

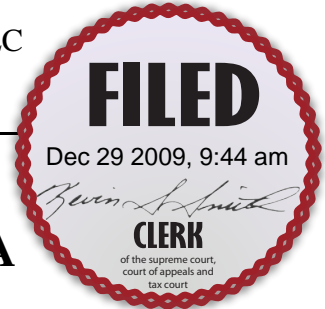
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**IN THE  
COURT OF APPEALS OF INDIANA**

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JAMES T. FERGUSON, on behalf of )  
DEPENDABLE SANDBLAST & DEBURRING )  
CORPORATION, and INDIVIDUALLY, )  
 )  
Appellants-Plaintiffs, )

vs. )

No. 49A05-0905-CV-285

CHARLES D. CANDLER, KENNETH J. )  
CANDLER, CK ENTERPRISES and )  
DEPENDABLE SANDBLAST & )  
DEBURRING CORPORATION, )  
 )  
Appellees-Defendants. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Reuben B. Hill, Special Judge  
Cause No. 49D10-0103-CP-429

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**December 29, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

James T. Ferguson (“Ferguson”) appeals the trial court’s amended findings of fact, conclusions thereon, and judgment entering an award of damages in favor of Ferguson in part, Dependable Sandblast & Deburring Corporation (“Dependable”) in part, and Charles and Kenneth Candler (collectively “the Candlers”) in part, regarding this dispute relating to the parties’ ownership of Dependable, a closely-held Indiana corporation.

Ferguson appeals presenting the following restated issues for our review:

- I. Whether the trial court erred by awarding the Candlers damages on their claims of underpayment of salary;
- II. Whether the trial court erred by awarding Dependable damages for the payment of excessive rent; and
- III. Whether the trial court erred by failing to award Ferguson damages on his claim of violation of the trial court’s clean-up order.

We affirm in part, and reverse and remand in part.

### **FACTS AND PROCEDURAL HISTORY**

This is the fourth appeal related to this controversy. *See Ferguson v. Candler*, No. 49A04-0206-CV-265 (Ind. Ct. App. Jan. 17, 2003); *Ferguson v. Candler*, No. 49A05-0607-CV-352 (Ind. Ct. App. June 8, 2007) (“*Ferguson II*”); *Ferguson v. Candler*, No. 49A04-0802-CV-73 (Ind. Ct. App. Sept. 4, 2008) (“*Ferguson III*”). Thus, the facts and a portion of the procedural history have been set forth previously, the most recent statement of which follows:

In October 1982, Ferguson and the Candlers formed Dependable for the purpose of purchasing the assets of Deburr & Supply, Inc. (“Deburr”), and using those assets to operate a sandblasting and deburring business. Ferguson and the Candlers were Dependable’s sole directors, officers, and shareholders, with Ferguson owning 40 percent and serving as Vice President, Charles owning 40 percent and serving as President, and

Kenneth owning 20 percent and serving as Secretary. The Candler's also were full-time employees of Dependable and ran its day-to-day operations. Except for a brief period in 1983 and 1984 when he worked part time, Ferguson was not an employee of Dependable. Instead, Ferguson operated a separate sole proprietorship, J.T. Ferguson Excavating and Demolition, whose place of business was located next to Dependable's.

In January 1983, Deburr sold its assets to Dependable, and Dependable commenced operations shortly thereafter. However, Deburr did not sell the property on which Dependable conducted its operations because Dependable was unable to secure financing. Instead, Deburr agreed to lease the property to Dependable until September 1984, at which time Dependable would have the option to purchase it. In March 1983, unbeknownst to the Candler's, Ferguson purchased the property "with the full knowledge and understanding of Dependable's [option]" and continued leasing it to Dependable. By September 1984, Dependable was in a position financially to purchase the property, but it declined to do so in part because the Candler's did not think the option had survived Ferguson's purchase and in part because the Candler's believed that Ferguson would put his interests as a director, officer, and shareholder of Dependable before his interests as a landlord.

Ferguson initially charged Dependable monthly rent in the amount of \$460, which was the same amount Deburr had charged. When that lease expired in September 1984, Ferguson entered into month-to-month oral leases with Dependable for the next eighteen years. During that time, Ferguson gradually raised the monthly rent until it reached \$2,250 in 1996 and stayed at that rate until Dependable vacated the premises in October 2003. Ferguson's ownership of the real estate allowed him to assert, as the trial court put it, "operational control" over Dependable--in other words, as landlord, Ferguson had more influence over Dependable's business decisions than is typical of a minority shareholder. A prime example of Ferguson's exercise of operational control was that whenever the Candler's voted to increase their salaries, Ferguson would respond by raising the monthly rent to compensate himself equally. As such, the Candler's were reluctant to raise their salaries, and they remained "underpaid considering their level of responsibility, their skill, their leadership and labor, their average weekly workload, and the relative success of the business."

Ferguson's heavy-handed tactics as Dependable's landlord caused obvious friction between him and the Candler's, and also resulted in the Candler's being less than open with Ferguson. In November 1990, a customer of Dependable, Martinsville Industries, owed over \$8,000 to

Dependable and was at risk of going bankrupt. Charles entered into an agreement with the owner of Martinsville whereby the Clanders would take over Martinsville's business and make periodic payments to Martinsville's owner, who in turn would repay the \$8,000 debt to Dependable. To that end, the Clanders formed a partnership, CK Enterprises, which they operated after working hours on Ferguson's property and with Dependable's equipment. Martinsville's owner eventually repaid the debt to Dependable, but CK Enterprises continued operating based on business it received from one of Martinsville's former customers. The Clanders did not inform Ferguson of this partnership, which generated over \$250,000 in revenue from 1990 to 2005.

On March 19, 2001, Ferguson filed a sixteen-count complaint against the Clanders, Dependable, and CK Enterprises, including a claim of breach of fiduciary duty against the Clanders as shareholders of Dependable, a claim for damages against the Clanders and Dependable relating to clean-up costs of the property, a claim for damages against the Clanders for constructive fraud, and a claim for treble damages and attorney fees under the Crime Victims Statute based on the Clanders' alleged criminal mischief. On the evening of March 6, 2002, Ferguson changed the locks on the property, took Dependable's checkbook and cash box, and wrote himself a check for \$10,600, representing what he believed was his share of Dependable. On March 7, 2002, the Clanders entered one of the buildings on the property by breaking three doors.

On April 24, 2002, Ferguson amended his complaint to include a claim for ejectment and immediate possession, having previously initiated eviction proceedings in the Marion County Small Claims Court in the Fall of 2001. On June 6, 2002, the Clanders filed a five-count counterclaim against Ferguson, including a claim of breach of fiduciary duty against Ferguson as a director and officer of Dependable. The parties initially tried to settle their dispute, but when negotiations failed, the litigation shifted its focus to Dependable's right to possess the property. On September 29, 2003, the trial court granted Ferguson's motion for summary judgment on that issue, ordering the Clanders and Dependable to clean up the property by October 1, 2003, and to vacate by October 15, 2003. The Clanders and Dependable vacated the property on October 15th and relocated to leased property located four blocks away.

On February 8, 9, and March 1, 2005, the trial court presided over a bench trial on the remaining claims and counterclaims, hearing testimony from Ferguson, the Clanders, other employees of Dependable, Dependable's accountant, and several other witnesses, and admitting over

2,000 pages of documents into evidence. On March 22, 2006, the trial court entered findings of fact and conclusions of law. Based on these findings and conclusions, the trial court ordered that Ferguson return \$10,600 to Dependable (representing the check Ferguson wrote to himself on March 6, 2002) and that Ferguson and the Candler's split Dependable's assets according to their respective shares. On appeal by Ferguson, this court remanded to the trial court because its "extraordinarily limited findings of fact do not provide a sufficient basis for us, in our capacity as a reviewing court, to draw legal conclusions therefrom." On January 7, 2008, the trial court filed amended findings of fact and conclusions of law with this court. Based on these amended findings and conclusions, the trial court ordered again that Ferguson return \$10,600 to Dependable and that Ferguson and the Candler's split Dependable's assets according to their respective shares, valuing the company at \$150,000 plus the \$10,600 Ferguson was obligated to return plus the fair market value of Dependable's equipment and tools. Although the trial court concluded both Ferguson and the Candler's breached their fiduciary duties, it refused to award either party damages because "both parties failed to prove their actual economic loss caused by the breach."

*Ferguson III* at 1-3.

In *Ferguson III*, we held in pertinent part that the trial court improperly concluded that Ferguson was not entitled to damages on his claim of destruction of property, and we remanded with instructions that the trial court award Ferguson damages on that claim in the amount of \$1,187.70. We also remanded with instructions that the trial court enter findings and conclusions on the questions: 1) whether the Candler's had complied with the trial court's clean-up order, and if not, to determine Ferguson's damages; and 2) whether the Candler's are entitled to damages relating to underpayment of salaries and excessive rent. The parties also requested that the trial court value the company's equipment in lieu of the cost-prohibitive option of a formal valuation.

The trial court held an additional hearing on February 11, 2009 at which time it entered amended findings of fact, conclusions thereon, and judgment. Relating to the

issues on remand, the trial court found and concluded that the Candlers admitted creating the property damage, found that the repairs related to that damage would cost \$1,187.70, and entered a judgment in Ferguson's favor in that amount. The trial court found that Ferguson presented insufficient evidence to prove that Dependable violated the trial court's clean-up order, consequently no damages were awarded. Further, the trial court found and concluded that Ferguson had charged Dependable excessive rent and awarded Dependable \$27,116.67 in damages. Lastly, the trial court found and concluded that the Candlers were underpaid salaries as a result of Ferguson's breach of fiduciary duty and that Dependable was liable to Charles Candler in the amount of \$41,056.00, and to Kenneth Candler in the amount of \$18,426.66 to compensate them for that underpayment.

Additionally, the trial court reiterated its order that Ferguson return \$10,600.00 to Dependable. The trial court valued the equipment at \$5,000.00 and ordered that amount added to Dependable's deposits in its account. The trial court once again ordered the final partition of Dependable. Ferguson now appeals.

## **DISCUSSION AND DECISION**

### **Standard of Review**

When, as here, a trial court enters findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A), we apply a two-tiered standard of review; first we determine whether the evidence supports the findings, and second, whether the findings support the judgment. *Davis v. Davis*, 889 N.E.2d 374, 379 (Ind. Ct. App. 2008). In deference to the trial court's proximity to the issues, we disturb the judgment only where

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.* Those appealing the trial court's judgment must establish that the findings are clearly erroneous. *Id.* Findings are clearly erroneous when a review of the record leaves us firmly convinced that a mistake has been made. *Id.* We do not defer to conclusions of law, however, and evaluate them *de novo*. *Id.*

### **I. Underpayment of Salaries**

As an initial matter, Ferguson argues that the trial court erred by considering the issue of underpayment of salaries because there is no evidence that Ferguson breached his fiduciary duty with regard to salaries. Our remand order in *Ferguson III* stated in relevant part that the trial court was to determine “whether the Candles are entitled to damages based on Ferguson’s breach of fiduciary duty, recognizing that such damages are time-barred before June 2, 2000.” *Ferguson III*, slip op. at 6. In a footnote, this court acknowledged that the Candles claimed they were entitled to damages because they were underpaid. *Id.* n.9. However, we declined to address the issue of whether a breach of fiduciary duty may be predicated on under compensation. *Id.*

The Candles collectively were majority shareholders of Dependable and at all time had the power to increase their salaries. They chose not to do so. In *Ferguson III*, we acknowledged that whenever the Candles voted to increase their salaries, Ferguson would respond by raising the monthly rent to compensate himself in like manner. *Ferguson III*, slip op. at 2. The Candles’ recourse for such action was to take the appropriate action against Ferguson, the minority shareholder, by seeking injunctive

relief, and/or damages for Ferguson’s breach of fiduciary duty. “[M]aintaining a landlord-tenant relationship with a closely-held corporation in which the landlord also serves as an officer, director, or shareholder may constitute a breach of fiduciary duty.” *Ferguson*, slip op. at 6 (citing *Hartung v. Architects Hartung/Odle/Burke, Inc.*, 157 Ind. App. 546, 555, 301 N.E.2d 240, 244-45 (1973)). Instead, however, the Clanders chose to forego instituting legal action against Ferguson on those grounds, and pursued other revenue-generating options to respond to the salary issue, in spite of evidence clearly establishing that Ferguson put his interests as landlord before his interests as shareholder of Dependable.

For this reason the trial court erred by finding and concluding that the Clanders were entitled to an award of damages based on the underpayment of salaries. As we noted in *Ferguson III*, the majority of cases involving a breach of fiduciary duty based on officer or employee compensation involve excessive compensation not under compensation. *Id.* (citing *Lowry v. Lowry*, 590 N.E.2d 612, 621-22 (Ind. Ct. App. 1992), *trans. denied*; *Krukemeier v. Krukemeier Mach. & Tool Co., Inc.*, 551 N.E.2d 885, 887-88 (Ind. Ct. App. 1990)).

Furthermore, this court previously has addressed the trial court’s findings and conclusions regarding any damages for underpayment of salaries resulting from Ferguson’s breach of fiduciary duty. “Under the law of the case doctrine, an appellate court’s determination of a legal issue is binding both on the trial court on remand and on the appellate court on a subsequent appeal, given the same case with substantially the same facts.” *Montgomery v. Trisler*, 771 N.E.2d 1234, 1238 (Ind. Ct. App. 2002), *trans.*



*denied* (citing *Humphreys v. Day*, 735 N.E.2d 837, 841 (Ind. Ct. App. 2000), *trans. denied* (2001)). All issues decided directly or implicitly in a prior decision are binding on all subsequent portions of the case. *Id.* at 1238.

Specifically, in *Ferguson II*, we observed that the issue of underpayment of salaries was presented to the trial court, but remanded the entire matter to the trial court because the trial court's legal conclusions addressed only a fraction of the claims presented and the meager findings of fact did not support the conclusions thereon. *Ferguson II*, slip op. at 3. We remarked that both parties had requested damages, that the trial court had found breaches of fiduciary duty on the part of both parties, but was silent on the issue of damages related to those breaches. *Id.* at 4.

In *Ferguson III*, we were asked to consider whether the trial court erred by concluding that the Candlers had failed to prove damages resulting from Ferguson's breach of fiduciary duty. *Ferguson III*, slip op. at 1. The trial court held that "although Ferguson's ownership of the land and his systematic increase of the rent created an ongoing breach of his duty to the Candlers . . . the Candlers were not entitled to damages because they 'failed to prove . . . actual economic loss caused by the breach[.]'" *Id.* at 6 (internal footnote and citation omitted). Upon examination of the record, we concluded that the trial court failed to address the evidence presented by the Candlers on the issue of excessive rent and remanded the matter to the trial court for findings and conclusions on this issue. *Id.*

As previously mentioned, we noted in *Ferguson III* that "the trial court merely found that the Candlers were 'underpaid[.]' . . . [T]hat finding does not support a

conclusion that the Candler's compensation rose to the level of a breach of fiduciary duty." *Id.* at 6 n.9. Consequently, the issue already has been addressed and decided by the trial court and this court. Unlike the issue of excessive rent, which will be addressed below, the trial court rejected certain evidence in finding that the Candler's had failed to prove damages. "[Ferguson's] expert testimony regarding compensation was not reasonable in light of evidence presented by the [Candler's] expert and all other evidence presented at trial." *Id.* at 6. While we found that the trial court's conclusion, which was adverse to the Candler's on the issue of damages from excessive rent, did not reflect the trial court's considered judgment (because the findings did not address the evidence on the issue of rent), we cannot say the same about the trial court's previous conclusion in regard to this issue.

In response to the remand from *Ferguson III*, the trial court entered amended findings of fact and conclusions thereon, including new findings and conclusions on the issue of underpayment of salaries. In *Ferguson III* we cited *G & N Aircraft v. Boehm*, 743 N.E.2d 227, 239 (Ind. 2001) for the standard of proof required for breach of fiduciary duty claims in compensation cases, namely a plaintiff shareholder to show the compensation is unjust, oppressive, or fraudulent. The trial court found that the "overall effect of Ferguson's breach of fiduciary duty . . . was the creation of an oppressive and fearful atmosphere with the operation of their company. This oppressive environment ultimately affected the amount of rent [Dependable] paid over the lifetime of the lease arrangement and the total amount of income the Candler's received[.]" *Appellant's Br.* at

38. This was in error as the matter had already been decided adversely to the Candles in *Ferguson III*.

Based upon the foregoing reasons, we find that the trial court erred by entering an award of damages in favor of each of the Candles on the issue of underpayment of salaries. We reverse and instruct the trial court to vacate that portion of its judgment awarding those damages.

## **II. Excessive Rent**

In *Ferguson III*, we remanded to the trial court the issue of the Candles' entitlement to damages based on Ferguson's breach of fiduciary duty from June 2, 2000 forward. On remand, the trial court awarded the Candles damages in the amount of \$27,116.67 for excessive rent from June, 2000 until June, 2002.

Ferguson claims that he did not breach his fiduciary duty by way of the month-to-month lease to Dependable during the relevant time period and that the trial court erred by making that finding and conclusion. However, we need not address this argument because we previously found in *Ferguson III*, that Ferguson had breached his fiduciary duty in that regard and that determination is the law of the case. *See Montgomery*, 771 N.E.2d at 1238. Our charge to the trial court on remand was to address the evidence presented on the issue of damages for excessive rent which were not addressed in prior findings of fact and conclusions thereon. Because of the relevant statute of limitations, we stated that the trial court was constrained to consider the evidence of damages from June 2, 2000, and that is what the trial court did.

Ferguson argues that the damages award is erroneous because the Candlers failed to present evidence of excessive rents for the relevant time period. However, our review of the record reveals that the Candlers admitted an appraisal report and testimony from the appraiser indicating that the amount of monthly rent charged by Ferguson exceeded the fair market monthly rental value for similar properties from 1986 through May 2004. *See Appellees' App.* at 10-23. The Candlers also presented evidence of the amount of rent they had actually paid to Ferguson for the relevant time period. *Id.* at 33. Further, the parties did not dispute that the size of the property was 5,390 square feet. The appraiser concluded that a fair rental value for the property for the relevant time period was \$3.50 per square foot. The trial court relied on that evidence to enter its findings of fact, and those findings support the conclusion that the calculation of a fair rent for the relevant time period was \$3.50 per square foot for 5,390 square feet for an annual rent of \$18,865.00.

The parties are correct that there are inconsistencies within the trial court's amended findings, conclusions, and judgment regarding calculation of the damages. However, Ferguson argues that the amount of damages is incorrect, while the Candlers argue that the end date of the relevant time period used by the trial court in the judgment section of its entry is incorrect. We agree with the Candlers that the trial court's erroneous use of "June 2002" was the error causing the inconsistency and that error amounts to a scrivener's error. The trial court stated in the amended findings of fact that "Ferguson should disgorge the excess rents from June 2, 2000 until October 15, 2003. For those forty (40) months, disgorged rent amounts to \$27,116.67." *Appellant's Br.* at

37. The appraiser's report includes a value of \$3.35 per square foot during 1996 through 1997, and finds the value of between \$3.50 to \$3.75 per square foot for May 1, 2004. *Appellees' App.* at 10. The trial court's award was based upon a figure that was within the range of the evidence. *Balicki v. Balicki*, 837 N.E.2d 532, 536 (Ind. Ct. App. 2005) (no abuse of discretion where trial court's valuation is within range of values supported by evidence). We find that the trial court did not err in its calculation of these damages because the evidence supports the findings, which in turn, support the legal conclusions used to reach the judgment.

### **III. Clean-Up Order**

In *Ferguson III*, we remanded to the trial court the issue whether the Candlers had complied with the trial court's clean-up order, and if not, to determine Ferguson's damages. On September 29, 2003, the trial court ordered Dependable to "clean up in a professional manner all spent sand, debris, and waste" on Ferguson's property by October 1, 2003. *Appellant's App.* at 187-88. In its most recent order, the trial court found and concluded that Dependable did not violate its clean-up order, and as a consequence found that an award of damages was not justified. Ferguson claims that the record establishes that Dependable violated the clean-up order, and that the trial court abused its discretion.

"Where, as here, the party who had the burden of proof at trial appeals, he appeals from a negative judgment and will prevail only if he establishes that the judgment is contrary to law." *MCS LaserTec, Inc. v. Kaminski*, 829 N.E.2d 29, 34 (Ind. Ct. App. 2005). "A judgment is contrary to law when the evidence is without conflict and all reasonable inferences to be drawn from the evidence lead to only one conclusion, but the

trial court reached a different conclusion.” *Id.*

Ferguson argues that the evidence established that the Candlers did not hire a professional to clean up the property and that his expert estimated that 700 tons of sand was left on the property the removal of which would cost \$45,940.00. Ferguson claims that this evidence confirms his entitlement to damages for the Candlers’ violation of the trial court’s clean-up order.

Ferguson’s evidence was not the only evidence presented to the trial court, however. Charles Candler testified that he hired Waste Management to dispose of eight or nine forty-yard dumpsters filled by Dependable. He further testified that he cleaned the sandblast rooms and areas to the best of his ability prior to turning the property over to Ferguson and that the Candlers used a Bobcat to remove sand outside the building until soil was exposed. The Candlers spent approximately \$7,000.00 to have sand removed from the property.

Additionally, as noted by the trial court, Ferguson waited until trial to raise the issue of non-compliance with the clean-up order and did not obtain an expert opinion until the property had been back in Ferguson’s control for almost eleven months. Ferguson could have filed a motion for contempt or could have amended his pleadings to address the alleged damage condition of the property upon its return to him by Dependable.

The trial court stated in its amended findings, conclusions, and judgment that the clean-up order was the product of a pre-trial meeting with counsel after addressing certain issues between the parties. The trial court stated that the primary purpose of the

order was “to insure an orderly transfer of the property that would not be left with worn equipment, trash, and debris upon Dependable’s departure.” *Appellant’s Br.* at 34.

We find that the evidence supports the findings and the findings support the trial court’s conclusion that Ferguson failed to meet his burden of proving that Dependable violated the trial court’s clean-up order. The evidence of the condition of the property upon Dependable’s departure was conflicting. However, the trial court’s findings and conclusions thereon are supported by the evidence and are not contrary to law. Considering only the evidence favorable to the judgment and all reasonable inferences to be drawn therefrom, we conclude that the trial court did not err. *See Briles v. Wausau Ins. Companies*, 858 N.E.2d 208, 212 (Ind. Ct. App. 2006) (consider only evidence favorable to judgment and reasonable inference to determine whether findings or judgment are clearly erroneous).

Affirmed in part, reversed in part and remanded with instructions.

NAJAM, J., and BARNES, J., concur.