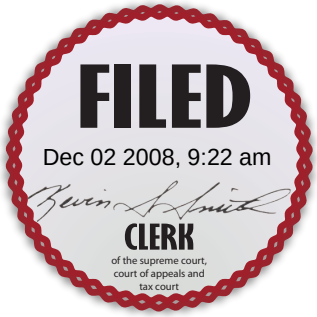

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IN THE
COURT OF APPEALS OF INDIANA

DAVID TOWER,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 40A01-0805-CV-237
	)	
MARK JOHNSON	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable James B. Morris, Judge
Cause No. 40C01-0611-PL-277

December 2, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

David Tower appeals a declaratory judgment in favor of Mark Johnson in an action pertaining to a dispute arising from a partnership that the two had formed. Upon appeal, Tower presents the following restated issue for review: Did the trial court err in determining that Tower purchased Johnson's interest in the partnership before the partnership assets were sold to a third party?

We affirm.

The facts favorable to the judgment are that in June 1999, Tower and Johnson entered into a partnership agreement forming the partnership TJP Enterprises. TJP subsequently purchased property and built and operated a car wash in Madison, Indiana. At some point thereafter, disputes arose between the parties and Johnson retained an attorney, Michael Rogers, to assist in dissolving the partnership. Tower retained attorney Bradley Kage to represent him in the matter. The parties at first agreed to submit their dispute to mediation, but Tower ultimately refused to attend. Eventually, the parties agreed that Tower would purchase Johnson's share for $250,000, as reflected in the following letter sent by attorney Kage on November 3, 2004: "I am going to represent David Tower. We discussed all the options yesterday. Dave will agree to pay Dr. Johnson $250,000 to dissolve the partnership; that Dr. Johnson will transfer all right, title and interest and that Dave will assume all debts." *Exhibits Binder* at Plaintiff's Exhibit 7.[1] Shortly thereafter, Tower sent a letter to attorney Rogers advising him that Tower had found a buyer for the car wash and that a contract had been signed for the pending sale to River Ridge Plaza, LLC, "at a price considerably in

[1] The exhibits are bound in a single volume, but the pages are not numbered.

excess of [Johnson's] appraisal."[2] *Id.* at Plaintiff's Exhibit 5. On November 18, Johnson filed a "Verified Complaint to Liquidate Partnership." *Id*. at Plaintiff's Exhibit 8. On November 22, Johnson sought a restraining order preventing the sale to River Ridge and on November 24, he sent a letter to River Ridge warning it that Tower did not have authority to sell the car wash and that Johnson would commence legal action should the sale proceed.

After discussing the matter, Johnson and Tower agreed that Tower would purchase Johnson's interest in the partnership for $250,000, and that Tower would pay that amount to Johnson at the closing of the sale of the car wash which occurred on January 25, 2005. On that day, both Johnson and Tower were present. Tower and Johnson executed a hold harmless agreement whereby Tower agreed to hold Johnson harmless "from any liabilities that arise from the Closing Agreement dated January 24th,[3] 2005 between TJP Enterprises and River Ridge Plaza, LLC and all accounts payable, trade debt, mortgages or any other liabilities of said partnership that exist on January 25, 2005", except applicable real estate taxes. *Exhibit Binder* at Plaintiff's Exhibit 12 (footnote supplied). Following the sale, Johnson received a check from Tower for $244,072.31, which represented the buyout amount minus certain closing costs (real estate taxes). Johnson had agreed to pay those costs as "a part of the hold harmless" "just so to make this go away." *Transcript* at 23. Johnson and Tower both signed the bill of sale.

A dispute subsequently arose concerning liability for certain taxes associated with the car wash. Tower claimed Johnson was still a partner at the time of the sale, while Johnson

[2] Johnson had obtained an appraisal for the car wash in anticipation of dissolving the partnership.
[3] As indicated elsewhere, the closing date was actually January 25.

claimed he sold his partnership interest to Tower before the sale of the car wash. The parties were unable to resolve their dispute and on November 13, 2006, Johnson filed a complaint for declaratory judgment on the basis that "a controversy has arose between the parties as to whether the plaintiff sold his interest in said partnership to the defendant or to a third party the determination of which affects each party's Federal income tax liability." *Appellant's Appendix* at 7. Following a hearing, the trial court entered the following judgment:

> This cause having come before the Court upon the plaintiff's Complaint For Declaratory Judgment and … the Court having heard evidence thereon and being duly advised in the premises now finds as follows:
>
> 1. That David Tower first purchased the partnership interest of Mark Johnson in the partnership TJP Enterprises and thereafter TJP Enterprises sold the car wash to a third party, River Ridge, LLC.
>
> IT IS THEREFORE DECLARED AS FOLLOWS:
>
> 1. That David Tower first purchased the partnership interest of Mark Johnson in the partnership TJP Enterprises and thereafter TJP Enterprises sold the car wash to a third party, river [sic] Ridge Plaza, LLC.

Id. at 36. Tower appeals this judgment.

When reviewing a ruling on declaratory judgment,[4] we are mindful that pursuant to

[4] Pursuant to Indiana Appellate Rule 46(A)(8)(b), the appellant's brief "must include for each issue a concise statement of the applicable standard of review", which in turn must be supported by citations to applicable authority. *See* App. R. 46(A)(8)(a). Neither of the cases cited by Tower in setting out the applicable standard of review involves an appeal of a declaratory judgment. App. R. 46(B) imposes a similar requirement on appellees' briefs. We note that in the first part of his "argument" section, Johnson sets out the scope of review. Although correctly identifying the ruling under review as a civil declaratory judgment, none of the four cases cited by Johnson on this point is, in fact, a declaratory judgment case, or even refers to one. Instead, one is an appeal regarding a motion for relief from judgment, one is an interlocutory appeal of an order reopening an estate, one is an appeal from a determination of the amount of damages, and the fourth is a challenge to the sufficiency of evidence supporting a criminal conviction. In short, neither party's brief on this topic was accurate or helpful. We encourage counsel in their future appellate endeavors to pay closer heed to this very important component of the appellate argument and appellate brief.

the Uniform Declaratory Judgment Act, declaratory judgments have the force and effect of final judgments and are reviewed as any other order, judgment, or decree. Ind. Code Ann. § 34-14-1-1 (West, PREMISE through 2007 1st Regular Sess.); *see also Ember v. Ember*, 720 N.E.2d 436 (Ind. Ct. App. 1999). Here, although not so designated and quite brief, the trial court entered on its own motion what could best be described as mixed findings of fact and conclusions of law. In reviewing the judgment, we first determine whether the evidence supports the findings, and then whether the findings support the judgment. *Id.* Findings of fact are clearly erroneous in this context when the record lacks any evidence or reasonable inferences from the evidence to support them. *Id.* Without reweighing the evidence or re-assessing witness credibility, and considering only the evidence most favorable to the judgment and all reasonable inferences flowing therefrom, we will reverse only when the judgment is clearly erroneous, i.e., when it is unsupported by the findings of fact. *Id.*

The issue in this case is straightforward: did Johnson get out of the partnership before the sale of the car wash to River Ridge? Tower claimed in effect that although he had agreed to buy out Johnson's share of the partnership before he found a buyer for the car wash, that agreement was abrogated and superseded by the sale to River Ridge, and that at the time of the closing Johnson was still a partner. In support of this contention, Tower points primarily to the following: (1) Johnson did not deliver a quitclaim deed conveying his interest in the car wash to Tower prior to the sale to River Ridge; (2) Tower allegedly repudiated his offer to purchase Johnson's interest via a November 10, 2004 letter to Johnson's attorney, in which he stated:

> Based on the numerous letters you have sent me starting on

February 23, regarding your clients [sic] desire to dissolve the TJP Partnership, I would like to take this opportunity to express my opinions concerning this matter.

(1) Regarding your letter of Feb. 23, your client wants to dissolve the partnership.
(2) It is obvious to me that timing has not been utilized to my advantage in the decision to dissolve or appraise the partnership.
(3) On or about October 18, Your [sic] clients [sic] offer to purchase my interest based on your appraisal was submitted and rejected by me as inadequate. I, countered with a more realistic price but was told by your client he would not pay my asking price. My offer to sell was put in writing on Oct. 22, 2004 to no avail.
(4) Being concerned about the ongoing cost of legal fees to the partnership, and being concerned about the economic uncertainties of the times, and being very concerned that TJP would not get a fair price because of your clients [sic] poor appraisal, and being threatened with dissolving the partnership and again on November 5th with conducting a meeting for a new managing partner, I have therefore taken the following action as **Managing Partner of TJP Enterprises, as provided in the General Partnership Agreement section 8**.

The Sale of TJP Enterprises at a price considerably in excess of your clients [sic] **appraisal.**

Enclosed is a copy of the signed Sales and Purchase agreement.

Exhibit Binder at Defendant's Exhibit B (emphasis in original); (3) at closing, both Tower and Johnson signed the Bill of Sale, a Closing Agreement, and an affidavit of sellers as partners and sellers; and (4) a post-sale letter from Johnson's attorney to another attorney

seeking an opinion regarding the dispute that had arisen and stating, in relevant part, as follows:

> The situation is that we have two partners whose sole partnership asset is real estate. The partners are in dispute and have agreed to sell the real estate. Partner 1 is to receive $250,000.00 net from the sale. The payment of the mortgage and other current debts of the partnership are the obligation of Partner 2 and he is to receive the remaining proceeds from the sale. After this agreement was reached the partners then agreed that each would pay one-half of the closing costs from the sale of the real estate. The dispute arises in that there is approximately $9,000.00 of real estate tax due. Partner 1 says that since he is to get a net amount that the real estate taxes should be paid by Partner 2 and that they should not be considered "closing costs". Partner 2 says that Partner 1 should pay one-half of the real estate tax because they are closing costs.

Id. at Defendant's Exhibit J.

Johnson cites the following countervailing evidence in support of his claim that the partnership was dissolved by the time of the sale: (1) Tower had offered to buy out Johnson's share for a sum certain, and Johnson received precisely that sum (minus costs) at the closing, notwithstanding that said amount did not constitute the amount Johnson would have received had the proceeds been distributed per the partnership shares set out in the partnership agreement; (2) Johnson had prepared and executed a quitclaim deed for his share of the partnership property conveying his interest in the real estate to Tower, but Tower expressed a preference to pay the buyout amount to Johnson at the closing, so this deed was not delivered; (3) Tower signed a hold-harmless agreement at closing indicating he would be solely liable for "all accounts payable, trade debt, mortgages or any other liabilities of [the TJP] partnership that exist on January 25, 2005", *id*. at Plaintiff's Exhibit 12, thus indicating that Tower was the sole remaining partner; and (4) Johnson pointed out that Tower's attorney

had executed an affidavit stating, in pertinent part:

> 2. That affiant represented David R. Tower in the dissolution of the partnership of TJP Enterprises.
> 3. That the agreed method of dissolution of said partnership was that David R. Tower would buy the interest of Mark R. Johnson.
> 4. That said agreement was consummated and David R. Tower purchased the interest of Mark R. Johnson in TJP Enterprises. Thereafter, TJP Enterprises sold its assets to a third party.

Id. at Plaintiff's Exhibit 14.[5]

We reiterate that our task here is to determine whether the evidence supports the trial court's findings and that, in so doing, we are limited to considering only the evidence and reasonable inference most favorable to the judgment, and in addition may not reweigh the evidence or re-assess witness credibility. *Ember v. Ember*, 720 N.E.2d 436. Our review of the foregoing confirms that there was evidence to support either outcome argued by the parties. The evidence relied upon by Tower might support a conclusion that Johnson was still a partner at the time of the closing. But the opposite is true as well; Johnson cites evidence that amply supports his contention that he was no longer a partner at the time of closing. In the end, we agree with Johnson that this appeal is a matter of the sufficiency of evidence. Johnson's evidence showed that several months before closing, Tower offered to buy out Johnson's share for $250,000, and that is precisely the amount Johnson received from Tower on the day of closing. Also at closing, and in the absence of any further formalities with respect to dissolving the partnership, Tower signed a document holding

[5] We note that counsel later "correct[ed]" his affidavit "upon further review of the matter with [Tower]" to reflect that Johnson was still a partner at the time of the sale. *See id*. at Plaintiff's Exhibit 18.

Johnson harmless for any liability related to the partnership. Moreover, Johnson offered plausible explanations for discounting Tower's evidence (e.g., he attended the closing "just to receive his check" and signed the relevant document "as a convenience for them", even though he "didn't want to sign anything because [he] didn't feel like [he] had any need to"). *Appellant's Appendix* at 65.

Constrained by our standard of review, we conclude that this evidence supports the findings, which in turn support the judgment that Tower's buyout of Johnson's partnership interest was a fait accompli by the time of the January 25, 2005 closing. Thus, Tower has failed to demonstrate that the judgment is clearly erroneous.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur