

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 27, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1562

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

GATOR GARB, INC.,

PLAINTIFF-RESPONDENT,

v.

KAY E. TANNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kay Tanner appeals a judgment requiring her to repay funds that she improperly received from Gator Garb, Inc., while she was an officer and a director of that corporation. She argues that because she and the other owner, Fred Stark, agreed to divide the profits equally, she should only be

required to repay half of the money she overpaid herself as salary. She also contends that the trial court erred when it ordered her to repay FICA and Medicare taxes that the company paid on her behalf. We reject both of her claims and affirm the trial court.

BACKGROUND

¶2 On March 17, 1997, Stark and Tanner founded Gator Garb, a company that sold designer T-shirts, sweatshirts and other merchandise to stores for resale. They divided the company shares equally and agreed to divide the profits equally. Stark was responsible for sales, and Tanner was responsible for sourcing product and bookkeeping. They agreed to postpone receiving salaries until the company had sufficient cash flow. In October 1997, the two agreed that they could each begin drawing \$5,000 gross salary per month. Stark and Tanner decided they would discuss and agree upon major business expenditures.

¶3 One year later, the parties began discussing reorganization. These discussions resulted in Stark agreeing to purchase Tanner's one-half interest in the company. In exchange for one dollar, Tanner's name was removed as personal guarantor for corporate bank loans. Ownership transferred on December 15, 1998, to Stark.

¶4 After receiving the Gator Garb records, Stark discovered that Tanner had, shortly before the company's sale was complete and without his knowledge, written herself salary checks for April through September 1997 totaling \$30,000. Over the life of the business until it was sold to Stark, Tanner had been paid \$100,000 in salary, including the \$30,000, and Stark had been paid \$70,000. Further, Stark discovered that Tanner had paid herself for rent, travel expenses,

and miscellaneous expenses that he had not previously authorized, and that she had removed his name as an authorized signer on the checking account.

¶5 Gator Garb filed for relief in circuit court. The court awarded Gator Garb \$30,000 for Tanner's gross wages improperly paid, \$1,079.90 for the FICA and Medicare employer's share paid, \$6,341.90 for the rent, travel expenses and miscellaneous expenses, and \$1,042.03 in costs and disbursements, for a total of \$38,463.83. Tanner appeals two components of this judgment: the repayment of gross wages and the FICA and Medicare taxes paid.

DISCUSSION

¶6 Tanner argues that she should only have to repay the company for half of the paychecks she wrote to herself. First, she contends that because Stark and Tanner agreed to share profits equally, Tanner would be unjustly enriched if she were ordered to repay the full \$30,000 instead of dividing the difference in gross wages evenly. Second, she argues that because they agreed that they would have equal salaries, under contract law she should only be required to repay half of the gross wage difference. Under either theory, she calculates that \$15,000 will equalize Stark's and her salaries.

¶7 Tanner concedes that she was paid \$100,000 in salary and that Stark was paid \$70,000. She argues that if she were to pay \$30,000 back to the company, then Stark would have been paid \$100,000 and she would have been paid \$70,000. She submits that a more equitable solution is for her to repay \$15,000, which would result in her salary totaling \$85,000 and Stark's salary totaling \$85,000.

¶8 Stark responds that her arguments are based on the erroneous assumption that the money she repays to the company automatically converts into Stark's salary. We agree with Stark that Tanner's argument rests on a faulty premise.

¶9 Unjust enrichment is proved if a benefit is conferred, the recipient knows and appreciates the benefit, and retention of the benefit without payment of its value would be inequitable. *Quinnell's Septic & Well Serv. v. Dehmlow*, 152 Wis. 2d 313, 316, 448 N.W.2d 16 (Ct. App. 1989). Application of the facts to the unjust enrichment legal standard is a question of law that we review de novo. *Waage v. Borer*, 188 Wis. 2d 324, 328, 525 N.W.2d 96 (Ct. App. 1994).

¶10 Tanner paid herself salary for the start-up period during which the parties agreed not to be paid. The company paid each party by agreement a \$70,000 salary. By paying herself an additional \$30,000 without Stark's consent and without also paying Stark \$30,000, Tanner is the one unjustly enriched. The plaintiff here is Gator Garb, an independent entity from either Tanner or Stark.¹ The record does not support a conclusion that the money owed will automatically be divided between Stark and Tanner.

¶11 Although Tanner urges the court to review the "contract" de novo, no written contract memorializes an agreement. Stark admits that he and Tanner agreed to split the profits and that each would be paid equally. Tanner caused the corporation to compensate Tanner and Stark unequally. The evidence does not show that the \$30,000 will be payable directly to Stark. We affirm the trial court's

¹ The record contains a U.S. Corporation Income Tax Return, filed for 1997. Additionally, in her answer, Tanner admitted that Gator Garb, Inc., was a Wisconsin corporation.

decision to award Gator Garb \$30,000 in salary erroneously taken from the corporation.

¶12 Next, Tanner argues that the trial court erroneously ordered her to repay the FICA and Medicare taxes that Gator Garb paid on her behalf, including the employee's share withheld from the erroneously issued paychecks. Tanner contends that the company may receive a credit for those taxes by simply filing a few forms with the Internal Revenue Service.

¶13 Gator Garb responds that Tanner provided no proof to the trial court about how it could obtain these tax refunds and that Tanner has thus waived the argument, citing *Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983) (an appellate court will not review an argument raised for the first time on appeal). We agree that Tanner has not sufficiently preserved and supported her argument.

¶14 While we conclude that Tanner raised the argument to the trial court, she did not provide any evidence that Gator Garb could recoup these taxes paid and that she could not. While she provides some documents to this court that tend to show that Gator Garb may be able to get a refund, Tanner provides no authority that she cannot. Gator Garb paid the taxes. The trial court properly concluded that Tanner had unjustly enriched herself. She should not now benefit from that wrong without demonstrating that the corporation has any duty to correct overpaid taxes or that she has exhausted her own remedies through the Internal Revenue Service. An argument insufficiently supported by authority will not be considered. *State v. Shaffer*, 96 Wis. 2d 531, 545-46 n.3, 292 N.W.2d 370 (Ct. App. 1980).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5.

