COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2959 **Cir. Ct. No. 2008CV141**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

SEIDLS' MOUNTAIN VIEW DAIRY, LLC AND ALAN M. SEIDL,

PLAINTIFFS-RESPONDENTS,

V.

MARK J. SEIDL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kewaunee County: D.T. EHLERS, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Mark Seidl and his brother, Alan Seidl, formed Seidls' Mountain View Dairy, LLC, in 2002, and were its only members.[1] Per the members' operating agreement, Alan and Mark were required to maintain equal capital accounts. Any excess in one member's capital account was treated as an obligation of the LLC to the member with the larger account.

¶2 Alan and the LLC brought suit after Mark converted $340,000 from the LLC's checking account. Mark defended the withdrawal as an equalization of the members' capital accounts. The trial court determined that Mark's capital account exceeded Alan's by $119,699.55. After deducting the $340,000 conversion, the court determined Mark owed the LLC $220,300.45.

¶3 Mark appeals the judgment, claiming the circuit court erroneously excluded multiple assets in its calculation of Mark's capital contributions. He also claims the court erred in refusing to award interest on the excess of his capital account. Finally, he asserts the court erred by taxing him half the cost of a receiver appointed to manage the LLC during the litigation. We affirm.

BACKGROUND

¶4 In 2002, Mark formed a sole proprietorship, Seidl's Homestead, and took over his family's farming business. He rented the farm from his parents, but brought some of his own farm equipment and about 110 cattle to the business. Mark's brother, Alan, had no monetary interest in the business, but still helped on the farm.

[1] We will follow the parties' practice of referring to Mark and Alan Seidl by their first names.

¶5 In May 2002, Mark met with an agricultural consultant, Patrick Knowles, about expanding the farm operation. Mark asked Alan, a self-employed construction worker, to return to farming with Mark. Alan would supervise employees, maintain buildings and manage crops, while Mark would run the dairy operation.

¶6 On July 17, 2002, Mark and Alan formed Seidls' Mountain View Dairy, LLC. They signed an operating agreement the same day. Each took a fifty percent equity position in the LLC. To maintain those positions, the agreement treated any excess in one member's capital account as an "obligation of the LLC to the Member with the larger capital balance."

¶7 On September 27, Mark and Knowles discussed the projected scale of the dairy operation, profit and loss scenarios, and the feasibility of obtaining a loan. Knowles completed a Dairy Expansion Proposal on November 21, 2002, for the purpose of securing a loan for the LLC. The proposal, which was introduced at trial, detailed anticipated capital contributions to the LLC from both Mark and Alan. The LLC ultimately received a $1.9 million loan.

¶8 During the winter, spring, and summer of 2003, the LLC started construction on a new facility and began purchasing feed, cattle, and equipment. It began operating out of the new facility in August 2003. Although Seidl's Homestead and the LLC were legally distinct businesses, funds were often intermingled and records were shoddily maintained.

¶9 After several years, the brothers' relationship deteriorated. An arbitrator would later conclude that interpersonal disputes caused "broad, deep, enduring and significant" damage that "led to paralyzing dysfunction of the business."

¶10 Between August 6 and August 18, 2008, Mark, without authorization, wrote himself checks on the LLC's checking account totaling $340,000. The checks depleted the checking account and exhausted the LLC's entire $250,000 line of credit. Mark defended the withdrawal as an equalization of the members' respective capital accounts.

¶11 Alan and the LLC filed suit, alleging among other things civil conversion. Shortly after the action was filed, Alan sought the appointment of a receiver to manage the LLC during the litigation. After finding that "irreconcilable issues" between Alan and Mark left them unable to agree on anything, the circuit court granted Alan's motion. The receiver was paid by Alan and the LLC.

¶12 Mark agreed to sell his interest in the LLC to Alan in January 2009. A provision in the purchase agreement specifically reserved for judicial resolution matters regarding the equality of the members' capital accounts:

> It is recognized that there are allegations and suggestions that capital accounts between the two members … are unequal as of the entry into this agreement, due to alleged unequal cash contributions, in-kind contributions, and unequal distributions. … Either the selling member or the purchasing member may present in court … allegations that one party or the other is entitled to compensation to equalize the capital accounts between the members.

Following the sale, the court held a bench trial on Alan's conversion claim and Mark's claim for excess capital contributions.

¶13 The court concluded that Mark improperly converted $340,000 and made multiple findings of fact related to the members' respective capital contributions. The court found that Alan's contributions totaled $287,284.36, from which Alan withdrew $141,320.83, leaving $145,963.53 in total equity.

Mark's contributions totaled $381,004.37, from which he withdrew $115,341.29, leaving $265,663.08 in total equity. Thus, Mark's capital account exceeded Alan's by $119,699.55. However, after deducting the $340,000 conversion, the court found that Mark owed the LLC $220,300.45.

¶14 Mark sought, but was denied, interest on his capital account excess. The trial court acknowledged Knowles' trial testimony that, pursuant to federal law, the Internal Revenue Service would impute interest on any excess capital payment. However, it concluded an interest award was not appropriate because interest was not contemplated by the operating agreement.

¶15 Following correspondence with Mark's attorney, the court found that Alan, Mark and the LLC were prevailing parties and entitled to costs. Alan and the LLC jointly submitted a proposed bill of costs that included the full cost of the receiver's services, to which Mark objected on the ground that the receiver's fee was not an allowable item of costs under WIS. STAT. § 814.02.[2] The court concluded that the fee was a necessary fee allowed under § 814.02, but determined that Mark, Alan, and the LLC benefitted from the receiver's appointment. Accordingly, it allowed Alan and the LLC to recover half of the receiver's fee from Mark.

DISCUSSION

¶16 Mark raises three issues on appeal. First, he contends the trial court erroneously excluded multiple items from his capital contribution. Second, Mark

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

asserts he is entitled to interest on his excess capital contribution. Finally, he contends the trial court erred by taxing half of the receiver's fee as costs.

I. Factual findings regarding capital contributions

¶17 Whether a capital contribution was made, and its amount, is a question of fact. *Cf.* ***United States Treasury Dep't. v. La Crosse Trust Co.***, 271 Wis. 199, 209, 72 N.W.2d 717 (1955) (whether stockholder's advance constitutes a capital contribution or loan is a question of fact). An appellate court will not set aside a trial court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). "Under this standard, even though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the same finding." ***Teubel v. Prime Dev., Inc.***, 2002 WI App 26, ¶12, 249 Wis. 2d 743, 641 N.W.2d 461. We accept all reasonable inferences drawn by the fact finder. ***Id.***, ¶14. To reverse a trial court's finding, the evidence for a contrary finding must constitute the great weight and clear preponderance of the evidence. ***Id.***, ¶12.

¶18 Citing ***Brown v. Sucher***, 258 Wis. 123, 45 N.W.2d 73 (1950), Mark argues for a less deferential standard of review because he claims the trial court made no findings of fact. We reject this argument for two reasons. First, Mark's contention that the trial court made no factual findings is incorrect. Although the trial court's findings of fact are not clearly labeled within its memorandum decision, the decision itself is replete with factual determinations based on the evidence presented at trial. Indeed, the court's memorandum decision was extremely detailed and of great benefit to this court. *See* ***La Crosse Trust Co.***, 271 Wis. at 208. Second, the trial court's failure to separately set forth its findings of fact does not alter the standard of review on appeal. *See* ***Brown***, 258 Wis. at 127

(appellate court may affirm the judgment if the record shows that the trial court reached a result sustained by the facts presented).

¶19 Mark argues several factual findings are erroneous. He contends the court erred by measuring his capital contributions as of August 2003, when the LLC began operating, instead of July 2002, when it was organized. Accordingly, Mark argues the court erred by deducting from his capital contribution feed and crops consumed between July 2002 and August 2003, and cattle that were sold or died during that time. He contends that, as a result of these alleged factual errors, the trial court improperly deducted from his capital contribution approximately $75,000 in cattle, $66,525 in feed, and $37,500 in crops, reducing his total contribution by over $179,000.

¶20 At trial, Alan testified that the LLC was formed in 2002 but did not begin operating until late August of 2003. Profits generated from milk and cattle sales before August 2003 went to Seidl's Homestead. The resources used to generate those profits, including cattle and feed, belonged to Seidl's Homestead, not the LLC. Alan testified that he received no benefit from milk produced in 2002. The Dairy Expansion Proposal indicates that as of November 21, 2002, Mark was still operating a one hundred-cow facility and Alan had not yet invested in the LLC. In general, the record demonstrates that as of late 2002, the LLC was still in the planning stages.

¶21 Alan further testified that in January 2003, the LLC purchased equipment and feed in anticipation of receiving five hundred cows in late summer. The LLC purchased the cattle in May 2003, and began operating when the new barn was complete in August. Alan stated that, of the original one hundred animals, only twenty-five transitioned to the new facility; the rest had been sold

for the benefit of Seidl's Homestead or had died. Payments for dead cows prior to August 2003 went to Seidl's Homestead. Alan testified that the LLC did not use any feed Mark purchased; it had all been consumed by cows for the benefit of Seidl's Homestead.

¶22 A reasonable fact finder could conclude from Alan's testimony that even though the business entities intermingled funds, the profits generated prior to August 2003 were primarily for the benefit of Seidl's Homestead, not the LLC. Accordingly, a reasonable fact finder could also conclude that the cattle and feed used prior to that time were not capital contributions to the LLC. The circuit court's findings of fact are not clearly erroneous.

¶23 Mark also argues that the trial court erred by not accepting Knowles' calculations of Alan's and Mark's capital contributions. The trial court rejected Knowles' calculations because they were not based on an actual inventory of the cattle, feed or crops. Instead, the calculations were based on the anticipated contributions listed on the November 21, 2002 Dairy Expansion Proposal. Alan, on the other hand, offered personal knowledge of *actual* contributions. It is the trial court's duty to determine the weight of the evidence and the credibility of witnesses. ***Micro-Managers, Inc. v. Gregory***, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988). The trial court was not required to accept Knowles' calculations over other credible evidence.

¶24 Finally, Mark claims the trial court erred by not accepting Knowles' calculations because Alan presented no expert testimony of his own. Expert testimony is required for "matters involving special knowledge or skill or experience on subjects not within the realm of ordinary experience or knowledge of mankind." ***State v. Johnson***, 54 Wis. 2d 561, 564, 196 N.W.2d 717 (1972).

Here, the sole issue at trial was what each member of the LLC contributed to its operation. That issue is not complex and is well within the grasp of the ordinary person. Expert testimony was not required.

II. Interest on excess capital contributions

¶25 Mark claims he is entitled to preverdict interest on the $119,699.55 found by the trial court to constitute an excess capital contribution. He contends that by treating a member's excess capital contribution as an "obligation of the LLC," the operating agreement contemplates interest on such a contribution. Resolution of this issue requires interpretation of the operating agreement. This presents a question of law. ***DeWitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing Ltd. P'ship***, 2004 WI 92, ¶20, 273 Wis. 2d 577, 682 N.W.2d 839. The goal of contract interpretation is to ascertain the intent of the parties. ***Id.***, ¶44.

¶26 Article 15 of the operating agreement, which governs excess capital contributions, does not mention interest. It begins by attributing to both Mark and Alan a fifty percent interest in the LLC capital. If the capital accounts do not reflect those percentages, the operating agreement requires that "the excess of the capital account of the Member with the larger capital balance shall be considered an obligation of the LLC to the Member with the larger capital balance." Article 15 does not establish an interest rate or a date by which the capital accounts must be brought into balance. Accordingly, we conclude the operating agreement does

not require interest to be paid on any amount owed by the LLC to a member for an excess capital contribution.[3]

¶27 Mark heavily relies on Knowles' testimony at trial that, as an "obligation of the LLC," Mark's excess capital contributions earn interest at a rate specified by the Internal Revenue Service, even though the operating agreement is silent on the issue. Although federal tax laws sometimes require a lender to recharacterize portions of a loan payment as imputed interest, *see* 26 U.S.C. §§ 483, 1274 (2010), the treatment of a loan payment for federal tax purposes has no bearing on whether a borrower must pay interest in the first instance. We have already concluded the operating agreement does not require payment of interest. The trial court was not required to accept Knowles' contrary legal conclusion. *See* ***Tesch v. Industrial Comm'n***, 200 Wis. 616, 623, 229 N.W. 194 (1930).

III. Receiver's fee as a cost

¶28 Mark claims he was improperly taxed one-half of the receiver's fee. He asserts the trial court was without authority to tax the receiver's fee as a cost because such an award is not specifically authorized by statute. *See* ***State v. Foster***, 100 Wis. 2d 103, 106, 301 N.W.2d 192 (1981) (The right to recover costs is "statutory in nature, and to the extent that a statute does not authorize the recovery of specific costs, they are not recoverable …."). Whether a Wisconsin statute authorizes recovery of a specific cost is a question of law, ***Kleinke v. Farmers Coop. Supply & Shipping***, 202 Wis. 2d 138, 147, 549 N.W.2d 714

[3] Mark asserts Article 12 of the operating agreement contains a "specific time for payment of unequal capital contributions …." Article 12 governs the division of profits and losses among the members. It says nothing about the members' respective capital contributions.

(1996), as is the interpretation of a statute, ***Hartman v. Winnebago Cnty.***, 216 Wis. 2d 419, 431, 574 N.W.2d 222 (1998). "The purpose of statutory interpretation is to ascertain and give effect to the intent of the legislature." ***Id.*** at 431-32.

¶29 Appointment of a receiver is an "extremely flexible remedy that may be used for a great number of purposes." 2 JAY E. GRENIG & NATHAN A. FISHBACH, WISCONSIN PRACTICE SERIES: METHODS OF PRACTICE § 74.60 (4th ed. 2004); *see generally* WIS. STAT. § 813.16. A receiver may be appointed out of fairness to protect property and prevent a diminution of its value. ***Zerfas v. Johnson***, 246 Wis. 60, 63, 16 N.W.2d 427 (1944). A receiver acts under the court's directions and instructions and is an officer of the court. GRENIG & FISHBACH, *supra*, § 74.60.

¶30 WISCONSIN STAT. § 814.04 identifies costs allowed in a civil action. Subsection (2) permits recovery of "[a]ll the necessary disbursements and fees allowed by law …." "A trial court exercises its discretion in determining what [is] a necessary cost under § 814.04(2)." ***Aspen Servs., Inc. v. IT Corp.***, 220 Wis. 2d 491, 511, 583 N.W.2d 849 (Ct. App. 1998).

¶31 The circuit court properly concluded that the receiver's fee was a necessary cost. Irreconcilable issues between the LLC's members left them unable to agree on anything or have any meaningful business relationship. Accordingly, the receiver was necessary to manage the LLC until it was ultimately purchased by Alan.

¶32 The sole remaining question is whether the fee was allowed by law. Wisconsin law allows for the appointment of a receiver, *see* WIS. STAT. § 813.16, and the circuit court determined that the receiver would be "compensated at a rate

to be determined by the Court." Although § 813.16, does not specifically mention fees, a receiver is entitled to compensation, with the party or parties benefitting from the appointment usually bearing the cost. *See* 12 ROBERT A. PASCH, WISCONSIN PRACTICE SERIES: WISCONSIN COLLECTION LAW § 81:1 (2d ed. 2006). It was within the circuit court's discretion to determine who benefitted from the receiver's appointment and hold them responsible for a share of the costs. The court properly exercised its discretion by determining that Mark and Alan equally benefitted from the appointment and apportioning costs accordingly.

By the Court.—Judgment affirmed.

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