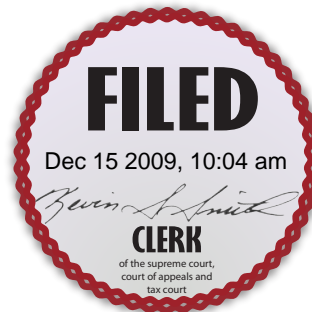


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

ROBERT E. SHIVE
CASSANDRA A. KRUSE
Emswiler Williams Noland & Clarke, P.C.
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DIVERSIFIED BLASTHOLE)
DRILLING, INC.,)
)
Appellant-Petitioner,)
)
vs.) No. 49A05-0812-CV-724
)
P. FREDERICK PFENNINGER,)
)
Appellee-Respondent.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David Dreyer, Judge
Cause No. 49D10-0608-PL-33432

December 15, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Diversified Blasthole Drilling, Inc. (“Diversified”) appeals the trial court’s denial of its motion to correct error. For our review, Diversified raises three issues, which we consolidate and restate as whether the trial court abused its discretion when it denied Diversified’s motion to correct error. Concluding the trial court erred when it dismissed Diversified’s claims against Frederick Pfenninger, we reverse and remand this case for further proceedings.

Facts and Procedural History

In a separate case, Pfenninger represented Cummins Michigan, Inc. in a collection action against Diversified. At various points during that case, the trial court (“Superior Court 2”) imposed sanctions on Pfenninger, requiring him to pay Diversified’s attorney fees due to frivolous filings both at Superior Court 2 and in this court on appeal, deceitful conduct, and conversion of settlement funds. For example, one of Superior Court 2’s orders states:

18. Pfenninger has ... deceived the Court and Diversified, its agents, employees and attorneys, and continued to maintain an appeal in the Court of Appeals of Indiana ... thereby apparently deceiving that court as well.

* * *

21. By his actions as set forth herein, Pfenninger has ... litigated and/or continued to litigate this action after Plaintiff’s alleged claim and/or defense clearly became frivolous, unreasonable and groundless, and continued to litigate this action in bad faith. In addition, Pfenninger’s acceptance of and subsequent deposit of Diversified’s check in the amount of \$16,555.00, and distribution of the proceeds thereof to a non-party ... without obtaining an executed final settlement agreement from his alleged client, constitutes a conversion of Diversified’s money.

22. The actions or omissions to act by Pfenninger as set forth herein constitute a willful disregard of the Indiana Rules of Professional Conduct, and were done with the intent to deceive the Court, Diversified, and Diversified's counsel.

Appellant's Appendix at 26. As a result, Superior Court 2 imposed sanctions on Pfenninger in the amount of \$14,398.58 and trebled the amount for a total award of \$43,195.74.

On appeal, this court reversed Superior Court 2's award of sanctions, finding Superior Court 2 had no authority to treble the award of sanctions. Pfenninger v. Great Lakes Drilling, Inc., No. 49A05-0803-CV-133, 2008 WL 5103194 (Ind. Ct. App. Dec. 5, 2008). In its opinion, this court remarked:

[T]he attorney deceit statute does not create a new cause of action but, instead, trebles the damages recoverable in an action for deceit. Although a new cause of action is not created, the statute permits the person injured by the deceit or collusion to bring a civil action for treble damages. [T]he injured party is required to allege and prove deceit rising to the level of a Class B misdemeanor and damages stemming therefrom. Here, an action for deceit was not filed by Diversified. Furthermore, no witnesses were sworn or subject to cross-examination at the hearing to present evidence to prove deceit on the part of Pfenninger. Therefore, without a complaint or proof of deceit to the level of a Class B misdemeanor, the proper procedures were not taken to obtain treble damages for deceit by Pfenninger.

Id. at *7 (citations and quotations omitted).

Subsequently, Diversified filed the underlying complaint in Superior Court 10 seeking damages stemming from Pfenninger's conduct, which it alleges rose to the level of criminal conversion and criminal attorney deceit. A bench trial began on September 29, 2008. Following opening statements by both parties and the partial presentation of evidence from Diversified's first witness, the trial court indicated it believed two motions were on the table for consideration, a motion to dismiss the case from Pfenninger and a motion to exclude

evidence from Diversified, although neither party had actually made a motion either orally or in writing. The trial court continued the trial and issued a written order dismissing the case on October 1, 2008, concluding Diversified's claims were precluded because it sought "to enforce orders and judgments already rendered and enforceable in the other matter." Appellant's App. at 9. On October 29, 2008, Diversified filed a motion for clarification and a motion to correct error. The trial court denied both motions without further explanation on November 24, 2008. Diversified now appeals.

Discussion and Decision

I. Standard of Review

Initially, we point out Pfenninger has failed to submit an appellee's brief in this case.¹ When an appellee fails to submit a brief, we will not undertake the burden of developing an argument on its behalf. Trinity Homes, LLC v. Fang, 848 N.E.2d 1065, 1068 (Ind. 2006). Instead, we will reverse if the appellant shows prima facie error, which in this context is defined as "at first sight, on first appearance, or on the face of it." Id. We review the denial of a motion to correct error for an abuse of discretion. Speedway SuperAmerica, LLC v. Holmes, 885 N.E.2d 1265, 1270 (Ind. 2008).

II. Dismissal of Diversified's Claims

A. Attorney Deceit

Diversified brought a claim for damages stemming from conduct rising to the level of attorney deceit pursuant to Indiana Code section 33-43-1-8, which allows "a person who is

¹ Pfenninger requested two extensions of time to file his brief. This court granted the first extension, but denied the second as well as Pfenninger's subsequent motion for reconsideration. Pfenninger then failed to

injured by [attorney deceit to] bring a civil action for treble damages.” In order to establish a claim under the attorney deceit statute, Diversified must prove by a preponderance of the evidence:

(1) that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; (2) that it was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and (3) that the party did in fact rely upon it and was induced thereby to act to his or her injury or damage. In addition, [Diversified] must show that [Pfenninger] practiced such deceit in his ... capacity as an attorney and not in an individual capacity as a citizen or party-litigant.

Shepherd v. Truex, 823 N.E.2d 320, 327-28 (Ind. Ct. App. 2005) (citations omitted).

Diversified must also prove the amount of damages, which is the value of what it parted with less the value of what it received. Id. at 328. Superior Court 2 entered a judgment against Pfenninger in the amount of three times the attorney’s fees incurred by Diversified. However, this court reversed the treble damages award concluding “no witnesses were sworn or subject to cross-examination at the hearing to present evidence to prove deceit on the part of Pfenninger. Therefore ... the proper procedures were not taken to obtain treble damages for deceit by Pfenninger.” Pfenninger, 2008 WL 5103194 at *7. By filing the underlying claim, Diversified is attempting to follow the proper procedures to obtain treble damages for Pfenninger’s alleged deceit. Diversified should have the opportunity to present its evidence proving Pfenninger’s deceitful conduct and its damages. Similarly, Pfenninger must be given the opportunity to present evidence in his defense and evidence mitigating any claim for damages. Therefore, the trial court abused its discretion when it dismissed Diversified’s claim for damages stemming from attorney deceit.

B. Conversion

Diversified also brought a claim for damages stemming from conduct rising to the level of criminal conversion pursuant to Indiana Code section 34-24-3-1, which allows a person who has suffered a pecuniary loss as a result of a violation of Indiana Code article 35-43, which includes the crime of conversion, to “bring a civil action against the person who caused the loss for ... [a]n amount not to exceed three times the actual damages of the person suffering the loss” and other costs, fees, and expenses. In order to establish a viable claim under the statute, Diversified must prove by a preponderance of the evidence that Pfenninger committed criminal conversion. Romanowski v. Giordano Mgmt. Group, LLC, 896 N.E.2d 558, 563 (Ind. Ct. App. 2008).

Although Superior Court 2’s order states Pfenninger’s conduct constitutes a conversion of Diversified’s money, it does not appear Superior Court 2 held an evidentiary hearing on the matter or gave Pfenninger an opportunity to present evidence in his defense against the charges. As stated above, this court reversed Superior Court 2’s award of treble damages because it concluded Superior Court 2 lacked authority to issue the award. The same reasoning employed by this court with respect to the claim for damages stemming from attorney deceit applies in the context of conversion: “no witnesses were sworn or subject to cross-examination ... to prove [conversion] on the part of Pfenninger.” Pfenninger, 2008 WL 5103194 at *7. As a result, Diversified should be given the opportunity to present evidence proving Pfenninger converted the settlement check, and Pfenninger must be given

the opportunity to present evidence in his defense. Therefore, the trial court abused its discretion when it dismissed Diversified's claim for damages stemming from conversion.

III. Diversified's Remaining Issues

Diversified also asks us to determine whether the trial court erred by not transferring this case to Superior Court 2 and whether the theory of res judicata applies to this case based on the findings and conclusions issued by Superior Court 2 in the other matter. Because we find the issue of the trial court's dismissal of Diversified's claims dispositive, we need not address these remaining issues. In addition, the issues are not ripe for our review because the trial court has not issued any rulings on either issue. See T-3 Martinsville, LLC v. US Holding, LLC, 911 N.E.2d 100, 119 n.15 (Ind. Ct. App. 2009), aff'd on reh'g.

Conclusion

The trial court erred when it dismissed Diversified's claims for damages stemming from conduct constituting criminal conversion and attorney deceit. As a result, the trial court abused its discretion when it denied Diversified's motion to correct error. Therefore, we reverse the trial court's dismissal of Diversified's claims and remand this case for further proceedings.

Reversed and remanded.

DARDEN, J., and MATHIAS, J., concur.