COURT OF APPEALS
DECISION
DATED AND FILED

May 20, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1783 **Cir. Ct. No. 2004CV303**

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

RICHARD BRIERE, DORRIT BRIERE AND HILLCREST LANDSCAPING CO., INC.,

PLAINTIFFS-APPELLANTS,

V.

BELLA ENTERPRISES, LLC,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Richard and Dorrit Briere and Hillcrest Landscaping Co., Inc., appeal from a judgment dismissing claims against Bella Enterprises, LLC, for consulting fees due to Dorrit and for punitive damages for Bella's conversion of accounts receivable and escrow funds. The appeal

essentially mounts a challenge to the sufficiency of the evidence to sustain the trial court's decision. We affirm the judgment.

¶2 The parties entered into an agreement for Bella to purchase the assets of Hillcrest Landscaping. The sale did not include accounts receivable. A certain portion of the sale price designated as goodwill was placed in an escrow account to be paid in installments to Richard over two years. An amendment to the purchase agreement provides that the escrow bank would mail the monthly payment to Richard "UNLESS SPECIFICALLY REQUESTED NOT TO BY THE UNDERSIGNED CHRISTINE A.M. STRAATE." Christine Straate is the managing member in Bella. Before the first payment was due, Straate told the bank not to make the payment. No payments were made from the escrow account.

¶3 The purchase agreement also provides that members of the Briere family would provide "familiarization and training" by on-site work and telephone consultation. This work was to be provided at no cost except as otherwise provided. Dorrit was to devote her time on site for thirty hours per week the first week immediately after closing and ten hours per week for the next three weeks. The agreement further stated: "Also, reasonable telephone consultation for 12 months after closing at no cost to buyer." That provision was amended to provide: "Buyer to pay Dorrit Briere $600.00 per month as telephone consulting fee for 15 months after closing." When the time for on-site work was over, both Richard and Dorrit were told their services were no longer needed. Bella did not make any $600 payments to Dorrit.

¶4 The Brieres commenced this action alleging that Bella breached the purchase agreement by withholding escrowed funds, retaining accounts receivable, failing to pay a promissory note for inventory, failing to pay Dorrit $600 per

month compensation and health insurance, and failing to pay Richard consulting fees and allow him use of a truck as promised. Bella counterclaimed alleging various misrepresentations inducing the purchase agreement, the Brieres' retention of deposits for work subsequently performed by Bella, bad faith conduct damaging goodwill of the business, and interference with prospective contracts. The counterclaim also alleged that the Brieres had failed to provide services and Dorrit intentionally damaged the computer accounting system of the business.

¶5 The case was tried to the court. The court determined that the amount due for goodwill was not contingent on any services Richard was to provide to Bella and granted judgment, with prejudgment interest, for the amount due from the escrow account, the inventory promissory note, and compensation owed Richard for work performed during the transition period. The Brieres also were granted judgment for accounts receivable. The court concluded that the Brieres had not proved conversion and denied the request for punitive damages. It found that given the circumstances under which Dorrit left Bella's office, "a complete termination of her services could be the only reasonable interpretation by both parties." Dorrit's claim for monthly compensation for telephone consultation was denied. A small amount found due to Bella for warranty work was offset against the total amount of the judgment.

¶6 We first set out a comprehensive statement of our standard of review because the Brieres fail to do so.[1]

[1] Not until their reply brief do the Brieres suggest that the appeal only involves challenges to the trial court's conclusions of law that should be reviewed de novo. We will not, as a general rule, consider arguments raised for the first time in a reply brief. ***Schaeffer v. State Pers. Comm.***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989).

> In reviewing findings made by a trial court in a trial to the court, "[i]t is well settled that the weight of the testimony and the credibility of the witnesses are matters peculiarly within the province of the trial court acting as the trier of fact" because the trial court has a superior opportunity "to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." ***Kleinstick v. Daleiden***, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976) (footnote omitted). It is for the trial court, not the appellate court, to resolve conflicts in the testimony, *see* ***Fuller v. Riedel***, 159 Wis. 2d 323, 332, 464 N.W.2d 97 (Ct. App. 1990), and we review the evidence in the light most favorable to the findings made by the trial court, *see* ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, [¶]10, 253 Wis. 2d 588, 644 N.W.2d 269. When more than one reasonable inference can be drawn from the credible evidence, this court must accept the inference drawn by the trial court. ***Noll v. Dimiceli's, Inc***., 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983). We must search the record for evidence to support the findings that the trial court made, not for findings that the trial court could have made but did not. ***Becker v. Zoschke***, 76 Wis. 2d 336, 347, 251 N.W.2d 431 (1977).

Tang v. C.A.R.S. Prot. Plus, Inc., 2007 WI App 134, ¶19, 301 Wis. 2d 752, 734 N.W.2d 169. Additionally, when the trial court does not make an express finding on a particular point, including a witness's credibility, we assume that a credibility determination was made in favor of the court's decision. ***State v. Hubanks***, 173 Wis. 2d 1, 27, 496 N.W.2d 96 (Ct. App. 1992).

¶7 The Brieres argue that in light of Dorrit's testimony that she was ready, willing and able to provide telephone consulting for the requisite fifteen months, she should have recovered on her claim for compensation required by the

purchase agreement. Distilled to its core,[2] their claim is that the trial court's finding of fact that the compensation agreement was terminated was clearly erroneous.

¶8 The record supports the trial court's finding that Dorrit's services were terminated. Dorrit acknowledged that at the end of her one month on site service, she was told that she was no longer needed. She was not ever called by Bella after that. She produced a log of activities for the weeks following the closing. The log indicates that she and Straate had conflicts about the responsibility for certain bills and the collection of monies owed to Hillcrest Landscaping. One week after the closing, the computer was removed from Dorrit's desk and there was a new mailbox to which Dorrit did not have a key. At the beginning of the fourth week after closing, Dorrit's log indicates that Straate "told me that she had learned all she could from me and my services would no longer be needed after this week."

¶9 Straate's testimony indicated how tensions grew with the Brieres during the transition period. When mail delivery was impaired by the change of address form the Brieres submitted, Straate felt uncomfortable continuing to work with the Brieres. Straate explained that she was able to utilize the accounting software and did not need Dorrit's knowledge or assistance with that after the four weeks was up.

[2] The Brieres make much ado that in its posttrial brief Bella misrepresented the record when it indicated that Dorrit testified that she saw fit to discontinue coming into work at Bella. True, Dorrit never indicated it was her choice to not perform any other services for Bella. However, the trial court expressly stated that its finding is based on "all the circumstances" and not just Dorrit's testimony. Further, the trial court did not lay blame on Dorrit or otherwise find that she had breached the agreement. We summarily reject that the misrepresentation invited error.

¶10 The Brieres are really advancing an interpretation of the contract that is not supported by the record. They claim Dorrit was entitled to the $600 a month payment regardless of whether any telephone consultation was provided because Bella was paying for Dorrit's availability.[3] At the end of the second day of trial, the trial court expressed the view that the provisions in the purchase agreement for consulting services were akin to an employment contract that failed to state the conditions under which it could be terminated. Implicitly, the court found that the provisions created an employment-at-will situation. *See* ***Heinritz v. Lawrence Univ.***, 194 Wis. 2d 606, 611, 535 N.W.2d 81 (Ct. App. 1995) (general rule in Wisconsin is that employment is terminable at will by either an employer or employee without cause). Although their posttrial brief to the trial court argued that the plain term of the compensation provision should be enforced without regard to the parties' intent, the Brieres did not specifically address the trial court's suggestion that it was an employment-at-will situation. When a party fails to object to a trial court's characterization of the underlying facts, that party has waived the right to argue the issue on appeal. ***First Interstate Bank of Wis.-Se. v. Heritage Bank and Trust***, 166 Wis. 2d 948, 954, 480 N.W.2d 555 (Ct. App. 1992). The Brieres attempt to recast the issue as one of contract interpretation when that issue was not raised or litigated at trial.[4] We will not reverse on theories

[3] Dorrit testified that the $600 per month was really intended to be for health insurance but that the wording got changed to say it was for consulting to satisfy loan requirements. Straate indicated that it was not her understanding that the $600 was for Dorrit's health insurance.

[4] It was disingenuous for the Brieres to assert for the first time after trial that Bella had been represented by counsel in the drafting and amending of the purchase agreement and therefore Bella should bear the consequences of the bare bones terms. No facts were developed on that issue. Indeed, the Brieres provide no record citation to the same claim in this court.

(continued)

of law never argued in the trial court or findings never considered by the trial court. ***Leon's Frozen Custard, Inc. v. Leon Corp.***, 182 Wis. 2d 236, 246 n.2, 513 N.W.2d 636 (Ct. App. 1994). *See also* ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) ("We will not, however, blindside trial courts with reversals based on theories which did not originate in their forum."). Having determined that the record supports the trial court's finding that Dorrit's employment was terminated, we affirm the conclusion that she was not owed any compensation.

¶11 The Brieres were granted judgment for the account receivables and escrow fund for Bella's breach of contract. Although punitive damages are not available in breach of contract actions, they are if the defendant has committed a tort as well as a breach of contract. ***Autumn Grove Joint Venture v. Rachlin***, 138

The Brieres' evidence regarding Dorrit's claim to compensation was sparse. It consisted only of Dorrit's testimony that she was ready, willing and able to provide telephone consulting services and that she was told her services were not needed. Right after the trial court commented on the appearance of an at will employment situation, the trial court elicited what appears to be the only evidence touching upon the contracting parties' intent. Because the continuing involvement of the Brieres was something the lending parties were interested in to assure a smooth transition and business success, the loan officer was examined about the compensation provisions. The trial court asked the witness if the circumstances of terminating the Brieres' services was ever discussed. The witness indicated that reasons for termination were not discussed and no one ever talked about the effect of Richard being fired by Straate.

Additionally, for the first time in their reply brief, the Brieres contend that because the purchase agreement provided for services for a fixed period of time, an employment at will situation did not exist. *See* ***Cronemillar v. Duluth-Superior Milling Co.***, 134 Wis. 248, 251, 114 N.W. 432 (1908) ("where wages are payable by the month, such circumstance is evidence of hiring for that period"). We reiterate that we will not consider arguments raised for the first time in a reply brief. ***Schaeffer***, 150 Wis. 2d at 144. If the claim had been properly litigated in the trial court, Dorrit may have been entitled to nominal damages for Bella's refusal to let her go to work at all. ***Cronemillar***, 134 Wis. 2d at 251-52; *but see* ***Heinritz v. Lawrence Univ.***, 194 Wis. 2d 606, 613-14, 535 N.W.2d 81 (Ct. App. 1995) (a cause of action for breach of contract does not exist where a prospective at will employee not for a stated term is terminated before commencing work).

Wis. 2d 273, 279-81, 405 N.W.2d 759 (Ct. App. 1987). The Brieres argue that the trial court should have found Bella guilty of conversion so that they can recover punitive damages. Even assuming that a specific finding that Bella converted monies owed could and should have been made, punitive damages do not automatically result.

¶12 Whether punitive damages are recoverable is a question of law. ***State Bank of Independence v. Equity Livestock Auction Mkt.***, 141 Wis. 2d 776, 785, 417 N.W.2d 32 (Ct. App. 1987). Punitive damages may be awarded when the defendant has "acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." WIS. STAT. § 895.043(3) (2007-08).[5] It is tempting to suggest that because conversion involves the "dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein," ***Schara v. Thiede***, 58 Wis. 2d 489, 497, 206 N.W.2d 129 (1973), that the defendant has acted with intentional disregard of the plaintiff's rights to that property.[6] However, there is an appreciable difference in the "intentional" nature of the conduct supporting tort recovery and that required for punitive damages. *See* ***Wangen v. Ford Motor Co.***, 97 Wis. 2d 260, 269, 294 N.W.2d 437 (1980).

¶13 The requirement that the disregard of rights be "intentional" requires "an increased level of consciousness and deliberateness." ***Strenke v. Hogner***, 2005 WI 25, ¶34, 279 Wis. 2d 52, 694 N.W.2d 296.

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[5] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[6] Malicious acts are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended. ***Strenke v. Hogner***, 2005 WI 25, ¶26, 279 Wis. 2d 52, 694 N.W.2d 296. The Brieres focus only on the disregard of their rights to the retained monies and do not argue that Bella acted maliciously.

> [A] person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded. This will require that an act or course of conduct be deliberate. Additionally, the act or conduct must actually disregard the rights of the plaintiff, whether it be a right to safety, health or life, a property right, or some other right. Finally, the act or conduct must be sufficiently aggravated to warrant punishment by punitive damages.

Id., ¶38. *See also* ***Berner Cheese Corp. v. Krug***, 2008 WI 95, ¶64, 312 Wis. 2d 251, 752 N.W.2d 800. The plaintiffs must prove by clear and convincing evidence that the defendant was aware that its conduct was substantially certain to result in the plaintiffs' rights being disregarded. ***Wischer v. Mitsubishi Heavy Indus. America, Inc.***, 2005 WI 26, ¶34, 279 Wis. 2d 4, 694 N.W.2d 320.

¶14 The trial court concluded that "under the present state of the law regarding punitive damages, the plaintiffs have not established the requisite elements." The record supports this determination as there is no evidence that Bella's retention of the accounts receivable and withholding of escrow payments was for the purpose of disregarding the Brieres' rights. The purchase agreement specifically gave Straate the authority to withhold the escrow payments. As to the accounts receivable, the trial court observed that communications broke down in both directions to prevent resolution of the dispute. At best the Brieres established that Straate's reasons for retaining checks and withholding escrow payments were later determined to be unfounded. However, at the time Straate had the intent to protect Bella's interest and not to disregard the Brieres' rights. *See* ***Berner Cheese***, 312 Wis. 2d 251, ¶70 (no basis for punitive damages when evidence demonstrates the alleged tortfeasor's belief that conduct was lawful). Both parties labored under the bare bones purchase agreement. Further, that there was

animosity between Straate and the Brieres shortly after closing does not make Bella's conduct sufficiently aggravated to support punitive damages.

By the Court.—Judgment affirmed.

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