

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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.

Appeal No. 2010AP115

Cir. Ct. No. 2008CV507

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**MERRILYNNE HAUGEN, JOHN E. HANSON, ROBERT H. HANSON,
JULIANNE A. ELGIN, HARVEY J. HANSON AND SARAH MEALEY,**

PLAINTIFFS-RESPONDENTS,

v.

STEVEN D. HANSON,

DEFENDANT-APPELLANT,

STANLEY A. HANSON,

DEFENDANT-CO-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County:
TIMOTHY M. DOYLE, Judge. *Affirmed in part; reversed in part.*

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

¶1 PER CURIAM. Steven Hanson, pro se, and Stanley Hanson appeal a money judgment against them for conspiracy and breach of fiduciary duties relating to their deceased father’s trust. They argue that the circuit court failed to apply the proper legal standard and misinterpreted the trust language, that there was insufficient evidence to demonstrate either a conspiracy or a breach of fiduciary duty, that a two-year statute of limitations should have applied and reduced the damages award, and that the damages award is not supported by the evidence. Steven also makes several additional arguments. We reject Steven’s and Stanley’s arguments, with one exception. One component of the damages award was without any evidentiary basis because it in fact represented transfers between the trust’s bank accounts—not disbursements. We therefore direct the circuit court to subtract \$42,803.50 from the judgment. The judgment is affirmed in all other respects.

BACKGROUND

¶2 Helmer Hanson created a living trust in September 2003. Helmer’s eight children were named as the primary beneficiaries of the trust estate. Sons Stanley and Steven are the defendants in this action, while the remaining six (the Siblings) are the plaintiffs. Stanley became trustee upon Helmer’s death in November 2004.

¶3 The trust provides that upon Helmer’s death, Stanley shall sell Helmer’s residence, add the proceeds to the trust estate, and promptly pay the funds to the beneficiaries. Stanley did not, however, sell the residence during the five years that he served as trustee. Stanley received eight offers to purchase the home, but made no counteroffers. While trustee, Stanley paid himself trust management and accounting fees and paid himself or Steven for maintenance and

improvement work at the house. Stanley also provided Steven several gifts and advances from the trust. Additionally, trust funds were utilized to pay legal costs defending this lawsuit.

¶4 Stanley operated a sole proprietorship named Certified Professional Accounting. The only income that entity ever received was paid from either Helmer or his trust. Stanley operated another sole proprietorship known as Stan Hanson Homes and Home Improvements, which also received funds from the trust. However, Stanley only kept one commercial bank account and deposited all income from the two entities into the same account.

¶5 Steven was Helmer's primary caretaker in the three years before Helmer's death, operating a business named Hanson Management. Helmer and the trust were Steven's only source of income for the years 2001 through 2007.

¶6 Stanley maintained two bank accounts on behalf of the trust. The accounts contained over \$300,000 when Stanley became trustee. In September 2009, there was a little over \$54,000 remaining. Stanley produced activity spreadsheets for the bank accounts, and the Siblings then prepared summary exhibits, which grouped the disbursements by payee.

¶7 Following a bench trial, the court concluded Stanley breached his fiduciary duties to the estate. Further, the court wrote:

This breach of duty is demonstrated by Stanley's failure to sell the house in a timely manner, close the trust and make prompt distribution to the beneficiaries as required. Over the intervening five years, he has systematically drained almost all cash assets from the trust, almost exclusively for the benefit of himself and his twin brother, Steven. This includes, but is not limited to, making gifts and advance distributions to Steven without regard to the rights of other beneficiaries for similar distributions. Notwithstanding a deteriorating real estate market, Stanley nevertheless had

abundant opportunity to sell the house and make final distribution as the trust requires.

The testimony and the exhibits make clear a concerted plan or course of action by both defendants to delay sale of the house, avoid final distribution to the beneficiaries and permit ongoing payments to their benefit.

....

Stanley and Steven Hanson acted in concert to defraud the trust They jointly prepared invoices and arranged payments to [themselves]. They are jointly and severally liable for repayment of all such inappropriate payments made from the trust.

¶8 The court also concluded Stanley was not entitled to compensation or disbursements paid to him as trustee and that neither brother was entitled to have the trust pay litigation costs. In setting its damages award, the court adopted the Siblings’ suggested cut-off date in November 2006, which was when Stanley could have closed a sale of the home had he accepted a particular offer. The court removed Stanley as trustee and ordered him and Steven to reimburse the estate \$272,216.16. Stanley and Steven now appeal.

DISCUSSION

¶9 Stanley and Steven raise multiple issues on appeal. We note at the outset, however, that neither brother moved for a new trial or for reconsideration under WIS. STAT. §§ 805.15(1) or 805.17(3).¹ The Siblings argue Stanley and

¹ WISCONSIN STAT. § 805.15(1) provides, as relevant: “A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice.”

WISCONSIN STAT. § 805.17(3) provides that in trials to the court, upon motion “the court may amend its findings or conclusions or make additional findings or conclusions and may amend the judgment accordingly. The motion may be made with a motion for a new trial.”

(continued)

Steven forfeited their rights to appeal most issues because they failed to first raise them in the circuit court. We agree.

¶10 As a general matter, “an issue must be raised in the trial court to be eligible for review upon appeal.” *Schinner v. Schinner*, 143 Wis. 2d 81, 94 n.5, 420 N.W.2d 381 (Ct. App. 1998) (citing *Zeller v. Northrup King Co.*, 125 Wis. 2d 31, 35, 370 N.W.2d 809 (Ct. App. 1985)). Additionally, the failure to move for reconsideration under WIS. STAT. § 805.17(3) constitutes a forfeiture of the right to raise issues of manifest errors of law or fact on appeal. *Id.* at 93; *see also Koepsell’s Olde Popcorn Wagons, Inc. v. Koepsell’s Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853.² And, it is “well-established law in Wisconsin” that a party forfeits all alleged errors not raised in motions after verdict, even if a timely objection was made during trial. *Suchomel v. University of Wis. Hosp. & Clinics*, 2005 WI App 234, ¶10, 288 Wis. 2d 188, 708 N.W.2d 13.

¶11 We now turn to Steven’s and Stanley’s arguments, which are largely overlapping. Stanley argues the circuit court failed to identify, define, or apply the correct legal standard regarding breach of fiduciary duty. These issues are first raised on appeal and are therefore forfeited. Moreover, the arguments would fail on their merits. The circuit court properly looked to the trust document to determine the scope of Stanley’s powers and responsibilities. Contrary to

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

² When *Schinner v. Schinner*, 143 Wis. 2d 81, 88, 420 N.W.2d 381 (Ct. App. 1998), was decided, WIS. STAT. § 805.17(3) only permitted reconsideration of the court’s “findings,” i.e., errors of fact, whereas it now also permits reconsideration of the court’s “conclusions,” i.e., errors of law.

Stanley's assertion, that document does not confer unbridled power or authorize self-dealing. Nor was it error for the circuit court to exclude evidence of Helmer's actions as evidence of intent, because the trust language is unambiguous. Additionally, Stanley relies on nonbinding foreign-state case law, which conflicts with Wisconsin precedent.

¶12 Stanley next argues the evidence was insufficient to demonstrate he violated his fiduciary duty. This issue has not been forfeited: "In actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has objected in the trial court to such findings or moved for [a] new trial." WIS. STAT. § 805.17(4). Stanley's argument, however, ignores both the standard of review and unfavorable evidence.

¶13 The circuit court's findings of fact must be affirmed unless they are clearly erroneous. WIS. STAT. § 805.17(2). When more than one reasonable inference can be drawn from the credible evidence, we must accept the inference drawn by the circuit court. *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 249, 274 N.W.2d 647 (1979).

¶14 The court concluded Stanley breached his fiduciary duties by failing "to sell the house in a timely manner, close the trust and make prompt distribution to the beneficiaries as required" and by giving "gifts and advance distributions to Steven without regard to the rights of other beneficiaries for similar distributions." Stanley does not dispute any of the facts the circuit court relied upon. In fact, he asserts, "The material facts are undisputed." Instead, Stanley reargues the significance of the facts and cites facts favorable to his position. He then suggests we should make inferences different from the circuit court. We cannot. Stanley

also intersperses legal arguments concerning interpretation of the trust language. Those arguments do not come within the sufficiency of the evidence exception, and have been forfeited.

¶15 Stanley next argues the evidence is insufficient to support a finding of conspiracy. Stanley again argues the significance of facts and ignores the standard of review, asserting the Siblings “failed to meet their burden of proof.” A conspiracy may be established by evidence that the perpetrators in some way or manner came to a mutual understanding to try to accomplish a common and unlawful plan. WIS JI—CIVIL 2800 (2003).³ “A conspiracy may be, and often must be, proved by circumstantial evidence. Inferences arising from surrounding facts and circumstances are sufficient to prove a conspiracy. It is not necessary that the plaintiffs prove that there was an express agreement.” WIS JI—CIVIL 2804 (2003). In determining whether a conspiracy existed, the fact finder is to consider all of the acts, events and evidence as a whole and its character and effects. WIS JI—CIVIL 2806 (1993). There was sufficient evidence in this case, as a whole, to permit the circuit court to conclude there was a civil conspiracy.

¶16 Stanley next argues the damages awarded by the court are neither causal nor supported by the evidence. Within this argument, he also contends the damages should have been limited by a two-year statute of limitations. These arguments were not presented below and were therefore forfeited. Additionally, there is no developed argument on the issue of causation. We will not decide

³ The Wisconsin jury instructions constitute only persuasive authority. *State v. Olson*, 175 Wis. 2d 628, 642 n.10, 498 N.W.2d 661 (1993). Stanley and Steven do not, however, challenge the propositions set forth therein.

issues that are not, or inadequately, briefed. *State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

¶17 Steven, pro se, sets forth many of the same arguments as Stanley. They fail for the same reasons and do not merit individual recitation. Steven also argues the circuit court erroneously concluded there was an intentional fraud, when no such claim had been pled. This argument was not raised below and was therefore forfeited. Moreover, as best we can discern, it appears the argument is based on the circuit court's use of the word "defraud" in both the decision and judgment. It is clear, however, that term was used in the context of the conspiracy claim, not as a separate legal claim. Steven also makes an incomprehensible argument regarding the availability of a jury trial on joint and several liability. That argument was forfeited because it was not raised below. Steven further argues it was improper to order joint and several liability as to Stanley's trustee fees. Again, this argument was forfeited.⁴

¶18 Finally, we address Steven's and Stanley's argument that one component of the damages award was improper. The brothers argue there is no basis for the circuit court's damages item eleven, \$42,803.50 in interbank transfers. The precise legal basis of Steven's argument is unclear. Stanley raised the issue in both his insufficiency of the evidence argument and his argument that the damages award was not supported by the evidence. We conclude the argument

⁴ Steven failed to comply with the rules of appellate procedure and provide a table of contents with page numbers for his numerous arguments and subarguments. *See* WIS. STAT. RULE 809.19(1)(a), (e). Instead, his table of contents merely indicates his "Legal Arguments of the Issues" are at pages 17-56. If Steven's pro se brief addresses any other issues not acknowledged in this decision or overlapping with Stanley's arguments, we would conclude they too were forfeited by failing to raise them below. As noted previously, Steven did not present any post-trial motions.

comes within the sufficiency of the evidence exception, permitting Steven and Stanley to raise the issue as of right for the first time on appeal.⁵ See WIS. STAT. § 805.17(4).

¶19 Stanley's bank account ledgers showed a number of transfers from the trust's U.S. Bank Cumberland account to its U.S. Bank Battle Creek account, with the notation "74 Michael Street Expenses." The Siblings prepared summary exhibits, which reorganized all of the account entries on the two bank ledgers by payee. At trial, Stanley was questioned about one of the summaries, exhibit 19. Stanley denied that the exhibit showed any payments to him from the Cumberland account, asserting it only showed transfers. The Siblings' counsel then indicated they must have the wrong exhibit. The court took the exhibit from Stanley and stated: "Well, Exhibit 19 appears to detail or summarize transfers from the U.S. Bank checking account to a different account maintained in connection with the maintenance of the house. Is that what these are?" The Siblings' counsel responded, "Our numbers are off then. I'm sorry, Your Honor."

¶20 The Siblings' pretrial brief itemized their claimed damages. Item eleven was identified as "[p]ayments not noted above that were allegedly made for the benefit of the real estate located at 74 Michael Street[,] in the amount of \$42,803.50. In its decision, the court observed, Stanley "has written checks not otherwise accounted for above and relating to the 74 Michael Street property in

⁵ Even if we concluded the issue was forfeited, we could nonetheless address it in our discretion. See *Schinner*, 143 Wis. 2d at 94 n.5.

the sum of \$42,803.50.” The court then ordered payment “in the amount of \$272,216.16 (as itemized in plaintiffs’ brief).”⁶

¶21 In response to Stanley’s and Steven’s argument, the Siblings mischaracterize Steven’s argument and assert the issue was forfeited, ignore Steven’s actual reasoning, and ignore Stanley’s argument altogether. They then curiously argue that, even on the merits, the brothers would only be entitled to a \$21,972.45 reduction in damages, apparently because only that amount of the transfer was paid out from the trust’s receiving bank account.

¶22 There is no credible evidentiary support for the damages awarded pursuant to exhibit 19. The Siblings acknowledged in open court that they had erred in representing that figure as a disbursement. We therefore direct the court to subtract \$42,803.50 from the damages award.⁷

¶23 No party shall receive appellate costs. *See* WIS. STAT. RULE 809.25(1).

By the Court.—Judgment affirmed in part; reversed in part.

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

⁶ The Siblings also submitted a post-trial brief with an itemization of claimed damages. The damages at issue here were repeated in that brief, as item number ten, which also indicated: “(see Ex. 19).”

⁷ Steven also presents a related argument. He asserts the damages award was excessive because, when added to the remaining bank account balances, the trust would have over \$12,000 more cash than it had when Helmer died. Our resolution of the exhibit 19 issue moots this argument.

