

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 26, 2016

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal No. 2015AP1058

Cir. Ct. No. 2012CV547

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**ST. CROIX REGIONAL MEDICAL CENTER, INDIVIDUALLY,
AND AS ASSIGNEE OF BADGER STATE, INC.,**

PLAINTIFF-RESPONDENT,

**NEI NORTHERN ELECTRICIANS, INC. AND
W. ZINTL CONSTRUCTION, INC.,**

PLAINTIFFS,

v.

ROBERT KELLER,

DEFENDANT-APPELLANT,

**KELLER COMPANIES, INC. AND KELLER
CONSTRUCTION MIDWEST, LLC,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Polk County:
MOLLY E. GALEWYRICK, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Robert Keller appeals a grant of summary judgment in favor of St. Croix Regional Medical Center (St. Croix). He argues the circuit court erroneously interpreted Wisconsin’s theft-by-contractor statute, WIS. STAT. § 779.02(5), and, by extension, the statute prohibiting the misappropriation of construction loan proceeds, WIS. STAT. § 706.11(3).¹ Keller’s brief-in-chief appears principally to argue he was not liable for violations of those statutes as a matter of law, while his reply brief appears principally to argue summary judgment was inappropriate because a genuine issue of material fact existed as to whether such violations occurred. We reject both arguments. Keller also asserts the circuit court erred by awarding treble damages for the violations under WIS. STAT. § 895.446. Again, we disagree. Accordingly, we affirm the judgment.

BACKGROUND

¶2 Keller Construction is a corporation formerly owned jointly by Robert Keller and his brother, Ronald Keller.² Keller Construction was a general contractor primarily involved in the construction of commercial buildings. In 2006, St. Croix hired Keller Construction as the general contractor for a hospital addition. St. Croix financed the design and construction of the hospital addition

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

² Ronald Keller died in 2010.

through a construction loan obtained from U.S. Bank. U.S. Bank recorded a mortgage on the hospital property as security for the loan.

¶3 The hospital project involved fourteen pay requests, or “draws.” For each draw, Keller Construction prepared and submitted a draw request to the project architect and to St. Croix, which request itemized the progress of the work through the date of the application and identified the amounts owed to Keller Construction and each subcontractor. Once approved, the request was submitted to U.S. Bank and its title company for review and payment. The contract between Keller Construction and St. Croix called for St. Croix to make direct payments to subcontractors and material suppliers for the materials furnished for use on the project, with the amount of those payments being subtracted from Keller Construction’s contract price. Keller Construction was responsible for paying the subcontractors for their labor. Keller Construction would obtain lien waivers from its subcontractors for payments they received from each draw request. Keller Construction also executed lien waivers for each payment made to, and retained by, it.

¶4 Draw request numbers one through ten and number twelve were paid to Keller Construction in full. Keller Construction then distributed the funds to its subcontractors consistent with the itemization presented in each draw request. A portion of draw request number eleven was withheld, but Keller Construction’s subcontractors were paid in full from the approved amount. Between March 1, 2007, and June 27, 2008, St. Croix made ten payments, totaling approximately \$1.2 million, directly to Keller Construction and to be retained by it.

¶5 Draw request number thirteen, however, proved unlucky for Keller Construction. Keller Construction submitted the request on July 22, 2008, in the

amount of \$200,000.³ Four subcontractors—Badger State, Northern Electricians, Inc., W. Zintl Construction, Inc., and O’Keefe, Inc.—were among the intended recipients of the money sought through the draw. St. Croix authorized a payment of \$546.43 for materials, but it refused to pay the balance of the draw request because of a dispute regarding the quality of the construction work, in particular the adequacy of the air handling system.

¶6 The dispute between St. Croix and Keller Construction was submitted to arbitration. On September 25, 2009, the arbitrator issued a decision awarding Keller Construction a net amount of \$9,132.29. The arbitrator found Keller Construction was entitled to an award of \$320,295.82, which represented, among other things, the approximate \$199,450 balance of draw request number thirteen. However, the arbitrator also concluded St. Croix was entitled to an award of \$311,163.53, consisting of a \$200,000 credit to fix the air handling system and a \$111,163.53 credit against the amount of draw request number thirteen for payments made by St. Croix directly to subcontractors. Despite the nearly offsetting awards, the arbitrator directed Keller Construction to “pay or otherwise satisfy all valid and legally enforceable liens or claims of [its] sub-subcontractors or suppliers.”⁴ Keller Construction stipulated to confirmation of the arbitration award in October 2009.

³ St. Croix made an additional payment of \$34,413 to Keller Construction on September 2, 2008, after draw request number thirteen was submitted. This payment was apparently not part of draw request number thirteen and brought the total amount paid directly to Keller Construction to approximately \$1,238,245.

⁴ The parties appear not to dispute, and the circuit court concluded, that this directive required Keller Construction to satisfy the claims of Badger State, Northern Electricians, W. Zintl Construction, and O’Keefe.

¶7 Keller Construction then failed to pay the four subcontractors, justifying its refusal on the rationale that it “was never paid the money in the first place” and “there was no money available for subcontractors.” Badger State, Northern Electricians, and W. Zintl Construction subsequently filed suit against Keller Construction and St. Croix. St. Croix was dismissed from the lawsuit and the subcontractors obtained judgments against Keller Construction in the amounts of \$76,143.55, \$58,484.65, and \$87,975.28, respectively. Pursuant to a settlement agreement, the subcontractors assigned these judgments to St. Croix and provided satisfactions of their respective liens. O’Keefe filed a separate suit against Keller Construction and obtained a money judgment in the amount of \$26,547.07, which judgment was also later assigned to St. Croix along with satisfaction of O’Keefe’s lien.

¶8 In 2012, St. Croix filed the present suit against Keller personally and his companies. St. Croix alleged Keller had created a new entity, Keller Companies, Inc., and had attempted to prevent St. Croix from enforcing the judgments against Keller Construction by transferring all its assets to the new entity. Accordingly, the amended complaint alleged Keller Companies was liable to St. Croix for the subcontractors’ assigned claims, both as Keller Construction’s alter ego and pursuant to WIS. STAT. ch. 242, the Uniform Fraudulent Transfer Act. The amended complaint also alleged Keller and his companies were jointly and severally liable in the amount of the judgments for theft by contractor, *see* WIS. STAT. § 779.02(5), and misappropriation of construction loan proceeds, *see* WIS. STAT. § 706.11(3). St. Croix also sought treble damages for the latter violations under WIS. STAT. § 895.446(3)(c).

¶9 On December 21, 2012, St. Croix filed a motion seeking summary judgment on all claims against Keller and his companies. St. Croix argued that

there was no genuine issue of material fact that Keller had committed theft by contractor and misappropriation of construction loan proceeds, and that Keller was liable for treble damages as a result of those violations. St. Croix also argued there was no genuine issue of material fact regarding application of the Uniform Fraudulent Transfer Act and the alter-ego doctrine to reach the assets of Keller Companies to satisfy the judgments against Keller Construction.

¶10 The circuit court granted summary judgment with respect to St. Croix's claims that Keller was personally liable for the statutory violations. The court concluded the undisputed facts established all elements of theft by contractor pursuant to WIS. STAT. § 779.02(5) and *State v. Hess*, 99 Wis. 2d 22, 28, 298 N.W.2d 111 (Ct. App. 1980). In rejecting Keller's argument that he could not have committed theft because Keller Construction did not receive any money from draw number thirteen, the court noted that Keller Construction had received over \$1.2 million in direct payments by virtue of the hospital project and that § 779.02(5) imposes a trust over "all moneys" paid to a general contractor "until all the claims [of subcontractors] have been paid." The court concluded the "same analysis" applied to St. Croix's claim for misappropriation of loan proceeds, as there was "no genuine issue of material fact that Robert Keller failed to hold sufficient funds in trust" to pay the subcontractors.

¶11 The circuit court awarded St. Croix treble damages for Keller's statutory violations but denied St. Croix's summary judgment motion with respect to Keller Companies' liability. Responding to Keller's argument that a factual issue existed regarding whether Keller had the criminal intent necessary to award treble damages, the court observed that refusal to deliver contractor trust funds on demand is prima facie evidence of criminal intent under WIS. STAT. § 943.20(1)(b). However, the court declined to award summary judgment on

St. Croix's fraudulent transfer claims, determining there was insufficient factual support to conclude "as a matter of law that the corporate form of Keller Companies is a mere sham." The circuit court formalized its decision in a document entitled, "Findings of Fact and Order for Judgment."

¶12 Keller attempted an appeal from the circuit court's "Findings of Fact and Order for Judgment," but, observing that St. Croix's fraudulent transfer claims were still unresolved, we concluded we lacked jurisdiction because that document was not a final order. On March 5, 2014, we dismissed Keller's appeal, and proceedings subsequently resumed in the circuit court on St. Croix's remaining claims. Those claims were resolved by a jury trial, whereupon the jury unanimously concluded Keller had fraudulently transferred assets to Keller Companies to avoid paying to St. Croix. Following the judgment's entry, Keller resurrected his earlier appeal. He challenges the circuit court's grant of summary judgment on St. Croix's claims for theft by contractor and misappropriation of construction loan funds, and the awarding of treble damages on those claims.

DISCUSSION

¶13 We review a grant of summary judgment de novo. *Burgraff v. Menard, Inc.*, 2016 WI 11, ¶20, 367 Wis. 2d 50, 875 N.W.2d 596. The summary judgment methodology is one of long standing and need not be repeated in its entirety here. *See Tews v. NHI, LLC*, 2010 WI 137, ¶4, 330 Wis. 2d 389, 793 N.W.2d 860. It is sufficient for purposes of this appeal to note that summary judgment is appropriate if the record shows the absence of any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Burgraff*, 367 Wis. 2d 50, ¶20; *see also* WIS. STAT. § 802.08(2).

¶14 Keller first argues the circuit court erroneously interpreted the theft-by-contractor statute, WIS. STAT. § 779.02(5). Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Unless the language used is technical or includes specially defined words or phrases, we give statutory language its “common, ordinary, and accepted meaning.” *Id.* We interpret the language “in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Id.*, ¶46. “If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning.” *Id.* (quoting *Bruno v. Milwaukee Cty.*, 2003 WI 28, ¶20, 260 Wis. 2d 633, 660 N.W.2d 656).

¶15 WISCONSIN STAT. § 779.02(5) is part of the Wisconsin Construction Lien Law. *Kraemer Bros. v. Pulaski State Bank*, 138 Wis. 2d 395, 399, 406 N.W.2d 379 (1987). These statutes originated more than a century ago to encourage construction by protecting building-project contractors and subcontractors. *Id.* Subsection 779.02(5), specifically, “is designed to protect subcontractors and material suppliers by making money paid by the owner to the contractors and subcontractors a trust fund for the subcontractors and material suppliers.” *Id.* at 399-400.

¶16 Accordingly, the theft-by-contractor statute “imposes a trust in favor of due or about-to-become-due claims of subcontractors and suppliers on all funds paid by the owner to the general contractor[,] and also imposes personal liability

on the general contractor for breach of that trust.”⁵ *Capital City Sheet Metal, Inc. v. Voytovich*, 217 Wis. 2d 683, 685, 578 N.W.2d 643 (Ct. App. 1998). We have held the statutory language is “plain and unambiguous”:

It imposes a trust on funds the [general] contractor receives from the owner, requiring that those funds be used only for payments “for labor and materials used” in performing the contract. Using the funds for some ... purpose [other than services, materials, plans and specifications used for the improvements]—whether personal or corporate—violates the statute, and the officers of the corporation may be held personally liable to the subcontractors and suppliers. The statute’s purpose is simply stated: “[It imposes a trust upon funds] received by the contractor for a particular purpose, the construction of improvements upon property. The statute imposes the trust to insure that one who receives money for this purpose uses it to that end.” *State v. Sobkowiak*, 173 Wis. 2d 327, 334, 496 N.W.2d 620, 623 (Ct. App. 1992) (quoted source omitted).

⁵ As relevant here, WIS. STAT. § 779.02(5) provides as follows:

The proceeds of any mortgage on land paid to any prime contractor ... for improvements upon the mortgaged premises, and all moneys paid to any prime contractor ... by any owner for improvements, constitute a trust fund only in the hands of the prime contractor ... to the amount of all claims due or to become due or owing from the prime contractor ... for labor, services, materials, plans, and specifications used for the improvements, until all the claims have been paid, and shall not be a trust fund in the hands of any other person. The use of any such moneys by any prime contractor ... for any other purpose until all claims, except those which are the subject of a bona fide dispute and then only to the extent of the amount actually in dispute, have been paid in full or proportionally in cases of a deficiency, is theft by the prime contractor ... of moneys so misappropriated and is punishable under s. 943.20. If the prime contractor ... is a corporation, limited liability company, or other legal entity other than a sole proprietorship, such misappropriation also shall be deemed theft by any officers, directors, members, partners, or agents responsible for the misappropriation.

Keller does not dispute that Keller Construction was a “prime contractor” as defined by WIS. STAT. § 779.01(2)(d).

Capital City Sheet Metal, 217 Wis. 2d at 689 (final bracketed language added in *Capital City Sheet Metal*).

¶17 As Keller observes, a general contractor violates WIS. STAT. § 779.02(5) by using funds held in trust for purposes unrelated to the project. *See, e.g., State v. Keyes*, 2008 WI 54, ¶32, 309 Wis. 2d 516, 750 N.W.2d 30 (collecting cases); *Burmeister Woodwork Co. v. Friedel*, 65 Wis. 2d 293, 298, 222 N.W.2d 647 (1974) (officer of general contractor committed theft by contractor by using money to pay expenses incurred in the ordinary course of the corporation’s business rather than to pay subcontractor); *Weather-Tite Co. of Milwaukee v. Lepper*, 25 Wis. 2d 70, 74, 130 N.W.2d 198 (1964) (“Defendant, having expended the trust funds for purposes other than the payment of claims as provided in the statute, is a converter of those funds and personally liable to plaintiff for the amount of its claim.”).

¶18 Keller points to *Capen Wholesale, Inc. v. Probst*, 180 Wis. 2d 354, 509 N.W.2d 120 (Ct. App. 1993), as a classic example of theft by contractor. In that case, it was undisputed that the subcontractor plaintiff had supplied roofing materials to the general contractor; the general contractor subsequently used those materials in its projects, for which it was paid by its customers; and the general contractor did not pay the subcontractor, instead using the money held in trust for the payment of other corporate expenses like payroll, rent, utilities, and taxes. *Id.* at 359, 363. We observed that these undisputed facts established all elements of theft by contractor under WIS. STAT. § 779.02(5). *Id.* at 363.

¶19 Keller argues his case is distinguishable from the typical theft-by-contractor cases because, here, the “arbitrator’s decision virtually negated [draw number thirteen] with [St. Croix’s] various claims and offsets.” Accordingly,

Keller reasons he could not be liable for theft because, after draw number twelve, Keller Construction never received any money intended to be paid to subcontractors, and therefore it “never received the money to hold in trust.”

¶20 We reject Keller’s attempt to distinguish the circumstances here from the run-of-the-mill theft-by-contractor case. First, Keller’s argument progresses from the flawed factual premise that Keller Construction did not receive any of the funds from draw request number thirteen. To be sure, St. Croix withheld those funds as it pursued resolution of its dispute with Keller Construction regarding the quality of the work. However, the arbitrator ultimately concluded Keller Construction was entitled to payment in the full amount of draw number thirteen. The arbitrator awarded Keller Construction those funds. It simply offset that award by the amount to which the arbitrator found St. Croix was entitled for Keller Construction’s deficient construction work. The arbitrator apparently anticipated the possibility that Keller Construction would view the offsetting awards as eliminating its liability to the subcontractors involved in draw number thirteen, and it foreclosed that possibility by mandating that Keller Construction “pay or otherwise satisfy all valid and legally enforceable liens or claims” to those businesses. It is undisputed Keller Construction failed to do so.

¶21 Second, as St. Croix points out, it is undisputed that Keller Construction received more than \$4.4 million in payments during the course of the hospital project, approximately \$1.2 million of which was retained by Keller Construction. Meanwhile, Keller Construction’s subcontractors were left uncompensated for nearly \$250,000 in work—at least, until their claims were purchased by St. Croix, which has now paid twice for the same work, contrary to WIS. STAT. § 779.02(5)’s purpose. See *Kraemer Bros.*, 138 Wis. 2d at 403. The theft-by-contractor statute requires that “*all* moneys paid to any prime contractor

... constitute a trust fund ... to the amount of all claims due or to become due or owing from the prime contractor ... for labor, services, materials, plans, and specifications used for the improvements, *until all the claims have been paid.*” Subsec. 779.02(5) (emphasis added). The undisputed facts in this case establish that Keller Construction should have had ample funds with which to pay its subcontractors.

¶22 Keller responds that there is a factual dispute regarding “how much of any allegedly thieved money was used to pay for labor, services, materials, equipment rental fees, plans and specifications related to the hospital project.” Keller states, without record citations, that there were “numerous other people and entities with claims that needed to be paid” other than the subcontractors whose claims St. Croix purchased:

As this Court can probably imagine, a multi-million dollar build results in claims for countless costs including labor, materials, rental fees, and other items that a contractor must pay in order to be able to complete a given project. The hospital would like this Court to overlook that reality and pretend that the only costs incurred and “claims” that the contractor needed to pay were the claims of the few subcontractors specifically identified in draw requests.

Accordingly, Keller argues there is an issue of fact regarding how much of the \$1.2 million Keller Construction retained was subsequently paid out for work on the project in some fashion.⁶

¶23 The problems here are manifest. First, courts, especially appellate courts, do not “imagine” facts or consider unsubstantiated generalities. Second, and related, Keller’s argument is not backed by any evidentiary substance. He fails to provide record citations for his suggestion that all, or even some, of the money that was undisputedly paid to Keller Construction went toward project costs. *See* WIS. STAT. RULE 809.19(1)(e), (4)(b) (reply brief argument must include “citations to the ... parts of the record relied on.”). Although we have no duty to scour the record to review arguments lacking adequate record citation, *see Roy v. St. Lukes Med. Ctr.*, 2007 WI App 218, ¶10 n.1, 305 Wis. 2d 658, 741 N.W.2d 256, our review of Keller’s submissions in opposition to the summary

⁶ Keller does not dispute Keller Construction retained over \$1.2 million in direct payments. However, he argues the February 13, 2013 affidavit of John Tremble, which sets forth many of the pertinent undisputed facts in this case, is insufficient for purposes of summary judgment because Tremble “merely alleges that a certain dollar figure was paid to Keller Companies” and he “does not address what happened to one dollar of the balance.” Keller contends Tremble’s affidavit “states a conclusion, without foundation or any basis of actual knowledge, that every dollar not paid out to the identified claimants that Mr. Tremble was aware of must have gone straight into Keller’s pockets.”

To the extent Keller intends these statements as an argument that Tremble’s affidavit was not made upon the requisite personal knowledge, *see* WIS. STAT. § 802.08(3), we disagree. According to the affidavit, Tremble is St. Croix’s chief financial officer and “served in that capacity during the entire period in which Robert Keller and Keller Construction Company were involved in the design and construction of an addition to the Hospital,” including the time period between 2006 and 2008. Moreover, Tremble averred he is “familiar with [St. Croix’s] financial records relating to the construction project and payments that were made to Keller Construction Company during the course of performance of the work.”

In any event, as we explain *infra* ¶23, it was Keller’s obligation to submit evidence that would create a genuine issue of material fact regarding its payments to other subcontractors for project work.

judgment motion has not revealed any evidence that would create a genuine issue of material fact regarding Keller Construction's use of project funds.⁷ Keller's bare argument is insufficient to create a fact issue defeating summary judgment. *See* WIS. STAT. § 802.08(3).

¶24 Moreover, as a legal matter, Keller's reply brief assumes, without citation to authority, that payments to unidentified individuals or entities from funds received in trust do not constitute theft if the money is spent on project costs, such as payments to Keller Construction's own employees. We generally do not consider arguments that are unsupported by references to legal authorities. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). In any event, it appears Keller is also wrong on the merits of this point.⁸

¶25 *Keyes* is instructive in this regard. In that case, Angela and Matthew Keyes were charged with felony theft by contractor, in violation of WIS. STAT. §§ 779.02(5) and 943.20(1)(b) (1999-2000). *Keyes*, 309 Wis. 2d 516, ¶1. The

⁷ Keller's failure in this regard is particularly damning given that all (or, at the very least, nearly all) of the factual information on which he purports to base his argument here was in Keller's and Keller Construction's possession. Accordingly, Keller was not reliant on discovery responses or any other forms of investigation to gain such information in defending against summary judgment.

⁸ Although Keller fails to cite it, one passage in *State v. Sobkowiak*, 173 Wis. 2d 327, 496 N.W.2d 620 (Ct. App. 1992), can arguably be read to support Keller's view. *See Capital City Sheet Metal, Inc. v. Voytovich*, 217 Wis. 2d 683, 690 n.4, 578 N.W.2d 643 (Ct. App. 1998) (relying on *Sobkowiak*'s rejection of a "similar contention" to address a hypothetical argument that it was impermissible for a general contractor to use owner's funds to pay for the labor and materials the general contractor furnished to the project). In *Sobkowiak*, we stated that the defendant general contractor was "entitled to reimburse himself for payments he had made for labor and materials on the [home construction] project before he received the \$65,000 draw." *Id.* at 335. The better interpretation of this passage is that a contractor does not violate WIS. STAT. § 779.02(5) when, having used its own funds to pay a subcontractor for work prior to receiving a draw, the contractor uses trust funds to reimburse itself for the amount previously paid. In such instances, the trust money can be said to have been used to satisfy a subcontractor's claim.

Keyes, doing business as Keyes to Design, Inc., were the general contractor on a home construction project, which was financed through a bank loan to be paid over a series of draws. *Id.*, ¶¶5-6. The contract specified that Keyes to Design would be paid \$37,500 for construction services plus the cost of the work, and that Matthew Keyes would be paid \$50 per hour for labor. *Id.*, ¶5.

¶26 Ultimately, the homeowners became suspicious that subcontractors were not being paid and that Angela Keyes was doing some of the contracting work herself. *Id.*, ¶6. An investigator hired by the homeowners testified that the Keyes received approximately \$417,000 in draws from the construction account, \$100,000 of which was “used for a variety of purposes, including loan payments and general business expenses.” *Id.*, ¶11. The investigator testified that despite there being approximately \$47,000 in outstanding subcontractor bills and invoices, Matthew Keyes had received \$30,750 for his labor, Angela Keyes had received over \$75,000 (of which over \$36,000 was unaccounted for), and the Keyes had taken nearly their entire contractor fee. *Id.*, ¶12. Based on this evidence, the circuit court bound the Keyes over for trial. *Id.*, ¶16.

¶27 On appeal, our supreme court affirmed the circuit court’s probable cause determination. Quoting WIS. STAT. § 779.02(5), the supreme court held “the focus of our inquiry is on whether the money Angela received was used ‘for any other purpose’ before ‘all claims ... [had] been paid in full or proportionally in cases of a deficiency.’” *Keyes*, 309 Wis. 2d 516, ¶22. The court assumed, for purposes of addressing the Keyes’ argument, that Angela was acting as a subcontractor and that the \$75,000 she received had fully compensated her for the

cost of providing project materials.⁹ *Id.*, ¶¶23-25. Nonetheless, the court determined the circuit court correctly found probable cause to believe the Keyes had committed theft.

¶28 Contrary to Keller’s arguments here, the supreme court concluded it was not sufficient that the money received by the Keyes was simply used toward the project. *See id.*, ¶27. “While the Keyes are correct that money cannot be used for purposes outside of the project, that does not end contractors’ responsibilities under the statute.” *Id.* By paying themselves in full and leaving other subcontractors with outstanding claims, the Keyes violated the proportionality requirement of the theft-by-contractor statute and used money for a non-statutory purpose. *Id.*; *see also* WIS. STAT. § 779.02(5) (“The use of any such moneys ... for any other purpose until all claims ... *have been paid in full or proportionally in cases of a deficiency*, is theft by the prime contractor.”).¹⁰ Thus, the court concluded the Keyes’ argument that a contractor could avoid liability under § 779.02(5) simply by keeping trust fund money within the project and “us[ing it] for payments that owners would owe” was incompatible with the statutory purpose of securing payments for subcontractors. *See Keyes*, 309 Wis. 2d 516, ¶¶31, 33;

⁹ The supreme court’s assumption that Angela was acting as a subcontractor, while noteworthy, is not significant to our analysis. As the court stated, the Keyes’ claim in this regard appeared “to conflict with [the supreme court’s] longstanding interpretation of ‘subcontractor’ within the context of [the] construction lien law.” *State v. Keyes*, 2008 WI 54, ¶24 n.4, 309 Wis. 2d 516, 750 N.W.2d 30 (citing *Marks Bros. v. Goossen*, 197 Wis. 562, 568, 222 N.W. 818 (1929)). But more importantly, the court stated that “whether Angela was a subcontractor or self-performing prime contractor does not bear upon our analysis.” *Id.*

¹⁰ Accordingly, even if we were to accept Keller’s argument that this is a deficiency case, *see supra* ¶19, there is no evidence in the record demonstrating that, despite Keller Construction receiving \$1.2 million during the project: (1) it sustained losses proportional to those sustained by the subcontractors; or (2) payments were made proportionally out of the \$1.2 million Keller Construction received.

see also Wisconsin Dairies Coop. v. Citizens Bank & Trust, 160 Wis. 2d 758, 765, 467 N.W.2d 124 (1991).

¶29 Keller also makes a policy-based legal argument that he should not be liable for theft by contractor under the circumstances of this case. Appealing to “the practical realities and industry standards of the construction industry,” Keller argues the circuit court’s interpretation cannot stand because it “would require every general contractor in the State of Wisconsin to have an independent source of income in order to be able to pay its employees, to pay for labor, to make equipment payments [and rent equipment,] and to fully fund all aspects of the job until its completion.” While we appreciate Keller’s position, policy decisions such as these are for the legislature to make.

¶30 From an interpretive standpoint, the circuit court’s construction of WIS. STAT. § 779.02(5) was not novel and has guided general contractors in this state for decades. The statute has long been understood to mandate that funds held in trust “can only be used for the payment of claims of the beneficiaries until all such claims are paid.” *Burmeister Woodwork Co.*, 65 Wis. 2d at 299; *see also State v. Blaisdell*, 85 Wis. 2d 172, 178, 270 N.W.2d 69 (1978) (“Until all claims for labor and materials are paid, the contractor’s interest in the money paid to him by the owner to the extent of the amount of all claims due and to become due for that project is merely as a trustee.”). As the *Burmeister* court bluntly put it, the statute “is not concerned with the financial problems of corporations.” *Burmeister Woodwork Co.*, 65 Wis. 2d at 299.

¶31 For these same reasons, we conclude the circuit court also properly granted summary judgment with respect to St. Croix’s claim for misappropriation of construction loan proceeds.¹¹ Such activity is prohibited by WIS. STAT. § 706.11(3), which, like WIS. STAT. § 779.02(5), imposes a trust over mortgage proceeds paid to an owner, contractor, or subcontractor. “The use of any such moneys by any owner, contractor or subcontractor for any other purpose until all [undisputed] claims ... have been paid in full, or proportionally in cases of a deficiency, shall constitute theft by such owner, contractor or subcontractor of any moneys so misappropriated.” Subsec. 706.11(3). According to our supreme court, the statute was “designed to prevent the disposition of funds for purposes other than lienable claims.” *State v. Halverson*, 32 Wis. 2d 503, 515, 145 N.W.2d 739 (1966). Like § 779.02(5), § 706.11(3) is intended to prevent an owner from “find[ing] himself in a position where he would have to pay twice—the lien claim and the mortgage.” *Halverson*, 32 Wis. 2d at 515. Again, this is precisely what occurred in this case.

¶32 Finally, Keller argues the circuit court erred by awarding treble damages under WIS. STAT. § 895.446. Treble damages are available in a civil suit for theft by contractor as long as the plaintiff demonstrates, by a preponderance of the evidence, “a violation of the trust fund provisions of WIS. STAT. § 779.02(5), plus the criminal intent required by WIS. STAT. § 943.20(1)(b).”¹² *Tri-Tech Corp.*

¹¹ Keller does not develop any arguments pertaining specifically to the application of WIS. STAT. § 706.11(3), instead simply asserting that his arguments regarding WIS. STAT. § 779.02(5) “apply equally to misappropriation findings, and they are incorporated herein.”

¹² Our supreme court succinctly traced the statutory path supporting this conclusion:

(continued)

of *Am. v. Americomp Servs., Inc.*, 2002 WI 88, ¶24, 254 Wis. 2d 418, 646 N.W.2d 822. The criminal intent referred to is the “intent to use moneys subject to a trust for purposes inconsistent with the trust.” *Sobkowiak*, 173 Wis. 2d at 339. Keller correctly observes that criminal intent “is generally not readily susceptible of determination on summary judgment.” See *Tri-Tech Corp.*, 254 Wis. 2d 418, ¶30 n.5.

¶33 The supreme court’s use of the adverb “generally” is important, as in this case—for reasons previously explained—there is no genuine issue of material fact concerning whether Keller intended to use the money received in trust for purposes other than the payment of Keller Construction’s subcontractors. The requisite intent may be proven circumstantially, *id.*, ¶29, and may be inferred from the defendant’s conduct, *Blaisdell*, 85 Wis. 2d at 179-80. Indeed, the criminal theft statute “sets forth one acceptable method of proof: a defendant’s refusal to pay a claim upon demand to one entitled to be paid out of trust funds is prima

By its terms, WIS. STAT. § 779.02(5) makes misappropriation of contractor trust funds punishable as a theft under WIS. STAT. § 943.20. [The predecessor statute to WIS. STAT. § 895.446, WIS. STAT.] § 895.80, which provides a civil treble damages remedy to victims of certain intentional property crimes, includes WIS. STAT. § 943.20 as one of the predicate criminal offenses for which the remedy is available. The elements of criminal theft by contractor under WIS. STAT. §§ 943.20(1)(b) and 779.02(5) include specific criminal intent, to-wit, that the defendant knowingly retained possession of or used contractor trust funds without the owner’s consent, contrary to his authority, and with intent to convert such funds for his own use or the use of another.

Tri-Tech Corp. of Am. v. Americomp Servs., Inc., 2002 WI 88, ¶2, 254 Wis. 2d 418, 646 N.W.2d 822.

facie evidence of the defendant’s intent to convert the trust funds to his own use.” *Tri-Tech Corp.*, 254 Wis. 2d 418, ¶28 (citing WIS. STAT. § 943.20(1)(b)).

¶34 It is undisputed that Keller Construction failed to pay subcontractors despite receiving adequate funds to cover all their claims and despite those subcontractors having demanded payment. Keller’s only arguments in response are that: (1) Keller Construction never received trust money, and therefore he could not have had the specific intent to convert that money to his own use; and (2) in the alternative, an issue of fact exists regarding “[w]hat actually happened to the money that was paid into trust, but was not paid out to the subcontractors.”¹³ For the reasons previously stated, these arguments are insufficient to persuade us that the circuit court erred when it granted summary judgment, and they do not overcome the prima facie evidence of Keller’s intent to convert the trust funds for an improper use.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

¹³ Keller vaguely states in his reply brief that he was “not given an opportunity to testify or present evidence” about his conduct. This is a patently false statement. Keller submitted an affidavit opposing St. Croix’s summary judgment motion, which affidavit Keller cited extensively in his brief-in-chief and which is included in his appendix.

