



## Issues

- Issue 1: Was Wayne a fiduciary?
- Issue 2: If Wayne was a fiduciary, did he breach any fiduciary duties by competing with Titus or soliciting customers after he resigned and if so, what are the damages?
- Issue 3: Did Wayne breach his employment duties of good faith, loyalty and fidelity by competing?
- Issue 4: Did Wayne breach his employment duties of good faith, fidelity and loyalty by misappropriating Titus's business documents and sharing them with his competitive business? Did he commit the tort of conversion by misappropriating Titus's business documents?
- Issue 5: Did Wayne misappropriate confidential business documents?
- Issue 6: Did Wayne commit willful misconduct or was his conduct grossly negligent in respect of two Titus clients prior to his resignation?

## Analysis

### Credibility

[4] Before turning to the issues, I will set out my views on the credibility/reliability of the witnesses.

[5] By way of introduction, I had serious concerns about the reliability and credibility of the two main witnesses: Wayne, for the defence, and Mike, for the plaintiff. I believe some but not all of what these witnesses attested to. In each case, I accept their evidence when it is consistent with the evidence of other witnesses or contemporaneous documents or where other admissible and reliable evidence supports what they say. However, I reject their evidence where it is not supported in this way.

### The defence witnesses

#### Wayne Hack

[6] My concerns about Wayne's credibility and reliability are as follows.

[7] He would not admit that he took Titus' business records although the record is clear that he downloaded them, purported to return them when Titus confronted him, but then still kept a copy.

[8] Wayne also would not admit obvious things, was evasive in many instances and even sarcastic at times.

[9] As well, his competing business, Progressive Armour, made an assignment in bankruptcy shortly after the initiation of this proceeding in December 2017. Despite this, Wayne accepted an order for the very product that Progressive Armour produces, in February 2018 when Titus set up a ruse to entrap him.

[10] Finally, Wayne also admits that in his final days at Titus, he falsified a ballistics report. Wayne says that this was at Mike's direction to speed up payment of the account. Even though I am not able to resolve this issue given Mike and Wayne's competing evidence, Wayne was prepared to falsify a document about whether armored steel could withstand bullets. This could have resulted in lethal consequences; it is no answer for him to say he was following orders.

### **Heather Hack**

[11] Heather Hack ("Heather") is Wayne's wife. She testified regarding the circumstances of Wayne's departure from Titus from her perspective as well as her knowledge of the competing business. I have no specific credibility concerns but her evidence was not very relevant.

### **Titus Witnesses**

#### **Mike Usatis**

[12] Mike is currently a director, treasurer and Chairman of Titus' Board.

[13] I have concerns about his credibility and reliability. There were many instances of inconsistencies. There were also many instances where his evidence did not accord with the contemporaneous documents. He was confused and argumentative at times. Most importantly, he admitted several times during his testimony that he had lied to the Texas court and his own counsel in a related proceeding.

[14] Titus' counsel argued that a witness who admits he lied is a truthful witness. Even though I take the point that his candor on this could suggest that he is prepared to admit to things, it is difficult to conclude what counsel urged on me which is that this shows he is truthful.

[15] Counsel also argued that there was a defect in the questioning of Mike on this issue because the actual Declaration where Mike made the statement referenced by the Texas Court was not in evidence, but only excerpted in the decision. However, Mike testified that there was not much more to his Declaration than was set out in the Texas Court's decision. If counsel had wanted to, they could have called rebuttal evidence in the form of the complete Declaration he made, but they did not.

#### **Steve Usatis**

[16] Steve Usatis (“Steve”) is Mike’s son. He began working with Titus in the early 2000’s while he was running another business. In 2011 he became a fulltime employee and then became President in 2014. His role involved selling steel products in a line different than Wayne. I have no credibility concerns about Steve’s evidence, but I did have a concern about the reliability of some of his evidence as it did not appear that he was privy to much of the interaction between Mike and Wayne.

### **Gordon Williams**

[17] Gordon Williams is a Certified Public Accountant and a Certified Management Accountant. He joined Titus in 2005 and remained until 2014 when he retired. He was brought in to manage Titus’ tool steel operations and served as its Controller. He also became responsible for Titus’ Barbados and U.S. operations. I did not have any concerns about Mr. Williams’ credibility, but I did question the reliability of some of his evidence as it did not appear that he was privy to much of the interaction between Mike and Wayne.

### **Kinga Kaleta**

[18] Kinga Kaleta began working at Titus in February 2004. She began as a receptionist and then moved to the position of office manager after Jennifer Usatis, Mike’s daughter, left that position. Then after Mr. Williams retired, she took over some of his responsibilities and became the financial controller. She managed accounts payable and accounts receivables and inputted the information. She also had some signing authority. I did not have any concerns about Ms. Kaleta’s credibility, but I did question the reliability of some of the evidence she gave given the fact that it did not appear that she was privy to much of the interaction between Mike and Wayne.

### **Mr. Weinstein**

[19] Mr. Weinstein was called as an expert qualified in damage quantification and forensic accounting and business valuation, on consent. I have no concerns about Mr. Weinstein’s reliability or credibility but in the end, his evidence was not very helpful because he primarily addressed damages for the alleged breach of Wayne’s fiduciary duty, and I have rejected the claim that Wayne was a fiduciary.

### **George Kokolakis**

[20] George Kokolakis is a computer consultant who Titus retained at the time of the events in question to prepare Wayne’s desktop computer for another employee. He alerted Titus to issues surrounding the deletion of materials on Wayne’s desktop, remotely accessed by someone after Wayne’s resignation on numerous occasions, as well as the installation of a program called file shredder on Wayne’s computer. I had no credibility or reliability concerns about him.

### **Issue 1: Was Wayne a Fiduciary?**

[21] I find that Wayne was not a fiduciary and therefore did not breach any fiduciary duty.

### What makes an employee a fiduciary?

[22] The general characteristics of fiduciary relationship are as follows:

(i) the fiduciary has scope for the exercise of some discretion or power; (ii) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and, (iii) the beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power: *Boehmers Box v Ellis Packaging*, 2007 CanLII 14619 at para 41 quoting *Frame v. Smith*, [1987] 2 S.C.R. 99.

[23] In *Imperial Sheet Metal Ltd. et al v Landry and Gray Metal Products Inc.*, 2007 NBCA 51 the Court reviewed caselaw and noted that there are two approaches to determining whether an employee is a fiduciary. The broad approach focuses on the degree of vulnerability of the employer to competition from the employee. The Court rejected this approach for policy reasons including the fundamental right of everyone to make a living. It also concluded that the broad approach is inconsistent with *Canaero* which focused on whether the employee was a “key” employee. See also *Boehmers* at para 46 which references the “key employee” test.

[24] The Court in *Imperial Sheet Metal* applied the following considerations to the “key employee” test:

- (1) whether the employee is integral and indispensable to the management team that guides the employer’s business affairs;
- (2) whether the employee is necessarily involved in the decision-making process; and
- (3) whether the employee has broad access to confidential information that if disclosed would significantly impair the competitive advantages that the former employer enjoyed.

[25] As noted by Brown J., in *Boehmers*, the results in various cases are fact driven: *Boehmers* at para 48. Brown J. cites Mark Ellis in *Fiduciary Duties in Canada* where he says that even where an employee generates a significant portion of the employer’s sales, it still must be demonstrated that the employer reposed a high degree of trust and confidence in the employee to find a fiduciary duty.

[26] Justice Brown indicates that a number of factors are relevant including exclusive relationships, the ability to unilaterally bind the employer in contract, the ability to set prices, and supervisory responsibility over other employees: *Boehmers* at para 52.

[27] Further, an employee’s title is not sufficient to establish a fiduciary relationship: *Imperial Sheet Metal* at para 60, *Boehmer v. Ellis Packaging* 2007 at para 42. *Plat v. Atlas* at para 79; What matters is the substance of the relationship in each case and whether the employee is “in the position to unilaterally exercise their authority in a way that could affect their employer’s legal and economic interests.” *Boehmers* at para 45.

[28] On either the broad or narrow approach and taking into account and balancing the variety of considerations noted by the authorities, Wayne was not a fiduciary.

### **The History of Titus**

[29] Titus has always been a small family run business specializing in steel products. In 2015 there were only 8 employees. Titus has a related US corporation which is Titus Steel Inc. as well as a related Barbados corporation. It has salesmen in all three jurisdictions.

[30] The predecessor to Titus was started by Mike's father Bill Usatis ("Mike Senior") in 1957. Mike Senior hired Wayne's father, Bill Hack ("Hack Senior") sometime after 1957.

[31] Hack Senior held the position of Vice President at Titus.

### **Wayne is hired**

[32] Titus hired Wayne pursuant to a written offer dated March 5, 2001, as Director of Sales. At the time he was 28 years old and had no experience selling steel products.

[33] The offer letter said Wayne would report to his father, Hack Senior. His responsibilities included developing new accounts for certain existing divisions. Further, the letter said that it was expected that Wayne would learn all aspects of running the company, with the objective to develop his skills to the point where he could assume full responsibility for running the company when his father, Hack Senior, retired.

[34] Wayne's base salary was \$35,000 per year and included a bonus program, a car allowance of \$500 per month and a benefit package of \$150 per month.

[35] The agreement set out commission incentives of between 1.5 and 8 percent depending upon the product sold.

### **Titus' Regular Business**

[36] At the time Wayne was hired, Titus' business consisted of distributing various steel products including steel "browser bars" used to rebuild crawler pads for bulldozers and excavators; steel beams driven into the ground to support buildings; manganese bars; and flux recycling.

### **Dynamic Steel Business**

[37] While employed with Titus, and with Titus' consent, Wayne began a side business that he operated as a sole proprietorship, Dynamic Steel, because of the growing demand for armored personnel vehicles and armored luxury vehicles.

[38] Armored steel that has to withstand bullets is known as ballistic steel. In this industry, a customer who orders armored steel indicates the kind of bullet that the steel must resist, e.g. from an AK 47. Sometimes the client also specifies the thickness.

[39] Then mills who produce steel heat treat it and shoot the steel with bullets in accordance with certain international standards. If the steel can stop these bullets, then the very same steel can be sold for approximately 50 % more. When mills produce the ballistic steel, if it fails the shooting test, they do not lose any money because they can simply melt it down.

[40] Wayne's idea was to purchase the steel and then arrange for the steel to be shot himself. Thus, he would be the distributor who would earn the increased price that the steel could fetch, rather than the mill who produced the steel. However, this kind of business had risks because unlike mills, if the steel failed the test, a distributor would not be able to melt it down and sell it as another product.

[41] Eventually, in or around 2004, Wayne sold this business to Titus.

[42] While Wayne had previously earned from 5 to 10 % commission on other steel products, they agreed that he would earn 30 % of Titus' gross profits from the Dynamic Steel Division. This would be based on the sales price, minus variable costs multiplied by 30 %. They did not include any overhead or fixed costs.

### **Hack Senior Retires in 2004**

[43] In March 2004, Wayne's father, Hack Senior, retired.

[44] When Hack Senior retired, it left a hole that had to be filled.

### **Wayne Appointed Vice President**

[45] Wayne was then promoted to the position of Vice President, in the Dynamic Steel Division.

### **Analysis of why Wayne was not a fiduciary**

[46] Even though Wayne was made a Vice President, the responsibilities assigned to him were still primarily sales in the Dynamic Armour Division.

[47] Further, after Hack Senior left, Wayne was not the only one hired to fill the hole left by Hack Senior. Gordon Williams ("Mr. Williams") was hired as COO. Kinga Kaleta ("Ms. Kaleta") came on with steadily increasing authority. Finally, Mike's own son Steve Usatis ("Steve") came on as President.

[48] In practice the only division that Wayne had responsibility in was the Armour Steel Division, which is only a part of Titus.

[49] Mr. Williams, Ms. Kaleta, and Steve's evidence that Wayne ran the Armour Steel Division is not persuasive, even though I found them credible. They testified briefly and did not support their conclusions with particulars. Moreover, there was no evidence, and nor do the contemporaneous documents show, that they have been privy to much of the communications that Wayne and Mike had on an ongoing basis. They would not necessarily have understood, as revealed in this trial, that Wayne's activities, even within the Armour Steel Division, were closely directed and monitored by Mike. He had very little discretion notwithstanding his title.

[50] Titus did not prove that Wayne guided Titus' general affairs or even the Dynamic Steel Division's affairs. He was not responsible for important decisions or setting its strategic direction. He exercised very little discretion and the way that Mike treated him demonstrated that he did not repose sufficient trust and confidence in him to be found a fiduciary. Finally, because of Mike's ongoing and significant involvement and oversight, Titus did not have the degree of vulnerability required to conclude that he was a fiduciary:

- He could not hire or fire staff.
- Mike wanted Wayne to go out on the road primarily doing sales. Even though that never materialized, it demonstrates how Mike saw Wayne and what he saw Wayne's role to be.
- Wayne's primary role was with respect to the Dynamic Armour Division. There was no evidence at trial about Titus' sales in other divisions or how important the Dynamic Armour Division was to Titus overall. In fact there was no evidence at all about Titus's general financial picture either before or after the events in question.
- The documentary record shows that Mike oversaw, directed and was involved in much of Wayne's activities.

### **Suppliers and Inventory**

- Mike was involved in inventory purchases. Wayne had some discretion to purchase inventory for small sales but if the inventory was not in stock on large orders, he had to obtain pricing and availability to see if he could build the order.

Mike was also involved in selecting suppliers. For example, in 2015 Mike determined that he wanted to move from their largest supplier, CMC, to another supplier, Thyssenkrupp, in Germany who Mike had located on his own. This was because Thyssenkrupp's prices were lower, and CMC had also begun competing with Titus. When Wayne expressed concerns about using Thyssenkrupp produced steel to fill a particular order from a major client in the Middle East, Al-Tadrea, a significant argument ensued. Ultimately, Mike directed Wayne to not place the order with CMC and



expected that order to be followed even though his own son, Steve, who was the President, agreed with the concerns expressed by Wayne.

### **New Directions**

- In 2014 Mike made plans to go to Saudi Arabia because he had been approached by a customer who asked whether he would be interested in establishing a heat-treating factory for use in the Armour Steel Division. Mike engaged a Canadian engineering firm to make a proposal.

Wayne made travel arrangements for Mike including obtaining the necessary Visa, a highly administrative and subordinate task.

### **Sales**

- There was no exclusivity with respect to customer contact. Mike and others participated in sales. Mike had considerable involvement with some significant clients including, INKAS, Al-Tadrea and Streit. In fact, he was the one who located and negotiated the exclusive agreement with Al-Tadrea by taking a trip to Saudi Arabia in 2014. Wayne did not even attend this meeting. On occasion they corresponded about customers. For example, Mike directed Wayne to go and meet with a customer Terradyne in the Middle East and said he would go with Wayne.
- On another occasion he went to New Zealand and sent Wayne an email regarding a potential new customer and said it had been “good hunting.”
- Mike provided some customers with specifications, pricing and availability. Although Mike testified that this was because Wayne was not available, it still shows that Mike was able to do so in a pinch if Wayne was not available and this undermines the argument that Wayne was so key, that Titus was especially vulnerable to his potential competition.
- Mike personally arranged for steel to be measured in some instances to ensure that it met a customer’s specifications.
- It is true Wayne was protective over his sales and customers in the Dynamic Armour Division, but it would not be unusual for a salesman to guard his turf.

### **Accounts Receivables**

- When customers in the Dynamic Steel Division did not pay in a timely manner, Mike got involved. He would be aware and direct Wayne to follow up and even directed Wayne to travel to the Middle East to collect

outstanding accounts receivable when he thought that was necessary. Sometimes, he even followed up on receivables that were not even due yet demonstrating that he was keeping a close watch on what was happening in that Division.

- On other occasions he would communicate directly with customers testifying that he had ways of making people pay. For example, one customer in the Middle East was late with a payment and Mike flew to Saudi Arabia to meet with this customer on his own.
- On another occasion, he went directly to another large customer to collect an account which resulted in the Armour Steel Division. Mike testified that he got in his car and went to this customer's office yelling and screaming for them to pay their overdue bills. They lost this client and this impacted Wayne's salary.

### **Pricing**

- Wayne could set pricing for steel in stock but could not set it otherwise. There are multiple examples of Mike suggesting the price for products to certain customers. For example, in 2014 Mike emailed Wayne suggesting the price that they charge Al Tadre (formerly Al Arabia.)
- In 2014 he directed Wayne to charge a 4 % premium and he expected Wayne to follow that.

In another instance in November 2015, Mike directed how the price of the steel could be blended for two clients who would be charged a different amount, so that the average price could stay the same.

### **Invoicing**

- Mike was involved in invoicing procedures. For example, in 2015 he wrote to a customer, Meggitt in Georgia to change the invoicing such that the work done for this customer would be invoiced to Titus' Barbados affiliate, who would then invoice Titus USA who would then ultimately pay Titus Canada.

### **Reporting to Mike**

- There are multiple instances of Mike directing Wayne in writing to keep him informed and copied with all important customer and supplier information and communications. In one instance in November 2015, Mike wrote:

Wayne...First thanks for the info.

Second, if I had not asked I would not know...and that makes me upset...we have discussed many many times...I want to be kept in the loop especially re: middle east and other big accounts. BCC me....I don't want to ask again.

Although Mike explained that this was to ensure that Titus had the required funds to be able to purchase inventory to fill orders, it is still the case that Mike was involved, seeking to monitor and did monitor sales.

### **Mike's Knowledge About the Dynamic Steel Division**

- Mike had a deep understanding of the Dynamic Steel Division. He understood the way ballistic steel was made, specifications, and tolerances of the steel where they existed. He knew about the steel having to be heat treated and that it could be cut with a plasma machine. He knew about pricing and profit margins. This also impacts the analysis of how key Wayne was and how vulnerable Titus would be to competition from him if he left.
- Titus had a customer contact program called ACT where detailed information about all customers and suppliers was stored. Everyone had their own password and could input notes on the system related to the customer so that any individuals who dealt with a customer would have relevant information. Thus, even the customer information was not exclusively held by Wayne and could be accessed by everyone.

### **Signing Authority**

- Although he had signing authority, in practice Wayne never wrote checks.

### **Financial Matters**

- Wayne did not participate in accounting or have access to Titus' financial records or its corporate bank account. He also did not have a corporate credit card.

Although Mike testified that Wayne had access to Ms. Kaleta's computer where financial records were kept, she testified that Wayne did not have such access. She testified that when she was away Wayne would leave stacks of information on her desk for her to input upon her return. I accept her evidence.

### **Remuneration**

- Even after Wayne was made Vice President, his base salary remained \$30,000 per year until his resignation in 2016. Although he admittedly earned a higher commission after he was made a Vice President, it is relevant that the bulk of his

salary at all times related to sales. This supports the conclusion that sales was his main role, because that is where his primary compensation came from.

### **Restrictive covenant**

- Wayne was not asked to sign a non-competition covenant until after he resigned, which one would have expected a prudent businessperson to do if he felt vulnerable to an employee.

### **Injunction**

- Titus did not seek an interim injunction, which again, a prudent business would do if it considered itself vulnerable to competition.

### **Mike's role as quarterback**

Mike's role was more than just an owner. As explained by Mike to Wayne in an email dated June 2015:

“I trust you completely but we are a team and I want to know...I want to be in the loop kept abreast...Everything you do affects other parts of the company from the banking to receivables to administration to inventory...like a quarterback needs to know ...cannot have the wingback running his own plays without telling quarterback.”

[51] Titus relies heavily on *Evans v. the Sports Corporation*, 2013 ABCA 14, a case involving a sports agency where an agent who recruited players for a segment of a business was found to be a fiduciary. This case is distinguishable as the agent would recruit athletes who would have an exclusive relationship with the company, it was found as a fact that he was the face of the company, he was found to be expected to develop close personal relationships with players and the element of vulnerability was apparent. He could use these personal relationships to benefit either his employer or himself. This is not at all the same.

[52] Although Wayne's role was admittedly important, in all the circumstances, he did not have the kind of discretion or authority that would make Titus peculiarly vulnerable to his competition when and if he left. Mike was a very hands-on owner who had enough involvement with the Dynamic Armour Division that it would not be difficult for someone to step in if Wayne left.

[53] Indeed, after Wayne resigned, they did not even replace him. Rather, Mike's son, Steve, who had been made President, stepped in to fill the void. Apart from the evidence in respect of

missing documents that had to be recovered, there was no evidence that anyone had any difficulty continuing the business. There was no evidence that the Armour Steel Division began losing money, lost revenue or lost any customers. One would expect that the loss of an employee that was so key that he would be considered a fiduciary, would have such impacts, at least in the short run.

[54] I conclude that despite his title, and the fact that he was the one who started the Armour Steel Division, Wayne's role continued to be primarily sales. As noted by Nakatsuru J. in *Cantol Corp v. State Chemical*, 2019 ONSC 531, a person whose primary role is sales is rarely found to be a fiduciary. *Cantol* is similar to this case as the employee was a Vice President of Marketing but did not exercise executive functions, had little discretion, was paid a commission, had no supervisory role over other salespersons and no discretionary power. See also *Carson International v. Biggar et al.*, 2010 MBQB 198 and *Wilson v. Secure Resources Inc.*, 2022 ABQB 204 at para 116.

**Issue 2: If Wayne was a fiduciary, did he breach any fiduciary duties by competing with Titus or soliciting customers after he resigned and if so, what are the damages?**

[55] If I am wrong about Wayne's designation, Titus did not prove any breach of Wayne's fiduciary duty or damages related to any such alleged breach.

**The duties of a fiduciary**

[56] Fiduciaries may compete after they leave their former employer, as long as they do so fairly and honestly: *Cosolo*, at paras. 13-15. Soliciting the former employer's customer is considered unfair, and accordingly, a fiduciary may not actively solicit former customers for a reasonable period of time. There is no liability if the customer seeks out the fiduciary: *Imperial Sheet Metal*, at para. 43; *Aquafor*, at para. 47.

[57] The reasonable period of time during which a fiduciary may not solicit customers varies in each case. Generally, it is equal to the length of time required in all the circumstances for the employer "to solidify and secure its relationship with its clients and to compensate for any destabilizing effect the employee's departure may have had": *Boehmer*, at para. 42. The more trust and confidence the employer has in the employee and the more vulnerable the employer is, the longer the reasonable period will be: *Boehmer*, at para. 42; *Anderson, Smyth & Kelly Customers Brokers Ltd. v. Worldwide Customs Brokers Ltd* (1996), 184 A.R. 81 (C.A.), at para. 32.

**The duration of the fiduciary duty in this case**

[58] The level of trust and confidence reposed in Wayne is low, as is the vulnerability, given my findings on his role. If Wayne had been a fiduciary, I would have found the duration of the

continuing fiduciary duty to be no longer than six months. Titus offered no evidence as to how large the customer pool was, how long it would take to communicate with this pool, or any evidence of customer loyalty in the industry that might make Titus more vulnerable. It also gave no evidence of efforts it made to contact these clients or any difficulty solidifying relationships.

[59] During this six-month period, Titus solicited Nucor, and entered into an exclusive supply agreement. I am not satisfied that this constituted unfair competition, however. Titus used many suppliers; Nucor was only the seventh largest supplier it used and indeed, Titus had purchased comparatively much less from Nucor than its other suppliers. Titus did not prove that it was unable to source product from its other suppliers or that the loss of Nucor caused it any losses. There was evidence of one cancelled order by Nucor, but again, no evidence that this caused Titus any losses or that it was unable to fill this one order.

[60] Furthermore, Titus did not show that Wayne successfully solicited any Titus customers during this six-month period, or even during the longer two-year period that it claims should be the reasonable period. There were only two Titus customers that Wayne ever sold to (Al-Tadrea and Cemar) and Titus did not call them as a witness. Wayne's uncontradicted evidence is that these two customers contacted him.

[61] I add that the defendants' competitive business was not successful. It operated at a loss for the first year and ultimately closed. The defendants never made much money. Furthermore, Titus also did not lead any evidence that this competitive business caused Titus to lose any customers or to lose any profit.

[62] Therefore, even if Wayne had been a fiduciary, I would find no breach and would award no damages.

**Issue 3: Did Wayne breach his employment duties of good faith, loyalty and fidelity by competing?**

[63] Ordinary employees owe a duty of loyalty and fidelity during the employment relationship. They cannot compete directly or indirectly with their employer while employed: *Imperial Sheet Metal Ltd. et al v Landry and Gray Metal Products Inc.*, 2007 NBCA 51 at para 34. However, just like a fiduciary, an employee may take preparatory steps while they are still employed: *Cosolo v. Geo A. Kelson Limited*, 2017 ONSC 4150 at para 10.

[64] Wayne did not breach these duties because all he did before he resigned was take preparatory steps.

[65] In or around 2015 Wayne's income began to go down. He and Heather testified that he was also increasingly dissatisfied with his relationship with Mike. He felt that Mike was more and more involved with all of his customers, that he was being squeezed out and that he couldn't do anything without Mike questioning it and getting involved. This is supported by many of the contemporaneous documents described above.

[66] Heather was also very concerned about Wayne's stress level and had been urging him to leave Titus. She said that his physical and mental health were suffering, he was not sleeping, and she had been encouraging him to leave Titus for some time.

[67] On January 19, 2016, Heather incorporated a numbered corporation 9589864 Canada Incorporated listing Wayne as the only Director.

[68] On January 21, 2016, Heather then registered the domain name Progressive Armor, which ultimately became the name of their business.

[69] Heather was in the process of setting up her own company and also arranged for a lawyer to speak to Wayne and he did. Heather said that they were nervous about how it would be received if Wayne resigned, and she wanted to obtain advice and direction about the rules and how to stay on the right side of things. Wayne then met with legal counsel shortly thereafter, which he said was in or around mid to late February.

[70] Then, Mike and Wayne had a significant dispute about Mike's desire to substitute CMC produced steel expected by a large Middle Eastern client, Al-Tadrea, with steel produced by Thyssenkrupp in Germany. This client had already paid over \$800,000 for this steel in or around August of the previous year.

[71] Wayne was concerned about export restrictions pursuant to German law and also about the way the client would react to the substitution of steel. Wayne was also concerned with the ethics of Mike's suggestion they could simply paint blast the Thyssenkrupp brand name off of the steel before it was delivered.

[72] Mike and Wayne had multiple emails about this issue. Ultimately, Steve agreed with Wayne's concerns and Wayne did not hear from Mike for two days as he was in Australia without phone service.

[73] Because there was no finality on this issue, Wayne cancelled an upcoming trip to the Middle East to meet Al-Tadrea that Mike told him to take.

[74] After their dispute over the Thyssenkrupp steel, Mike and Wayne met on Monday March 7, 2016. At the end of the meeting Wayne took out a typed letter of resignation which he gave Mike.

[75] Progressive Armor applied to set up a business account on March 29, 2016, and began operations after Wayne resigned.

[76] Titus tried to argue that Wayne solicited the supplier Nucor and a customer Meggitt US in late February. However, all I have is Wayne's uncontradicted evidence that the visits he made were with respect to Titus' business. Titus did not call any evidence from these parties. Its suspicions are not enough.

[77] Thus, on the record before me, Wayne only began actively competing after he resigned. As set out in *GasTops*, at para. 95, to constitute a breach, the employee must have been engaged in “active competition.”

**Issue 4: Did Wayne breach his employment duties of good faith, fidelity and loyalty by misappropriating Titus’ business documents and sharing them with his competitive business? Did he commit the tort of conversion?**

[78] Wayne had both a desktop at work and a laptop that he had purchased for his own use and for which he had been reimbursed.

[79] After Wayne resigned, Titus retained an IT consultant, Mr. George Kokolakis, to prepare Wayne’s desktop to be used by another employee.

[80] As part of Mike and Steve’s narrative of what occurred, after Mr. Kokolakis began working on the desktop, he advised Mike and Steve of concerns he had because it looked as if it was a brand-new computer instead of a computer that an employee had been working with for fifteen years. There was an absence of files that he would expect to be there. Mike and Steve were both in the office when this work was being done and both saw for themselves that there was a significant absence of files on Wayne’s desktop. I accept their evidence because as I said, I have no concerns about Steve’s credibility or reliability.

[81] Mike and Steve were also concerned because from their review, there was also information missing from the ACT customer database.

[82] When Wayne left, they assumed that the ACT files were in order. Mike went into the ACT database because he wanted to follow up on an account in Jordan. The file was missing. Steve looked at the ACT database and also concluded that all the files were gone. Again, I accept this evidence.

[83] Titus then requested Wayne’s laptop which he returned on March 21, 2016, upon his return from Florida.

[84] Wayne admitted at trial that he used a program called file shredder to remove his personal data before he returned the laptop and that there was some corporate data which he had backed up. He said that everyone was expected to do this individually as there wasn’t any central back up system. He said he removed photos and mortgage and financial documents but denied deleting any Titus information with file shredder.

[85] On March 22, 2016, Titus advised Wayne that they had evidence that before he left, he copied and downloaded confidential and proprietary information. In the email they said this included customers, finances, profitability, pricing, margins, discounts, incentives, vendors, suppliers, sales, intellectual property and trade secrets. Titus directed Wayne to return the material within five days, failing which they would commence legal proceedings.



[86] Wayne then immediately wrote on March 22, 2016, and said that he had backed up all the files as part of his customary practice to ensure that files were recoverable if there was a computer or system failure. He then wrote: “I am aware of my legal obligations. The backup USB drives will be returned to you immediately by courier.”

[87] Then Wayne did return a USB stick with Titus documents. Wayne testified that the USB stick contained materials from both his laptop and his desktop which shows that he had backed up materials at the office on his desktop and then brought whatever he backed them up onto home. There would be no logical reason to bring the documents backed up from his work desktop home, as part of the ordinary course of business, particularly when he was resigning.

### **Mr. Kokolakis’ Evidence**

[88] Mr. Kokolakis is a computer consultant who obtained a degree in programming from York University and the University of Waterloo. He has been working in the IT field since 1988 when he started his own business. Mr. Kokolakis testified at trial at a blended voir dire on the basis that the parties would argue the issue of admissibility during their closing submissions.

[89] Wayne’s position was that Mr. Kokolakis was an expert who had failed to comply with r. 53 in that no report or curriculum vitae had been provided 90 days prior to trial. Instead, Titus had claimed privilege over Mr. Kokolakis’ notes and something it referred to as an expert report in Schedule “B” of Titus’ affidavit of document. Titus had also refused to answer any questions on the substance of Mr. Kokolakis’ analysis of the computers in question at the examination for discovery.

[90] Then, on February 8, 2024, 30 days before trial, Titus delivered the notes it had listed in Schedule “B” as a form of willsay of Mr. Kokolakis’ evidence as the parties had agreed that they would exchange willsays. Titus also delivered two documents that set out the details of Mr. Kokolakis’ analysis of someone logging in remotely into Titus’ computer system shortly after Wayne resigned. He analyzed where the login had occurred and provided his opinion on this. These documents had also never been disclosed.

[91] Titus took the position that Mr. Kokolakis was not a r. 53 expert but was rather a participant expert. Wayne also argued that having claimed privilege over the notes in Schedule B and having failed to abandon that claim 90 days before trial, Wayne could not use the notes pursuant to r. 30.09 without my leave.

[92] There are parts of Mr. Kokolakis’ evidence that are admissible as they are not any kind of opinions, (participant or Rule 53 expert), but are facts. This includes the fact that he was hired, the fact that he was asked to look at the desktop and laptop, the fact that he saw that Wayne’s desktop appeared brand new with little files, the fact that he saw that Wayne had used file shredder on his laptop (which is admitted by Wayne in any event), and the fact that he was able to recover lost documents.

[93] Although I agree that the substance of Mr. Kokolakis's evidence should have been disclosed much sooner than February 8, 2024, there was still time for Wayne to conduct further examination for discovery on any issues that arose as a result of this late disclosure. The *Rules* permit parties to correct answers and to even change their answers given on discovery. No one pointed to any *Rules* that provide that parties cannot do so one month before trial. As of February 8, 2024, there was still time to remedy any prejudice occasioned by the late disclosure of the substance of Mr. Kokolakis' fact evidence which was summarized in his notes produced. It was not open to Wayne to simply object to the fact evidence, which was relevant, rather than seek further discovery on it and seek costs of that if appropriate.

[94] Mr. Kokolakis' evidence would have been admissible in full, even his opinion evidence regarding the work he did analyzing the remote logins. However, Titus's failure to permit Wayne to conduct his own analysis of the computers is a prejudice that could not be remedied one month before trial. There was not even any evidence that the desktop and laptop were still available for analysis and/or that such analysis would have been possible eight years after the events in question.

[95] As such, I find that apart from Mr. Kokolakis' fact evidence that he analyzed the computers, saw that there were missing files and was able to recover them, none of his other evidence is admissible. This is not because he is a Rule 53 expert, but as a matter of fairness because Titus would not permit any analysis of the computers and the late disclosure.

[96] Mr. Kokolakis' evidence supports Mike and Steve's evidence that they saw there was information missing from Wayne's desktop and laptop.

[97] As well, even though Wayne purported to return Titus documents, in this proceeding, the defendants, together, listed troves of Titus business documents in their Affidavit of Documents. This shows that Wayne kept these documents even when he said he returned the backup drives. He never told Titus he would be keeping copies. And the fact that they are listed in the defendants' affidavit of documents together, not just Wayne's, shows that they are in Progressive Armor's possession.

[98] There are approximately 1200 documents listed in the defendants' affidavit of documents.

[99] Thus, I am satisfied that Wayne copied Titus's business records in his possession, kept them and gave Progressive Armor access to them.

[100] Although employees may use the knowledge they obtained through their employment, as noted by the Court in *Imperial Sheet Metal Ltd.* at para 33:

Employees who depart with suitcases of documents, computer files or even a solitary customer list are in breach of their post-employment obligations.

[101] I also infer that it was Wayne who deleted some of these materials from Titus' laptop and desktop because Wayne was the one in possession of these computers in the first place, there is no evidence that anyone had any ability to access them, and there is no evidence of any general data

breach having occurred at Titus. Mr. Kokolakis' evidence, the timing of the copying and the missing materials, in the context of the defendants planning a competing business, also supports this.

[102] Further, Wayne also paid Titus \$9,314 in December 2016 when Titus raised the issue of his conduct with respect to these computers. He said that he did this to address the issues raised by Titus regarding damage to the computers. At discovery Mike said this payment was for replacement costs of a new laptop and new desktop as well as fees for analyzing the computers and database recovery by a company called LanCare.

[103] Payment of this significant sum, months after the incident in question, demonstrates a consciousness of guilt.

[104] Thus, he breached his employment duties of fidelity, loyalty and good faith and also committed the tort of conversion; the documents were not merely information, they were physical documents stored on a hard drive that he took. While the breach of his employment duty was not well pleaded in this regard,<sup>1</sup> I am satisfied that relevant facts were all pleaded, that the defendants were sufficiently put on notice and that there is no prejudice: *RBC v. Merrill Lynch*, 2008 SCC 54 at paras 9 & 13.

### **Permanent Destruction of Documents?**

[105] However, I am not satisfied that Titus was unable to recover any deleted data as Titus alleges.

[106] Mike and Steve testified that some materials were never recovered, in particular 108 client files. But Mr. Kokolakis testified that he was able to recover documents which he gave to Titus on two flashdrives. He did not specifically testify as to anything that he could not recover.

[107] Ms. Kaleta testified that she used a database called Simply Accounting where she processed purchase orders, and inputted customer information and invoices. There was no evidence that anything on this database was affected. Titus was in the position to analyze this database and compare it to whatever was recovered to show customer files in Wayne's possession were still missing after Mr. Kokolakis restored materials to show files were permanently deleted.

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<sup>1</sup> One paragraph of the Statement of Claim referenced the duty of good faith as part of his alleged fiduciary duty, and that it was breached by the destruction of data, another part of the Statement of Claim only referenced the breach of confidence and conversion regarding data issues.

[108] The evidence on this issue was confusing and unclear at best. Titus did not meet its burden of proof.

**Issue 5: Did Wayne misappropriate confidential business documents?**

[109] Although Wayne did keep over a thousand Titus business documents after he left Titus, the tort of breach of confidence has not been made out.

**The elements of breach of confidence**

[110] The elements of the tort of breach of confidence are: i) the documents have a quality of confidence, 2) the documents were imparted to the employee in circumstances importing an obligation of confidence, and 3) they were used in an unauthorized manner: *Cantol v. State Chemical*, 2019 PMSC 531 citing *RBC Dominion Securities* at para 55. *Boehmer* at para 62 citing *Stenada Marketing Ltd. v Nazareno*, [1990] B.C.J. No. 2118; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at para 152.

[111] The plaintiff must prove that the use of the confidential information by the employee caused the employer losses: *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, 1999 CanLII 705 (SCC) at paras 61, 91 & 93.

**Criteria 1 & 2: Documents that have a quality of confidence which were imparted in circumstances importing an obligation of confidence.**

[112] Most of the documents listed in the defendants' affidavit of documents are described as emails ranging from 2001 to 2016. Emails to outside parties would not be considered confidential.

[113] The first problem with this claim is that Titus lead no evidence in chief about these documents, why they would be considered confidential and how a competitor could make use of them. Documents in the Joint Document Brief from the defendants' affidavit of documents had a handwritten number in the bottom right-hand corner. There are only approximately 15 noted to be from the defendants' affidavit of documents that were included by the parties in the Joint Book of Documents. This shows that Titus did not even consider the bulk of these documents relevant to the issues in this proceeding, which include its breach of confidence claim. I reviewed these 15 documents and there was nothing that stood out as something that would have given the defendants any kind of competitive advantage, if used. Most of these pertained to issues regarding Bemex International LLC ("Bemex") and CMC of Georgia ("CMC") which I discuss below, and which have nothing to do with the defendants' competitive business.

[114] Further, Titus only cross-examined Wayne with respect to two email chains listed in the affidavit of document, with respect to the issue of breach of confidence. The first was an email exchange between Mike and Wayne dated December 21 to December 22, 2014, where they discuss future prospects for clients including Al Tadrea as well as forecasts for Al Tadrea for 2015-2015. This email has the quality of confidence and was imparted to Wayne in circumstances importing

an obligation of confidence. The second also satisfies this test but had nothing to do with customers who the defendants ultimately sold to.

[115] Therefore, the first and second criteria are only satisfied with respect to two document chains which I find have a quality of confidence and were imparted to Wayne in circumstances importing an obligation of confidence.

**Criteria 3: Documents used in an unauthorized manner.**

[116] Even though the defendants sold to Al-Tadrea and they had confidential information contained in the email correspondence between Wayne and Mike from December 21 to December 22, 2014, Titus did not show that the defendants made use of this information to assist them with any sales to Al Tadrea. This information, on its face did not even relate to the years that the defendants made sales to Al Tadrea. Titus called no evidence explaining how this information would have or could have been used by the defendants when it made its sales.

**Conclusion re Breach of Confidence**

[117] Even though it is concerning that Wayne kept troves of business documents and must have shared them with Progressive Armor, it was incumbent on Titus to show with evidence that these documents are confidential, that they were used in an unauthorized manner and that this use caused Titus a loss. It failed to do so.

[118] Therefore, I award no damages for breach of confidence.

[119] In *Carson v. Biggar et al*, 2010 MBQB 198, the court was faced with a situation where an employee had taken business documents which the court found to be a breach of the former employee's employment duty, but not the tort of breach of confidence. The Court sought further arguments from counsel concerning the nature of the breach and what damages might flow: at para 95.

[120] In this case, I have already sought these submissions after the trial. Titus did not arrive at any theory for how it suffered any actual damages as a result of what Wayne did. This would apply to the conversion claim as well where no damages were proven. Furthermore, Titus already negotiated a sum in respect of the deletion and recovery issue, which Wayne has already paid.

[121] However, since these documents belong to Titus, and the defendants still have them I will be ordering that all copies are returned.

**Issue 6: Did Wayne commit willful misconduct or was his conduct grossly negligent in respect of two Titus clients prior to his resignation?**

**The law on employee liability for negligence, gross negligence and intentional acts**

[122] The case *Douglas v King*, 2008 ONCA 452 held that an employee will not be liable for ordinary negligence: para 57-63. However, the Court left open the possibility of claims in respect of willful misconduct or gross negligence, which it left for another day.

[123] The parties provided no authorities where such liability has been found but I need not decide the legal issue because as a matter of fact, Titus has failed to prove this claim, even if the legal basis exists.

### CMC

[124] Titus had sold steel to a customer CMC of Georgia that was specified to be ¼ inch AR500 armored plate. It was intended to stop a 9 mm bullet. A ballistics report from H.P. Laboratory dated January 11, 2016, had accompanied the sale and showed that the steel had been tested and met the client's specifications.

[125] Wayne admits that he falsified a ballistics report that accompanied the shipment when no ballistics testing was actually done. He used an old report and simply changed the date. He says Mike directed him to do this. Mike denies this.

[126] This is another instance where all I have is the conflicting evidence of two witnesses who I did not find credible. As the burden is on Titus, it has thus not proven this claim.

[127] If I am wrong, I assess damages.

[128] Titus claims the amount it paid CMC converted to \$70,928 CDN, shipping costs estimated and converted to be \$6,448 CDN, estimated lost future profits from sales to CMC ranging between \$18,000 for one year of additional sales and \$36,000 for two years of additional sales, and return of commission in the amount of \$5,500.

[129] Wayne argued that there was no proof that Titus had actually paid the \$55,000 to CMC but I have the evidence of Mike and Steve which I accept. Wayne also argued that there is no proof that Titus received the steel back, but I also have Mike and Steve's evidence on this which I accept.

[130] The defendants also argued that any damages should only reflect the lost profit since Titus received the steel back. However, the CMC steel had been cut into many pieces and could not be resold. There was no evidence before me that Titus could have done anything with it. Therefore, it incurred all the costs in purchasing and selling this steel and could not recover any of these costs. Therefore, awarding Titus the full amount of the sale price repaid to CMC would reflect the lost profit as well as costs that it incurred and could not recover.

[131] Regarding transportation, Mike said that the cost to transport the steel from Toronto to Georgia was \$3,916.38 USD and that the cost to transport it back would be similar. Therefore, I do not accept Mr. Weinstein's estimate of \$6,448 and instead would award \$3,916.38 USD for transportation.

[132] I would also award the return of the commission in the amount of \$5,500. In my view, it is implicit that commissions are repaid to the employer where the sale is reversed.

[133] I would not award any amount for estimated lost profits on future sales. CMC was a relatively new client and there was no evidence as to why Titus would have expected ongoing purchases from CMC, including no such evidence from anyone at CMC.

### **Bemex**

[134] Although I find that Wayne did fail to provide the product ordered by Bemex with the required thickness, the evidence does not establish that Wayne deliberately took steps to harm Titus; at most he was negligent (for which an employee cannot be liable) and even his negligence does not rise to the level of gross negligence.

[135] Throughout this incident, Mike supported Wayne's position that he had sent a specification which noted the steel measurement had a tolerance of within plus or minus .012 inches which disentitled CMC to reimbursement. Mike also took this position in the Texas lawsuit brought by Bemex. In fact, the evidence showed Wayne had provided CMC such a specification.

[136] When confronted with the inconsistency between his evidence before the Texas court and his evidence before me, Mike said that he had lied to the Texas court.

[137] It is hard to see Wayne's conduct as grossly negligent when Mike backed him up on the issue for months.

[138] There is the additional problem that no one from Bemex testified about the product not being the required thickness. None of Titus' witnesses testified that they had measured the steel, and that they personally saw that the steel was not the required thickness. Therefore, all the evidence on the deficiency in the steel was hearsay in any event.

[139] If I am wrong and this conduct does rise to the level of gross negligence, or willful misconduct, I address here Titus's damages claim. It claims the amount it paid to Bemex converted to \$73,173 CDN, the amount it paid for legal fees in the Texas proceeding converted to \$28,230 CDN, shipping costs converted to \$6,448 CDN for shipping, estimated profits on future sales to Bemex ranging between \$18,000 for one year of additional sales and \$36,000 for two years of additional sales, as well as the return of commission paid to Wayne in the amount of \$5,500.

[140] I would not award the legal fees as it was Titus' decision to defend the claim. If Wayne was so obviously grossly negligent, then Titus should have immediately refunded the amount rather than proceed to litigation. I would also not award any amount for lost future sales. There was no basis to assume that Bemex would have continued to make sales to Titus but for this incident. Even though there was no evidence on the cost to transport the steel back to Toronto, Mike testified that it would cost approximately \$5,000 USD (which when converted is \$6,448 CDN) and Mr. Weinstein says that he based his estimated shipping costs on information provided by Mike. I find this estimate reasonable and supported in the circumstances and would award this

amount. I would also award the return of the commission in the amount of \$5,500 for the same reason as above

[141] With respect to the payment of \$55,663.50, Mike agreed that Titus negotiated the return of the steel because Titus felt the steel had some value. Even though the steel was a nonstandard length, Mike agreed that it could be cut to a standard length and sold. Given that Titus failed to show that it took these steps, it has not mitigated its damages and I would not award this.

### **Punitive Damages**

[142] I do not award any punitive damages as Titus did not identify any independent actionable wrong. The fact that it could not prove damages related to Wayne taking the documents does not equate to an independent actionable wrong: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras 36, 82.

### **Conclusion**

[143] I find that Wayne has breached his employment duties of good faith, loyalty and fidelity by:

- deleting, copying and keeping a raft of Titus business documents after he resigned. The keeping of the documents also constituted the tort of conversion.

[144] Titus failed to prove any damages in respect of the above, but I order that the defendants return all of Titus' business records to Titus within 7 days.

[145] All other claims advanced by Titus were not proven and are dismissed.

[146] The parties may also make cost and interest submissions as follows: Titus within 7 days and the defendants within 7 days thereafter.

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Papageorgiou J.

**Released:** June 25, 2024



**CITATION:** Titus v. Hack, 2024 ONSC 3666

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

TITUS STEEL COMPANY LIMITED  
Plaintiff

– and –

WAYNE ROBERT HACK , 9589864 CANADA  
INCORPORATED doing business as PROGRESSIVE  
ARMOR, and PROGRESSIVE ARMOR  
INCORPORATED USA  
Defendants

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**REASONS FOR JUDGMENT**

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Papageorgiou J.

**Released:** June 25, 2024