COURT OF APPEALS
DECISION
DATED AND RELEASED

April 9, 1997

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

NOTICE

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No. 95-2061

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

MICHAEL A. DOWNEY AND ANNA M. DOWNEY,

Plaintiffs-Appellants-Cross Respondents,

v.

JOHN P. KENDALL AND MARGARET T. KENDALL,

Defendants-Respondents-Cross Appellants.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Michael A. and Anna M. Downey appeal from a judgment in favor of John P. and Margaret T. Kendall returning their investment in a

joint business venture and for punitive damages. Kendall cross-appeals from Downey's recovery under a mortgage to secure business debt and the failure of the trial court to award lost wages.[1] Downey attacks the trial court's decision as not supported by the evidence. We reject his claims and affirm that portion of the judgment denying him recovery. On Kendall's cross-appeal, we affirm the judgment requiring Kendall to pay under the mortgage but reverse and remand that portion of the judgment denying Kendall's claim for lost wages.

In 1989, Downey and Kendall discussed becoming partners in a venture called Eighty Fourth, Inc., a contract machine shop. Downey and his wife would hold a 70% interest and Kendall 30%. Downey was named president and treasurer. Kendall was to supervise in the shop. Kendall quit his job to assume his role in the business venture. Neither man was to draw a salary from Eighty Fourth unless there were profits.

The newly-formed corporation was to acquire the rights, interests and assets of Madgek Corporation. Madgek was another corporate venture Downey was involved in which had recently purchased the business and assets of another manufacturing company. Madgek was in possession of equipment, on-going business, work in progress, customer accounts, and a leasehold on a building which included an option to purchase. Title to the equipment was never transferred to Eighty Fourth. Rather, Eighty Fourth made "lease" payments for using the equipment which were equal to the debt service Madgek owed. Downey acquired title to the building but secured the loan with Eighty Fourth assets. He leased the building back to Eighty Fourth. Downey also acquired new equipment in his own name and leased it to Eighty Fourth.

[1] Although their wives are named as parties to the action, the active participants in the venture were Michael Downey and John Kendall. Therefore, we will refer to the parties as Downey and Kendall.

In the fall of 1991, Kendall became ill and was unable to participate in operation of the shop. In March 1992, Downey listed the business for sale. The venture was abandoned.

Downey commenced this action to foreclose on a mortgage given by Kendall as a personal guaranty of a bank loan obtained by Eighty Fourth, to collect unpaid rent under a personal guaranty Kendall gave to guarantee the lease obligations of Eighty Fourth to Downey, and to recoup money due by virtue of the "owners loans accounts" which charged Kendall with 30% of the corporate expenses. Kendall counterclaimed for Downey's breach of a fiduciary duty by the acquisition of corporate opportunities, for waste of corporate assets, and for fraudulent misrepresentation inducing Kendall to invest $68,000 in the corporation.

The case was tried to the court. The trial court found that the parties had agreed that the Madgek assets would be transferred to Eighty Fourth and that Downey had breached the agreement by failing to make the transfer. It found that Downey had made misrepresentations and concealed from Kendall the fact that the assets were never transferred to or owned by Eighty Fourth. It also found that Downey had fraudulently obtained Kendall's personal guaranty of the leases. It determined that Kendall owed Downey $11,301 on the mortgage. The trial court awarded Kendall the return of his investment of $45,229, punitive damages in the sum of $10,000, and a sum of $12,654 to account for an adjustment to the "owners loans accounts."[2] Kendall's claim for lost wages was denied.

[2] Downey kept track of corporate expenses by charging 70% to his "owners loans account" and 30% to Kendall's. It was an accounting method to offset capital contributions and expenses. In adjusting the accounts, it appears that the trial credited Kendall with 30% of a $47,000 payment that Downey diverted to Madgek.

Downey argues that Kendall was not swindled. This and his other claims amount to a challenge to the trial court's findings and conclusions based on the sufficiency of the evidence.[3] The trial court's findings of fact will not be set aside unless clearly erroneous. *See* § 805.17(2), STATS. For purposes of appellate review, the evidence supporting the court's findings need not constitute the great weight and clear preponderance of the evidence; reversal is not required if there is evidence to support a contrary finding. *See* ***Bank of Sun Prairie v. Opstein***, 86 Wis.2d 669, 676, 273 N.W.2d 279, 282 (1979). Rather, the evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. *See* ***id.*** In addition, the trial court is the ultimate arbiter of the witnesses' credibility when it acts as the fact finder and there is conflicting testimony. *See* ***id.*** We accept the inference drawn by the trier of fact when more than one reasonable inference can be drawn from the evidence. *See* ***id***.

We conclude that the trial court's credibility determination is dispositive. Kendall and Downey gave conflicting testimony about their agreement and what Kendall was advised of and approved of. Although Kendall acknowledged that Eighty Fourth did not own the assets when he made his initial capital contribution, he indicated his understanding that Downey was working on transferring title and that it was a condition of the venture. The trial court found that the parties' intent to "obtain" the assets of Madgek contemplated title ownership of those assets. It also found that Downey engaged in self-dealing in disregard of his fiduciary duties to the corporation. The evidence demonstrated that Downey used Eighty Fourth funds to cover costs on personal acquisitions and manipulated accounts to his advantage.

[3] Downey does not cite any standard of review in his appellant's brief, so it is necessary for this court to define the issues. In his reply brief Downey suggests our standard of review is de novo because the trial court made no "findings of fact but only unsupported conclusions of law or impossible inferences from undisputed evidentiary facts." We reject his contention that our review involves anything other than the sufficiency of the evidence.

The trial court obviously found Kendall to be more credible than Downey.[4] It rejected Downey's explanation that Kendall had approved his structuring of the various transactions. The trial court drew reasonable inferences from the record. Its findings are not clearly erroneous.

Downey argues that he is entitled to recover 30% of unpaid building and equipment rent from Kendall as a corporate expense charged to Kendall's "owners loans account." He claims that Kendall's share of such unpaid expenses to the time the equipment and building were sold amounts to $27,242. However, at trial, Downey's accounting of the owners loans accounts reflected that at best Kendall owed $4649. There is no support in the record for his claim that the larger sum is due under the owners loans accounts. Moreover, the trial court rejected Downey's accounting method and held that Kendall's personal guaranty of the lease agreements was unenforceable.

We cannot turn to Kendall's cross-appeal without commenting on the conclusionary portion of Downey's appellant's brief. In an "additional statement" at the end of his appellant's brief, Downey characterizes the trial court's decision as defamatory. He suggests that the trial court was confused and prejudiced. The additional comments rise to the level of a personal attack on the trial court and are unwarranted. Counsel violates the cardinal rule of effective appellate legal writing when he or she disparages the lower court. Even in zealous advocacy, attorneys are required to maintain respect to courts of justice. *See* Preamble SCR Chapter 20; SCR 62.02(c); ***In re Cannon***, 206 Wis. 374, 407, 240 N.W. 441, 454 (1932). Counsel's expression of such indignation is

[4] We reject the remainder of Downey's arguments that attack the trial court's decision where dependent on Downey's credibility. This includes his claim that it was error to credit Kendall with 30% of a $47,000 payment received by Eighty Fourth and diverted to Madgek for payment of work in progress. The trial court accepted Kendall's testimony regarding that payment. We do, however, conclude later in this opinion that awarding Kendall a portion of that income is inconsistent with an award of lost wages.

symptomatic of the decline of civility in the legal profession which has become so prevalent that this court has found it necessary to decry such tactics. *See* ***Miro Tool & Mfg., Inc. v. Midland Mach., Inc.***, 205 Wis.2d 643, 654, 556 N.W.2d 437, 442 (Ct. App. 1996) (Anderson, J., concurring).

The first issue in the cross-appeal is whether Kendall's mortgage given on April 12, 1990, secures a promissory note executed sometime in 1993. Kendall argues that because the mortgage references only the contemporaneous issuance of a $100,000 loan to Eighty Fourth, only that loan is secured. The note provides, "This mortgage secures prompt payment to Lender of … the sum stated in the first paragraph of this Mortgage … and any extensions, renewals or modifications of such promissory note(s) or agreement …."

Absent ambiguity, the construction of a contract presents a question of law. *See* ***Koenings v. Joseph Schlitz Brewing Co.***, 126 Wis.2d 349, 366, 377 N.W.2d 593, 598 (1985). The mortgage unambiguously covers continuations of the original loan to Eighty Fourth.

The question is whether the debt Downey paid off in October 1993 was an extension, renewal or modification of the original loan. Kendall argues that Downey failed to meet his burden of proof on this issue because Downey did not produce the original or copies of the promissory notes executed with the bank in 1992 and 1993. However, Kendall does not provide any authority that § 910.02, STATS.,[5] forecloses any other method of proof that a corporate debt existed which was an extension of the original note.

The banker testified that new notes issued to Eighty Fourth were collateralized by the collateral from the original note. That would include Kendall's

[5] Section 910.02, STATS., provides: "To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in chs. 901 to 911 or by statute."

mortgage. The banker indicated that the note Downey paid off was a renewal of the original debt. There was no objection to the banker's testimony on these points.[6] His testimony provides sufficient evidence that the mortgage extended to the debt paid by Downey. There was no need to prove the terms of the note itself and the "best evidence rule" does not apply. *See* ***Mitchell v. State***, 84 Wis.2d 325, 340, 267 N.W.2d 349, 356 (1978); *see also* ***York v. State***, 45 Wis.2d 550, 557, 173 N.W.2d 693, 697 (1970) (the "lesser evidence" does not raise a question of admissibility but rather goes to the weight the evidence will be given). We affirm that portion of the judgment awarding Downey $11,301 for Kendall's share of debt secured by the mortgage.[7]

The issue we reverse on is Kendall's claim for lost wages. The trial court ruled: "As to lost wages, there is insufficient evidence to establish the entitlement of the $78,000.00 the defendant demanded in his counter-claim." It is not clear whether the trial court considered the evidence insufficient as to a causal connection between Downey's conduct and Kendall's termination of his job or as to the amount of lost wages. We conclude that the evidence is sufficient on both elements.

The record establishes a causal connection between Kendall's lost wages and Downey's fraud in the inducement. Downey's conduct deprived Kendall of an expected income stream from either his prior employment or the corporation. Kendall testified that he had earned $39,000 annually in the job he quit because of his joint venture with Downey. He introduced his income tax return to corroborate his claim. Thus, the evidence was sufficient for a determination of damages.

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[6] In the trial court, Kendall argued that Downey failed to meet his burden because he had not produced the last promissory note. The trial court took the matter under advisement. Implicit in its ruling that the mortgage extended to the promissory note Downey paid off, the trial court rejected Kendall's insufficiency of the evidence claim.

[7] The trial court's judgment that the mortgage is satisfied and canceled is also sustained because we have affirmed the offsetting portions of the judgment on Downey's appeal.

We remand the issue of lost wages to the trial court for factual findings as to the total amount of lost wages. The trial court should make findings on the record made at trial. However, the trial court may not award both lost wages and income from the corporation, particularly Kendall's share of the $47,000 payment to Eighty Fourth that Downey diverted to Madgek. It would be inconsistent to negate the business arrangement for misrepresentation and yet give Kendall the benefit of that arrangement to the extent of income realized by Eighty Fourth. While Kendall may recover lost wages, he may not "double dip." On remand, the trial court will have to either vacate the award of damages which includes Kendall's share of the $47,000 payment,[8] or offset any income Kendall realized from the corporation against the award of lost wages.

No costs to either party.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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

[8] See footnote 2.