

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 1, 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. 2010AP926

Cir. Ct. No. 2004CV8072

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

ALLEN SILVERSTEIN,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

BRADFORD AMIDZICH,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT-CROSS-RESPONDENT,**

V.

VENT-MATIC COMPANY, INC., A WISCONSIN CORPORATION,

THIRD-PARTY DEFENDANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Bradford Amidzich and Allen Silverstein terminated their business agreement. Amidzich appeals a judgment deciding that payments he thought due him were not royalties and that rescissory damages, a constructive trust and prejudgment interest were not appropriate. Silverstein cross-appeals an underlying order deciding that the statute of limitations had not run on Amidzich’s breach-of-fiduciary-duty claim, that he breached a fiduciary duty to Amidzich and that the ownership of certain patents should be returned to Amidzich. On both the appeal and cross-appeal, the parties really are attempting to retry the facts. That is not our role. Because the trial court’s rulings are supported by well-founded factual determinations, we must affirm the judgment.

¶2 Silverstein, a lawyer, and Amidzich, an inventor, are longtime acquaintances. In 1996, Silverstein represented Amidzich in a dispute over the ownership of a patent for a beer dispenser valve that Amidzich devised. Instead of paying Silverstein a fee, Amidzich agreed to assign him a fifteen percent interest in all income, assets and/or value derived from the valve. Amidzich also did not pay for Silverstein’s representation in some family court matters.

¶3 Silverstein and Amidzich thereafter formed a business partnership to market the valve patent and Amidzich’s future inventions. Silverstein drew up the agreement (“the 1996 Agreement”) for the new business, Vent-Matic Company, Incorporated. The 1996 Agreement provided that the two would own Vent-Matic fifty-fifty; that Vent-Matic would pay Amidzich a weekly salary of \$300 to meet his child-support obligations; and that Amidzich would assign all but two of his past, present and future inventions to Vent-Matic unless he terminated his interest in the company. Terminating his interest would divest Amidzich of his interest in

Vent-Matic and in Vent-Matic's ownership of the valve patent and any other assigned inventions. Amidzich later invented two other beer-dispensing devices, a faucet and a liquid flow pressure reducer. The rights to both were assigned to Vent-Matic. Both parties thought the agreement was fair and reasonable.

¶4 Vent-Matic initially prospered. In 1997, it entered into an agreement with Perlick Corporation, a Milwaukee-based beer-dispensing equipment business. This agreement later was terminated and in January 2000, Vent-Matic and Perlick entered into a new, more comprehensive agreement. A letter of intent proposed that Perlick would contribute fixed assets, inventory and accounts receivable and Vent-Matic would contribute its valve patent, the pending pressure reducer patent application and all Amidzich's future research and development. It also provided that Perlick would "guarantee minimum royalties" from sales of the valve.

¶5 Despite heavy investment, the valve never reached the marketplace and Perlick terminated the joint venture. Vent-Matic filed a claim against Perlick in federal court, demanded \$2 million in damages for breach of contract and alleged that Perlick was selling a faucet that infringed the faucet patent. Two years later, the parties settled. As is relevant here, the patent-infringement claims were resolved by a licensing agreement requiring a "Lump-Sum Royalty" of \$450,000 and "Continuing Periodic Royalties" of at least \$50,000 per year over four years based on sales of certain products Perlick was licensed to sell. Perlick never sold enough faucets to require more than the minimum Periodic Royalties; its four-year payment therefore was \$200,000, for a total settlement of \$650,000.

¶6 Perlick wired \$450,000 to Vent-Matic's account. Silverstein paid about \$142,000 to Vent-Matic's counsel, \$15,000 to a Chinese company for faucet parts and \$320,000 to himself. When Amidzich objected to the latter, Silverstein

demanded dissolution of Vent-Matic. Amidzich counter-claimed, alleging, among other things, that the 1996 Agreement was neither fair nor reasonable and was a breach of the ethical and fiduciary duties Silverstein owed him, a client. Both moved for summary judgment. Neither prevailed. In April 2006, Silverstein moved for reconsideration. He filed an affidavit attaching an August 1996 memorandum by which he claimed to have advised Amidzich that he could not represent Amidzich in the future and that Amidzich should seek legal counsel.

¶7 The trial court dismissed Amidzich’s complaint for failing to state a claim and found that Silverstein’s “uncontested” memorandum clearly showed what Silverstein claimed it did. Amidzich successfully moved to reopen the proceedings on the basis that he had never seen or been advised of the substance of the memorandum.

¶8 At the September 2007 bench trial,¹ the court found that the document’s unpolished nature suggested it was a working draft, likely undelivered. The court was persuaded that if Silverstein had honored his fiduciary duty of loyalty, Amidzich still might have licensed his inventions to Vent-Matic but would not have assigned them. The court concluded that equity required that the assignment of patents be rescinded and returned to Amidzich’s ownership.

¶9 Postjudgment, Amidzich sought damages on grounds that simply rescinding the assignments did not make him whole. He claimed that the “royalties” paid to Vent-Matic (the \$650,000 Perlick paid in settlement and the approximately \$21,000 another company paid) also should have been awarded to

¹ The transcript of the September 2007 bench trial is not in the record. We look to the trial court’s written decision as evidence of what transpired.

him as rescissory damages. The matter was set for trial. In pre-trial rulings, the court held that Silverstein bore the burden of proving, as an off-set, what expenses Amidzich would have incurred in earning any royalties due him.

¶10 At the July 2008 trial, the court was convinced that Amidzich would have conducted his business no differently had he licensed his inventions rather than assigning them. It found that neither Perlick nor Vent-Matic intended the payments to be royalties in the usual sense of the word and that any payment Amidzich might have realized was offset by expenses Vent-Matic had assumed but that he would have had to incur. The court concluded that Amidzich thus would be in a position no better than Vent-Matic's: "in the hands of a receiver, unable to pay all of its creditors." Determining that Amidzich proved no rescissory damages, the court dismissed his claim.

¶11 Amidzich unsuccessfully moved for reconsideration. Vent-Matic's affairs took a year to wind up. In March 2010, the court signed the final judgment.

¶12 On appeal, Amidzich first argues that the Perlick payments were royalties earned from his inventions, that Silverstein wrongfully took them for Vent-Matic's and, ultimately, his own benefit, and that the monies therefore should be returned to him as rescissory damages. *See Wickenhauser v. Lehtinen*, 2007 WI 82, ¶17 n.4, 302 Wis. 2d 41, 734 N.W.2d 855. Under tenets of basic contract law, he contends, the plain and unambiguous language of the License Agreement stating that Perlick "guarantee[s] minimum royalties" precludes any alternate interpretation or reference to parol evidence. Therefore, he submits, the trial court's conclusion that the payments were "not intended to be royalties in the usual sense of the word" is legally unsupportable. We disagree.

¶13 Amidzich’s claim requires that we review the trial court’s findings of fact. We will not disturb those findings unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2009-10).² “The trial court is the ultimate arbiter of the credibility of witnesses and a reviewing court will accept the inference drawn by the trier of fact.” *Groshek v. Trewin*, 2010 WI 51, ¶11, 325 Wis. 2d 250, 784 N.W.2d 163 (citation omitted). Also, Amidzich’s claim for rescissory damages was an action in equity. The parol evidence rule is premised upon contract, not equity, principles. *Kafka v. Pope*, 186 Wis. 2d 472, 477, 521 N.W.2d 174 (Ct. App. 1994), *aff’d*, 194 Wis. 2d 234, 533 N.W.2d 491 (1995).

¶14 Four facts convinced the court that the payments were not royalties. First, such royalties typically run five or six percent of the sale price and there was no evidence that Perlick sold enough faucets at \$20 each to justify \$450,000 in royalties, let alone \$650,000. Second, royalties would have flowed from the patent-infringement claim and the breach-of-contract claim alone exceeded a million dollars. Third—the fact the court said confirmed for it that “royalties” was not meant in the usual sense—was an e-mail from Perlick’s attorney to Michael Hopkins, Vent-Matic’s attorney. Perlick’s attorney wrote that the \$450,000 lump-sum payment “needs to be distinguished from royalties to be paid in the future for the right to sell the faucet and [pressure reducer]. It really represents settlement of Vent-Matic’s claims of patent infringement and breach of contract, and we should so state in the Settlement Agreement.” Last, Hopkins testified that he believed the \$450,000 was paid in settlement of both the breach-of-contract and the license-infringement claims. These findings are not clearly erroneous.

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

¶15 Amidzich next contends that not only did the court reverse itself on whether the payments were royalties, it inexplicably shifted the burden of proving the expenses he would have incurred to earn them. Pretrial, the court ordered that the burden was Silverstein’s “to persuade the court that Mr. Amidzich would not have earned the royalties he is claiming as rescissory damages”—in other words, to prove the expenses that would offset monies due Amidzich. At trial, Amidzich chose to call no witnesses or put on any proof to rebut evidence Silverstein presented. The court ruled that Amidzich failed to prove that he suffered any rescissory damages and so dismissed his claim. The court did not shift the burden of proof; it acknowledged that Silverstein met his.

¶16 Amidzich also would have us overturn numerous findings the court made as to the expenses he would have incurred to develop the inventions into marketable products, in litigation to get the payments from Perlick and to repay loans to Vent-Matic. We decline. The same trial judge presided over these proceedings since mid-2006. The court’s findings were based on unrefuted evidence at this trial and on its overall familiarity with the case, as demonstrated by its comprehensive decisions. Its findings are not clearly erroneous.

¶17 Amidzich next contends that Silverstein was unjustly enriched at his expense by Silverstein’s overreaching, breach of a fiduciary duty and conversion of money from the Perlick payments. He argues that the trial court should have imposed a constructive trust—“a device in a court of equity to prevent unjust enrichment which arises from fraud or abuse of confidential relationship and is implied to accomplish justice.” *See Meyer v. Ludwig*, 65 Wis. 2d 280, 285, 222 N.W.2d 679 (1974) (citation omitted).

¶18 The trial court initially found that Silverstein breached his fiduciary duty because he overreached in fashioning an agreement that required Amidzich to assign, rather than license, his interest in the valve patent, and to assign all but two of his inventions to Vent-Matic. The court determined, however, that there was no unjust enrichment because the money that went to Silverstein represented repayment of loans made to support the venture. Noting that the parties expressed a clear intent to preserve an equal balance of ownership, it deemed Silverstein's assertion that his financial contributions to the business were loans more credible than Amidzich's claim that he thought they were simply infusions of capital. Were it otherwise, the court said, Silverstein would have been entitled to a greater share of the company, leaving Amidzich in the minority. Once more, these findings are not clearly erroneous.

¶19 Finally, Amidzich asserts that the trial court erred in denying prejudgment interest. Whether a party is entitled to prejudgment interest is a question of law we review de novo. *Teff v. Unity Health Plans Ins. Corp.*, 2003 WI App 115, ¶42, 265 Wis. 2d 703, 666 N.W.2d 38. We reject his complaint.

¶20 Prejudgment interest may be awarded at the discretion of the trial court for the purpose of compensating a party to whom payment is due for lack of use of the money. *Estreen v. Bluhm*, 79 Wis. 2d 142, 156, 255 N.W.2d 473 (1977). Damages must be either liquidated or determinable by reference to some objective standard, and not dependent upon some unresolved issues of fact. *See Teff*, 265 Wis. 2d 703, ¶¶43, 50. Before the offsets were determined, there was no fixed and readily determinate amount which could have been tendered. Once they were, no monetary judgment was awarded in Amidzich's favor. Denying prejudgment interest was a proper exercise of the court's discretion.

CROSS-APPEAL

¶21 Silverstein commenced his action for dissolution of Vent-Matic in 2004. Amidzich counterclaimed that the 1996 Agreement represented a breach of Silverstein's fiduciary duty. Silverstein contends the trial court erred in determining that the statute of limitations had not run on the issue. We disagree.

¶22 In 2004, a cause of action for an intentional tort had to be filed "within 2 years after the cause of action accrues." WIS. STAT. § 893.57 (2003-04). This section applies to a breach-of-fiduciary-duty claim. *See Zastrow v. Journal Commc'ns, Inc.*, 2006 WI 72, ¶1, 291 Wis. 2d 426, 718 N.W.2d 51. The statute of limitations does not begin to run until the date the injury is discovered, or reasonably should have been discovered. *Spitler v. Dean*, 148 Wis. 2d 630, 633, 436 N.W.2d 308 (1989).

¶23 Without a transcript of the bench trial, the scope of our review is limited to the record before us. *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979). Based on the trial court's written decision, we cannot say that Amidzich's claim was untimely. The court found that Amidzich and Silverstein first reached an impasse in 2004; that Amidzich did not discover his difficulty until that point; and that without the advice of a lawyer or a reason to have engaged one, he would not have "discovered the problem caused by deadlock until the deadlock actually occurred." These findings are not clearly erroneous.

¶24 Silverstein next complains that the trial court erred in finding that he breached a fiduciary duty of loyalty to Amidzich. The court found that Silverstein and Amidzich were in an attorney-client relationship when they entered into the 1996 Agreement; that Silverstein thus owed Amidzich a fiduciary duty of loyalty to fully inform him that the transaction could harm him and benefit Silverstein;

that Silverstein should have advised Amidzich that he could license the valve patent instead of assigning it; and that requiring Amidzich to assign future inventions was unreasonable and overreaching.

¶25 An attorney who deals with a client carries a heavy burden if the character of the transaction comes under question. *See Armstrong v. Morrow*, 166 Wis. 1, 6, 163 N.W. 179 (1917). Silverstein failed to establish that requiring Amidzich to assign, without consideration, virtually all of his inventions to a company he did not control was anything but overreaching. He did not show that he advised Amidzich that the fifty-fifty arrangement created a potential for deadlock or that Amidzich stood to lose control of his inventions should they reach an impasse. We conclude that the facts as found establish a breach of fiduciary duty. *See Groshek*, 325 Wis. 2d 250, ¶11.

¶26 Finally, Silverstein argues that if he did not breach his fiduciary duty to Amidzich, the trial court erred in transferring the patents owned by Vent-Matic back to Amidzich. Having concluded that Silverstein did breach his duty of loyalty to Amidzich, we need address this issue no further.

¶27 No costs to either party on appeal.

By the Court.—Judgment affirmed.

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

