MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Dante Wells,
Appellant-Defendant

v.

W.W. Contracting, Inc.,
Appellees-Plaintiffs

April 2, 2024

Court of Appeals Case No.
23A-PL-1111

Appeal from the Tippecanoe Superior Court

The Honorable Randy J. Williams, Judge

Trial Court Cause No.
79D01-1903-PL-33

Memorandum Decision by Chief Judge Altice
Judges Weissmann and Kenworthy concur.

Altice, Chief Judge.

Case Summary

[1] Following a bench trial, the trial court found in favor of W.W. Contracting, Inc. and Doug Williams (collectively, Plaintiffs) on their complaint for damages against Dante Wells for conversion of corporate funds and conversion of construction equipment/tools owned by Plaintiffs. The trial court also ruled against Wells on his counterclaim, in which he claimed to be a fifty-percent owner of W.W. Contracting.

[2] Wells presents the following restated issues on appeal:

> 1) Did the trial court erroneously determine that Wells was merely an employee of W.W. Contracting with no ownership interest in the corporation?
>
> 2) Even if Wells had no ownership interest in the corporation, did the trial court improperly determine damages?

[3] We affirm in part, reverse in part, and remand with instructions.

Facts & Procedural History

[4] Williams and Wells both worked for Mid-States General and Mechanical Contracting Corporation (Mid-States) for many years and became friends. Mid-States operated in Illinois and Indiana as a general contractor on institutional and commercial projects. Although Williams resided in Illinois, he often worked on Indiana projects with Wells in and around Lafayette, Indiana,

where Mid-States had an office. Williams was a longtime superintendent for Mid-States, and Wells was a carpenter foreman.

[5] On October 9, 2017, George Hill, president and majority shareholder of Mid-States, held a meeting at the main office in Decatur, Illinois. Williams was in attendance, along with three other members of the management team: Jim McDaniels, comptroller; Gary Sebens, chief estimator and minority shareholder; and Rick Pettry, small projects manager in Indiana. Hill informed the men that he was stepping away from the business and inquired whether any of them would like to purchase his interest in Mid-States. No one was interested in the offer, so Hill decided to dissolve the company.

[6] Within a few days of the meeting, Williams and Hill began discussing a proposal in which Williams would assist Hill with winding up the business, including overseeing the completion of certain open projects for Mid-States and assisting in the liquidation of its assets. In the meantime, Williams had discussions with Wells and Chad Hudson (a Mid-States foreman like Wells) to determine whether they would help "getting [Mid-States's] jobs finalized." *Transcript Vol. II* at 129.

[7] On November 13, 2017, Williams and Hill, as president of Mid-States, executed a written contract in which Williams agreed to act as subcontractor on seven unfinished projects in Indiana and, in exchange, he would receive certain itemized assets of Mid-States upon completion of the projects. The agreement stated that Williams would provide field supervision at no labor cost to Mid-

States, but Mid-States would supply equipment and tools for use on the projects and pay labor at thirty dollars per hour. Additionally, the agreement required Williams to attend certain meetings and to assist Hill in "liquidation of property, small tools and equipment – advertise, display, and fix up." *Exhibits Vol. V* at 63.

[8] With the assistance of Dan Schrader, a former coworker at Mid-States, Williams incorporated W.W. Contracting with the State of Indiana on December 7, 2017. Williams was listed on the articles of incorporation as the sole principal – the president – and the incorporator. Wells was listed as the registered agent for W.W. Contracting with his Indiana address, having spoken to Schrader before incorporation and consenting to such. When Wells received the articles of incorporation from the Indiana Secretary of State, he promptly forwarded the document to Williams.

[9] Williams was the sole shareholder of W.W. Contracting and the only individual to receive a Schedule K-1 from the Subchapter S corporation for the 2018 tax year. Wells, on the other hand, received a W-2 from W.W. Contracting. As a superintendent for W.W. Contracting, along with Hudson, Wells submitted timecards and received hourly and overtime pay accordingly, as well as vacation pay.

[10] Williams opened W.W. Contracting's first corporate checking account on December 22, 2017, at Horizon Bank. Wells, also present at the opening, was designated as "Authorize[d] Signer" on the account, and Williams was

designated as "President". *Id*. at 38. A second corporate checking account with Horizon Bank was opened with Williams and Wells as signatories on April 27, 2018, and Williams's wife, Justine, was later added as a signatory on one of the accounts.

[11] Justine was the bookkeeper for W.W. Contracting since its inception. In April 2018, she purchased QuickBooks and began processing payroll and paying employees with checks rather than cash. From that point forward, W.W. Contracting's practice was to no longer use counter checks but rather to use office or field checks. In addition to corporate credit cards, which all employees had, Williams, Wells, and Hudson had debit cards for W.W. Contracting. Wells and Hudson were permitted to use the cards for fuel, maintenance and repairs to their vehicles, and meals.

[12] As W.W. Contracting closed out the projects for Mid-States, tools and equipment that Williams was acquiring from Mid-States were moved to property owned by Wells beginning in December 2017. Wells, who was instrumental in helping get W.W. Contracting off the ground, allowed these to be stored on his property free of charge and permitted employees of W.W. Contracting to access them as needed. Wells also allowed W.W. Contracting to use some of his own equipment, and he loaned money to the company to make payroll on three occasions in 2018 - $4,500 on April 27, $3,100 on June 4, and $2,800 on August 30.

[13] On January 11, 1019, Wells came into W.W. Contracting's office in Lafayette and confronted Williams about money he believed he was owed. Wells then left, telling Williams that he was quitting and that he wanted two weeks of vacation pay. This was not the first time that Wells had threatened to quit, so Williams thought he would eventually come back.

[14] Sometime the next week, after not returning to work, Wells called Williams and recorded their phone conversation. During the call, Wells claimed that he was owed a little over $12,000, and he tried, unsuccessfully, to get Williams to acknowledge that they had agreed to reimbursement of $15,000 given the length of time the debt had existed. Wells suggested that he would not allow access to the tools until the matter was resolved. Wells also claimed that he was a half owner of W.W. Contracting, which Williams said was "crazy". *Digital Exhibits* (USB with recording). Thereafter, Wells kept the tools as "leverage" and hoped that doing so "would impact [Williams's] ability to pay his bills." *Transcript Vol. II* at 28, 27.

[15] On February 20, 2019, Wells went to Horizon Bank and withdrew $23,820 from one of W.W. Contracting's accounts. Wells knew it was payday for W.W. Contracting and that his unauthorized withdrawal would leave only $900 in the account. He explained at trial, "That's what I got every week. So, I thought [Williams] would enjoy what I got every week." *Id*. at 32. W.W. Contracting was only able to make payroll that day because Williams obtained a loan from a friend.

[16] On March 11, 2019, through counsel, W.W. Contracting sent a demand letter to Wells for the immediate surrender of the tools and equipment stored on his property and the return of $23,820. W.W. Contracting acknowledged in the letter that Wells had made "a one-time loan in the amount of $4,000" that had not been repaid. *Exhibits Vol. V* at 126. It noted, however, that a subsequent review of bank records revealed that Wells had made several unauthorized withdrawals of corporate funds totaling $5,927 between April and September 2018. W.W. Contracting made a settlement offer in the letter, which Wells did not accept.

[17] On March 18, 2019, W.W. Contracting filed a complaint for replevin, seeking the return of its tools and equipment and an award for expenses caused by Wells's unlawful detention of the tools and equipment.[1] Later that month, W.W. Contracting filed an additional complaint for conversion of corporate funds totaling $29,747,[2] conversion of its tools and equipment, and injunctive relief. W.W. Contracting sought to recover treble damages, prejudgment interest, attorney's fees, and litigation expenses for Wells's criminal conversion pursuant to Ind. Code § 34-24-3-1, the Crime Victim's Relief Act.[3] On April 11,

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[1] W.W. Contracting incurred nearly $15,000 in expenses for the rental and/or replacement of tools and equipment to complete jobs while its employees were not permitted access to Plaintiffs' tools and equipment stored on Wells's property.

[2] This amount includes Wells's large withdrawal in February 2019 and smaller withdrawals he made using counter checks between April and September 2018.

[3] I.C. § 34-24-3-1 permits victims of certain crimes, including conversion and theft, to bring a civil action against the person who caused the loss for an amount not to exceed three times the actual damages, in addition to costs of the action, reasonable attorney fees, and other expenses.

2019, the trial court permitted W.W. Contracting to amend its complaint to add Williams as a plaintiff.

[18] Thereafter, along with his answer and affirmative defenses, Wells filed a counterclaim against W.W. Contracting. Wells asserted that he and Williams had entered into an oral agreement to form W.W. Contracting with each owning half of the company. He also generally alleged that Williams had engaged in fraudulent practices. Wells sought compensation for his share of W.W. Contracting and/or for the return of money he loaned to the company and compensation for the use of his land, tools and equipment, and labor.

[19] Pursuant to a preliminary order entered in May 2019, Wells returned most of the tools and equipment at issue and in his possession to Plaintiffs and returned $11,900 to W.W. Contracting. At some point, the trial court also ordered the attorneys on each side to hold $6,300 in trust from their clients during the pendency of the lawsuit.

[20] A two-day bench trial was held at the end of June 2022. Williams testified that he was the sole shareholder of W.W. Contracting and that he and Wells "[n]ever talked about going 50/50" together. *Transcript Vol. II* at 113. Williams explained that Wells was a good employee and friend, who helped get W.W. Contracting off the ground, but that Wells was not part owner. Williams's and Justine's testimony painted W.W. Contracting as a family business, with Justine running the office as bookkeeper and their son, who had recently graduated from junior college with a degree in construction management,

working for the company fulltime by the time of the trial. Justine testified that she was "the other w" in W.W. Contracting. *Id*. at 67.

[21] Hudson testified that he and Wells worked together as the superintendents for W.W. Contracting, "running" the jobs. *Id*. at 89. He explained, "I … considered us equal and we did the same things." *Id*. at 90. Hudson testified that in his role as superintendent he did not have an ownership interest in W.W. Contracting but that Williams had talked about possibly selling an equity stake to him in the future. Williams similarly testified that, after W.W. Contracting was incorporated, he had spoken with both Hudson and Wells about this possibility. No formal offer was ever made, as Williams explained at trial: "I was 54 at the time, and I'd like to go till 60, start picking up a couple partners. I figured five [equal partners], and, um, by the time I'm 70, 72, I'd check out." *Id*. at 109.

[22] Wells, on the other hand, testified that he and Williams had a 50/50 arrangement from the start and that he was the other "W" in W.W. Contracting. Wells gave inconsistent testimony regarding when this verbal agreement originated, and he could not provide specific details of their agreement. As proof of an agreement, Wells pointed to his name and address on the articles of incorporation and the fact that he loaned money and made his land and equipment available for use by the company. Wells acknowledged, however, that he was not involved with the negotiations or agreement between Williams and Mid-States/Hill and that he received paychecks and a W-2, as opposed to a Schedule K-1, from W.W. Contracting.

[23] The trial court issued its order on April 21, 2023, entering judgment in favor of Plaintiffs on their conversion claims and on Wells's counterclaim. In sum, the trial court determined that Wells failed to establish the existence of an oral agreement with Williams regarding ownership of W.W. Contracting. The court found that Wells had no ownership interest in the corporation or its assets and that he was merely an employee. For Wells's unlawful conversion of Plaintiffs' tools and equipment, the trial court awarded Plaintiffs actual damages of $14,660.65 and punitive damages of $14,660.65, along with attorney's fees and costs. For the February 2019 theft of corporate funds, the court found that W.W. Contracting had "suffered a pecuniary loss of $5,600" and entered judgment against Wells in the amount of $18,900.00, plus prejudgment interest, costs, and attorney's fees. *Appendix* at 219. The court also ordered Wells's attorney to release to W.W. Contracting the $6,300 held in trust.

[24] Wells now appeals. Additional information will be provided below as needed.

Standard of Review

[25] The existence of a verbal contract was asserted by Wells as both an affirmative defense and a counterclaim. Having the burden to prove this claim below, he now appeals from a negative judgment and must show that "the evidence points unerringly to a conclusion different from that reached by the trier of fact, or that the judgment is contrary to law." *Samples v. Wilson*, 12 N.E.3d 946, 949 (Ind. Ct. App. 2014). "This means that even if we might have taken a different

course of action than that which a trial court took, we are bound to review the order, and findings and conclusions for clear error only." *Id.*

[26] When, as here, the trial court enters findings of fact and conclusions thereon without an Ind. Trial Rule 52 written request from a party, the specific findings control our review only as to the issues they cover. *Samples*, 12 N.E.3d at 949-50. "Where there are no specific findings, a general judgment standard applies and we may affirm on any legal theory supported by the evidence adduced at trial." *Id*. at 950.

[27] A trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, when the record contains no facts or inferences supporting them. *Id*. "A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made." *Id*. On review, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we will neither reweigh the evidence nor assess witness credibility. *Id*.

Discussion & Decision

1. The trial court's determination that Wells had no ownership interest in W.W. Contracting

[28] Wells initially challenges the trial court's determination that he was merely an employee of W.W. Contracting rather than part owner. Pointing to his own testimony, Wells argues that he established the existence of an enforceable

verbal agreement between himself and Williams to form W.W. Contracting as equal partners.

[29] A contract is established by evidence of an offer, acceptance, consideration, and a manifestation of mutual assent. *Lash v. Kreigh*, 202 N.E.3d 1098, 1104 (Ind. Ct. App. 2023). In addition to communication of acceptance, a meeting of the minds between the contracting parties extending to all essential terms is necessary for the formation of a contract. *Id*. For an oral contract to exist, the parties must agree to all terms of the contract. *Id*. at 1104-05.

[30] We agree with Plaintiffs that Wells's argument "centers on relitigating the evidence he finds favorable to his position but that the trial court found wanting." *Appellees' Brief* at 9. On appeal, Wells directs us to his own testimony that: Wells insisted on being a 50% owner while talking with Williams about taking on the completion of Mid-States's jobs; W.W. Contracting was named after both him and Williams; and Williams made a statement to Wells that the 50 authorized shares listed on the articles of incorporation were Williams's "50% shares" but that once Wells got his "taxes straightened out … we'll get your 50% shares next to your name." *Transcript Vol. II* at 150. Wells also notes that he contributed tools, equipment, free storage on his property, and personal loans to the corporation.

[31] We reject Wells's invitation to reweigh the evidence and judge witness credibility. Williams testified that he was the sole owner of the corporation and that he never discussed a 50/50 arrangement with Wells. Indeed, the articles of

incorporation, bank documents, and tax records support Williams's testimony that he was the only principal of W.W. Contracting. Additionally, the record shows that Wells submitted timesheets, was paid by the company as an employee, and received a W-2 for taxes rather than a Schedule K-1. W.W. Contracting hired many former Mid-States employees, including Wells and Hudson who both worked for W.W. Contracting as superintendents on the job sites. On the other hand, Williams, as president and owner, ran the company and was "bidding projects … from day one." *Id*. at 130. Indeed, the company started with Williams's negotiations and agreement with Mid-States, of which Wells was not a party.

[32] It is undisputed that Williams discussed the Mid-States opportunity with Wells (as well as Hudson), and Wells subsequently helped get W.W. Contracting off the ground, agreeing to be its registered agent, making his land and equipment available for use, and loaning money at times to make payroll. But this does not necessarily establish that he was anything more than a valuable employee and good friend.

[33] The trial court considered all the evidence, much of which was conflicting, and determined: "Evidence supports the finding that Wells was but an employee of W.W. [Contracting] and had no other interests in the corporation or its assets." *Appendix* at 218. We cannot say that the evidence points unerringly to a different conclusion. Accordingly, we affirm the trial court's rejection of Wells's claim that he was an owner of W.W. Contracting.

2. The damages award

[34] Wells argues that even if he was only an employee of W.W. Contracting, the trial court still erred because it failed to consider his "capital investments" in the company when awarding damages. *Appellant's Brief* at 13. Wells contends that he is entitled to be reimbursed for the "fair market rental value" of the tools, equipment, and land that he allowed W.W. Contracting to use. *Id*. at 19. And he argues that the trial court failed to offset the damages award by all three loans that he made to W.W. Contracting.

[35] Wells relies entirely on *Tucker v. Cap. City Riggers*, 437 N.E.2d 1048 (Ind. Ct. App. 1982), where this court affirmed a judgment in a replevin action in which the trial court entered judgment for both parties. The facts were set out in *Tucker* as follows:

> Defendant-appellant Clark Tucker (Tucker) was in the business of moving heavy machinery. His principal place of business was Trafalgar, Indiana. Capital City Riggers (Capital) is an Indiana corporation whose principal place of business is in Fairland, Indiana; William Meredith (Meredith) is the president of Capital. In July 1980, Capital was working on a job in Oklahoma when Tucker went to see Meredith about a job. Capital had contracted to move a plant in Merced, California to Greenville, South Carolina. Tucker subcontracted with Meredith to move some of this equipment. The job required a large fork lift, and Meredith agreed that Tucker should move Capital's large fork lift to California and use it when Capital did not need it.
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> When Tucker arrived in California on July 29, 1980, Meredith was already on the job. There is substantial evidence that while the parties were in California, Meredith asked Tucker to move

> the large fork lift to Indiana after the California job was complete. Tucker took the fork lift to Indiana on or about September 29, 1980. At trial Meredith insisted that no final agreement to move the fork lift to Indiana was ever reached, and it is this agreement which is the source of controversy in the case at bar. After Meredith learned that Tucker had taken the fork lift, a Capital employee contacted Tucker and demanded that he return it. Tucker refused to return the fork lift until he had been paid $6,500 due from the California job, $1,200 for another job, and the agreed price for moving the fork lift, $2,500. Capital did not offer to pay any of these sums.
>
> Capital sued Tucker for replevin, seeking recovery of the fork lift plus damages for the loss of its use and punitive damages. Tucker counterclaimed for the moving charges for the fork lift and the other sums Capital owed him. The trial court entered judgment in favor of Capital for $13,836 and in favor of Tucker for $10,200.

Id. at 1050 (footnote omitted).

[36] Tucker appealed and argued, as relevant here, that the judgment for Capital, which required a finding that Capital was entitled to immediate possession, was contrary to law in that it was inconsistent with the judgment for Tucker, which required a finding that Tucker was at some time rightfully in possession of the fork lift. *Id*. In affirming the trial court's general judgment, we determined that the trial court could have found that Tucker had no valid carrier's lien, having failed to follow proper statutory procedures, or that Tucker waived his lien by acting in bad faith. We explained:

> It is clearly unlawful to seize the property of another without legal process, lien, or agreement and hold it until a debt is paid. Likewise a lienholder acts unreasonably and in bad faith when he refuses to relinquish encumbered property until certain unrelated debts are paid, and the trial court could have construed Tucker's actions as a waiver of his lien. Therefore, once he had refused to return the fork lift, Tucker was wrongfully in possession of Capital's property and liable in replevin. Nevertheless he was entitled to the money owed him for moving the fork lift as previously agreed, as well as the amounts still owing on the other two contracts. Hence, the trial court correctly awarded damages to both parties, and the judgment is supported by the law and the evidence.

Id. at 1052-53 (citations omitted).

[37] Wells argues that, like Tucker, he is entitled to "recover costs associated with the subject property and for unrelated contracts with plaintiff *despite* his unlawful seizure of the property." *Appellant's Brief* at 18 (emphasis in original). But the distinction Wells fails to recognize is that Tucker had valid contracts with Capital on which the damages awarded him were based.[4]

[38] Here, Wells directs us to no evidence that he had an agreement with W.W. Contracting to be paid anything – let alone fair market rental value – for the use of his land, tools, and equipment for the benefit of the company. Moreover, the evidence establishes that W.W. Contracting paid to maintain, fuel, and repair

[4] In *Tucker*, we stated: "Since the trial court awarded Tucker damages, including the moving charge, and Capital has not cross appealed, we must assume a valid contract to move the fork lift." *Tucker*, 437 N.E.2d 1051.

the equipment it used of his. In fact, Williams testified that although the company used Wells's Bobcat for the first couple jobs, "[Williams] repaired it so it could be usable." *Transcript Vol. II* at 138.

[39] The trial court specifically found that Wells agreed to allow W.W. Contracting to store its tools and equipment on his property at no charge. The trial court's order also includes the following finding:

> In support of his Counterclaim, Wells testified that he suffered damages as he was not compensated for the use of his tools and equipment, that he paid for gas and maintenance of his truck and received no compensation in kind. However, while employed by W.W. [Contracting], Wells charged $44,183.06 to W.W. [Contracting's] credit and debit card for those items.

Appendix at 218. These findings make clear that the trial court rejected Wells's claims for reimbursement, and Wells has not established clear error in this regard.

[40] On the other hand, error is evident within the trial court's findings relating to the funds Wells loaned to W.W. Contracting. The court found:

> W.W. [Contracting] maintained a corporate account at Horizon Bank to pay bills and make deposits[.] Williams was listed on the account as President and Wells was listed as an authorized signer. A second account was opened on April 27, 2018, with Williams, Wells, and Justine Williams having authority to access. From December 2017 through April 2018 Williams authorized Wells to withdraw funds from the corporate account

> to pay employee payroll. Beginning in April 2018, W.W. [Contracting] used QuickBooks to pay its employees by [check[5]].
>
> While an employee, *Wells made two loans to W.W. [Contracting] totaling approximately $5,900*. From May 2018 to September 2018, while still an employee, Wells withdrew $5,927 from the corporate checking account.

Id. at 217 (emphasis added).

[41] The trial court likely considered the "two" loans and the unauthorized withdrawals to be a wash, but it expressed no actual conclusions in this regard. *Id*. Regardless, the factual finding is clearly erroneous because the undisputed evidence establishes that Wells made three loans to W.W. Contracting totaling $10,400, not just two loans totaling $5,900. Accordingly, we remand for the trial court to consider each of the three loans made by Wells and to determine their effect on the judgment.

[42] Though not raised by Wells on appeal, we observe that the trial court's judgment contains an obvious error in its calculation of damages for Wells's February 2019 theft of corporate funds. In its findings, the trial court expressly determined, after accounting for the $11,000 Wells returned in May 2019 and the $6,300 held in trust, that W.W. Contracting "suffered a pecuniary loss of $5,600." *Id*. at 219. In its judgment, the trial court then awarded $18,900 for

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[5] The order says "cash", but this clearly is an unintended error, as it was undisputed below that employees were paid by check after the company started using QuickBooks.

the theft of corporate funds, presumably concluding that W.W. Contracting was entitled to the treble damages, the maximum permitted under I.C. § 34-24-3-1. Treble damages, however, would amount to $16,800, not $18,900.[6] On remand, the trial court is directed to correct this portion of the award.

[43] Finally, having prevailed on their conversion claims, we grant Plaintiffs' request for appellate attorney's fees pursuant to I.C. § 34-24-3-1. *See Heartland Res., Inc. v. Bedel*, 903 N.E.2d 1004, 1008 (Ind. Ct. App. 2009) ("[A] plaintiff is entitled to attorney's fees, including appellate attorney's fees, when she prevails under the Crime Victim's Relief Act."). Accordingly, on remand, the trial court is directed to determine Plaintiffs' reasonable appellate attorney's fees and include that amount in Plaintiffs' award.

[44] Judgment affirmed in part, reversed in part, and remanded.

Weissmann, J. and Kenworthy, J., concur.

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[6] It appears that the trial court inadvertently tripled the $6,300 figure, representing the funds held in trust, instead of the $5,600 pecuniary loss.