COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 98-3030

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

JIM SMITH,

PLAINTIFF-APPELLANT,

V.

BASIL RYAN, JR., D/B/A IRISH STONE & ROCK COMPANY,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT,

DOUG GORDON AND THEODORE DRAGOTTA,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Reversed and cause remanded with directions.*

Before Fine, Schudson and Curley, JJ.

¶1 SCHUDSON, J. Jim Smith appeals from the order denying his postverdict motions and changing the jury's answers to four special verdict questions, and from the judgment awarding Basil Ryan, Jr., d/b/a Irish Stone & Rock Company, $43,513.93 ($41,000 plus interest and costs). Smith argues that the trial court erred by: (1) denying his motion for judgment on the jury verdict rendered in his favor on his partnership claim; (2) granting Ryan's motion to change the jury's partnership verdict; (3) granting Ryan's motion for judgment notwithstanding the verdict; (4) denying his motion to dismiss Ryan's counterclaim for conversion; and (5) denying his postverdict motions seeking relief, including the appointment of a receiver. Smith also argues that if we do not reverse the trial court, we should remand this matter for correction of the trial court's erroneous legal rulings and for further trial proceedings in the interests of justice.

¶2 We conclude that the trial court erred by denying Smith's motion for judgment on the verdict on his partnership claim and by granting Ryan's motions challenging the verdict. Accordingly, we reverse and remand to the trial court for reinstatement of the jury verdicts and for reconsideration of Smith's request for a receivership.

I. BACKGROUND

¶3 J. F. Shea Company (Shea) contracted with the Milwaukee Metropolitan Sewerage District (MMSD) to excavate stone from the Lincoln site of the deep tunnel project and dispose of the excess limestone ("spoil"). Shea had utilized Smith to remove spoil from other deep tunnel project sites and informed him that the spoil from the Lincoln site would be available in November or December of 1990. While searching for land near the Lincoln site on which to

stockpile the spoil, Smith discovered that Ryan owned a potentially suitable eleven-acre piece of undeveloped land. Following his unsuccessful attempt to purchase the land from Ryan, Smith told Ryan that he had a contract to obtain stone from the excavation of the deep tunnel project and proposed a partnership in which Ryan would allow the spoil to be stored on his land, and they would split the profits from the sales of the spoil.

¶4 Ryan consulted with an attorney, Robert DeJong, to explore the legal ramifications of a partnership agreement. On November 19, 1990, after drafting a letter of intent to serve as an outline for discussion, DeJong met with Ryan and Smith to discuss their potential business relationship. At the meeting, Smith revealed that: (1) a felony proceeding was pending against him for transportation of hazardous waste without a license; (2) he had not filed income tax returns for multiple years; (3) he wanted to be paid in cash due to his concerns about problems with the Internal Revenue Service; (4) he did not have a written contract entitling him to the spoil; and (5) he intended to provide "grease" payments to Shea to ensure receipt of the spoil. Based on this information, DeJong advised Ryan that it would be too risky to enter into a partnership with Smith. Other forms of potential business associations were discussed, including corporations, an employer-employee relationship, and independent contracting. After the meeting, DeJong advised Ryan not to do business with Smith at all, but that the next safest available option would be an independent contractor arrangement.

¶5 On November 21, 1990, Ryan applied for an erosion control permit and an occupancy permit for the storage of the limestone spoil, and informed Shea, in writing, that Irish Stone and Rock Company[1] would provide a site for the

[1] Irish Stone and Rock Company was established by Ryan as a sole proprietorship.

spoil storage and that the necessary permits had been obtained from the City of Milwaukee. In a letter dated November 29, 1990, E. O. Mixon, Shea Project Manager, referred to Ryan's letter of November 21 and agreed to deliver to Ryan's property "all rock produced by Shea's tunnel boring machine at the … Lincoln site with the exception of quantities required by Shea and quantities obligated by contract to the County and the Redevelopment Authority." The letter also stated: "This understanding is contingent upon City of Milwaukee approval of the proposed haul routes and your maintaining the required permits. It is also understood that the MMSD reserves the right to direct Shea to dispose of the rock at MMSD designated sites."

¶6 Although Smith and Ryan never established, in writing, the terms of their agreement, delivery of the spoil to Ryan's land began in November 1990 and continued into the next year. In January 1991, to facilitate moving the spoil, Ryan leased a loader for one year.[2] In August 1991, however, Ryan learned that the spoil was being delivered to sites other than his own. He eventually discovered that some of the spoil was being diverted to a site owned by Giuffre Brothers Cranes, Inc., and that Smith was responsible for the diversion. After Ryan confronted Smith, and Smith provided Ryan an accounting of the Giuffre sale, delivery of the spoil to Ryan's land resumed. Eventually, however, Smith and Ryan encountered more problems and their working relationship ended.

¶7 Claiming that an oral partnership had been established, Smith sued Ryan for breach of contract. Ryan counterclaimed, alleging conversion. Ryan

[2] Ryan purchased the loader after the lease expired.

also impleaded Doug Gordon and Theodore Dragotta.[3] Granting Gordon's and Dragotta's motion for summary judgment, the trial court dismissed the claims against them. The jury, finding that a partnership agreement between Smith and Ryan had existed and that Ryan had breached the agreement, awarded Smith damages of $85,000. The jury, also finding that Smith, Gordon, and Dragotta had committed conversion, awarded damages of $7,409.15 to Ryan. The trial court subsequently changed the jury's answers to four of the special verdict questions, thus eliminating Smith's award and increasing Ryan's award to $41,000.

II. STANDARD OF REVIEW

¶8 The supreme court has explained: "Appellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it. Moreover, if there is any credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding, we will not overturn that finding." ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659 (citations omitted). Additionally, "it is the role of the jury, not an appellate court, to balance the credibility of witnesses and the weight given to the testimony of those witnesses." ***Id.*** at ¶39. If evidence in the record "gives rise to more than one reasonable inference," even if that evidence is weaker and less convincing than contradictory evidence, we must "accept the particular inference reached by the jury." *See* ***id.***

III. DISCUSSION

A. Partnership

[3] Gordon and Dragotta were real estate investment partners who negotiated the Giuffre sale; they purchased the spoil from Smith and resold it.

¶9 A partnership is created only when four elements are established: "The parties must (1) intend to form a bona fide partnership and accept the accompanying legal requirements and duties, (2) have a community of interest in the capital employed, (3) have an equal voice in the partnership's management, and (4) share and distribute profits and losses." *See* ***Tralmer Sales & Serv., Inc. v. Erickson***, 186 Wis. 2d 549, 563, 521 N.W.2d 182 (Ct. App. 1994). In the instant case, the jury found that Smith and Ryan had formed a partnership. The trial court, however, concluding that the evidence did not support the jury's finding, declared:

> The only evidence in support of the intent to form a partnership was the plaintiff's testimony. The plaintiff testified that there was an oral agreement … to establish a partnership[—]to operate the business as a partnership and share proceeds.
>
> No other evidence supports this element. There are no written agreements. None of the witnesses supported a finding of the defendant's intent. The defendant denied any intent.…
>
> ….
>
> The plaintiff testified as to his discussions with the defendant. He acknowledged there was no written agreement to which they both agreed.
>
> The evidence, when taken as a whole, there is no support for the conclusion that the conduct of the parties demonstrated the necessary mutual agreement or mutual intent.

We conclude that the trial court erred. Even if "[t]he only evidence in support of the intent to form a partnership was the plaintiff's testimony," the jury was entitled to believe it and base its finding on that testimony. And in this case, as we will explain, the jury had much more.

1. "[I]nten[t] to form a bona fide partnership and accept the accompanying legal requirements and duties"

¶10 Regarding the first element of the partnership test, the jury instruction provided:

> The ultimate and controlling test as to the existence of a partnership is the parties' intention of carrying on a definite business as co-owners, and such intention may be determined from the terms of the parties' agreement or from their conduct under the circumstances of the case. Furthermore, the filing—or lack of filing—of the partnership tax returns or other such tax documents does not necessarily show the intent of the parties in this regard, but it is one factor which you are free to consider or to reject in determining whether a partnership existed.

Smith testified, among other things, that: (1) Ryan "indicated to [him] that he was interested in partnering up with [him]"; (2) he told Ryan that "if he had the land and the capital, [they] needed to get rolling" and that Ryan "would be good as partners as anybody else"; (3) "at the time of November 19, 1990," he had a verbal partnership agreement with Ryan; (4) at the November 19, 1990 meeting, he told Ryan and DeJong that he wanted to be paid in cash; (5) both he and Ryan used the word "partner" when referring to their relationship; (6) he had advised Ryan that if their partnership agreement were not reduced to writing, he would redirect the spoil to another site; (7) he estimated that he asked Ryan for a written partnership agreement dozens of times from "early or mid-November, 1990, into July of '91"; but (8) he and Ryan never entered into a written agreement because they "never did come to a complete agreement on the terms of the partnership agreement."

¶11 The trial court never explained why Smith's testimony was not sufficient for the jury to find that Smith and Ryan formed a partnership and Ryan, on appeal, offers nothing to suggest that the jury could not accept it. We conclude that Smith's testimony alone was sufficient to establish the first element of a partnership and, in combination with the undisputed evidence of Smith's and

Ryan's actions in pursuit of their spoil business, provided the jury with ample evidence of their mutual intent to form a partnership.

2. "[A] community of interest in the capital employed"

¶12 Smith testified that: (1) Ryan agreed to provide the land, necessary capital for labor, "either capital improvement or financing for a large loader which [was] necessary to not only spread the stone that was delivered but ultimately load it for sale," and "the capital to keep everything going" until a profit was generated; and (2) he (Smith) agreed to provide the spoil and the labor needed to prepare the site to receive the spoil. This testimony was sufficient to satisfy the second element and, once again, the jury reasonably could have found that Smith's testimony, in combination with the undisputed evidence of Smith's and Ryan's actions, established that Smith and Ryan had a "community of interest in the capital employed."

3. "[A]n equal voice in the partnership's management"

¶13 Smith testified that: (1) he "designed and submitted the haul route [for the transportation of the spoil] to the Shea contractor who ultimately g[a]ve it to the MMSD"; (2) he made the arrangements to accept loads of spoil at Ryan's property; (3) he was involved in negotiating the sale price of the loader; (4) he was involved in sales of the spoil; (5) he "along with Mr. Gordon and Mr. Dragotta diverted stone away from Mr. Ryan's site," doing so "directly in the face of an agreement between … J. F. Shea and Mr. Ryan that all rock was to be delivered to Mr. Ryan's location"; and (6) Ryan did not authorize him to "divert the stone from Mr. Ryan's site to Giuffre Brothers." We conclude that the jury reasonably could have found that Smith's testimony, in combination with the undisputed evidence,

established that Smith and Ryan had "an equal voice in the partnership's management."

4. The "shar[ing] and distribut[ion of] profits and losses"

¶14 Smith testified that: (1) he and Ryan "came to an agreement … that whatever monies [Ryan] had to put into [the] operation to make it go, when [they] sold the material, [Ryan] would get his money out and [they] would split the profits out of the balance of the material"; and (2) he was to receive fifty percent of the profits. For the reasons we have expressed regarding the first three elements, this testimony, in combination with the undisputed evidence, also would establish the fourth element.

¶15 At the hearing on postverdict motions, however, the trial court ruled that "there is no evidence that the plaintiff shared in the profits and losses of this business." But the pertinent jury instruction provided that Smith, as the plaintiff, only had to prove "to a reasonable certainty by the greater weight of the credible evidence" that "both parties *intended* to share in the distribution of profits and losses." (Emphasis added.) Therefore, as Smith contends in his brief to this court: "[T]he trial court imposed an improper standard. Thus whether or not Smith actually shared in the profits and losses is irrelevant …." Smith is correct. Thus, the evidence was sufficient for the jury to find that Smith and Ryan "intended to share in the distribution of profits and losses."

¶16 Having determined that the jury could reasonably have found that the evidence established all four elements of a partnership, we conclude that the trial court erred by reversing the jury's determination that a partnership agreement existed. Thus, the trial court erred in changing the jury's determinations that Ryan

breached the partnership agreement and caused Smith to sustain $85,000.00 in damages.

B. Conversion

¶17 The jury found that "Smith, … Gordon[,] and [Dragotta] convert[ed] an amount of stone to their own use in the sale of the stone to Giuffre Brothers and obtain[ed] benefit from the sale of the stone," and that as a result of Smith's "actions with respect to the diversion of the Giuffre stone," Ryan suffered $7,409.15 in damages. Smith argues that the $7,409.15 should properly be denominated as an offset, not a conversion. At oral argument before this court, however, counsel for Smith, while insisting that Ryan's conversion counterclaim should be dismissed as a matter of law, acknowledged that if we accept that a partnership existed, Ryan would be entitled to recover the amount awarded by the jury, as that is half of what Smith was paid for the Giuffre sale. Therefore, having accepted Smith's position on the partnership issue, we need not further address his concerns on the conversion issue.

C. Receivership

¶18 WISCONSIN STAT. § 813.16 provides that a court has discretionary authority to appoint a receiver "when the applying party establishes an apparent right to or interest in property which is the subject of the action and which is in the possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially impaired." *See* WIS. STAT. § 813.16(1) (1997-98). Since at least 1997, Smith has sought an accounting and/or the appointment of a receiver to assist in the assessment of damages. The trial court declined to appoint a receiver, reasoning that because no partnership existed, no receiver should be appointed. In light of our conclusion that the trial court erred by

reversing the jury's determination that a partnership agreement existed, we now direct the trial court to reconsider the receivership issue.

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.