

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

SEPTEMBER 4, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0325

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

KATHERINE KAATZ,

Plaintiff-Respondent,

v.

**TOMMY E. HAMILTON,
INDIVIDUALLY, AND DOING
BUSINESS AS VARIETY BUILDERS
AND COMPANY, INC.,**

Defendant-Appellant,

**PINKERT, SMITH, WEIR,
JENKINS & NESBITT,**

Defendant.

APPEAL from a judgment of the circuit court for Door County:
CHARLES D. HEATH, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Tommy Hamilton appeals a judgment based upon a jury verdict awarding his former business associate, Katherine Kaatz, compensatory damages of \$125,000 and punitive damages of \$400,000 for intentional misrepresentation. Kaatz testified that Hamilton falsely represented that he would drop his lawsuit against her in Illinois for misappropriation of his funds in exchange for mediation/arbitration, but then took a default judgment for \$77,000. Kaatz also testified that Hamilton falsely represented that he would transfer ownership of their Illinois business operations to her. Hamilton raises numerous challenges to the money judgment and several are dispositive.

Kaatz filed a Wisconsin lawsuit seeking a declaration that the Illinois judgment was void because it was obtained by fraud. Kaatz's failure to appeal the Wisconsin trial court's decision dismissing her request for a declaration that the Illinois judgment is void because she failed to prove fraud renders her other Wisconsin claim to recover the amount of that judgment invalid by virtue of the doctrine of claim preclusion.

Kaatz's separate and second unpleaded misrepresentation claim, i.e., that Hamilton falsely promised that he would transfer his Illinois business to her, fails on several grounds, first and foremost because she failed to prove damages resulting from the alleged agreement.

Hamilton also appeals the trial court's dismissal of his counterclaim seeking transfer in equity of Kaatz's Door County homestead on grounds of insufficient evidence. Because Hamilton seeks relief in equity with unclean hands, the trial court did not erroneously exercise its discretion by denying him relief. We therefore affirm in part and reverse in part.

Much of the relevant evidence was in dispute. On review, we look at the evidence in the light most favorable to sustain the verdict, and when more than one inference may be drawn from the evidence presented at trial, we are bound to accept the inference drawn by the jury. *Gonzalez v. City of Franklin*, 137 Wis.2d 109, 134, 403 N.W.2d 747, 757 (1987). So viewed, the evidence revealed the following: Hamilton operated a sole proprietorship, T&A Home Improvement, repairing and remodeling homes in Illinois. Beginning in 1986, Kaatz was employed by Hamilton as a bookkeeper for T&A. Soon thereafter, she began her own business cleaning and painting houses repaired

by T&A. In early 1988, Kaatz began using a new trade name for her business, Variety Builders, and continued operations under that name. Kaatz and Hamilton developed a personal relationship as well and began living together.

Later in 1988, Hamilton began proceedings to obtain a divorce from his estranged wife. In a scheme designed to prevent Hamilton's wife from obtaining any T&A assets in the divorce action, he transferred T&A operations to Variety Builders, and began working for Kaatz as an employee. As part of the transfer, Variety assumed all T&A debts and liabilities. In the course of this transfer, and presumably in consideration of her assumption of the debts and other factors, Hamilton represented to Kaatz that she would own the construction business. Kaatz testified that she believed his representations and that she was entitled to draw on the accounts for her expenses and compensation. Hamilton was paid out of the Variety account and was not paid a salary, but instead received periodic checks for whatever expenses he requested payment.

Hamilton testified that he agreed with Kaatz to have her purchase the Door County property in her name "[t]o hide the funds from my ex-wife." Kaatz claimed that she paid for the home out of her income from the business and was not concealing Hamilton's assets.

By late 1989 the business began to experience financial difficulties. Shortly thereafter, the parties ended their personal and professional relationships. Hamilton, however, continued the construction business under the name Variety Builders, without Kaatz. He took over all of Variety's existing equipment and jobs. In 1990, Hamilton incorporated his business in Illinois as Variety Builders and Company, Inc.

In early 1990, Hamilton filed an action in Illinois, requesting an accounting and damages from Kaatz, alleging that Kaatz misappropriated monies from him. In March of that year, the parties, their counsel and a CPA met in Chicago to discuss an out-of-court settlement, and Kaatz testified that all parties agreed to pursue an accounting out of court. According to Kaatz, as a result of negotiations, Hamilton agreed that he would not pursue his Illinois lawsuit.

Hamilton obtained an Illinois default judgment against Kaatz on September 24, 1991, in the sum of \$77,195.42. Hamilton's Illinois complaint alleged that he operated the business in question from August 1988 to November 1989 under the trade name Variety Builders, that Kaatz appropriated monies from the business for her personal use and therefore those monies were due and owing. The judgment provides that Hamilton was the owner of the business operation and that Kaatz converted the monies to her own use without Hamilton's consent.

Kaatz became aware of the Illinois judgment no later than December 1991 when Hamilton filed it in Door County as a foreign judgment precedent to attempts to execute against Kaatz's property there. Although there was extensive conflicting evidence concerning notice to Kaatz and whether the default judgment was properly taken under Illinois law, after hearing evidence concerning the circumstances, the trial court dismissed Kaatz's action to declare it void on grounds of fraud because the evidence was insufficient. Kaatz does not appeal the trial court's dismissal and concedes in her brief that the Illinois judgment is still valid.

Kaatz's request for a declaratory judgment that her Door County real estate be exempt from execution as homestead property was tried along with Hamilton's counterclaim seeking to have the Door County property transferred directly to him under the court's equitable powers. The trial court dismissed the counterclaim at the close of evidence on grounds that Hamilton failed to meet his burden of proof. Following an advisory jury verdict that the property was Kaatz's homestead, the court entered judgment consistent with that finding.

Kaatz's claim made in her amended complaint alleging that Hamilton intentionally misrepresented that he would drop the Illinois lawsuit was tried to a jury along with an unpleaded claim that he also misrepresented that he would transfer his Illinois business to Kaatz. The jury found in Kaatz's favor and awarded \$125,000 in compensatory damages and \$400,000 in punitive damages.¹ Hamilton now appeals this judgment, arguing that the valid Illinois

¹ Although Kaatz pleaded only one claim of misrepresentation, the first question in the special verdict inquired of two separate misrepresentations. Hamilton does not challenge the form of the verdict on appeal. The first question asked:

judgment bars Kaatz's action under principles of claim preclusion. Alternatively, Hamilton attacks the sufficiency of the evidence of compensatory damages.² He also challenges the trial court's dismissal of his counterclaim.

CLAIM PRECLUSION

Hamilton argues that the trial court erred by failing to dismiss Kaatz's misrepresentation claims based upon the doctrine of claim preclusion. We separately examine the two misrepresentation claims addressed in the verdict. *See* note 2.

Last year our supreme court joined the trend adopting "claim preclusion" and "issue preclusion" in lieu of the terms "res judicata" and "collateral estoppel," respectively. *NSP v. Bugher*, 189 Wis.2d 541, 549-50, 525 N.W.2d 723, 727 (1995). The doctrine of claim preclusion provides that a final judgment is conclusive in all subsequent actions between the same parties, or their privies, as to all matters that were litigated or that might have been litigated in the former proceedings. *Id.* at 550, 525 N.W.2d at 727. Whether the doctrine of claim preclusion applies under a given set of facts is a question of law we must review de novo. *De Pratt v. West Bend Mutual Ins. Co.*, 113 Wis.2d 306, 310, 334 N.W.2d 883, 885 (1983).

(..continued)

Did the defendant Tommy Hamilton make the representation to the plaintiff Katherine Kaatz that he would stop his Illinois lawsuit against her or did the defendant Tommy Hamilton make the representation that he would give her his construction business?

The jury answered "yes," creating an ambiguity. Because the question combined two separate claims, it is not possible to determine whether the jury found two misrepresentations or only one, and, if only one, which one. Further, because there was only one compensatory damage and one punitive damage question, we cannot determine whether those awards represent damages for two separate torts or only one and, if one, which one.

² Because we reverse the judgment against Hamilton, we need not address his other arguments, including the sufficiency of the evidence to include his Illinois corporation in the judgment on a theory that it was liable as a "successor corporation." We do note that Kaatz did not plead a claim against the corporation.

The Illinois complaint sufficiently pleaded that Hamilton owned the business from which Kaatz misappropriated funds without consent. Kaatz's subsequent (second amended) complaint in Wisconsin pleaded that Hamilton misrepresented that he would drop the Illinois lawsuit in return for mediation/arbitration. Kaatz, however, has not appealed the trial court's dismissal of her action to declare the Illinois judgment void, and concedes on this appeal that the Illinois judgment is valid. Kaatz's misrepresentation claim seeking to recover the amount of the Illinois judgment violates the claim preclusion doctrine because it would simply nullify the Illinois judgment if successful. Kaatz's claim in this respect cannot serve as a basis for the verdict awarding her compensatory damages.

We turn to the other misrepresentation claim addressed in the verdict and for which Kaatz may have been awarded compensatory damages. Although the claim for misrepresentation was never pleaded, the jury was asked whether Hamilton misrepresented that he would transfer the Illinois business to Kaatz.

Wisconsin follows the benefit of the bargain rule in intentional misrepresentation cases. *Ollerman v. O'Rourke Co.*, 94 Wis.2d 17, 52, 288 N.W.2d 95, 112 (1980). The purchaser is not limited to direct damage, that is, the purchaser may recover for indirect or consequential damages such as loss of profits, as long as they do not duplicate the recovery under a benefit of the bargain damage claim. See WIS. JI— CIVIL 2405 cmt. 2, citing *Ollerman* and others. Kaatz provides no record reference in response to Hamilton's contention that the record is devoid of proof of damages. See *Keplin v. Hardware Mut. Cas. Co.*, 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964); § 809.19(1)(d), STATS. Although Kaatz's failure violates the appellate rules, we have examined the trial transcript for evidence of her alleged damages.

The only reference relevant to potential damages was testimony elicited from Hamilton regarding business "revenues" for the months of November and December 1989, as evidenced from several exhibits. These exhibits consisted of a business bank checking account statement showing deposits for the month of November 1989 and a general business ledger that Kaatz's counsel advised the jury showed business deposits for the month of December 1989. Mere proof of deposits or revenue covering a two-month

period without any evidence of expenses is inadequate to prove Kaatz's lost profits.

Damages for lost profits need not be proven with absolute certainty, but the claimant must produce evidence of sufficient evidence ... in this case, the books and records, on which to base a reasonable inference as to a damage amount. To establish lost profits, the claimant must prove the business's revenue as well as its expenses.

Skrupky v. Elbert, 189 Wis.2d 31, 51, 526 N.W.2d 264, 272 (Ct. App. 1994) (quoting *Lindevig v. Dairy Equip. Co.*, 150 Wis.2d 731, 740, 442 N.W.2d 504, 508 (Ct. App. 1989)).

We conclude that this record is woefully inadequate to sustain a compensatory damage award ostensibly based on Kaatz's loss of benefit of the bargain and connected consequential damages.

Apart from the failure to prove damages, another defect is noteworthy: The verdict inquires about a misrepresentation relating to a future event. The jury verdict may have found that Hamilton made the representation "that he would give her his construction business." See note 1. Such a finding, however, demonstrates a promise relating to a future event. Ordinarily, an unfulfilled promise or statement of future events will not suffice to support a tort claim for misrepresentation. *Chitwood v. A.O. Smith Harvestore Products*, 170 Wis.2d 622, 631, 489 N.W.2d 697, 702 (Ct. App. 1992).³ While a promise may be actionable as a tort upon proper proof that there was no present intent to perform the promise when it was made, *Hartwig v. Bitter*, 29 Wis.2d 653, 658, 139 N.W.2d 644, 647 (1966), neither the pleadings, the verdict, arguments of counsel nor the jury instructions address the question of Hamilton's present intent when his alleged promise was made.

³ If there was consideration for the alleged promise, the failure to perform may constitute a breach of contract. Kaatz, however, did not pursue a breach of contract claim.

Because any part of the judgment awarding damages based upon the Illinois judgment is barred by the doctrine of claim preclusion, and because any remaining damages rest upon insufficient evidence, we reverse the judgment awarding Kaatz damages. Because the compensatory damages cannot stand, the punitive damage award must also fail. Because it does, we do not address Hamilton's contention that the award was based on unfair prejudicial argument to the jury concerning his misconduct toward persons other than Kaatz.

THE DOOR COUNTY PROPERTY

Hamilton also appeals the trial court's dismissal of his counterclaim. Hamilton sought transfer of Kaatz's Door County property to him under equitable principles. Hamilton sought equitable relief. Apparently Hamilton's counterclaim was based upon a theory of fraudulent conveyance. According to Hamilton's testimony, Kaatz was instructed to purchase the home from funds from his business operations in order to hide the income from his estranged wife in their contested divorce action. Kaatz's version of the circumstances was different.

His counterclaim is an attempt to invoke the Wisconsin court's equitable powers to escape the results of a corrupt scheme. The decision to grant equitable relief is within the trial court's discretion. *Zinda v. Krause*, 191 Wis.2d 154, 175, 528 N.W.2d 55, 62 (Ct. App. 1995). "One of the fundamental tenets of equity is that a person seeking equitable relief must come to the court with clean hands." *Id.* at 174, 528 N.W.2d at 62. We can think of no more appropriate circumstances to uphold the application of this doctrine than the scheme so arrogantly admitted here.

Moreover, there is conflicting evidence from Kaatz indicating that the money used to purchase the property did not come from the monies misappropriated by Kaatz. The record in this case is filled with conflicting testimony regarding what monies Kaatz used to purchase the Door County property. In this case, Hamilton apparently sought a jury verdict on the issue whether the funds came from misappropriations by Kaatz.

[W]hen the trial judge rules, either on motion for nonsuit [or]
motion for a directed verdict ... that there is or is not

sufficient evidence upon a given question to take the case to the jury, the trial court has such superior advantages for judging of the weight of the testimony and its relevancy and effect that this court should not disturb the decision merely because, on a doubtful balancing of probabilities, the mind inclines slightly against the decision, but only when the mind is clearly convinced that the conclusion of the trial judge is wrong.

Olfe v. Gordon, 93 Wis.2d 173, 186, 286 N.W.2d 573, 579 (1980) (quoting *Trogan v. Fruchtman*, 58 Wis.2d 569, 585, 207 N.W.2d 297, 306 (1973)). The trial court held that Hamilton failed to prove his evidence by clear and convincing standards. Thus, in addition to the rejection of Hamilton's claim on equitable grounds, we defer to the trial court's view of the evidence and affirm the judgment dismissing the attempt to acquire Kaatz's Door County property.

By the Court. – Judgment affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

Not recommended for publication in the official reports.