IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DR. MICHAEL CARTER,
Appellant,
vs.
NEVADA SYSTEM OF HIGHER EDUCATION, A NEVADA STATE ENTITY,
Respondent.

No. 77574-COA

FILED

APR 23 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Dr. Michael Carter appeals from a district court order granting summary judgment in favor of Nevada System of Higher Education. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

Beginning in August 2006, Michael Carter was a graduate student at the University of Nevada, Reno studying cellular and molecular pharmacology and physiology.[1] Between August 2006 and December 2013, Carter was continuously employed by respondent Nevada System of Higher Education (NSHE) as a graduate assistant in the laboratory of a UNR professor, Dr. Josh Baker. No later than July 2012, while employed as a graduate assistant, Carter developed software that was used to analyze the movement of microscopic organisms in a cell.

From October 10, 2014, through March 3, 2015, Carter was employed by NSHE pursuant to two Letter of Appointment contracts (LOAs), which provided that Carter was to be paid $24 per hour for up to 19 hours of work per week. Carter regularly submitted time sheets and he was always paid for the hours he claimed he worked. Nevertheless, he was instructed to

[1]We do not recount the facts except as necessary to our disposition

not work more than 19 hours per week. During this time, Carter used the software he developed along with research to develop a proposed paper entitled, "Characterizing Multiple Dynamic States in Single Molecule Trajectories Using a Non-Averaged Displacement Analysis." The article listed Carter as the First Author and Dr. Baker as the Last Author.

From approximately 2013 through 2015, Carter worked with Dr. Baker and Dr. Joseph Muretta on a paper entitled "Cytoplasmic Macro-Structure Slows Microtubule Dependent Vesicle Motility in Live Cells." Dr. Muretta was listed as First Author, Carter was listed as Second Author, and Dr. Baker was listed as the Last Author. Around February 2015, Carter discovered that Dr. Baker had permitted Dr. Muretta to use information from Carter's first paper without his permission or knowledge. Neither paper has been published.

In May 2017, Carter filed a complaint suing NSHE for breach of contract, breach of the implied covenant of good faith and fair dealing, conversion, and unjust enrichment, and filed an amended complaint in August 2018 asserting the same claims. In October 2018, the district court granted summary judgment in favor of NSHE on all of Carter's claims. Carter appeals from this order.

On appeal, Carter argues that the district court erred in granting summary judgment in favor of NSHE regarding his claims of breach of contract, breach of the implied covenant of good faith and fair dealing, and conversion.[2] Additionally, Carter argues that he pleaded sufficient facts to

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[2]On appeal, Carter does not address the unjust enrichment claim he raised in the district court; therefore it is deemed waived. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that "[i]ssues not raised in an appellant's opening brief are deemed waived").

put the district court and NSHE on notice that he was also pursuing a copyright infringement claim, and therefore, he should be able to seek federal statutory damages for copyright infringement.

A district court's decision to grant summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence demonstrate that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law. *Id.* All evidence must be viewed in a light most favorable to the nonmoving party. *Id.*

The district court did not err when it granted summary judgment in favor of NSHE regarding the conversion claim

Carter argues the district court incorrectly granted summary judgment as to his conversion claim because the court improperly applied Nevada caselaw and that there is an evidentiary basis for his damages. NSHE argues that Carter has not met his burden to demonstrate both the right to recover damages, nor the amount of damages. We agree with NSHE.

"Conversion is 'a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such title or rights.'" *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000) (quoting *Wantz v. Redfield*, 74 Nev. 196, 198, 326 P.2d 413, 414 (1958)). "[C]onversion is an act of general intent, which does not require wrongful intent and is not excused by care, good faith, or lack of knowledge." *Id.* Whether conversion has occurred is generally a question for the jury. *Id.* The Nevada Supreme Court has held that personal property need not be tangible in order to give rise to a conversion claim. *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 911, 193 P.3d 536, 543 (2008).

Nevada caselaw does not include the measure of damages as part of the definition of conversion. *Bader v. Cerri*, 96 Nev. 352, 356, 609 P.2d 314, 317 (1980), *overruled on other grounds by Evans*, 116 Nev. at 608, 5 P.3d at 1050. However, a claim for conversion cannot be based on damages that are de minimus. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 328-30, 130 P.3d 1280, 1287-88 (2006).

In Nevada, the burden is on the plaintiff to demonstrate both the right to recover and the amount of damages. *Clark Cty. Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 397, 168 P.3d 87, 97 (2007). "Although the amount of damages need not be proven with mathematical certainty, testimony on the amount may not be speculative." *Id.* Further, the plaintiff "must provide to the court an evidentiary basis upon which it may properly determine the amount" of his damages. *Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co.*, 105 Nev. 855, 857, 784 P.2d 954, 955 (1989).

Carter provides this court with no evidentiary basis supporting his claim for conversion damages. Instead, he only argues general principles of law that a jury should decide the amount of damages. Therefore, he has not cogently argued a basis for reversal. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38 (stating that arguments not cogently argued or supported with relevant authority need not be considered).

Nevertheless, we have reviewed the record and determined that the district court properly found that "there is no way to identify or determine the damages [Carter] is alleged to have incurred." Specifically, in his Answer to Interrogatory No. 3, Carter fails to offer a method to calculate any alleged loss, fails to offer any industry information regarding the elements or nature of the alleged loss, and does not tie the alleged loss into the act of alleged

conversion.[3] Without an evidentiary basis for damages, Carter failed to meet his burden, and the district court did not err in finding that Carter failed to meet his burden to demonstrate damages that would support his conversion claim against NSHE.

Carter attempts to remedy this deficiency by asserting that he is entitled to seek damages under copyright statutes because he received a United States copyright for his software analysis program. Specifically, he asserts that he may elect to receive statutory damages under 17 U.S.C. § 504 (2010). However, he fails to cite any authority that such damages are available in a state court for a claim of conversion. Therefore, we need not consider this argument. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

The district court determined that because he had not pleaded a copyright infringement claim in his complaint, Carter could not use the statutory damages in 17 U.S.C. § 504 as a basis for damages for his conversion claim. Carter argues that while neither his complaint nor his amended complaint pleaded a specific claim for federal copyright infringement under 17 U.S.C. § 504, the complaint did allege that Carter's

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[3]The interrogatory stated: "Please identify with specificity all damages, including how you calculated those damages that you allege you suffered from the alleged wrongful appropriation, use and/or conversion of the data, content and information identified in response to Interrogatory 1."

Carter answered: "Pay for the additional time I spend [sic] attempting adding [sic] the disputed data to my dissertation." "Pay for the time my graduation was delayed so I could modifying [sic] my dissertation chapters so that they could be 'rapidly published.'" "Pay for the 1 year I was looking for an academic post doc position." "The fact that after more than a year of looking for work following my graduation not able to find a position demonstrating that I was locked out of my chosen field."

intellectual property was wrongfully misappropriated and interfered with by the agents of NSHE, and these allegations put NSHE on fair notice of the potential of a copyright violation claim. Carter further argues that although he did not specifically move to amend his original or amended complaints to allege an alternative cause of action for copyright infringement, the district court should have—sua sponte—looked to NRCP 15(b), which states that a court should allow the liberal amendment of pleading, even during trial, if allowing the amendment would aid in consideration of the merits of the claim.

NSHE argues that Carter's claim of copyright infringement should not be considered because Carter did not assert this claim in any of his complaints. Specifically, the amended complaint filed by Carter does not allege ownership of a copyright, cite to 17 U.S.C. § 504, or make any reference to infringement of a copyright or statutory damages, or even include the word "copyright." We agree that Carter did not properly plead such a claim as there is no reference to a copyright, he stated insufficient facts to provide notice, and he did not move to amend when he easily could have. But even if he had made such a motion, it would have been futile because a claim for copyright infringement is not permissible in state court.

The text of 28 U.S.C. § 1338(a) states: "The [federal] district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to . . . copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating [to] . . . copyrights." Caselaw supports this conclusion too: "The federal courts have exclusive jurisdiction over actions that arise under the federal copyright laws." *Topolos v. Caldewey*, 698 F.2d 991, 993 (9th Cir. 1983) (citing 28 U.S.C. § 1338(a)). Therefore, because Carter did not plead a

claim for copyright infringement, and the federal statutes prohibit raising such a claim in state court, he may not use alleged statutory copyright infringement damages to support his conversion claim.[4] *See also EMSA Ltd. P'ship v. Lincoln*, 691 So. 2d 547, 550 (Fla. Dist. Ct. App. 1997) ("A case arises under copyright law if a well-pleaded complaint establishes either that copyright law creates the cause of action *or that the plaintiff's right to relief* necessarily depends on resolution of a substantial question of copyright law, in that copyright law is a necessary element of one of the well-pleaded claims." (emphasis added) (internal quotation omitted)).

Therefore, because Carter has not provided an evidentiary basis for damages for the alleged acts of conversion, and he may not use federal statutory copyright infringement damages to support his conversion claim, the district court did not err in granting summary judgment in NSHE's favor on Carter's conversion claim.

The district court did not err when it granted summary judgment in favor of NSHE regarding the breach of contract claim

Next, Carter argues that NSHE failed to properly compensate him during his employment, and NSHE thus breached the contract between the parties. Specifically, Carter claims that he worked a total of 647 hours for NSHE, but was only paid for 443.5 hours, leaving a difference of 203.5

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[4]Federal copyright law preempts "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright" and "no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." 17 U.S.C. § 301(a); *see also United States ex rel. Berge v. Bd. of Trs. of the Univ. of Alabama*, 104 F.3d 1453, 1463 (4th Cir. 1997) ("However, § 301(a) will preempt a conversion claim where the plaintiff alleges only the unlawful retention of its intellectual property rights and not the unlawful retention of the tangible object embodying its work." (internal quotation omitted)).

hours for which he was unpaid. NSHE argues that it fulfilled its obligations under the contract. We agree with NSHE.

Under Nevada law, "the plaintiff in a breach of contract action [must] show (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach." *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006) (citing *Richardson v. Jones*, 1 Nev. 405, 409 (1865)). When a contract is clear on its face, the court must construe the contract from the written language and enforce it accordingly. *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005). If no ambiguity exists, the words of the contract must be taken in their usual and ordinary meaning. *Parsons Drilling Inc. v. Polar Res. Co.*, 98 Nev. 374, 376, 649 P.2d 1360, 1362 (1982). When the facts are not in dispute, the interpretation of a contract is a question of law. *Shelton v. Shelton*, 119 Nev. 492, 497, 78 P.3d 507, 510 (2003). "[A]n interpretation which makes the contract or agreement fair and reasonable will be preferred to one which leads to harsh or unreasonable results." *Sterling v. Goodman*, 102 Nev. 218, 220, 719 P.2d 1262, 1263 (1986) (quoting *Mohr Park Manor, Inc. v. Mohr*, 83 Nev. 107, 112, 424 P.2d 101, 105 (1967)).

In this case, the terms of Carter's employment with NSHE were dictated by two LOAs. The LOAs covered the period from October 10, 2014, through March 3, 2015. The LOAs stipulated that Carter was to be paid $24 per hour for 19 hours of work per week. The LOAs clearly state that Carter's work hours were capped at 19 hours per week. The record shows, and Carter agrees, that Carter was paid in full for the hours that he submitted under the LOAs while he was employed, including, in some instances, compensation for additional hours. Nevertheless, Carter contends that he

should be paid for even more hours, which he did not submit to NSHE using the established procedures while he was under contract.

The district court properly determined that the LOAs capped Carter's hours at 19 hours per week between the dates of October 10, 2014, through March 3, 2015, and that NSHE complied with the terms of the LOAs and paid Carter accordingly. Carter was aware that his hours were capped at 19 hours per week because it was in the contracts and he was instructed by NSHE not to exceed those hours. Further, Carter provides no evidence or authority that demonstrates that he is entitled to payment for the additional hours that he is alleging he worked but did not report or claim. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38 (stating that arguments not cogently argued or supported with relevant authority need not be considered).

The district court concluded that Carter failed to demonstrate a genuine dispute of material fact under the terms of the contracts. We agree that the record does not support his claim for breach of contract on these grounds, and we note he has abandoned his claim for unjust enrichment. The language in the LOAs was clear and free from ambiguity, and the district court did not err when it granted summary judgment in favor of NSHE with respect to the breach of contract claim.

The district court did not err when it granted summary judgment in favor of NSHE regarding the breach of the good faith and fair dealing covenant claim

Next, Carter argues that the district court erred in finding insufficient support for his breach of the good faith and fair dealing covenant claim. NSHE argues that it did not breach the covenant of good faith and fair dealing because it fulfilled the requirements of the contracts between the parties. We agree with NSHE.

In Nevada, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *A.C. Shaw Constr., Inc. v. Washoe Cty.*, 105 Nev. 913, 914, 784 P.2d 9, 9 (1989) (quoting Restatement (Second) of Contracts § 205). "When one party performs a contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied, damages may be awarded against the party who does not act in good faith." *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 234, 808 P.2d 919, 923 (1991). "Liability for bad faith is strictly tied to the implied-in-law covenant of good faith and fair dealing arising out of an underlying contractual relationship." *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 511, 780 P.2d 193, 197 (1989).

Here, the district court properly found that there was no genuine issue of material fact as to Carter's claim for breach of the covenant of good faith and fair dealing. First, the district court noted that there were valid employment agreements between Carter and NSHE that set forth the terms of Carter's employment, such as the number of hours to be worked (up to 19 hours per week) and the rate of pay ($24 per hour). As previously discussed, Carter was paid according to the hours he submitted under the agreements, and based upon the hourly rate that was contained in the LOAs. Carter was also instructed by NSHE that the terms of the LOAs restrict the number of payable hours per week to 19 hours. Therefore, Carter failed to present a genuine issue as to whether NSHE performed in a manner that was unfaithful to the purpose of the contract, thereby violating its duty.

Further, the record shows that Carter provided no evidence to raise a genuine issue as to his allegations that NSHE or its agents acted in bad faith or misappropriated his work, or violated a single provision of the

Graduate Assistant Contracts, University Administrative Manual, or the LOAs, which would support his contention that NSHE breached the covenant of good faith and fair dealing. Because Carter failed to demonstrate a genuine factual issue or present evidence supporting this claim, we conclude that the district court did not err in granting summary judgment to NSHE on Carter's claim of breach of the covenant of good faith and fair dealing.[5]

Accordingly, we

ORDER the judgment of the district court AFFIRMED

_____, C.J.
Gibbons

_____, J.
Bulla

TAO, J., concurring:

I concur with the majority in all respects except for Carter's claim for conversion, in connection with which I agree with the ultimate outcome of affirmance, but for different reasons. Carter's Third Claim for Relief asserts the tort of "conversion," alleging the appropriation of "data, content and information belonging to the Plaintiff exclusively as Plaintiffs' intellectual property." The majority concludes that summary judgment was warranted on this claim because Carter failed to present sufficient proof of his alleged damages. This approach suggests that the tort of conversion is

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[5]The district court did not address whether the complaint could be amended to add a claim for copyright infringement. As stated earlier, however, it was unnecessary because it would have been a futile act. *See Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 289, 357 P.3d 966, 973 (Ct. App. 2015).

an appropriate vehicle to seek compensation for the theft of intellectual property, which means that Carter would have been legally entitled to prevail if he had just been able to present stronger evidence than he did.

I diverge from this analysis because this skips past an important question, namely, whether the tort of conversion applies to intellectual property at all in Nevada. Other states have split on this question. Historically, the tort of conversion was traditionally applied only to chattels or tangible property that could be lost or found. *See* Restatement (Second) of Torts § 242, cmt. d (1965). Over time, courts have slowly expanded the tort beyond these traditional limits. *See id.; see also Hurst v. Dezer/Reyes Corp.*, 82 F.3d 232, 235 (8th Cir. 1996) ("The expanded attention given intangible and intellectual property rights in recent decades has produced theories for expanding the tort of conversion to include misappropriation of such intangibles."). Nevada is one of the states that has expanded the tort to encompass personal property that is intangible, such as a state-issued contractor's license. *M.C. Multi-Family Dev., LLC v. Crestdale Assoc., Ltd.*, 124 Nev. 901, 904, 193 P.3d 536, 538 (2008).

But "intangible personal property" is not the same thing as "intellectual property." Oddly, courts are split on whether "intellectual property" is either tangible or intangible. *Compare Quantlab Technologies Ltd. (BVI) v. Godlevsky*, 719 F.Supp.2d 766 (S.D.Tex. 2010) (because intellectual property can be reduced to tangible form, it is tangible property), *with Ralph v. Pipkin*, 183 S.W.3d 362 (Tenn.Ct.App. 2005) (intellectual property is a species of intangible personal property). But what is clear is that merely because a state has generally expanded the tort of conversion to cover "intangible" personal property does not, by itself, mean that the same tort must necessarily cover "intellectual property." Indeed, whether the tort

applies to intellectual property is a question that one court has characterized as "hotly disputed." *Marley Co. v. FE Petro, Inc.*, 38 F.Supp.2d 1070, 1077 (S.D.Iowa 1998). *See generally* Jeff C. Dodd, *Rights in Information: Conversion and Misappropriation Causes of Action in Intellectual Property Cases,* 32 Hous. L. Rev. 459 (1995) (discussing pros and cons of whether tort of conversion can cover some types of intellectual property); Val D. Ricks, *The Conversion of Intangible Property: Bursting the Ancient Trover Bottle with New Wins,* 1991 B.Y.U. L. Rev. 1681 (1991) (same).

Some states have carved out statutory exceptions for certain types of intellectual property. For example, in the 48 states that have adopted the Uniform Trade Secrets Act (including Nevada, *see* NRS Chapter 600A), traditional common-law conversion claims cannot be used to remedy the theft of any intellectual property that qualifies as a trade secret. *See* NRS 600A.090(1) ("[t]his chapter displaces conflicting tort, restitutionary, and other laws of this state providing civil remedies for misappropriation of a trade secret.").

Beyond the conflicting state approaches, what makes the question even more complicated is the issue of federal preemption: regardless of whichever way a state decides to go on the larger question of whether the tort of conversion ought to include any kind of intellectual property at all, Congress has made it clear that it can never include certain specific types of intellectual property. For example, the federal patent laws preempt any state tort directed to inventions eligible for patent protection. *See Harris v. Coleman,* 863 F.Supp.2d 336, (S.D.N.Y. 2012); *Rushing v. Nexpress Solutions, Inc.*, 2009 WL 104199 (W.D.N.Y Jan. 14, 2009) (tort of conversion does not apply to patent rights). Federal trademarks also cannot be the

subject of state conversion claims. *See Grgurev v. Licul*, 229 F.Supp.3d 267 (S.D.N.Y. 2017).

Similarly (and most relevant here), anything covered by the federal Copyright Act is expressly preempted by 17 U.S.C. §301(a) ("no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State"). Courts have interpreted this to include such things as computer software programs, technical and scientific manuals, and reports. *Motion Medical Technologies, L.L.C., et al. v. ThermoTek, Inc., 875 F.3d 765* (5th Cir. 2017); *see OpenRisk, LLC v. MicroStrategy Services Corp.*, 876 F.3d 518 (4th Cir. 2017). This seems awfully similar to the very things that Carter identifies in his Third Claim for Relief as having been stolen from him. Yet the scope of such preemption is not entirely clear and often not easy to determine, because the federal circuit courts have split on whether federal preemption applies to material that is not actually copyrighted, and perhaps not copyrightable, but is of the same type as material that is subject to copyright protection. *See Spear Mktg., Inc.* v. *BancorpSouth Bank,* 791 F.3d 586, 596-597 (5th Cir. 2015) (noting "clear split" between the federal circuits); *Dunlap* v. *G&L Holding Grp., Inc.*, 381 F.3d 1285, 1294 (11th Cir. 2004) (noting disagreement with rulings on the same question from the Fourth and Sixth Circuits). This split matters here because Carter filed for copyright protection on at least some of the materials in question while other parts of it may not have been copyrightable, so the facts of this case may lie directly on the fault-line of that federal circuit split.

Thus, it might or might not be true that Carter's conversion claim was legally valid but failed only due to lack of supporting evidence. Rather, to assess whether the tort of conversion even applies to protect

intellectual property in Nevada, we must answer two separate questions: first, what kinds of intellectual property Congress has not made the subject of preemption and instead left room for the states to address through their tort laws; and, second, within that range of non-preempted subject matter, whether Nevada's definition of the tort actually does encompass intellectual property of the kind that Carter identifies. Neither question is particularly easy to answer. Quite to the contrary, the first question appears exceedingly difficult to answer as even the federal circuits are divided.

Fortunately, however, because of the proof problems that the majority cites, we need not reach those questions. Even if the answers to both questions were such that Carter's Third Claim for Relief alleges a non-federally-preempted tort recognized under Nevada law, he couldn't prevail on it anyway for all of the reasons that the majority sets forth. Consequently, I concur with the majority in all respects except that I wouldn't go quite so far to suggest that, proof problems aside, Carter's Third Claim for Relief even alleges a proper tort.

Tao, J.

Tao

cc: Hon. Kathleen M. Drakulich, District Judge
Kirk T. Kennedy
Matthew T. Milone
Washoe District Court Clerk