

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

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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. 2011AP1271

Cir. Ct. No. 2008CV248

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

LONGBERG BRANDEL & ASSOCIATES, INC.,

PLAINTIFF-APPELLANT,

V.

JOHN C. LONGBERG,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Longberg, Brandel & Associates, Inc. (Associates) appeals from a circuit court judgment dismissing its breach of contract and tortious interference claims against John Longberg (John). We affirm.

¶2 Before we begin our review, we observe the following. Associates' appellate arguments overlook a fundamental tenet of appellate review. Where the issues are driven by circuit court findings of fact, we are bound to affirm those findings if they are not clearly erroneous. WIS. STAT. § 805.17(2) (2009-10).¹ When the circuit court has made a credibility determination, "it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony." *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. On appeal, Associates must confront the circuit court's findings of fact, not retry the case.

¶3 We take the facts from the circuit court's well-considered opinion. In 2002, John sold his heating, ventilation and air conditioning company, Longberg Associates, Inc. (Longberg), to Longberg, Brandel & Associates, Inc. In addition to selling assets and equipment, John also sold the value of his business goodwill to Associates. John became an employee of Associates and entered into a covenant not to compete with Associates. In 2003, Associates encountered financial problems. Chris Brandel, Associates' president, suggested that John meet with Associates' banker to confirm the steps the bank required in order to provide financing. John met with the Business Bank's president, Jim Wilson. The next day, the loan officer, Richard Grall, put Associates' request for financing on hold in order to further evaluate the situation.

¶4 John and Associates were unable to resolve their differences about how Associates intended to address its financial problems. John terminated his employment with Associates and formed John C. Longberg Consulting, LLC to

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

provide HVAC design and engineering services to former customers of his prior employers, Associates and Longberg. Associates was not able to obtain additional financing and eventually ceased operations.

¶5 Associates sued John for breach of contract because he failed to meet his billable hour requirement as set forth in the Asset Purchase Agreement. Associates also sued John for tortious interference with Associates' relationship with its bank and alleged that John caused the bank to deny Associates additional financing. After making findings of fact, the court dismissed Associates' claims.

¶6 Associates' breach of contract claim was based on the following provision of the Asset Purchase Agreement: "John's requirement to bill out 1500 billable hours per calendar year shall be in effect for a five (5) year calendar term, commencing with the year 2003." Associates calculated that John only billed out 1349 billable hours in 2003. While Associates did not dispute that John generated 1500 billable hours, Associates argued that John's real responsibility under the Asset Purchase Agreement was to generate 1500 "billed out" billable hours. Using Associates' methodology and having discovered an additional 166.5 hours for which Associates had generated invoices, John calculated that he billed out 1515.5 hours for 2003. John argued that he satisfied his obligation under the Agreement, and he was not involved in how his hours were charged or billed out to clients.

¶7 The circuit court found that Associates did not establish its breach of contract claim relating to John's billable hours. First and foremost, the court found John's accounting of his 1515.5 billable hours to be "more particular, better documented, and more reliable" than Associates' accounting of his hours. This was a finding the court was entitled to make based upon its assessment of the evidence before it. The court noted that the Agreement did not distinguish the type of work

that would satisfy John's 1500 billable hour requirement, i.e., work billable to a client versus administrative or other nonclient work for Associates. The court found no evidence that John refused to perform available billable work or that Associates directed John to devote himself solely to billable hours rather than other endeavors for Associates. Associates was responsible for billing out John's hours, and there were a "significant if indeterminable number of billable hours in excess of 1349 [that] were actually worked and not billed" by Associates.

¶8 On appeal, Associates argues that as a matter of contract construction, John breached the Asset Purchase Agreement because he did not bill out 1500 hours in 2003. Associates cannot succeed on appeal by arguing a contract provision while ignoring the circuit court's findings of fact in relation to that provision. Associates does not confront the circuit court's finding that John's accounting, which the court deemed more reliable than Associates' accounting, showed that John billed out 1515.5 hours using the same methodology Associates used to calculate John's obligation under the Asset Purchase Agreement. We will neither sift the record to locate facts to support Associates' appellate arguments, *see Keplin v. Hardware Mut. Cas. Co.*, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964), nor craft an argument for Associates, *see Vesely v. Security First Nat'l Bank*, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985) (we do not address inadequately briefed issues).

¶9 We turn to Associates' tortious interference with contract claim. Associates claimed that John's conversation with Wilson caused the bank to deny Associates additional financing. The elements of tortious interference are: (1) Associates had a current or prospective contractual relationship with a third party, the bank; (2) John interfered with that contractual relationship; (3) John's interference was intentional; (4) a causal connection existed between John's interference and Associates' damages; and (5) John was not justified or privileged to

interfere in Associates' relationship with the bank. See *Wolnak v. Cardiovascular & Thoracic Surgeons of Cent. Wis.*, 2005 WI App 217, ¶14, 287 Wis. 2d 560, 706 N.W.2d 667. The circuit court found that Associates did not satisfy the elements of the claim.

¶10 Based on the evidence before the circuit court, the court found that there was insufficient evidence that the bank had committed to additional financing at the time John met with Wilson. Therefore, Associates did not establish that there was a reasonably certain business opportunity or contract with which John could have interfered. There was no evidence that John intended to interfere with or torpedo Associates' financing opportunity with the bank. There was no evidence that John knew at the time he met with Wilson that a financing request was pending at the bank. While Wilson passed along to the loan officer John's concerns about Associates, the court found no persuasive evidence that Wilson shared anything critical of Associates that would have affected the bank's evaluation of Associates' credit worthiness.

¶11 The court found no causal connection between John's meeting with Wilson and the bank's refusal to extend additional credit. The loan officer was undertaking appropriate meetings with representatives of Associates to evaluate the request for additional financing and objectively assess whether additional financing should be extended. The court found that in denying additional financing, the bank acted upon sound banking principles rather than anything John said to Wilson. In denying additional financing, the bank had good, independent reasons rooted in Associates' financial condition and prospects: diminishing revenues, additional interim financing had already been required, and staff had been laid off. The bank had previously placed Associates' risk rating in the highest category so that any extension of credit would have been preceded by a careful, heightened review. The

court found that the bank did not extend further credit to Associates because the business was failing, not because of anything John said to the bank's president.

¶12 On appeal, Associates argues that it satisfied the elements of tortious interference. While Associates argues as to each element, only one element needs to be unsatisfied for the claim to fail. Associates asserts a causal link between John's statements to Wilson and the bank's refusal to extend credit. The circuit court found to the contrary based on its evaluation of the evidence and the witnesses' credibility. Associates does not show that this finding is clearly erroneous.

¶13 Because Associates did not prove its claims, the circuit court did not err in dismissing them.

By the Court.—Judgment affirmed.

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

