



Supreme Court Watch

John C. Hanson

HeplerBroom LLC, Edwardsville

How Tangible are the Computer Passwords We Use Everyday if Not Reduced to Paper: Illinois Conversion Claims?

In *Z's IT Consulting Services, Inc. v. Hunt Law Group, LLC*, 2024 IL App (3d) 230333, whether “intangible” objects, notably computer passwords and access codes, are subject to claims of conversion will be addressed by the Illinois Supreme Court. In our society and commerce, it is now normal that many pieces of information that are absolutely essential never cross the barrier from being solely digital to being a tangible object, such as a printed paper copy. Presently, Illinois case law requires an object to be tangible to sustain a tort claim of conversion.

Hunt Law Group, LLC (Hunt Law), filed a counterclaim against their former IT consultant, Z's IT Consulting Services, Inc. (Z's IT), based in conversion of personal property, claiming that Z's IT, the group that had been responsible for Hunt Law's IT infrastructure and computer systems since 2005, had withheld passwords and access codes following the request of Hunt Law. *Z's IT Consulting Services, Inc. v. Hunt Law Group, LLC*, 2024 IL App (3d) 230333, ¶ 3. After a billing dispute, Hunt Law alleged it again requested the passwords and access codes relevant to Hunt Law's systems without receiving them from Z's IT. *Z's IT Consulting Services, Inc.*, 2024 IL App (3d) 230333, ¶¶ 3, 5-6. Following this, Hunt Law then discharged Z's IT from providing any further services. *Id.* ¶ 6. Hunt Law further alleged that Z's IT deleted Hunt Law's passwords and access codes, and as a result Hunt Law lost access to e-mail filters, domain registration, and phone systems, resulting in spending thousands of dollars to remedy. *Id.* ¶ 6-7.

To maintain a claim of conversion under Illinois law, if the property is intangible, the property must be merged into a tangible document under the control of the alleged tortfeasor. This doctrine perhaps makes greater sense in the pre-digital era. It has been a decade since the Illinois appellate court previously considered whether digital assets or files may be the subject of claims of conversion, by whether they are tangible personal property. In *Ogbolumani v. Young*, 2015 IL App (1st) 141930-U, in an unpublished opinion, made before the change in circumstances for the citation of Rule 23 cases, the appellate court found that digital files on a USB drive were not tangible personal property for purposes of a conversion claim. Interestingly, the *Ogbolumani* court did not question the state of Illinois case law further than “no Illinois court has recognized the validity of that theory (conversion) when applied to intangibles like digital information.” *Ogbolumani*, 2015 IL App (1st) 141930-U, ¶ 9.

The Illinois Supreme Court, perhaps surprisingly, has not considered, even in circumstances before the access to digital information became such a fundamental part of life and commerce, whether digital information is tangible personal property. Illinois law still follows the same standards in conversion as an 80-year-old Restatement of Torts, whereby intangible property rights must be merged into a tangible document to sustain a tort. *Z's IT Consulting Services, Inc.*, 2024 IL App (3d) 230333, ¶ 18.

Hunt Law argued that passwords and access codes are real and tangible unto themselves, and therefore a claim of conversion is proper. *Id.* ¶ 12. Moreover, the mere format of the information should not be determinative of whether the

owner of the information has a right to possess it; modern practices mean that the tort of conversion must extend to digital information. *Id.*

While the appellate court ultimately found they were limited by the Supreme Court's 1985 opinion *In re Thebus*, 108 Ill. 2d 255 (1985), the appellate court did explore the changes to conversion claims in other states, even those that specifically extended those claims to digital information. *Z's IT Consulting Services, Inc.*, 2024 IL App (3d) 230333, ¶ 22.

The majority opinion of the appellate court essentially invited and requested analysis by the supreme court:

Whether the bar on intangible property recovery for conversion claims is a limitation that is appropriate in light of the proliferation of intangible rights in the modern technological age is a worthwhile consideration ... [w]hether intangible property rights warrant the creation of a new framework of tort or if the protections against the tort itself should be expanded within this jurisdiction are questions better addressed by our legislature and supreme court, respectively.

Id. ¶ 23. Perhaps in questioning the legislature, the Appellate Court was recognizing that while the legislature has certainly begun to address property and information rights as they apply with advances in technology (most notably in Illinois's Biometric Information Privacy Act, now more than fifteen years old), the issue of conversion of digital data still not being subject to a conversion claim or other protections of whole digital data for that matter.

The appellate court described Hunt Law's argument as an attempt by way of "extra-jurisdiction developments" to "divorce" Hunt Law's from case law. *Id.* The Appellate Court in no way criticized the logic of the argument, openly acknowledging that both changes in technology and practices make removing the bar of property being intangible to recovery under conversion is worthy of consideration, and that in addition to other courts having removed this bar, that scholarly discourse has also the practical importance of finding the merger of intangible property with a physical format to the tort of conversion, finding that the remedies under conversion should be available regardless of format. *Id.*

The two dissenting opinions were also published, both of which consider *Thebus*. *Z's IT Consulting Services, Inc.*, 2024 IL App (3d) 230333, ¶¶ 30, 33. One dissenting opinion essentially relied upon other jurisdictions having expanded the conversion to generally include intangible property and the miniscule nature of the lack of the printing of the information. *Id.* ¶ 35. The other dissenting opinion clearly stated that while this it is the Illinois Supreme Court's prerogative to "open the umbrella of claims that fall under the tort of conversion," a digital password file is effectively the same as a tangible key. *Id.* ¶ 28.

Perhaps the dissenting opinion of Justice Holdridge best illustrates the simple change in facts that underscores why consideration by the Illinois Supreme Court is needed. Had there been a printed hard-copy of the passwords and access codes allegedly being withheld by Z's IT, the court would have undoubtedly sustained a claim of conversion. *Id.* ¶ 35.

In short, this appears to be an instance where the Illinois Supreme Court will have the opportunity to make precedent that changes a common law tort under Illinois law to better comport with modern uses. The supreme court last considered such issues of tangible format when carbon paper was a practical manner to manage access to data.

About the Author

John C. Hanson, an Associate with *HeplerBroom LLC* in Edwardsville, focuses his practice on the defense of litigation involving personal injury, products liability, insurance law, governmental matters, and election law. Prior to joining HeplerBroom, Mr. Hanson served as a Madison County Assistant State's Attorney, with experience in both civil and



criminal matters. In addition to his State's Attorney experience, he handled the defense of commercial and toxic tort litigation as an associate in a large St. Louis metro-area firm. Mr. Hanson earned his J.D. from Southern Illinois University School of Law, his M.A. from Eastern Illinois University, and a B.S. from Southern Illinois University—Edwardsville.

About the IDC

The Illinois Defense Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at www.IDC.law or contact us at PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, admin@IDC.law.