2d 595, ¶12; *Pruitt v. LGR Trucking, Inc.*, 148 Ohio App.3d 481, 487, 2002-Ohio-722, 774 N.E.2d 273; *Strasel v. Seven Hills Ob-Gyn Assoc., Inc.*, 170 Ohio App.3d 98, 2007-Ohio-171, 866 N.E.2d 48, ¶39.
[28] See R.C. 2315.21(D)(4).

motions with respect to punitive damages, Alsfelder and Hayward each exhibited "ill will and [a] conscious disregard of HSN's right to possession" of the Line. During 2002 and 2003, they had repeatedly asserted their entitlement to rent payments and to a warehouse lien on the Line in disregard of substantial evidence that HSN was entitled to possession of the Line. The fourth assignment of error is overruled.

{¶44} Therefore, the trial court's judgment is affirmed.

Judgment affirmed.

HENDON, P.J., and **SUNDERMANN, J.,** concur.

Please Note:

The court has recorded its own entry on the date of the release of this opinion.