NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 0089

EAST BATON ROUGE PARISH SCHOOL BOARD

VERSUS

CITY OF BAKER SCHOOL BOARD AND
ELMER B. LITCHFIELD IN HIS OFFICIAL CAPACITY AS SHERIFF AND
EX OFFICIO TAX COLLECTOR OF EAST BATON ROUGE PARISH

Judgment Rendered: September 15, 2006

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 520,730

Honorable Curtis Calloway, Judge

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

In this suit for damages arising out of breach of contract and conversion, the defendant, the City of Baker School Board ("CBSB"), appeals a judgment rendered in favor of the plaintiff, the East Baton Rouge Parish School Board ("EBRPSB"), which denied the CBSB's motion for summary judgment; granted the EBRPSB's motion for summary judgment; granted in part and denied in part the EBRPSB's motion to strike; entered judgment in the amount of $250,000, plus legal interest against the CBSB; and dismissed, with prejudice, the claims of the CBSB against the EBRPSB. For reasons that follow, we affirm in part and reverse in part.

FACTUAL AND PROCEDURAL HISTORY

Prior to 1995, all of East Baton Rouge Parish was included in the East Baton Rouge Parish school system ("EBRPSS"). Due to those proceedings entitled *Clifford Eugene Davis, Jr., et al. and the United States of America versus East Baton Rouge Parish School Board, et al.*, civil action no. 56-1662, on the docket of the United States District Court for the Middle District of Louisiana (the "desegregation case"), the EBRPSS was under the continuing supervision and jurisdiction of the federal court.[1]

By statewide election in 1995, a new school system was established within East Baton Rouge Parish for the incorporated limits of the City of Baker, and is now known as the City of Baker school system ("CBSS"). Thereafter, in accordance with the provisions set forth in La. R.S. 17:72, the members of the CBSB were elected. See **City of Baker School Board v. East Baton Rouge**

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[1] Prior to 1954, the EBRPSS was racially segregated as a matter of law. The desegregation case was filed in 1956 following the decisions of **Brown v. Board of Education**, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) and **Brown v. Board of Education**, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). Since that time and until the EBRPSB could establish a unitary school system (or attain "unitary status"), the United States District Court for the Middle District of Louisiana maintained continuing supervision and jurisdiction over the case under **Swann v. Charlotte-Mecklenburg Board of Education**, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed. 2d 554 (1971), to ensure that the EBRPSB fulfilled its duty to eliminate all vestiges of segregation from its school system. See **Davis v. East Baton Rouge Parish School Board**, 721 F.2d 1425 (5th Cir. 1983) and the related cases cited therein.

Parish School Board, 99-2505 (La. App. 1st Cir. 2/18/00), 754 So.2d 291, 292. However, in order for the CBSS to separate from the EBRPSS, it was required to obtain a final judgment in the desegregation case allowing the separation. See La. R.S. 17:72.

In February 2002, the plaintiffs in the desegregation case (Clifford Eugene Davis, Jr., et al.), the Baton Rouge Branch of the National Association for the Advancement of Colored People ("NAACP"), the United States Department of Justice, the EBRPSB, CBSB, and the Zachary Community School Board[2] entered into an agreement in the desegregation case which settled the requests by the CBSB and the Zachary Community School Board to separate from the EBRPSS (the "separation agreement").[3] On February 19, 2002, the Honorable James Brady, United States District Judge for the Middle District of Louisiana, rendered and signed an order approving the separation agreement.

The separation agreement allowed the CBSS to separate from the EBRPSS and, commencing July 1, 2003, to educate the children who resided within its boundaries. Of particular importance to this appeal, paragraph 5 of the separation agreement provided:

> 5. [CBSB] will pay EBRPSS $750,000 on or before October 1, 2002 to assist in the reopening of White Hills Elementary School and the relocation of any existing programs presently at White Hills School. If this Court enters a judgment prior to or following the trial currently scheduled for November 12, 2002, declaring that EBRPSS has achieved unitary status, vacating all outstanding relief, and dismissing this case, and such judgment is upheld in its entirety on any appeal therefrom, EBRPSS shall refund $250,000 to [CBSB] within 90 days after the time permitted for any appeal, including a petition for writ of certiorari in the United States Supreme Court, has elapsed, or, if any notice of appeal or petition for a writ of certiorari is filed, all appellate proceedings are complete.

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[2] The Zachary Community School Board was likewise seeking to separate its school system from the EBRPSS.

[3] The separation agreement was signed by counsel for all of the listed interested parties. At the time the CBSB entered into the separation agreement, it was represented by attorney Mark Plaisance and three other attorneys from the law firm of Breazeale, Sachse & Wilson, L.L.P.

After the parties entered into the separation agreement and after Judge Brady approved the separation agreement, the trial on the issue of whether the EBRPSS had achieved unitary status was cancelled by Judge Brady. However, on August 14, 2003, a final judgment in the desegregation case was rendered by Judge Brady declaring the EBRPSS unitary, dissolving and vacating all previously issued injunctive relief, dismissing the suit with prejudice, and thereby releasing the EBRPSS from judicial supervision.

Just prior to the rendition of the judgment declaring that the EBRPSS had achieved unitary status, on July 25, 2003, the CBSB and the EBRPSB entered into another agreement to address certain issues in connection with the separation of the CBSS from the EBRPSS (the "intergovernmental agreement").[4] Of particular importance to this appeal and with regard to property tax revenues, the intergovernmental agreement provided:

> The EBRP School System will cease levying and collecting ad valorem taxes within the geographic limits of the Baker School System beginning July 1, 2003. The EBRP School Board and the Baker School Board hereby agree that, as to school-related property taxes levied and collected within the geographic limits of the Baker School System, the EBRP School System shall receive such property taxes as it may levy and collect within that geographical area for the period of January 1, 2003 – June 30, 2003 and the Baker School System shall receive such property taxes as it may levy and collect within that geographical area for the period of July 1, 2003 – December 31, 2003. The EBRP School Board and the Baker School Board agree that the Baker School System will receive the property taxes levied and collected by the East Baton Rouge Parish Sheriff for the 2003 calendar year for the geographical area located within the Baker School System and remit one-half of those property taxes to the EBRP School System.

From January through April 2004, Elmer B. Litchfield, Sheriff and Ex-Officio Tax Collector for East Baton Rouge Parish (the "Sheriff"), issued checks to the CBSB for the 2003 property taxes and for back taxes for years prior to 2003. It

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[4] The intergovernmental agreement was signed by the superintendent for each of the respective school systems/school boards. At the time the CBSB and the EBRPSB entered into the intergovernmental agreement, the superintendent of the CBSS was C. Lester Klotz, and the superintendent of the EBRPSS was Clayton M. Wilcox.

is undisputed that the CBSB has remitted one-half of the 2003 property tax payments it has received to the EBRPSB, less $250,000.

On March 9, 2004, and April 23, 2004, the EBRPSS made formal demand for all sums owed to it by the CBSS in accordance with the intergovernmental agreement. The CBSB refused, contending that the EBRPSB owed it $250,000 pursuant to paragraph 5 of the separation agreement because the EBRPSB obtained a judgment on August 14, 2003, which had become final, declaring that the EBRPSS had attained unitary status.

On June 1, 2004, the EBRPSB commenced these proceedings by filing a Petition for Damages for Breach of Contract and/or Conversion, Temporary Restraining Order and Other Injunctive Relief or, in the Alternative, Writ of Mandamus, against the CBSB and the Sheriff. In their petition, the EBRPSB alleged that the CBSB had breached the intergovernmental agreement by failing to remit one-half of the property tax revenues due to the EBRPSB despite amicable demand for full payment. As such, the EBRPSB further alleged that the CBSB had wrongfully deprived the EBRPSB of possession of its property, and thus the CBSB had committed the intentional tort of conversion and was liable to EBRPSB for damages it has sustained. On June 2, 2004, the trial court issued an alternative writ directing the Sheriff to withhold all 2003 property taxes collected within the geographic limits of the CBSS and EBRPSS pending further order of the court.

On June 22, 2004, the CBSB filed an answer and reconventional demand, alleging that the EBRPSB had breached the separation agreement by failing to refund the CBSB the sum of $250,000 pursuant to paragraph 5 of the separation agreement, since the EBRPSB had obtained a final judgment declaring the EBRPSS unitary. After a hearing on the EBRPSB's application for a preliminary injunction, the trial court ordered the Sheriff to continue withholding payment of the 2003 ad valorem taxes collected within the geographic city limits of the CBSS

due to the CBSB and the EBRPSB.

On January 21, 2005, the EBRPSB filed a motion for summary judgment, with supporting affidavits and exhibits, asserting that the undisputed material facts demonstrated: (1) the CBSB had breached the intergovernmental agreement by refusing to remit to the EBRPSB one-half of all property taxes collected by the Sheriff and distributed to CBSB; (2) the CBSB had wrongfully deprived EBRPSB possession of its property, and therefore, had committed the intentional tort of conversion; and (3) the settlement agreement did not require the EBRPSB to pay the CBSB $250,000.

The CBSB also filed a motion for summary judgment and opposition to EBRPSB's motion for summary judgment, with supporting affidavits and documentation, contending that the undisputed material facts demonstrated: (1) the CBSB had not breached the terms of the intergovernmental agreement; (2) the CBSB had not wrongfully deprived the EBRPSB of possession of its property, and thus, had not committed the intentional tort of conversion; (3) paragraph 5 of the separation agreement required the EBRPSB to refund $250,000 to the CBSB; (4) the $250,000 owed by the EBRPSB was now "due and owing"; (5) the EBRPSB had breached the separation agreement by failing to pay the CBSB the sum of $250,000; and (6) the EBRPSB had wrongfully deprived the CBSB possession of its property, and therefore, had committed the intentional tort of conversion.

In response, the EBRPSB moved to strike the CBSB's supporting affidavits of C. Lester Klotz, the superintendent of the CBSS; Dr. Dana C. Carpenter, the president of the CBSB; and Mark D. Plaisance, an attorney who represented the CBSB when it negotiated and entered into the separation agreement, on the basis that the affidavits failed to comply with the requirements of La. C.C.P. art. 967.

The CBSB then supplemented both its motion for summary judgment and its opposition to the EBRPSB's motion for summary judgment with the affidavits of

Jerry Epperson, who was the superintendent of the CBSS when it entered into the separation agreement, and Allen Spears, Jerry Epperson's administrative assistant. Additionally, the CBSB submitted the supplemental affidavits of C. Lester Klotz and Mark D. Plaisance. The EBRPSB again moved to strike the supplemental affidavits of C. Lester Klotz and Mark D. Plaisance, as well as the affidavit of Allen Spears, on the basis that the affidavits failed to comply with the requirements of La. C.C.P. art. 967.

A hearing on the motions to strike and the motions for summary judgment was held on June 28, 2005. After the argument of counsel and the presentation of documentary evidence, the trial court rendered judgment granting the EBRPSB's motion to strike the affidavits of C. Lester Klotz, Dr. Dana C. Carpenter, and Mark D. Plaisance; denying EBRPSB's motion to strike the affidavit of Allen Spears; granting the EBRPSB's motion for summary judgment, and denying the CBSB's motion for summary judgment.

A written judgment in accordance with the trial court's ruling was signed on August 11, 2005. This judgment further provided for judgment in favor of the EBRPSB and against the CBSB in the amount of $250,000, together with legal interest from June 1, 2004 until paid, and dismissed the CBSB's claims against the EBRPSB. Additionally, the judgment ordered the alternative writ directing the Sheriff to withhold the 2003 property taxes collected within the geographic limits of the CBSS due to the CBSB and the EBRPSB be withdrawn; ordered the Sheriff to remit all such 2003 property taxes to the EBRPSB; and ordered that all such sums paid to the EBRPSB by the Sheriff be credited towards the amount owed by the CBSB under the provisions of the judgment. It is from this judgment that CBSB now appeals.[5]

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[5] On August 18, 2005, the CBSB filed motions for new trial on both the motion to strike and on the parties' motions for summary judgment. The motions for new trial were denied *ex parte* by the trial court on August 24, 2005.

ASSIGNMENTS OF ERROR

On appeal, the CBSB sets forth the following assignments of error:

(1) The trial court erred in granting the EBRPSB's motion to strike the affidavits of Mark D. Plaisance, C. Lester Klotz, and Dr. Dana C. Carpenter.

(2) The trial court erred in failing to allow the CBSB the opportunity to amend or cure any defects in the affidavits of Mark D. Plaisance, C. Lester Klotz, and Dr. Dana C. Carpenter.

(3) The trial court erred in granting the EBRPSB's motion for summary judgment on the basis that the obligation requiring the CBSB to pay the EBRPSB one-half of all ad valorem taxes received for the 2003 tax year set forth in the intergovernmental agreement, was due and owing.

(4) The trial court erred in granting EBRPSB's summary judgment on the basis that the separation agreement did not establish an obligation on the part of the EBRPSB to refund the sum of $250,000 to CBSB after the EBRPSB achieved unitary status in August 2003.[6]

SUMMARY JUDGMENT

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. **Craig v. Bantek West, Inc.**, 2004-0229 (La. App. 1st Cir. 9/17/04), 885 So.2d 1241, 1244; **Western Sizzlin Steakhouse v. McDuffie**, 2002-0935 (La. App. 1st Cir. 3/28/03), 844 So.2d 355, 357, writ denied, 2003-1147 (La. 6/20/03), 847 So.2d 1236. A party seeking a summary judgment is entitled to a favorable judgment only if there is no genuine issue as to a material fact. **Boland v. West Feliciana Parish Police Jury**, 2003-1297 (La. App. 1st Cir. 6/25/04) 878 So.2d 808, 813, writ denied, 2004-2286 (La. 11/24/04), 888 So.2d 231. Thus, the motion should

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[6] The CBSB has not assigned error to the trial court's denial of its motion for summary judgment.

be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). If the court finds that a genuine issue of material fact exists, summary judgment must be rejected.

On a motion for summary judgment, the burden of proof is on the mover. When the issue before the court on the motion for summary judgment is one on which the party bringing the motion will bear the burden of proof at trial, the burden of showing that there is no genuine issue of material fact is on the party bringing the motion. La. C.C.P. art. 966(C)(2); **Buck's Run Enterprises, Inc. v. Mapp Const., Inc.**, 99-3054 (La. App. 1st Cir. 2/16/01), 808 So.2d 428, 431.

If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover need only point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. C.C.P. art. 966(C)(2); **Robles v. ExxonMobile**, 2002-0854 (La. App. 1st Cir. 3/28/03), 844 So.2d 339, 341.

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. See **Independent Fire Ins. Co. v. Sunbeam Corp.**, 99-2181, 99-2257 (La. 2/29/00), 755 So.2d 226, 230; **Allen v. State ex rel. Ernest N. Morial-New Orleans Exhibition Hall**

Authority, 2002-1072 (La. 4/9/03), 842 So.2d 373, 377. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. **Ernest v. Petroleum Service Corp.**, 2002-2482 (La. App. 1st Cir. 11/19/03), 868 So.2d 96, 97, writ denied, 2003-3439 (La. 2/20/04), 866 So.2d 830.

The credibility of a witness is a question of fact, thus, a court cannot make credibility determinations on a motion for summary judgment. **Hutchinson v. Knights of Columbus, Council No. 5747**, 2003-1533 (La. 2/20/04), 866 So.2d 228, 234. In deciding a motion for summary judgment, the court must assume that all of the witnesses are credible. *Id.* Furthermore, summary judgment is seldom appropriate for determinations based on subjective facts, such as motive, intent, good faith, knowledge or malice, and should only be granted on such subjective issues when no issue of material fact exists concerning that issue. **Jones v. Estate of Santiago**, 2003-1424 (La. 4/14/04), 870 So.2d 1002, 1006.

An issue is "genuine" if reasonable persons could disagree. **Smith v. Our Lady of the Lake Hospital**, 93-2512 (La. 7/5/94), 639 So.2d 730, 751. In determining whether an issue is "genuine," courts cannot consider the merits, make credibility determinations, evaluate testimony or weigh evidence. *Id.* A fact is "material" when its existence or non-existence may be essential to plaintiff's cause of action under the applicable theory of recovery. *Id.* Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Foreman v. Danos and Curole Marine Contractors, Inc.**, 97-2038 (La. App. 1st Cir. 9/25/98), 722 So.2d 1, 4, writ denied, 98-2703 (La. 12/18/98), 734 So.2d 637.

LAW AND DISCUSSION

In this case, the EBRPSB moved for summary judgment on both its main

demand and the CBSB's reconventional demand. The EBRPSB's petition for damages is based on breach of contract, specifically the alleged breach of the intergovernmental agreement by the CBSB, and on conversion. The CBSB's reconventional demand is based on breach of contract, specifically, the alleged breach of paragraph 5 of the separation agreement by the EBRPSB.

Breach of Contract

Contracts have the effect of law for the parties. La. C.C. art. 1983. In a breach of contract action, the burden of proof is on the party claiming rights under the contract. **Bond v. Allemand**, 93-1441 (La. App. 1st Cir. 2/23/94), 632 So.2d 326, 329, writ denied, 94-0718 (La. 4/29/94) 637 So.2d 468. The existence of the contract and its terms must be proven by a preponderance of the evidence. *Id.*

Thus, in order to succeed on its motion for summary judgment with regard to its breach of contract claims, the EBRPSB had the burden of establishing there were no genuine issues of material fact that the terms of the intergovernmental agreement required the CBSB to remit one-half of the 2003 property taxes collected by the Sheriff and distributed to CBSB to the EBRPSB, and that the CBSB had breached those terms. Further, with regard to the CBSB's reconventional demand for the EBRPSB's alleged breach of the separation agreement, the EBRPSB had to establish that there was an absence of factual support for the CBSB's claim that the terms of paragraph 5 of the separation agreement required the EBRPSB to refund the CBSB $250,000.[7]

In its motion for summary judgment, the EBRPSB asserts that the terms of the intergovernmental agreement clearly and unambiguously provide that the CBSB shall pay the EBRPSB one-half of all 2003 school-related property taxes collected within the geographic limits of the CBSB and that the CBSB has

[7] Neither party disputes the existence of nor the authenticity of either the intergovernmental agreement or the separation agreement contained in the record of these proceedings.

breached the terms of the intergovernmental agreement, because the CBSB admitted it has not paid one-half of all 2003 property taxes it has received. However, the CBSB contends that the intergovernmental agreement is unclear as to when the 2003 property taxes distributed to the CBSB by the Sheriff were to be remitted to the EBRPSB, and thus, there are genuine issues of material fact that preclude summary judgment.

The interpretation of a contract is the determination of the common intent of the parties. La. C.C. art. 2045. When the words of a contract, given their generally prevailing meaning, are clear and explicit, and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. La. C.C. arts. 2046 and 2047. In such cases, the meaning and intent of the parties to the written contract must be sought within the four corners of the instrument and cannot be explained or contradicted by parol evidence. La. C.C. art. 1848; **Allain v. Shell Western E & P, Inc.**, 99-0403 (La. App. 1st Cir. 5/12/00), 762 So.2d 709, 714. The use of extrinsic evidence is proper only where a contract is found to be ambiguous after an examination of the four corners of the agreement. *Id.* When a contract can be interpreted from the four corners of the instrument (without the necessity of extrinsic evidence) the question of contractual interpretation is answered as a matter of law, and summary judgment is appropriate. **Brown v. Drillers, Inc.** 93-1019 (La. 1/14/94), 630 So.2d 741, 749-50.

However, in cases in which the contract is ambiguous, the agreement shall be construed according to the intent of the parties. **Taylor v. Brandner**, 2005-0970 (La. App. 5th Cir. 4/25/06), 928 So.2d 751, 754. Intent is an issue of fact that is to be inferred from all of the surrounding circumstances. *Id.* A doubtful provision must be interpreted in light of the nature of the contract, equity, usages, the conduct before and after the formation of the contract, and other contracts of a like nature between the same parties. La. C.C. art. 2053.

As previously set forth above in more detail, with regard to the 2003 property tax revenues, the intergovernmental agreement provided:

> The [EBRPSB] and the [CBSB] agree that the [CBSS] will receive the property taxes levied and collected by the East Baton Rouge Parish Sheriff for the 2003 calendar year for the geographical area located within the [CBSS] and remit one-half of those property taxes to the [EBRPSS].

While we agree with the CBSB that this paragraph of the intergovernmental agreement may not specify an exact date or time period within which the CBSS was required to remit the one-half of the property tax revenues after receipt, we find this paragraph is clear and explicit in providing that the CBSS would receive all of the 2003 property taxes belonging to both the CBSS and the EBRPSS and remit one-half of those funds to the EBRPSS. As such, no further interpretation of the contract may be made in search of the parties' intent, and the contract is to be interpreted as a matter of law. We find under the terms of the intergovernmental agreement, that the CBSB was required to remit one-half of the property taxes upon receipt and, thus, did not have the right to retain any portion of the EBRPSB's one-half of the 2003 property tax revenues for any period of time. Additionally, the evidence submitted by both the EBRPSB and the CBSB established that the CBSB has remitted one-half of all 2003 property tax revenues it has received from the Sheriff, less $250,000.

Accordingly, we find that the EBRPSB has satisfied its burden of showing that there were no genuine issues of material fact that the terms of the intergovernmental agreement required the CBSS to remit payment of one-half of the 2003 property tax revenues upon receipt and that the CBSB had breached the terms of intergovernmental agreement by failing to make such payment. Moreover, once the burden shifted to the CBSB to establish that it would be able to satisfy its evidentiary burden of proof at trial, we find the evidence submitted by the CBSB was insufficient to satisfy its burden in this regard, and therefore, the EBRPSB was

entitled to judgment as a matter of law. Accordingly, we find that the trial court properly granted the EBRPSB's motion for summary judgment on the breach of contract claims set forth in the EBRPSB's the main demand.

However, we cannot say that the trial court properly granted summary judgment on the breach of contract claims set forth in the CBSB's reconventional demand with regard to the separation agreement. In its motion for summary judgment, the EBRPSB asserts that the language of paragraph 5 of the separation agreement clearly and unambiguously provides that the refund of $250,000 sought by the CBSB was owed if, and only if, a judgment was entered in the desegregation case prior to or following the trial scheduled for November 12, 2002. Since no trial took place in the desegregation case on November 12, 2002 (or at any other time) on the issue of whether the EBRPSS had achieved unitary status, EBRPSB contends there is an absence of factual support for the CBSB's claim that it is entitled to $250,000 under the separation agreement.

As previously set forth above in more detail, with regard to the refund of $250,000, paragraph 5 of the separation agreement provided:

> [CBSB] will pay EBRPSS $750,000 ... to assist in the reopening of White Hills Elementary School .... If this Court enters a judgment prior to or following the trial currently scheduled for November 12, 2002, declaring that EBRPSS has achieved unitary status ... and such judgment is upheld in its entirety on any appeal therefrom, EBRPSS shall refund $250,000 to [CBSB] within 90 days after the time permitted for any appeal ... has elapsed, or ... all appellate proceedings are complete.

Contrary to assertions by the EBRPSB, we note that paragraph 5 of the separation agreement does not contain the language "if and only if." Rather, paragraph 5 contemplates a judgment, which would declare that the EBRPSS had achieved unitary status prior to or following a trial "**currently** scheduled for November 12, 2002." (Emphasis added.) We find the terms of paragraph 5 of the separation agreement are ambiguous insofar as the word "currently" in the context

used therein, could be interpreted to mean that the event which triggered the EBRPSB's obligation to refund $250,000 to the CBSB was not a constant or fixed date, but rather, subject to change, and further this language could be interpreted to mean that the event triggering the obligation to refund the $250,000 was not necessarily a trial, but the judgment itself declaring that the EBRPSS had achieved unitary status. Thus, the terms of paragraph 5 of the separation agreement must be construed according to the intent of the parties.

The affidavits of Clayton Wilcox (the former superintendent of the EBRPSS), Charlotte Placide (the Deputy Superintendent and interim superintendent of the EBRPSS), and Roger Moser (the President of the EBRPSB), established that the parties intended that the EBRPSB would refund the CBSB $250,000 only if the EBRPSB received a final judgment in the desegregation case declaring the EBRPSS unitary prior to or following the trial scheduled for November 12, 2002. The parties did not draft the separation agreement with the intent or understanding that the EBRPSB would be required to refund any money to the CBSB under any other circumstances, at any future time, or in perpetuity. These affidavits also established that one of the primary objections the EBRPSB had to the separation of the CBSS (and the Zachary community school system) was the negative financial impact that the separation would have on the EBRPSS. Specifically, the EBRPSB was concerned about the cost associated with reopening White Hills as an elementary school, which was necessary to accommodate the students who had previously attended schools located within the geographic limits of the new CBSS, but who resided outside of the CBSS and, thus, would no longer attend the schools after the separation. The affidavits of Clayton Wilcox, Charlotte Placide, and Roger Moser further explained that the payment of $750,000 by the CBSB to the EBRPSB was negotiated and agreed to by the parties to help pay for the costs associated with re-opening of White Hills as an elementary school and the

relocation of programs housed there to other facilities. Additionally, these affidavits established that the EBRPSB renovated White Hills and re-opened it as an elementary school in August 2003, and that the EBRPSB intends to continue operating that school.

Additionally, the EBPRSB submitted the affidavit of Michael Kirk, an attorney from Washington, D.C., who represented the EBRPSB in the desegregation case and in the litigation concerning the separation of the CBSS and the Zachary community school system. His affidavit also established that one of the primary objections of the EBRPSB to the separation of the CBSS and the Zachary community school system was the negative financial impact on the EBRPSS, particularly with regard to the cost associated with re-opening of White Hills as an elementary school. Michael Kirk further explained that the purpose of the payment of $750,000 by the CBSB was to assist in the reopening of White Hills, and that the negotiations and agreement regarding the payment of the $750,000, and a possible refund of $250,000, occurred during a court-ordered status conference in Judge Brady's courtroom on Friday, February 8, 2002. Michael Kirk also stated that the separation agreement was drafted by counsel for EBRPSB, the CBSB, the Zachary community school board, the United States Department of Justice, the Baton Rouge Branch of the NAACP, and the original plaintiffs, and that based upon his participation in the negotiations and drafting of the separation agreement, the parties intended that the EBRPSB would only be required to refund the CBSB $250,000 if the EBRPSB received a final judgment declaring its school system unitary prior to or following the trial scheduled for November 12, 2002, and not in perpetuity. He further explained that if the trial was cancelled or if EBRPSB did not prevail at the trial, the $250,000 would not be refundable even if the EBRPSS obtained unitary status at a later date. Additionally, Michael Kirk stated that the language "prior to" was included in

paragraph 5 of the separation agreement to address the possibility of settlement or of the court granting summary judgment on EBRPSB's motion for unitary status "prior to" the November 12, 2002 trial, and that the language "following the trial currently scheduled for November 12, 2002," was included in paragraph 5 of the separation agreement to clarify that any refund owed by the EBRPSB was conditional upon the trial taking place on or around that date. He further explained that the possibility of a refund to the CBSB was included to address the concerns of the CBSB in that the CBSB did not want to pay the EBRPSB $750,000 in October 2002 only to have the EBRPSS declared unitary one month later at the trial in November 2002, which could have resulted in the possibility that the EBRPSB would not have to incur all of the anticipated costs to renovate White Hills Elementary School.

Based on this evidence, the EBRPSB contends that since the parties intended that the EBRPSB would be required to refund the CBSB $250,000 only if the EBRPSB received a final judgment declaring its school system unitary prior to or following the trial scheduled for November 12, 2002, and since the trial scheduled for November 12, 2002 was cancelled, the CBSB has failed to present a genuine issue of material fact on an essential element of their claim—that the EBRPSB had breached the separation agreement by failing to refund the CBSB the sum of $250,000 pursuant to paragraph 5 of the separation agreement.

In opposition to the EBRPSB's motion for summary judgment, the CBSB submitted the affidavits of C. Lester Klotz (original and supplemental), Mark D. Plaisance (original and supplemental), Dr. Dana C. Carpenter, Allen Spears and Jerry Epperson. According to the CBSB's evidence, the CBSB paid $750,000 to the EBRPSB as part of the agreement allowing it to separate from the EBRPSS with the intent and understanding that the CBSB would receive a refund of $250,000 if and when unitary status was granted to the EBRPSS, regardless of

whether it was "prior to or following" the trial that was scheduled for November 12, 2002. It was also the CBSB's understanding that there was no time limit set forth in the separation agreement that would preclude the CBSB from receiving the $250,000 refund, that the $250,000 refund from EBRPSB became past due on or about January 11, 2004, that the CBSB had made formal demand for the payment of this obligation, and that the EBRPSB has denied owing this obligation to the CBSB.

The CBSB's evidence further established that the EBRPSB sought payment in the amount of $1,000,000 from the CBSB in exchange for the EBRPSB not opposing the separation of the CBSS from the EBRPSS. Although the CBSB objected to having to pay EBRPSB any sum of money to separate from the EBRPSS, the CBSB counter-offered $500,000 to the EBRPSB not to oppose its separation. Thereafter, the EBRPSB reduced its demand to $750,000, and, in order to induce the CBSB to agree to pay $750,000, Michael Kirk offered that the EBRPSB would rebate $250,000 to the CBSS once the EBRPSS was deemed to have achieved unitary status. Based on Michael Kirk's insistence that the EBRPSS would be granted unitary status in November 2002, the CBSS agreed to pay the EBRPSB $750,000 and to await the $250,000 rebate.

Based on this evidence, the CBSB contends that it has presented sufficient factual support as to the essential elements of their claim—that the EBRPSB has breached the separation agreement by failing to refund the CBSB the sum of $250,000—such that they will be able to satisfy their evidentiary burden at trial, and hence there are genuine issues of material fact which precludes summary judgment.

However, the trial court excluded the affidavits of C. Lester Klotz (original and supplemental), Mark D. Plaisance (original and supplemental), and Dr. Dana Carpenter, on which the CBSB relied on to establish the intent of the parties with

regard to the refund of the $250,000 set forth in the separation agreement. Since the CBSB assigns error to the exclusion of this evidence, we must determine the correctness of this ruling.

Motion to Strike

The EBRPSB moved to strike the affidavits of C. Lester Klotz, Mark D. Plaisance, and Dr. Dana C. Carpenter on the basis that the affidavits were insufficient to meet the requirements of La. C.C. P. art. 967. In granting the EBRPSB's motion to strike, the trial court ruled as follows:

> Okay. After hearing the comments by the parties, the attorneys in reference to several affidavits, those are the affidavits of Mr. Klotz, Dr. Carpenter, Mr. Plaissance [*sic*] and Mr. Spears, the court is going to deny the use of the affidavits of Mr. Klotz, Dr. Carpenter, Mr. Plaissance [*sic*]. The court will permit the use of the affidavit of Mr. Spears.

Louisiana Code of Civil Procedure article 967 describes the type of documentation a party may submit in support of or in opposition to a motion for summary judgment. **Independent Fire Ins. Co. v. Sunbeam Corp.**, 99-2181, 99-2257 (La. 2/29/00), 755 So.2d 226, 231. Supporting and opposing affidavits shall be made on "personal knowledge," shall set forth facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. La. C.C.P. art. 967(A). "Personal knowledge" encompasses only those facts, which the affiant saw, heard or perceived with his own senses. **Dominio v. Folger Coffee Co.**, 2005-0357 (La. App. 4th Cir. 2/15/06), 926 So.2d 16, 18.

Generally, a lay witness can only testify to the facts within his personal knowledge and not to impressions or opinions. **Vanderbrook v. Coachmen Industries, Inc.**, 2001-0809 (La. App. 1st Cir. 5/10/02), 818 So.2d 906, 910. However, La. C.E. art. 701 provides that a lay witness may testify in the form of an opinion if the opinion is "[r]ationally based on the perception of the witness" and is

"[h]elpful to a clear understanding of his testimony or the determination of a fact in issue." Thus, a witness is permitted to draw reasonable inferences from his personal observations. **Vanderbrook**, 818 So.2d at 910.

With regard to the affidavits of C. Lester Klotz and Dr. Carpenter, the EBRPSB contends that these affidavits contain legal conclusions and statements for which the affiants lacked the requisite "personal knowledge" to testify. According to the affidavit of C. Lester Klotz, although he was not the superintendent of the CBSS at the time the parties entered into the separation agreement, as superintendent, he is bound by and familiar with its terms. He further stated that since becoming superintendent, he became intimately involved in the separation and changeover of the CBSS from the EBRPSS, and that he was informed about and advised of the obligation owed to the CBSS from the EBRPSB by Mark D. Plaisance, general counsel for the CBSB when the agreement was signed and approved. According to the affidavit of Dr. Dana C. Carpenter, the current president of the CBSB, he was a member of the CBSB when the parties entered into the separation agreement and is familiar with its terms.

With regard to the affidavits of Mark D. Plaisance, the EBRPSB contends they contains lay opinions which are inadmissible, statements pertaining to settlement negotiations which are inadmissible, and statements which are not based on his "personal knowledge." According to the affidavits of Mark D. Plaisance, he was one of the attorneys that represented the CBSB when the CBSS withdrew from the EBRPSS, and he participated in and negotiated the terms of the separation of the CBSS from the EBRPSS on behalf of the CBSS.

After reviewing all of the affidavits submitted by the CBSB in this matter, we agree with the trial court that C. Lester Klotz and Dr. Dana C. Carpenter do not have the requisite "personal knowledge" to testify about the intent of the parties with regard to paragraph 5 of the separation agreement, and therefore their

affidavits are not competent summary judgment evidence under La. C.C.P. art. 967. However, we do we find that Mark D. Plaisance had sufficient personal knowledge of the all matters testified to in his affidavit, and further find that the facts he testified to would be admissible at trial, such that his affidavit meet the requirements of La. C.C.P. art. 967. Although some of the statements contained in his affidavits are lay opinion testimony, those opinions are based on his perception and participation in the negotiations, which led to the separation agreement, as well as the actions of the parties after the execution of the separation agreement. Furthermore, those lay opinions are helpful to a determination of the intent of the parties with regard to paragraph 5 of the separation agreement—a fact at issue in this case—and thus, constitute admissible lay opinion testimony. Accordingly, we find that the affidavits of Mark D. Plaisance were admissible and that the trial court abused its discretion in ruling otherwise.[8]

Therefore, when the affidavits improperly excluded by the trial court in this case are considered, it is clear that there are genuine issues of material fact with regard to the parties' intent on paragraph 5 of the separation agreement and whether the EBRPSB is required to refund the sum of $250,000. Accordingly, we find that the trial court inappropriately granted summary judgment and we hereby reverse the judgment of the trial court insofar as it granted summary judgment in favor of the EBRPSB on the breach of contract claims set forth in the CBSB's reconventional demand and dismissed those claims.

Conversion

Conversion is an intentional tort and consists of an act in derogation of the plaintiff's possessory rights. **Aymond v. State, Dep't of Revenue and Taxation**, 95-1663 (La. App. 1st Cir. 4/4/96), 672 So.2d 273, 275. The tort of conversion is

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[8] An appellate court should not disturb a trial court's ruling with regard to the exclusion of evidence on a motion for summary judgment absent an abuse of discretion. See generally **MSOF Corp. v. Exxon Corp.**, 2004-0988, p. 11 (La. App. 1st Cir. 12/22/05), 934 So.2d 708; **Buggage v. Volks Constructors**, 2006-0175 (La. 5/5/06), 928 So.2d 536.

committed when one wrongfully does any act of dominion over the property of another in denial of or inconsistent with the owner's rights. *Id.* Any wrongful exercise or assumption of authority over another's goods, depriving him of the possession, permanently or for an indefinite time, is a conversion. *Id.*; see also **Quealy v. Paine, Webber, Jackson & Curtis, Inc.**, 475 So.2d 756, 760 (La. 1985). Although the defendant may have rightfully come into possession of another's goods, the subsequent refusal to surrender the goods to one who is entitled to them may constitute conversion. **Aymond**, 672 So.2d at 276.

In a conversion suit, it is no defense that the defendant was not negligent or that the defendant acquired the plaintiff's property through the plaintiff's unilateral mistake, or that the defendant acted in complete innocence and perfect good faith. *Id.* Further, the indebtedness of the plaintiff to the defendant, or the defendant's claim of such indebtedness is not a defense. *Id.*

Thus, with regard to the issue of conversion, in order to succeed on its motion for summary judgment, the EBRPSB had the burden of establishing that there were no genuine issues of material fact that the CBSB wrongfully exercised or assumed authority over the EBRPSB's property in denial of or inconsistent with the EBRPSB's rights. As we have previously determined that the terms of the intergovernmental agreement required the CBSS to remit payment of one-half of the 2003 property tax revenues upon receipt and that the CBSB has failed to do so, based on the evidence presented, we find that there are no genuine issues of material fact that the CBSB is in possession of, and has wrongfully deprived the EBRPSB possession of, its property—specifically $250,000 of the 2003 property tax revenues. Although the CBSB asserts that the EBRPSB owes $250,000 to the CBSB pursuant to the separation agreement, the alleged indebtedness of the EBRPSB is not a defense to a suit for the conversion of its funds. Accordingly, we find that the EBRPSB has satisfied its burden of showing that there were no

genuine issues of material fact concerning the wrongfully exercise or authority over the EBRPSB's property in denial of or inconsistent with the EBRPSB's rights, and that the CBSB had committed the intentional tort of conversion.[9] Therefore, we find that the trial court properly granted the EBRPSB's motion for summary judgment on the conversion claim set forth in the EBRPSB's the main demand.[10]

CONCLUSION

For the above and foregoing reasons, we reverse the August 11, 2005 judgment of the trial court insofar as it granted summary judgment on and dismissed the CBSB's reconventional demand for breach of contract and granted the East Baton Rouge Parish School Board's motion to strike the affidavit of Mark Plaisance. In all other respects, the August 11, 2005 judgment is hereby affirmed.

All costs of this proceedings in the amount of $5,821.00 are assessed equally between the plaintiff/appellee, the East Baton Rouge Parish School Board and the defendant/appellant, the City of Baker School Board.

AFFIRMED IN PART; REVERSED IN PART.

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[9] Although conversion is an *intentional* tort and while it is rarely appropriate to use summary judgment for determinations based on *intent* or motive, we find there was no genuine issue as to the intent of the CBSB in withholding the $250,000.

[10] Since no other damages were alleged or set forth by the EBRPSB on its claim for conversion, we also find that the trial court properly entered judgment in favor of the EBRPSB in the amount of $250,000 plus legal interest.