Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEYS FOR APPELLANT:

STEVEN K. HUFFER
JOSHUA F. BROWN
S.K. Huffer & Associates, P.C.
Carmel, Indiana

ATTORNEYS FOR APPELLEES:

BRUCE D. BRATTAIN
MARIO GARCIA
Brattain & Minnix
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

RUTH M. BROWN,

Appellant/Defendant/Counter-Claimant/
Third-Party Plaintiff,

vs.

ALLIANCE ENVIRONMENTAL, INC.,

Appellee/Plaintiff/Counter-Claim
Defendant,[1]

vs.

R. BRUCE WALLACE,

Appellee/Third-Party Defendant.

No. 49A02-0909-CV-854

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David J. Dreyer, Judge
Cause No. 49D10-0501-CC-441

July 16, 2010

[1] No claims have been raised against Alliance Environmental, Inc. on appeal. However, pursuant to Indiana Appellate Rule 17(A), a party of record in the trial court is a party on appeal.

BRADFORD, Judge

Appellant/Defendant/Counter-Claimant/Third-Party Plaintiff Ruth M. Brown appeals from the trial court's determination that Appellee/Third-Party Defendant R. Bruce Wallace breached his fiduciary duty to Brown. Specifically, Brown contends that the trial court's order was clearly erroneous because the trial court failed to award Brown compensatory damages after determining that Wallace breached the fiduciary duty that he owed to Brown. In addition, Wallace contends that the trial court's findings regarding Brown's ownership interest in Alliance Environmental, Inc. ("Alliance") were clearly erroneous. Concluding that the trial court issued conflicting findings regarding Brown's ownership interest in Alliance and that the trial court erroneously failed to award Brown compensatory damages in light of its determination that Wallace breached his fiduciary duty to Brown, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

Alliance was incorporated on November 1, 1991, and was engaged in environmental architectural engineering and consulting services. The original stockholders of Alliance were Wallace, Joseph S. Brown ("Joseph"), George X. Cannon, and Patrick K. Brown. Each of the original stockholders held 250 shares of Alliance common stock. At some point, Alliance redeemed, *i.e.*, bought back, all shares owned by Cannon and Patrick Brown.

Starting on November 1, 1991, Wallace served as the President and CEO of Alliance. Wallace's employment arrangement with Alliance was memorialized in an Employment

Agreement ("Agreement"), which was dated June 16, 1992. The Agreement provided that Wallace was entitled to a first year salary of $50,000, and that he was subject to a minimum ten percent raise each year subject to minimum annual earnings by Alliance. The Agreement also provided that Wallace was entitled to receive a bonus "equal to one hundred percent (100%) of the net profits of the corporation for each fiscal year above the first Ninety Thousand Dollars ($90,000), up to a maximum bonus of Fifty Thousand Dollars ($50,000)." Wallace Exhibit 3, p. 2.

Pursuant to the terms of the Agreement, Wallace was also entitled to receive certain benefits, including the option "to purchase a total of One Thousand Eight Hundred Seventy Five Shares (1,875) shares [sic] of common stock of the corporation at a purchase price of Twenty-Five Dollars ($25.00) per share" in accordance with the schedule set forth in the Agreement. Wallace Exhibit 3, pp. 2-3. The stock option was cumulative and, once accrued, could be exercised at any time during Wallace's employment.[2] Wallace also entered into a Deferred Compensation Agreement with Alliance, under which he was entitled to receive a payment equal to "the actuarial equivalent of the then minimum cash value(s) which would have been earned" if a $1,000,000 whole life insurance policy had been purchased on Wallace's life. Wallace Exhibit, p. 927. The Agreement was subsequently renewed three times and was still in effect at the time that Alliance's assets were sold in March of 2005.

On June 29, 1992, Wallace and Joseph entered into a Stock Option Agreement. Pursuant to the terms of the Stock Option Agreement, Wallace was granted an exclusive right

[2] Although the Agreement explicitly grants Wallace the cumulative option to purchase 1875 shares of common stock, the schedule set forth in the Agreement only covered 1750 shares.

to purchase all of Joseph's 250 shares of Alliance common stock. On or about March 12, 1996, Wallace exercised his option to purchase Joseph's shares of Alliance common stock. However, before the purchase of the 250 shares was completed, Joseph and Wallace modified their agreement so that Wallace acquired 190 shares of Joseph's common stock and Joseph retained the remaining sixty shares. On November 29, 2002, Joseph transferred his remaining sixty shares to his wife, Brown. Upon this transfer, Brown became the sole minority shareholder of Alliance.

On January 12, 1993, Wallace exercised his option set forth in the Agreement to purchase 300 shares of Alliance common stock. On March 22, 1994, Wallace exercised the option set forth in the Agreement to purchase 450 shares of Alliance common stock. Also during 2004, Wallace exercised the option set forth in the Agreement to purchase 1000 shares of Alliance common stock.

On February 18, 1993, Wallace loaned $75,000 to Alliance. Alliance's debt was memorialized in a promissory note which carried an interest rate of seven percent per annum. The promissory note was unpaid at the time of the sale of Alliance's assets in March of 2005.

Over the course of his employment at Alliance, Wallace received a number of pay increases. In 1993, Wallace's salary was increased to $65,000. This salary increase was paid to Wallace. In 1994, Wallace's salary was increased to $76,750. In 1995, Wallace's salary was increased to $88,263. In 1996, Wallace's salary was increased to $101,502. However, the 1994, 1995, and 1996 salary increases were memorialized as debts of Alliance owed to Wallace at an interest rate of ten percent per annum because Alliance did not have the available funds to pay these salary increases. These salary increases were thereafter loaned year after year by Wallace to Alliance at an interest rate of ten percent per annum until the sale of Alliance's assets in 2005.

Wallace was awarded various bonuses during the course of his employment at Alliance. In 1993, Wallace was awarded a bonus of $50,000 in accordance with his Employment Agreement. Wallace was also awarded bonuses of $50,000 in 1994 and 1995. Alliance, however, did not have the available funds to pay these bonuses, so these bonuses were memorialized as debts at an interest rate of ten percent per annum. As of Alliance's asset sale in 2005, these bonuses had yet to be paid.[3]

Over time, Alliance made a number of loans totaling approximately $817,000 to companies in which Wallace or some of the other original shareholders had an interest. However, neither Joseph nor Brown had an interest in any of these companies. Ultimately, most of these monies were never repaid and were subsequently written off Alliance's books.

In March of 2005, Wallace negotiated and executed a sale of all of Alliance's assets. The assets sold for $750,000, $85,000 of which was paid via promissory note. At the time of the sale, Wallace owned 2190 shares of Alliance common stock and Brown owned sixty shares of Alliance common stock. Wallace kept the proceeds of Alliance's sale, claiming that the funds were partial repayment for the loan, unpaid wages, and unpaid bonuses owed to him by Alliance. Brown did not receive any distribution from the proceeds of the asset

[3] Alliance's financial records indicate that Wallace was paid a bonus every year between 1992 and 2004, even though a bonus was not earned pursuant to the terms of the Agreement in all of those years. Wallace has subsequently admitted that he was not entitled to a bonus every year, but rather only when the terms set forth in the Agreement had been met.

sale.

At some point during 2005, Alliance sued Brown to recover certain funds loaned to Brown in 2003 that had yet to be repaid.[4] In August of 2006, Brown filed a third-party complaint alleging that she was entitled to a distribution of a portion of the proceeds of Alliance's asset sale and that Wallace had breached the fiduciary duty that he owed to her as the minority shareholder.

A bench trial was conducted before the trial court on March 5, 6, and 9, 2009. On May 27, 2009, the trial court issued its findings of facts and conclusions thereon. The trial court entered judgment in the amount of $90,000 in favor of Brown. Brown filed a Motion to Correct Errors, which was subsequently deemed denied pursuant to Indiana Trial Rule 53.3(A). Brown now appeals.

DISCUSSION AND DECISION

Pursuant to Indiana Trial Rule 52(A), "[o]n appeal of claims tried by the court without a jury… the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." When a trial court has entered specific findings and conclusions along with its judgment under Trial Rule 52, we apply a two-tiered standard of review. *Ruse v. Bleeke*, 914 N.E.2d 1, 8 (Ind. Ct. App. 2009) (citing *Fox v. Green*, 856 N.E.2d 86, 88 (Ind. Ct. App. 2006)). Construing the findings liberally in support of the judgment, we first consider whether the evidence supports the findings. *Id*. Findings are clearly erroneous only

[4] The facts surrounding the legal proceedings between Alliance and Brown are not included in this opinion because they are not relevant to the claims raised by Brown on appeal.

when a review of the record leaves us firmly convinced that a mistake has been made. *Id*. We must then determine if the findings support the judgment. *Id*. A judgment is clearly erroneous when the findings of fact and conclusions thereon do not support it. *Id*. We will disturb the judgment only when there is no evidence supporting the findings or the findings fail to support the judgment. *Id*. We do not reweigh the evidence, but consider only the evidence favorable to the trial court's judgment. *Id*.

I. Breach of Fiduciary Duty

On appeal, Brown contends that the trial court's judgment is clearly erroneous because it does not include an award of compensatory damages following its conclusion that Wallace breached the fiduciary duty that he owed to her. Wallace does not dispute this claim. The Indiana Supreme Court has held that shareholders in a closely-held corporation stand in a fiduciary relationship with one another and must deal fairly, honestly, and openly with the corporation and their fellow shareholders. *Fleming v. Int'l Pizza Supply Corp.*, 676 N.E.2d 1051, 1056 (Ind. 1997) (citing *Barth v. Barth*, 659 N.E.2d 559, 561 (Ind. 1995)). "It follows, therefore, that a shareholder suffering compensatory damages proximately caused by the breach of such fiduciary duty or fraud must have a remedy therefor." *Id*.

"It is well established in Indiana law that damages are awarded to compensate an injured party fairly and adequately for her loss, and the proper measure of damages must be flexible enough to fit the circumstances." *Prime Mortgage USA, Inc. v. Nichols*, 885 N.E.2d 628, 656 (Ind. Ct. App. 2008) (quoting *Bolin v. Wingert*, 764 N.E.2d 201, 207 (Ind. 2002)). Damages may include any damages "'directly related to the wrong and arising without an intervening agency.'" *Id*. (quoting *Bolin*, 764 N.E.2d at 207). Indiana courts have historically and consistently awarded compensatory damages to minority shareholders in closely-held corporations who have been injured by a majority shareholder's breach of fiduciary duty in the form of diverting corporate assets for personal gain. *See W & W Equip., Co. v. Mink*, 568 N.E.2d 564 (Ind. Ct. App. 1991) (awarding plaintiff compensatory damages following the diversion of corporate assets by the corporation's other shareholder); *Lowry v. Lowry*, 590 N.E.2d 612 (Ind. Ct. App. 1992) (awarding minority shareholders compensatory damages following the diversion of corporate assets by the majority shareholders); *Prime Mortgage*, 885 N.E.2d 628 (awarding plaintiff compensatory damages following the diversion of corporate assets by the corporation's other shareholder).

Upon review, we find the reasoning employed in *Prime Mortgage* to be applicable to the case at hand. The corporation at issue in *Prime Mortgage*, like Alliance, had two shareholders. *Prime Mortgage*, 885 N.E.2d at 637. In *Prime Mortgage*, one of the shareholders breached his fiduciary duty to the corporation's other shareholder, the plaintiff, by using corporate capital to fund companies in which he, but not the plaintiff, had a substantial interest and by using company credit cards to make personal purchases. *Id*. at 658-59. The trial court concluded that the offending shareholder's actions constituted a breach of fiduciary duty and awarded the plaintiff compensatory damages. *Id*. at 638. On appeal, this court affirmed the trial court's award of compensatory damages concluding that the shareholder "dissipated Prime's assets through his dealings between Prime and his other companies" and that the personal expenses paid with Prime's credit card were not "legitimate business expenses." *Id*. at 659.

In the instant matter, the trial court concluded that Wallace breached his fiduciary to Brown by writing off loans made by Alliance to companies that he, and not Brown, had an interest in, taking bonuses that he was not entitled to receive, allowing those bonuses to accrue interest without authority from the Agreement, and using corporate funds to pay off personal expenses. However, despite this conclusion, the trial court did not grant Brown any remedy to compensate her for the losses which the trial court attributed to Wallace's breach. Brown claims that the trial court's failure to award her compensatory damages was clearly erroneous in light of the long-standing precedent that a shareholder is entitled to compensation for damages resulting from the breach of a fellow shareholder's fiduciary duty. We agree.[5]

Here, the uncontested findings of the trial court indicate that Wallace's breach of his fiduciary duty to Brown resulted in a financial loss to Brown. However, to the extent that the trial court attributed a portion of this financial loss to Alliance's act of loaning certain Alliance funds to companies in which Wallace, but not Brown, had an interest, we remind the trial court that the distribution of said funds did not in and of itself constitute a breach of Wallace's fiduciary duty to Brown because Brown was not a shareholder at the time the loans were made. Accordingly, Brown does not have standing to challenge the loans in question. *See Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995) (providing that an individual must have

[5] Having concluded that the trial court's failure to award Brown compensatory damages was clearly erroneous, we need not consider Brown's argument relating to the principles of equity and public policy.

standing to bring a claim before the court). Any breach of Wallace's fiduciary duty to Brown must have occurred after Brown became a shareholder in Alliance. Therefore, Wallace's breach of the fiduciary duty that he owed to Brown occurred when he, acting on behalf of Alliance, decided to write off the loans. Further, we remind the trial court that at least part of the financial loss suffered by Brown was offset by the financial gain she incurred when Alliance failed to pay back the 1993 loan of $75,000 that was loaned to Alliance by Wallace, to pay Wallace back-wages dating to 1994, and to pay Wallace certain deferred compensation in accordance with the Agreement. Therefore, we remand this matter to the trial court to determine the amount of compensatory damages to which Brown is entitled after her financial loss resulting from Wallace's breach of fiduciary duty. This amount is offset by her financial gain resulting from Alliance's failure to repay the $75,000 loan from Wallace to Alliance and Alliance's failure to pay Wallace certain compensation in accordance with the Agreement.

II. Ownership of Alliance at Time of Asset Sale

We next consider whether the trial court's finding that Brown owned twelve percent of the outstanding shares of Alliance common stock at the time of the asset sale was clearly erroneous. It is undisputed that Wallace and Brown were the only shareholders of Alliance at the time of the asset sale. Moreover, the undisputed evidence favorable to the trial court's judgment demonstrates and the trial court found that Wallace owned 2190 shares and Brown owned sixty shares of Alliance common stock at the time of the asset sale. These numbers indicate that at the time of the sale of Alliance's assets in March of 2005, Wallace owned approximately ninety-seven percent and Brown owned approximately three percent of the outstanding shares of Alliance common stock. This evidence is irreconcilable with the trial court's findings that Brown owned twelve percent of the outstanding shares of Alliance common stock at the time of asset sale, which therefore renders the finding clearly erroneous. Accordingly, to the extent that the trial court's judgment was based on its finding that Brown owned twelve percent of the outstanding shares of Alliance common stock at the time of the asset sale, it is clearly erroneous.

In sum, we conclude that the trial court's order was clearly erroneous to the extent that it failed to award Brown compensatory damages resulting from Wallace's breach of the fiduciary duty that he owed to Brown, and that it found that Brown held a twelve percent ownership interest in Alliance at the time of the asset sale in 2005. Therefore, we reverse in part and remand this matter for further proceedings consistent with this opinion. The trial court's order is affirmed in all other respects.

The judgment of the trial court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

RILEY, J., and MATHIAS, J., concur.