IV. Conclusion

Accordingly, we affirm the trial court judgment. Costs are to be borne by the parties. FSM App. R. 39(b).

* * * *

FSM SUPREME COURT APPELLATE DIVISION

MAYLEEN IHARA, Appellant, vs. JOSEPH VITT, in his official and individual capacity as the General Manager of Pohnpei Transfer & Storage, Inc., POHNPEI TRANSFER & STORAGE, INC., and POHNPEI TRAVEL SERVICES, Appellees.	)	APPEAL CASE NO. P2-2013 (Civil Action No. 2008-031)

OPINION

Argued: October 7, 2014
Decided: October 27, 2014

BEFORE:

Hon. Ready E. Johnny, Acting Chief Justice, FSM Supreme Court
Hon. Beauleen Carl-Worswick, Associate Justice, FSM Supreme Court
Hon. Cyprian J. Manmaw, Specially Assigned Justice, FSM Supreme Court*

*Chief Justice, State Court of Yap, Colonia, Yap

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* * * *

HEADNOTES

Appellate Review – Standard – Civil Cases – De Novo

Since the interpretation of contract provisions is a matter of law to be determined by the court, the appellate review is de novo. Ihara v. Vitt, 19 FSM R. 595, 600 (App. 2014).

Appellate Review – Standard – Civil Cases – Factual Findings

The standard of review for trial court findings of fact is whether those findings are clearly erroneous. A trial court's findings are presumed correct. Ihara v. Vitt, 19 FSM R. 595, 600 (App. 2014).

Appellate Review – Standard – Civil Cases – Factual Findings

When trial court findings are alleged to be clearly erroneous, the appellate court will find reversible error only: 1) if the trial court findings were not supported by substantial evidence in the record; or 2) if the trial court's factual finding was the result of an erroneous conception of the applicable law; or 3) if, after reviewing the entire body of the evidence and construing it in the light most favorable to the appellee, the appellate court is left with a definite and firm conviction that a mistake has been made, but the appellate court cannot substitute its judgment for that of the trial court. Ihara v. Vitt, 19 FSM R. 595, 600 (App. 2014).

Appellate Review – Standard – Civil Cases – Factual Findings

A trial court's finding will only be set aside if there is no credible evidence in the record to support that finding, in part because the trial court had the opportunity to view the witnesses and the manner of their testimony. Ihara v. Vitt, 19 FSM R. 595, 600 (App. 2014).

Appellate Review – Standard – Civil Cases – Factual Findings

To be clearly erroneous, a decision must strike the court as more than just maybe or probably wrong; it must strike the court as wrong with the force of a five-week-old unrefrigerated dead fish. Ihara v. Vitt, 19 FSM R. 595, 600 (App. 2014).

Employer-Employee – Wrongful Discharge

The three factors used to analyze whether there is just cause for immediate termination are: 1) culpability, 2) knowledge of expected conduct, and 3) control over the offending conduct. Ihara v. Vitt, 19 FSM R. 595, 601 (App. 2014).

Employer-Employee – Wrongful Discharge

The proper emphasis under the culpability requirement for employee termination should not be upon the number of violations; rather, it should address the problem of whether the discharge was necessary to avoid actual or potential harm to the employer's rightful interest. Ihara v. Vitt, 19 FSM R. 595, 601 (App. 2014).

Appellate Review – Standard – Civil Cases – Factual Findings; Employer-Employee – Wrongful Discharge

The trial court's conclusion upholding an employee's termination is sound when the factual findings on which the conclusion is based are not clearly erroneous and the facts meet the three-factor test to permit immediate termination despite an employee handbook provision requiring progressive discipline. Ihara v. Vitt, 19 FSM R. 595, 602 (App. 2014).

Torts – Conversion

The elements of an action for conversion are the plaintiff's ownership and right to possession of the personalty, the defendant's wrongful or unauthorized act of dominion over the plaintiff's property inconsistent with or hostile to the owner's right, and resulting damages. Ihara v. Vitt, 19 FSM R. 595,

602 (App. 2014).

Criminal Law and Procedure – Theft; Torts – Conversion

Although conversion has sometimes been called the civil equivalent of theft that is not an accurate description. It is not the same as theft. The crime of theft requires the intent to permanently deprive another of the property. Conversion only requires the defendant's wrongful or unauthorized act of dominion over the plaintiff's property be inconsistent with the owner's right. It does not require the intent to permanently deprive the owner of its property. Ihara v. Vitt, 19 FSM R. 595, 602 (App. 2014).

Torts – Conversion

A defendant's argument that she did not steal the property alleged converted and that no criminal case was filed is irrelevant. A conversion may occur even when the defendant has every intention of returning the property. Conversion is a strict liability tort whose foundation rests neither in the knowledge nor the intent of the defendant so a defendant can be liable for conversion even when he acted in good faith, lacked knowledge of the conversion, or lacked motive to commit the tort. Ihara v. Vitt, 19 FSM R. 595, 602 (App. 2014).

Torts – Conversion

When the factual finding that the employee took dominion over her employer's property (its money used to pay for tickets) without its permission is not clearly erroneous, and when the other elements of conversion are undisputed, the elements of conversion have been met. Ihara v. Vitt, 19 FSM R. 595, 602 (App. 2014).

Torts – Conversion

A defendant may successfully defend a conversion action by proving that the plaintiff consented to the defendant's taking, or that the defendant had rights in the property superior to the plaintiff's, or that the plaintiff has waived its cause of action, or that the plaintiff is estopped from asserting any right to the property. Ihara v. Vitt, 19 FSM R. 595, 603 (App. 2014).

* * * *

COURT'S OPINION

READY E. JOHNNY, Acting Chief Justice:

This appeal is from the trial division's January 18, 2013 decision that the plaintiff, Mayleen Ihara, was not wrongfully terminated and that she was liable for $5,562.50, plus interest on the defendants' conversion counterclaim. Ihara v. Vitt, 18 FSM R. 516, 531-32 (Pon. 2013). We affirm. Our reasons follow.

I. BACKGROUND

In February, 2006, Pohnpei Transfer and Storage, Inc. ("PT&S") hired Ihara. She worked for it and its wholly-owned subsidiary Pohnpei Travel Services ("PTS"). Joe Vitt was the businesses' General Manager and Ihara's supervisor and had the authority to hire and fire for the businesses. PT&S does agency work for shipping lines and fishing vessels as well as warehousing and cargo movement, and had seven employees. PTS was a travel agency making airline ticketing arrangements for PT&S clients, government travelers, and individual private travelers. PTS had only one employee, Ihara. As the only PTS travel agent, she performed reservations and ticketing for PTS but also did clerical work for PT&S. Ihara could sell airline tickets to the FSM Government and certain repeat customers without consulting

Vitt. All other customers required Vitt's express preapproval. Ihara was not authorized to approve any credit transactions for plane tickets.

On Sunday, December 9, 2007, Ihara called Vitt and told him that she had a family emergency and asked if she could use PTS to issue two airline tickets. Vitt testified that the request was for tickets from Pohnpei to Guam, one for Ihara's mother and one for her sister. Ihara told Vitt that she would get a bank loan the next week to pay for the tickets. Vitt told her that she could issue the tickets. Vitt's position was that Ihara would be responsible for payment if her relatives could not pay. (Ihara had in the past booked an airline ticket on credit from PTS for a first cousin and, under an arrangement worked out with Vitt, had paid for it by salary deductions.) That same day, Ihara issued two one-way tickets from Pohnpei to Charleston, South Carolina via Guam for her mother and sister. Her mother and sister left Pohnpei on Monday, December 10, 2007. These tickets cost $3,700.50. PT&S was required to, and did, pay the airlines for the tickets within 15 days of their issuance. Return flights were not booked and purchased at the same time.

Vitt learned when later reviewing the daily sales report prepared by Ihara, that the tickets were from Pohnpei to Charleston, South Carolina, and not just to Guam. On December 20, 2007, Ihara issued two one-way tickets for her mother and sister to return to Pohnpei from South Carolina. Ihara did not consult Vitt before issuing the return tickets because she considered Vitt's initial approval for the issuance of the first set of plane tickets to be authorization for round-trip tickets. The return tickets cost $3,188.35. PT&S also paid for these plane tickets.

Neither Ihara nor her sister obtained a loan to pay for the plane tickets. Ihara made payments on her mother's plane tickets from December, 2007 to April, 2008, totaling $776.40. Ihara's sister made payments on her plane tickets from January, 2008 to May, 2008, totaling $550.

During Ihara's employment, regular office hours for the businesses were Monday to Friday, 8:00 a.m. to 5:00 p.m. The port was open from 6:00 a.m. to 6:00 p.m., seven days a week, when PT&S must accommodate clients. Mainly due to the servicing of vessels, whose schedules varied widely, employees were expected to work at any time when necessary to assist clients.

On March 20, 2008, a seaman on a PT&S client vessel had a stroke and needed urgent medical attention. PT&S arranged to have the seaman treated at Pohnpei Genesis Hospital. The next day was Good Friday, March 21, 2008, a Pohnpei state holiday. Ihara had the day off. That morning, the Genesis Hospital doctors informed PT&S that the stroke victim was able to fly.

Around 10:00 a.m., PT&S Office Manager Maria Teresa Legion, called Ihara at her home and told her that she needed to come to work and issue airline tickets for the stroke victim and a traveling companion. The two would be flying to Japan for the stroke victim to get further urgent medical treatment there. Ihara told Legion that Vitt only wanted her to work on regular working days. Legion told Ihara that it was a medical emergency involving a client and urged Ihara to come in and issue the plane tickets as she was the only person who could issue tickets for PTS. Ihara refused. She told Legion to tell Vitt to buy the plane tickets himself with a credit card directly from Continental Airlines rather than go through the PTS travel agency process.

At about 1:00 p.m., Vitt called Ihara at her home. Ihara's daughter answered the phone and Ihara refused to speak to Vitt. Vitt called again around 2:00 p.m. and spoke to Ihara. He told her that she needed to come in and issue the plane tickets for the ill seaman and his traveling companion. She asked Vitt if she would be paid at the holiday rate and Vitt replied that she would. Ihara asked him why he could not buy the plane tickets himself and Vitt responded by telling her that she is the company's travel agent and she needed to book the tickets. Ihara then complained about gas prices and Vitt

responded by telling her that she did not need to worry about gas because she no longer had a job. Ihara did not come in to issue the plane tickets and Vitt managed to book and purchase the tickets directly from Continental Airlines with a credit card in time for the men to make the next flight.

On March 27, 2008, Ihara received an official letter, dated March 24, 2008, terminating her employment at PT&S. Since Ihara's termination, PT&S has not employed a travel agent and eventually closed the travel agency.

Ihara filed suit in the Pohnpei Supreme Court against Vitt, PT&S, and PTS for wrongful termination. The defendants removed the case to the FSM Supreme Court and counterclaimed against Ihara for the outstanding balance on the South Carolina plane tickets.

The trial court noted that Ihara was a private employee, and that private employment was governed by contract law principles. Ihara v. Vitt, 18 FSM R. 516, 524 (Pon. 2013). It ruled that when Ihara was presented with an employee handbook, instructed to read and understand the handbook, told to sign-off on the handbook, and when she did so, the employee handbook constituted a unilateral contract between the parties. *Id.* at 524-25 (citing Reg v. Falan, 14 FSM R. 426, 431-32 (Yap 2006)). For disobeying the employee's supervisor, the handbook called for progressive discipline of a written warning, followed by a one-day suspension, and then by termination. *Id.* at 524 n.2.

The trial court then examined the handbook's terms to determine whether, based its factual findings, Ihara could be immediately terminated, and noted that the handbook stated: "'It is expected that all employees must obey all rules, regulations and instructions by their supervisor. Cooperation between coworkers helps make a smooth running company.'" *Id.* at 525 (quoting Employee Handbook § D5). And it noted that "Ihara was requested by her supervisors twice on March 21, 2008 to come into work to issue plane tickets to deal with a medical emergency situation of a client and both times refused." *Id.* After reviewing other jurisdictions' cases involving employee handbooks with progressive discipline, *id.* at 527-28, the trial court concluded that even when an employee handbook provided for progressive discipline, an employee could be fired for "just cause" or "good cause" without going through the progressive discipline process. *Id.* at 526, 529. The trial court ruled that, "Ihara's repeated acts of insubordination provided just cause for her immediate termination and did not require the progressive discipline in the Employee's Handbook and therefore Defendants PT & S, PTS, and Vitt are not liable to her for any wrongful termination." *Id.* at 529.

The trial court then turned to the defendants' counterclaim. It concluded that, "the tickets Ihara issued from Pohnpei to Charleston, South Carolina were unauthorized for issuance and payment by PT & S, and were inconsistent with the Defendants' rights of ownership and possession of the company funds used to pay for these tickets." *Id.* The trial court held that, since the issuance of tickets to South Carolina was unauthorized and since the return tickets were neither requested nor authorized, PT&S had proven its conversion claim and awarded the defendants $5,562.50, plus 9% interest from January 4, 2008 (15 days after December 20, 2007, the latest date that PT&S could have paid for the last set of plane tickets).

Ihara timely appealed.

II. Issues Presented

Ihara contends that the trial court's findings were factually and legally erroneous and thus: (1) the trial court abused its discretion when it found that Ihara's conduct was wrongful because Ihara's conduct was insufficient to justify her termination under a fully integrated employment contract that required progressive discipline, and (2) the appellees failed to produce sufficient evidence to meet the

elements of the tort of conversion.

III. Standards of Review

The interpretation of contract provisions is a matter of law to be determined by the court. Pohnpei v. Ponape Constr. Co., 7 FSM R. 613, 621 (App. 1996); Nanpei v. Kihara, 7 FSM R. 319, 323 (App. 1995). We review matters of law de novo. *E.g.*, Carlos Etscheit Soap Co. v. McVey, 17 FSM R. 427, 434 (App. 2011). Thus, we will review de novo the contract interpretation portion of the wrongful termination issues.

Our standard of review for trial court findings of fact is whether those findings are clearly erroneous. *E.g.*, George v. George, 17 FSM R. 8, 9 (App. 2010). A trial court's findings are presumed correct. *Id.* at 10; George v. Albert, 17 FSM R. 25, 30 (App. 2010). When trial court findings are alleged to be clearly erroneous, we will find reversible error only: 1) if the trial court findings were not supported by substantial evidence in the record; or 2) if the trial court's factual finding was the result of an erroneous conception of the applicable law, or 3) if, after reviewing the entire body of the evidence and construing it in the light most favorable to the appellee, the appellate court is left with a definite and firm conviction that a mistake has been made, George, 17 FSM R. at 9-10; Albert, 17 FSM R. at 30, but we cannot substitute our judgment for that of the trial court. Simina v. Kimeuo, 16 FSM R. 616, 620, 624 (App. 2009).

IV. Analysis

A. *Ihara's Claim of Factually Erroneous Findings*

Ihara, in setting out the case's factual background, asserts that the trial court made certain factual errors or just asserts facts different from those the trial court found. The "facts" she relies on include: that she was not disobedient by not coming to work on a holiday, that the travel agency business was closed before she was terminated, and that she told Vitt that the plane tickets for her mother and sister would be from Pohnpei to South Carolina and not just to Guam. Ihara points to her own testimony in the record to support her version of these facts.

A trial court's finding will only be set aside if there is no credible evidence in the record to support that finding, in part because the trial court had the opportunity to view the witnesses and the manner of their testimony. Simina v. Kimeuo, 16 FSM R. 616, 620, 624 (App. 2009). The trial court, having viewed the witnesses while they testified, chose to believe testimony and evidence other than Ihara's. But the trial court's factual findings must stand since they are supported by substantial evidence in the record and since Ihara has not shown that these findings are clearly erroneous. As we have previously noted, to be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must strike us as wrong with the force of a five-week-old unrefrigerated dead fish. Smith v. Nimea, 19 FSM R. 163, 173 (App. 2013). There are no unrefrigerated dead fish here.

B. *Ihara's Claim of Legally Erroneous Conclusions*

1. *Ihara's Termination*

Ihara first contends that she was not disobedient by not coming in to issue tickets for the stroke victim and his traveling companion since Vitt did not want her working on weekends and holidays. She next asserts that even if she was disobedient, the manual required certain procedures – progressive discipline – before she could be terminated. She further argues that PT&S thought it could fire her because it thought she was an at-will employee and she disparages at-will employment as a discredi

doctrine. Ihara asserts that even if she had been insubordinate, the most that should have happened is that she should have been given a warning letter. She urges the court to ignore, as out-dated, the at-will doctrine and hold that her acts were not egregious enough to warrant termination but only a warning letter. Ihara relies on Duldulao v. St. Mary of Nazareth Hospital Center, 505 N.E.2d 314 (Ill. 1987) for the principle that an employee handbook can create a binding contract. She thus concludes that since the employee handbook was a contract and since she did not receive progressive discipline, she could not be terminated.

The Duldulao court reversed a summary judgment for an employer on the at-will employment principle because there was an employee handbook that could create an employment contract. But at-will employment was not the issue before the Ihara trial court. The issue considered and decided was whether Ihara's acts of insubordination were egregious enough to warrant immediate termination even though her unilateral employment contract (the employee handbook) provided for progressive disciple. Ihara does not reject the U.S. case law that the trial court consulted to hold that even when there was an employee handbook requiring progressive discipline an employee could be terminated without going through the progressive discipline if the employee's misconduct was sufficiently egregious. Ihara contends that even using the U.S. caselaw's three-factor analysis, her disobedience was not egregious enough to warrant her immediate dismissal.

The trial court used three factors to analyze "whether there was just cause for immediate termination: (1) culpability, (2) knowledge of expected conduct, and (3) control over the offending conduct." Ihara, 18 FSM R. at 527. Ihara implicitly accepts the three-factor test's validity by basing her arguments on it.

The trial court held that: "'The proper emphasis under the culpability requirement should not be upon the number of violations; rather, it should address the problem of whether the discharge was 'necessary to avoid actual or potential harm to the employer's rightful interest.'" *Id.* at 528 (quoting Kehl v. Board of Review, 700 P.2d 1129, 1134, (Utah 1985)). It found:

> Because Ihara was the only employee who could book airline tickets, and after being explained the emergency nature and urgency of the situation, she must have known that by her not showing up to work as ordered, a serious interruption of the operations of PT & S would occur which would have possibly endangered the health of one of its clients. Further, Ihara's absence placed unexpected pressure on other employees of PT & S, especially its Office Manager and General Manager, in what was already an emergency situation.

Id. Since these facts are not clearly erroneous, the defendants satisfied the culpability factor.

The trial court found the knowledge factor satisfied because Ihara's actions violated the Employee's Handbook subsections which she knew about and which set the standards expected of PT&S employees to effectively carry out the company's objectives, "not to mention not to endanger the health and safety of one of its clients. . . . [and] Ihara's inaction in light of the medical emergency was also arguably a flagrant violation of a universal standard of behavior." *Id.*

The trial court found the third factor satisfied since

> Ihara did have control over her actions because PT & S called her three times, directly reaching her twice . . . [and] Ihara having been twice made aware of the medical emergency situation and her continuing to refuse to come in to work and issue the plane tickets, had control over her actions that day, and her decision not to come into work was

not abrupt, nor did she lack adequate time to consider the consequences of her actions.

Id. at 529. Based on these factual findings and its analysis, the trial court concluded

> that Ihara's termination for severe and multiple instances of disobedience and insubordination was justified and for just cause. Ihara's repeated acts of insubordination provided just cause for her immediate termination and did not require the progressive discipline in the Employee's Handbook and therefore the Defendants PT & S, PTS, and Vitt are not liable to her for any wrongful termination.

Id. Since the factual findings on which this conclusion is based are not clearly erroneous, this conclusion is sound.

Ihara argues that it was not a life-or-death situation and she was only following company policy by not working holidays or weekends. These arguments are all misplaced. It was a medical emergency; she was informed of the emergency; and she was specifically told to come to work for an hour or so on a holiday and that she would receive holiday pay. She refused. The facts meet the three-factor test to permit immediate termination despite an employee handbook provision requiring progressive discipline.

2. *Ihara's Liability for Conversion*

Ihara contends that PT&S did not prove its counterclaim for conversion because (noting some case law that called conversion the civil equivalent of theft), she did not steal the airline tickets and she did not take dominion over PT&S's property without its permission. She asserts that her dominion over PT&S's property was with its permission because she told Vitt that the trips were to South Carolina and he approved the daily sales reports.

The elements of an action for conversion are the plaintiff's ownership and right to possession of the personalty, the defendant's wrongful or unauthorized act of dominion over the plaintiff's property inconsistent with or hostile to the owner's right, and resulting damages. Bank of Hawaii v. Air Nauru, 7 FSM R. 651, 653 (Chk. 1996). Although conversion has sometimes been called the civil equivalent of theft that is not an accurate description. It is not the same as theft. The crime of theft requires the intent to permanently deprive another of the property. Conversion only requires the defendant's wrongful or unauthorized act of dominion over the plaintiff's property be inconsistent with the owner's right. It does not require the intent to permanently deprive the owner of its property. Ihara's argument that she did not steal the tickets and that no criminal case was filed is irrelevant. A conversion may occur even when the defendant has every intention of returning the property. Conversion is a strict liability tort whose foundation rests neither in the knowledge nor the intent of the defendant so a defendant can be liable for conversion even when he acted in good faith, lacked knowledge of the conversion, or lacked motive to commit the tort. Iriarte v. Individual Assurance Co., 18 FSM R. 340, 356-57 (App. 2012).

Ihara contends that she never took dominion over PT&S's property (its money used to pay for tickets) without its permission. However, the trial court found as fact that Vitt was only told that the tickets were to Guam. Ihara claims this finding is clearly erroneous and points to her own testimony that she told Vitt the tickets were for South Carolina. The trial court found Vitt's testimony more convincing than Ihara's. It viewed the witnesses' manner and demeanor of testifying. Since that finding is not clearly erroneous, it is a fact that Ihara took dominion over PT&S's property (its money used to pay for tickets) without its permission. Since the other elements of conversion are undisputed, the elements of conversion have been met. That being so, we need not address Ihara's argument that

PT&S should sue her for breach of contract in a separate action.

Ihara's last argument is that PT&S has unclean hands because it applied her last paycheck of $26.50 to her debt on the airline tickets. Ihara has not shown that this setoff was wrongful and even if she had, this is not a defense to conversion. "A defendant may successfully defend a conversion action by proving that the plaintiff consented to the defendant's taking, or that the defendant had rights in the property superior to the plaintiff's, or that the plaintiff has waived its cause of action, or that the plaintiff is estopped from asserting any right to the property." Iriarte, 18 FSM R. at 357. Ihara's defense was that the counterclaimants had authorized her taking. That defense failed.

V. Conclusion

Accordingly, we affirm the trial court judgment. The appellees are entitled to their costs. FSM App. R. 39(a).

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FSM SUPREME COURT APPELLATE DIVISION

QUIRINO LOYOLA, in his capacity as Nett District Election Chairman, ex rel. ADELINO EDMUND, Appellant-Petitioner, vs. PETERIKO HAIRENS, Appellee-Respondent.	APPEAL CASE NO. P1-2014

ORDER DISMISSING APPEAL

Argued: October 7, 2014
Decided: October 27, 2014

BEFORE:

Hon. Ready E. Johnny, Acting Chief Justice, FSM Supreme Court
Hon. Beauleen Carl-Worswick, Associate Justice, FSM Supreme Court
Hon. Camillo Noket, Temporary Justice, FSM Supreme Court*

*Chief Justice, Chuuk State Supreme Court, Weno, Chuuk

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