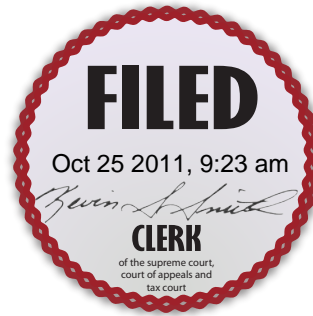


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

TIMMY NGUYEN AND TIMMY
NGUYEN d/b/a INDIANAPOLIS
VITE BAO,)

Appellant.)

vs.)

No. 29A02-1012-SC-1370

HANG T. AND THOM T. NGUYEN,)

Appellees.)

APPEAL FROM THE HAMILTON SUPERIOR COURT
SMALL CLAIMS DIVISION
The Honorable Wayne A. Sturtevant, Judge
Cause No. 29D05-0909-SC-1916

October 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Timmy Nguyen and Timmy Nguyen d/b/a Indianapolis Viet Bao appeal a small claims court's judgment in favor of Hang T. Nguyen. Timmy raises several issues, which we consolidate and restate as whether the court erred in ruling in favor of and entering judgment for Hang. We affirm in part,¹ reverse in part, and remand.¹

The relevant facts follow. In 2003, Timmy and Hang became involved in a home-based business which published a Vietnamese magazine titled Indianapolis Viet Bao. Hang sold advertising in the magazine, collected advertising fees, and deposited the fees into the Viet Bao business checking account. Hang worked for Viet Bao for forty hours per week during the last two weeks of each month. Timmy also worked as an electrical advisor for another employer. At some point, Timmy and Hang had a disagreement regarding money withdrawn from the Indianapolis Viet Bao business checking account.²

Hang and his wife, Thom T. Nguyen,³ filed a claim in Marion County, apparently Timmy filed a counterclaim, and the cause was transferred to the small claims court in Hamilton County in September 2009.⁴ After discovery and a number of continuances,

¹ We remind counsel for Timmy and Hang that Ind. Appellate Rule 46(A)(8) provides that contentions in the argument section of the appellate brief be supported by citations to the appendix or parts of the record on appeal relied on.

² Timmy's signature was the only signature on the signature card for the Indianapolis Viet Bao business checking account. Hang had full access to the business checking account. Both Timmy and Hang signed checks "T. Nguyen." See Transcript at 45.

³ The small claims court found that Thom Nguyen failed to establish that she had any standing in this matter or any legal right to recover from Timmy, and thus the court did not enter judgment in favor of Thom. The parties do not challenge this finding on appeal.

⁴ Timmy's appellant's brief states that Hang originally filed a notice of claim in the small claims court in Marion County in February 2009 and that Timmy filed counterclaims and a motion for change of venue in March 2009. In his appellee's brief, Hang agrees with these statements. Copies of Hang's notice of claim and Timmy's counterclaims and motion for change of venue are not included in the record.

the court held a hearing on December 8, 2010, at which the parties presented evidence and argument and the court took the matter under advisement.

On December 14, 2010, the small claims court entered judgment in favor of Hang in the amount of \$10,976.⁵ Specifically, in its written Judgment, the court noted that Timmy's counterclaim alleged conversion through fraudulent cash and check transactions and intentional interference with Timmy's business relationships. With respect to the count for intentional interference with a business relationship, the court found that Timmy failed to present evidence that he had contracts with the advertisers or that Hang committed any illegal act. With respect to the conversion count, the court found that the evidence showed that Hang was granted permission to write checks on behalf of Viet Bao and that this was a common routine which Timmy observed every month when he obtained and accepted the bank statements related to the business.

The court then noted that Hang's notice of claim alleged that Timmy converted funds from the parties' jointly-owned business by fraud and deception, and that Hang contends that the parties entered into a partnership while Timmy contends that Hang was an independent contractor. The court noted that Timmy's testimony indicated that "payment was on a '50/50' basis from the net profits of the business" and that Hang "had de facto signature rights to the business bank account and wrote the majority of the checks with [Timmy's] knowledge and acceptance." Appellant's Appendix at 7. The court then determined "from all of the evidence presented that the parties were engaged

⁵ The court's order is signed December 14, 2010, and the chronological case summary shows the judgment entered on December 16, 2010.

in a partnership, but also [] that such finding is not essential to the Court’s ruling.” Id. The court found that “[w]hether the parties had established a partnership or not, it is clear from [Timmy’s] own testimony that there was a contractual relationship between the parties for the services that [Hang] provided.” Id. The court found that in exchange for Hang’s efforts, “his cell phone and vehicle expenses (both gasoline and repairs) would be paid and then after the expenses of the business were paid, the parties would share the net income ‘50/50.’” Id. The court determined that “[t]o the extent that [Timmy] paid personal expenses out of company assets before providing [Hang] his share of the net proceeds, [Timmy] breached his contract with [Hang] and converted monies that belonged to [Hang].” Id.

The court noted that the evidence focused on two situations, the first involving nine payments of \$512 each and the second involving several alleged \$900 payments to Timmy’s wife. The court found that the evidence established that nine payments from the Viet Bao business checking account, each in the amount of \$512, “were going to [Timmy’s] personal bank account at American Federal that in [Timmy’s] own words had ‘nothing to do with business’” and that the total of the nine checks was \$4,608. Id. at 7-8. The court stated that half of that amount, \$2,304, “contractually belonged to” Hang, that “[t]his is the amount that [Timmy] knowingly or intentionally exerted unauthorized control over,” that Timmy “conveyed it to his own account without [Hang’s] consent and by affirmatively creating or confirming a false impression in [Hang] that the money was going to pay an Internal Revenue debt of the business,” and that “there was intent to permanently deprive [Hang] of any part of the value or use of this money.” Id. at 8. The

court also found that Hang failed to prove his allegation that several payments of \$900 to Timmy's wife were fraudulent.

In calculating the judgment, the court found that Timmy “violated Indiana Code § 35-43-4-2 and/or Indiana Code § 35-43-4-3” and that Hang is entitled to three times his actual damages of \$2,304, which is \$6,912. *Id.* at 9. The court reduced the damage award to the jurisdictional limit in the small claims court of \$6,000. The court also found that Hang is entitled to reasonable attorney fees under Ind. Code § 34-24-3-1 in the amount of \$4,900 and court costs in the amount of \$76. The court entered a total judgment in the amount of \$10,976.

The issue is whether the small claims court erred in ruling in favor of and entering judgment in favor of Hang and against Timmy. Judgments in small claims actions are “subject to review as prescribed by relevant Indiana rules and statutes.” Ind. Small Claims Rule 11(A). Our standard of review is particularly deferential in small claims actions, where “[t]he trial shall be informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law.” Ind. Small Claims Rule 8(A); Mayflower Transit, Inc. v. Davenport, 714 N.E.2d 794, 797 (Ind. Ct. App. 1999). Nevertheless, the parties in a small claims court bear the same burdens of proof as they would in a regular civil action on the same issues. Ind. Small Claims Rule 4(A); Mayflower Transit, 714 N.E.2d at 797. While the method of proof may be informal, the relaxation of evidentiary rules is not the equivalent of relaxation of the burden of proof. Mayflower Transit, 714 N.E.2d at 797. It is incumbent upon the party who bears the burden of proof to demonstrate that it is entitled to the recovery sought. *Id.*

Timmy presents arguments on appeal that: (A) the evidence was insufficient to show the formation or existence of a partnership; (B) the evidence shows that Hang converted funds which belonged to Timmy; (C) the court erred in finding that Timmy breached any agreement or converted funds belonging to Hang; and (D) the court erred in awarding damages and attorney fees to Hang under Ind. Code § 34-24-3-1.

A. Finding that a Partnership Existed

Timmy essentially argues that the evidence was insufficient to show the formation or existence of a partnership. Because this case was tried before the bench in small claims court, we review for clear error. McKeighen v. Daviess Cnty. Fair Bd., 918 N.E.2d 717, 720 (Ind. Ct. App. 2009) (citing Lowery v. Hous. Auth. of City of Terre Haute, 826 N.E.2d 685 (Ind. Ct. App. 2005)). We will affirm a judgment in favor of a party having the burden of proof if the evidence was such that a reasonable trier of fact could conclude that the elements of the claim were established by a preponderance of the evidence. Id. We presume that the trial court correctly applied the law and give due regard to the trial court's opportunity to judge the credibility of the witnesses. Id. We will not reweigh the evidence, and we will consider only the evidence and reasonable inferences therefrom that support the trial court's judgment. Id.

Timmy specifically argues that "the parties did not share equally in each other's profits," that "[t]he proceeds from the sale of advertising were apportioned 50%-50%, or some other percentage split, without regard to the expenses of either party," and that "Hang may have a net profit in a particular year, while Timmy may have a net loss for the same year, due to equipment or other expenses." Appellant's Brief at 8-9. Timmy

argues that the “record reveals that both Timmy and Hang intended any share of the profits to constitute wages” and that “[t]herefore, pursuant to Indiana Code § 23-4-1-7(4)(b), the parties’ agreement providing for pre-expense division of profits is akin to wages based on a percentage of gross income, i.e., commission.” Id. at 9. Timmy further argues that the evidence does not show that the parties held themselves out as partners, assumed the debts of each other, or intended to form a partnership.

Hang argues that the parties’ behaviors revealed that they were partners who intended to share net profits, and that the evidence shows that he had complete access to the business checking account, that Timmy did not supervise Hang’s activities, that the parties worked under the same arrangement for four years with no objection from Timmy until Hang discovered Timmy was cheating him, that Timmy did not deduct any expenses for wages, commissions, or contract labor on his 2007 tax returns, that Timmy made monthly withdrawals of \$512 each and listed the withdrawals as being for taxes, that in fact there was no tax obligation, and that there would have been no need for Timmy to lie to Hang about the withdrawals if he believed himself to be a sole proprietor. Hang argues that the small claims court “had ample evidence to support its decision that a partnership or other contractual agreement existed between Timmy and Hang” Appellee’s Brief at 8. Hang also argues that the court “ruled that its finding of a partnership was not essential to its ruling.” Id.

In his reply brief, Timmy argues that access to a checking account by employees is quite common, that access to an account is a sign of trust which Hang betrayed, that less supervision is indicative of trust rather than a hallmark of partnership, and that longevity

does not support the creation of a partnership. Timmy further argues that “Timmy was apparently the only one of the two who felt it necessary to even file taxes in the first place,” that “Hang testified that he had not filed income taxes,” and that “[n]or, as an alleged partner, had [Hang] initiated any partnership-based tax filings.” Appellant’s Reply Brief at 3.

The court found that “[w]hether the parties had established a partnership or not, it is clear from [Timmy’s] own testimony that there was a contractual relationship between the parties for the services that [Hang] provided.” Appellant’s Appendix at 7.

Further, there was evidence presented at the December 8, 2010 hearing from which the court could have found that a partnership existed. A partnership is defined as “[a]n association of two or more persons to carry on as co-owners a business for profit and includes for all purposes of the laws of this state a limited liability partnership.” Ind. Code § 23-4-1-6(1). Ind. Code § 23-4-1-7 provides:

In determining whether a partnership exists, these rules shall apply:

- (1) Except as provided by section 16 of this chapter, persons who are not partners as to each other are not partners as to third persons.
- (2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.
- (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.
- (4) The receipt by a person of a share of the profits of a business is prima facie evidence that the person is a partner in the business, but

no such inference shall be drawn if such profits were received in payment for the following:

- (a) As a debt by installments or otherwise.
 - (b) As wages of an employee or rent to a landlord.
 - (c) As an annuity to a widow or representative of a deceased partner.
 - (d) As interest on a loan though the amount of payment varies with the profits of the business.
 - (e) As the consideration for the sale of a goodwill of a business or other property by installments or otherwise.
- (5) The existence of a partnership is not affected by the following:
- (a) The filing or failure or omission to file an original or renewal registration as a limited liability partnership under section 45 of this chapter.
 - (b) The expiration of a partnership's status as a limited liability partnership.
 - (c) The filing of a notice of withdrawal under section 45 of this chapter.

In construing these rules, this court has held that the existence of a partnership is generally a question of fact. Copenhaver v. Lister, 852 N.E.2d 50, 58 (Ind. Ct. App. 2006) (citing Weinig v. Weinig, 674 N.E.2d 991, 994 (Ind. Ct. App. 1996)); see Byrd v. E.B.B. Farms, 796 N.E.2d 747, 754 (Ind. Ct. App. 2003), trans. denied. The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits. Copenhaver, 852 N.E.2d at 58. To establish a

partnership relation between parties, there must be: (1) a voluntary contract of association for the purpose of sharing profits and losses, which may arise from the use of capital, labor, or skill in a common enterprise; and (2) an intention on the part of the parties to form a partnership. Id. at 59. Further, the intention that controls in determining the existence of a relationship is the legal intention deducible from the acts of the parties. Id. The intention to form a partnership must be determined by examining all the facts of the case, and the conduct of the parties reveals their true intentions and the construction they placed upon their own agreement. Id.

We consider only the evidence in the record that supports the trial court's judgment. McKeighen, 918 N.E.2d at 720. The record reveals that Timmy testified that Hang sold advertising in the magazine, collected advertising fees, and deposited the fees from advertising into the Viet Bao business checking account. Hang worked for Viet Bao for forty hours per week during the last two weeks of each month. Timmy testified he paid Hang "[b]y his commission." Transcript at 62. When asked how much he paid Hang, Timmy testified "Oh, I decide to pay 50/50, but I might pay him less or more. That my decision." Id. When asked "[f]ifty-fifty what?" Timmy stated "[o]f what the – we make." Id. When asked "[b]ut you and [Hang] agreed it was gonna be 50/50?" Timmy testified: "I agreed, but I can take it away if he do something wrong. I agree, me and he's owner." Id. Timmy also indicated that he and Hang had an agreement that Hang was to be reimbursed for his expenses. Timmy further testified that, at least for some time prior to the dispute between he and Hang, the magazine listed both Timmy and Hang as publishers.

Hang testified that he and Timmy started Indianapolis Viet Bao together in April 2003. Hang indicated that the magazine paid him for his car, phone, and gas. Hang testified that during the period of time from 2003 to 2007 “he got the 50/50” which was “about 500 a month.” Id. at 75. Hang also stated that the \$500 was “for everything, for gas, car, and food.” Id. Hang indicated that there were never profits where he and Timmy could take money out of the account.

Timmy’s individual income tax return for 2007 included an attached Schedule C for Indianapolis Viet Bao which showed gross receipts or sales of \$32,145 and various expenses including legal and professional services of \$350, office expenses of \$1,602, supplies of \$20,441, meals and entertainment of \$1,775, other expenses of \$4,948, and expenses for the business use of Timmy’s home of \$2,907. The tax schedule did not include expenses associated with employees or independent contractors. See Defendant’s Exhibit A. Timmy testified that the net profit for Viet Bao in 2007 was \$122.

Based upon the record and the evidence and reasonable inferences therefrom that support the trial court’s judgment, we conclude that the evidence was sufficient for the court to find that a partnership existed between Timmy and Hang whereby they agreed that any profits from Viet Bao, i.e., the funds remaining in the business after revenue was collected and business expenses were paid, would be split equally between them. See Weinig, 674 N.E.2d at 996 (holding that the totality of facts was sufficient to support the trial court’s finding that the appellant’s share of proceeds was due to his participation in a partnership and noting that although no one fact stood alone the agreement considered

with the subsequent conduct of the parties shows that a partnership was intended and that the goal of the partnership was actually achieved).

B. Alleged Breach of Agreement or Conversion by Hang

Timmy argues that the parties entered into an enforceable oral contract regarding the business checking account and that Hang's access to the account was premised on the condition that Hang would provide documentation for the checks that he wrote. Timmy asserts that Hang breached the oral contract by failing to provide required documentation, that Timmy discovered numerous checks that had been written by Hang payable to "cash," that Hang wrote checks to American Express and failed to provide documentation of those expenses, and that at least one of the checks to American Express included the cost of an unauthorized repair to a vehicle belonging to Hang's wife. Appellant's Brief at 10. Timmy argues that "Hang clearly breached the term of the oral contract and, in writing the unauthorized checks, committed conversion, that is, the unauthorized taking of another's property." Id. at 11. Timmy argues that the evidence shows that his damages amounted to \$14,444.42.

Hang points to his testimony that he provided receipts and explanations of expenses to Timmy, to the fact that all of the checks and expenses Timmy complained of were written two years prior to Timmy's allegations, that Timmy testified that he included all of the income and expenses from the business checking account on his 2007 tax returns, that the expense to repair his wife's vehicle was legitimate because the vehicle was being used for business purposes, and that he could not produce certain receipts because he had given them to Timmy.

We note that, to be valid and enforceable, a contract must be reasonably definite and certain. Zukerman v. Montgomery, 945 N.E.2d 813, 819 (Ind. Ct. App. 2011) (citing Conwell v. Gray Loon Outdoor Mktg. Grp., Inc., 906 N.E.2d 805, 813 (Ind. 2009) (citing Wolvos v. Meyer, 668 N.E.2d 671, 675-676 (Ind. 1996))). An agreement “must provide a basis for determining the existence of a breach and for giving an appropriate remedy.” Id. (internal quotation marks and citations omitted).

We further note that Ind. Code § 35-43-4-3 provides that a person commits criminal conversion when he or she knowingly or intentionally exerts unauthorized control over the property of another person. Pursuant to Ind. Code § 34-24-3-1, a person who suffers a pecuniary loss as a result of a violation of Ind. Code § 35-43-4-3 may bring a civil action against the person who caused the loss. A criminal conviction for conversion is not a condition precedent to recovery in a civil action for conversion. Breining v. Harkness, 872 N.E.2d 155, 159 (Ind. Ct. App. 2007), reh’g denied, trans. denied. Rather, a claimant must merely prove commission of the crime by a preponderance of the evidence. Id.; see also French-Tex Cleaners, Inc. v. Cafaro Co., 893 N.E.2d 1156, 1166 (Ind. Ct. App. 2008).

The trial court found that Timmy has “failed to show fraudulent cash and check transactions as alleged,” that “[w]hat the evidence has shown is that [Hang] was at least tacitly if not expressly granted permission to write checks on behalf of Indianapolis Viet Bao and to sign [Timmy’s] name to those checks,” and that “[t]his was a common route that [Timmy] observed every month when he obtained and accepted the bank statements on the business account.” Appellant’s Appendix at 5-6. As stated above, we consider

only the evidence in the record that supports the trial court's judgment. McKeighen, 918 N.E.2d at 720.

Based upon the record, we conclude that the evidence was sufficient for the small claims court to find that Hang did not convert funds from Timmy or breach the parties' agreement. See Breining, 872 N.E.2d at 159 (finding that the evidence was insufficient to prove that the appellant's stepbrother had exercised unauthorized control over the money of the appellant's mother).

C. Findings Regarding the \$512 Withdrawals by Timmy

Timmy argues that the court erred in finding that he converted funds allegedly belonging to Hang and that "[t]he parties' oral agreement regarding Hang's compensation is unenforceable for want of certainty and definiteness regarding a material term." Appellant's Brief at 13. Timmy argues that there "was a fatal flaw in the agreement because [the] percentage varied widely." Id. Timmy asserts that the court "completely fails to take into account Timmy's discretion in setting the percentage;" that "[o]ne may also infer that the commission was based on pre-expense profits, that is gross ad sales;" and that "[t]he prospect of using a percentage of net profit as the basis for commission compensation appears to be inapplicable in this case as Hang testified that there were never profits that he and Timmy would each take from the account." Id. at 13-14 (quotation marks omitted). Timmy further argues that Hang "failed to produce any evidence that he was the owner of the property allegedly stolen or criminally converted." Id. at 14. Timmy also argues that there was no foundation for the admission of a letter

from the Indiana Department of Revenue and that the court erred in relying upon the letter in finding that Timmy misrepresented to Hang that he had a tax obligation.

Hang argues that “[h]aving determined that a partnership or agreement existed that required Timmy and Hang to share net profits, the Court had adequate evidence to support its determination that Timmy converted funds belonging to Hang.” Appellee’s Brief at 10. In support of his argument, Hang points to Timmy’s testimony that he withdrew monthly payments of \$512 each and deposited them in his personal account, that he owed no taxes to the IRS, that the check register of the business account described the \$512 payments as being for taxes, and that the payments would not be available to split with Hang at the end of the year. In his reply brief, Timmy argues that “[a]bsent the foundational agreement between the two parties, Hang’s remaining argument regarding his conversion of funds has no support” and that Hang “has wholly failed to address and establish that a duty existed in the first place.” Appellant’s Reply Brief at 5.

The court found that nine payments from the Viet Bao business checking account, each in the amount of \$512, “were going to [Timmy’s] personal bank account at American Federal that in [Timmy’s] own words had ‘nothing to do with business’” and that the total of the nine checks was \$4,608. Appellant’s Appendix at 8. The court further found that Timmy “knowingly or intentionally exerted unauthorized control over” those funds and conveyed the funds “to his own account without [Hang’s] consent” and that Timmy “violated Indiana Code § 35-43-4-2 and/or Indiana Code § 35-43-4-3” Id. at 8-9.

At trial, Timmy testified that he did not owe taxes. With respect to the withdrawals from the Viet Bao business account in the amount of \$512 each, Hang's counsel stated "[a]nd on the checking account register there, it says it was for taxes," and Timmy testified "Uh, but is not – is this – not this for my (indiscernible), but it is not from me." Transcript at 18. Hang's counsel asked "[w]ho is American Financial?" and Timmy stated: "[i]s my personal account, loan account." Id. at 19. Hang's counsel asked "[n]othing to do with the business?" and Timmy testified "[n]othing to do with business." Id. Hang's counsel asked "[b]ut you were paying for it out of the business account?" and Timmy testified: "This is my business. I am fully accessed to the money here. This is my fully business account." Id. Later during his testimony, Timmy indicated that he calculated the net profit of Viet Bao using the check register, that he wrote checks for \$512 for personal expenses, and that those amounts would not be available at the end of the year to divide with Hang.

While the trial court found that nine payments of \$512 each were made from the Viet Bao account to Timmy's personal account, there is no testimony to support that finding and the Viet Bao account statements from June through December, 2007 contained in Plaintiff's Exhibit No. 10 reveal only seven payments of \$512.01, which total \$3,584.07. As a result, Hang's actual damages in connection with the breach of the agreement between Timmy and Hang are \$1,792.04, which represents one-half of the amount that would have been divided equally between Timmy and Hang had Timmy not breached the parties' agreement and withdrawn the funds from the business checking account.

In addition, while the evidence supports the court's finding that Timmy breached the agreement between him and Hang when Timmy transferred the \$512.01 payments from the business account to his personal account, the evidence does not support the conclusion that Timmy's breach constituted a violation of Ind. Code § 35-43-4-2 or Ind. Code § 35-43-4-3. See Ruse v. Bleeke, 914 N.E.2d 1, 11-13 (Ind. Ct. App. 2009) (finding that the trial court correctly found that Ruse failed to sustain the burden of showing that Parrish committed criminal conversion of certain partnership assets and noting that at most the conduct alleged involved a contract dispute); see also Whitaker v. Brunner, 814 N.E.2d 288, 297 (Ind. Ct. App. 2004) (noting that "the mens rea requirement differentiates criminal conversion from the more innocent breach of contract or failure to pay a debt situation that the criminal conversion statute was not intended to cover" and that "[t]he legislature did not intend to criminalize bona fide contract disputes") (internal quotation marks and citation omitted), trans. denied; NationsCredit Commercial Corp. v. Grauel Enter., Inc., 703 N.E.2d 1072, 1078 (Ind. Ct. App. 1998) (concluding that the trial court erred in finding that NationsCredit had committed criminal conversion where the parties were in a dispute concerning ownership of a reserve account under a financing and security agreement), reh'g denied, trans. denied. Accordingly, we affirm that portion of the trial court's order finding that Timmy breached the parties' agreement when he made withdrawals in the amounts of \$512.01 from the Viet Bao business checking account and reverse that portion of the court's order finding that the withdrawal of the funds was a violation of Ind. Code § 35-43-4-2 or Ind. Code § 35-43-4-3.

D. Award of Damages, Attorney Fees, and Costs under Ind. Code § 34-24-3-1

Timmy finally argues that the trial court erred in awarding Hang enhanced damages and reasonable attorney fees. Timmy argues that “Hang, not Timmy, is liable for conversion in this matter” and that “[a]s a result, Timmy, not Hang, is entitled to treble damages and reasonable attorney’s fees, pursuant to statute.” Appellant’s Brief at 16. Hang argues that the court did not err in ordering enhanced damages and attorney fees in his favor and that Timmy’s argument “is based entirely on his prior arguments that the trial court erred in every respect” Appellee’s Brief at 10-11.

In its written judgment, the court found that Timmy “violated Indiana Code § 35-43-4-2 and/or Indiana Code § 35-43-4-3” and thus that Hang is entitled to three times his actual damages under Ind. Code § 34-24-3-1,⁶ as well as reasonable attorney fees and court costs under Ind. Code § 34-24-3-1. Appellant’s Appendix at 9.

We concluded in Part B that the small claims court did not err in finding that Hang did not convert funds from Timmy, and thus the court did not err in declining to award

⁶ Ind. Code § 34-24-3-1 provides in part:

If a person has an unpaid claim on a liability that is covered by IC 24-4.6-5 or suffers a pecuniary loss as a result of a violation of IC 35-43, IC 35-42-3-3, IC 35-42-3-4, or IC 35-45-9, the person may bring a civil action against the person who caused the loss for the following:

- (1) An amount not to exceed three (3) times:
 - (A) the actual damages of the person suffering the loss, in the case of a liability that is not covered by IC 24-4.6-5; or

* * * * *

- (2) The costs of the action.
- (3) A reasonable attorney’s fee.

damages to Timmy under Ind. Code § 34-24-3-1. However, in Part C we found that the evidence does not support the conclusion that Timmy's breach of the agreement between the parties constituted a violation of Ind. Code § 35-43-4-2 or Ind. Code § 35-43-4-3. As a result, Hang is not entitled to an award under Ind. Code § 34-24-3-1, and accordingly we reverse that portion of the small claims court's order awarding Hang total damages of three times his actual damages, attorney fees, and costs.

For the foregoing reasons, we affirm the trial court in part and reverse those portions of the judgment finding that Timmy violated Ind. Code § 35-43-4-2 or Ind. Code § 35-43-4-3 and is entitled to damages, attorney fees, and costs under Ind. Code § 34-24-3-1, and remand with instructions to enter judgment against Timmy and in favor of Hang in the sum of \$1,792.04, the amount of Hang's actual damages, plus court costs of \$76.00 and to amend its written judgment accordingly.

Affirmed in part, reversed in part, and remanded.

KIRSCH, J., concurs.

BAKER, J., concurs and dissents with opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

TIMMY NGUYEN AND TIMMY)	
NGUYEN d/b/a INDIANAPOLIS)	
VIET BAO,)	
)	
Appellant,)	
)	
vs.)	No. 29A02-1012-SC-1370
)	
HANG T. AND THOM NGUYEN,)	
)	
Appellees.)	

BAKER, Judge, concurring and dissenting.

I concur with the majority’s determination that Viet Bao was a partnership and that Timmy was in violation of the agreement with Hang when Timmy placed the monthly payments into his own account. However, I part ways with the conclusion that Timmy’s withdrawal of the funds did not amount to conversion. Thus, I agree with the trial court’s decision to award Hang treble damages, attorney’s fees, and costs.

Also, even assuming for the sake of argument that Viet Bao was a sole proprietorship owned by Timmy that would preclude Hang’s claim against him for conversion, the evidence nonetheless establishes that Hang could recover treble damages and attorney’s fees under our Wage Claim statutes.

In examining Hang's claim for conversion, Indiana Code section 35-43-4-3 provides that criminal conversion is committed when one knowingly or intentionally exerts unauthorized control over the property of another person. As the majority observes, the plaintiff may recover three times his actual damages, the cost of the action, and reasonable attorney's fees, once conversion is established in accordance with Indiana Code section 34-24-3-1. Slip op. at 13. The claimant is only required to prove the conversion by a preponderance of the evidence. Breining v. Harkness, 872 N.E.2d 155, 159 (Ind. Ct. App. 2007).

In this case, the undisputed evidence shows that Timmy deposited nine payments from the Viet Bao business checking account, each in the amount of \$512, into his personal bank account. Tr. p. 18-19, 63-64. It is also undisputed that those checks had nothing to do with the business. Appellant's App. p. 7-8. Timmy transferred these funds to his own account without Hang's consent and he created and confirmed a false impression that the money would be used to pay an Internal Revenue Service (IRS) debt of the business. Tr. p. 19, 63. Timmy admitted that no taxes were owed to the IRS, even though the check register of the business account indicated that the \$512 payments were for taxes. As a result of Timmy's actions, those funds that he deposited into his personal account would not be available to split with Hang at the end of the year. Slip op. at 15; tr. p. 15. That said, in accordance with the parties' agreement, one-half of the deposits that Timmy diverted to his personal bank account—or \$2304—contractually belonged to Hang. In short, this is the amount that Timmy knowingly or intentionally exerted unauthorized control over. Therefore, I agree with the trial court's determination that

Timmy committed conversion within the meaning of the statute, and I would uphold the damage award.

Finally, even if it could be said that the evidence did not support a finding of conversion, the evidence nonetheless supports a determination that the amounts that Timmy owed to Hang were commissions under their agreement. In fact, Timmy readily acknowledges that his agreement with Hang was that “he would pay Hang on a commission basis.” Appellant’s Br. p. 13. Thus, Timmy was subjected to liability pursuant to Indiana Code section under Indiana Code section 22-2-9 et seq, the Wage Payment statutes.

Indiana Code section 22-2-9-1(b) states:

(b) The term ‘wages’ means all amounts at which the labor or service rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or in any other method of calculating such amount.

(Emphasis added); see also Helmuth v. Distance Learning Sys. Indiana, Inc., 837 N.E.2d 1085, 1092 (Ind. Ct. App. 2005) (observing that commissions constitute “wages” within the meaning of the wage claim statute). And under the Wage Claim statutes, Hang could assert a claim for unpaid wages, treble damages, and attorney’s fees:

Every such person, firm, corporation, limited liability company, or association who shall fail to make payment of wages to any such employee as provided in section 1 of this chapter shall, as liquidated damages for such failure, pay to such employee for each day that the amount due to him remains unpaid ten percent (10%) of the amount due to him in addition thereto, not exceeding double the amount of wages due, and said damages may be recovered in any court having jurisdiction of a suit to recover the amount due to such employee, and in any suit so brought to recover said wages or the liquidated damages for nonpayment thereof, or both, the court

shall tax and assess as costs in said case a reasonable fee for the plaintiff's attorney or attorneys.

I.C. § 22-2-5-2; see also Todd v. Stewart, 566 N.E.2d 1077, (Ind. Ct. App. 1991) (observing that the defendant company's failure to pay bonus amounts to which the plaintiff was entitled mandated the imposition of treble damages and reasonable attorney's fees under Indiana Code section 22-2-5-2).

When calculating the damages to which Hang is entitled under either the conversion statute or the Wage Claim Statute, it is apparent that the award will exceed the small claims jurisdictional limit. Therefore, I would affirm the trial court's judgment for Hang but reduce the amount to the jurisdictional limit of \$6,000, and costs.