

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 4, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2015AP2149

Cir. Ct. No. 2011CV353

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

NTM, INC.,

PLAINTIFF-RESPONDENT,

V.

GARY FONG, INC.,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,**

GARY FONG,

DEFENDANT-THIRD-PARTY PLAINTIFF,

V.

LARRY ORMSON,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Juneau County: JOHN P. ROEMER, JR., Judge. *Order affirmed.*

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. NTM, Inc. sued Gary Fong, Inc. and Gary Fong for payment on a contract.¹ Fong and Gary Fong filed a third-party complaint against NTM’s CEO Larry Ormson, alleging that Ormson engaged in a kickback conspiracy with a Fong employee that constituted civil theft. Fong alone appeals the circuit court’s order dismissing the third-party complaint. Fong argues that the circuit court erroneously found that the evidence presented at trial did not establish that Ormson engaged in the alleged kickback conspiracy with the Fong employee.² In light of the circuit court’s findings based on its assessment of the weight and credibility of the evidence, we conclude that Fong fails to show that the circuit court’s determination is clearly erroneous. Accordingly, we reject Fong’s argument and affirm.

BACKGROUND

¶2 We briefly summarize the nature of the case. We will present additional facts as relevant to Fong’s specific arguments in our discussion.

¹ For ease of reference, we generally refer to the company as Fong and to Gary Fong personally as Gary Fong.

² Fong also appeals the judgment in favor of NTM on NTM’s breach of contract claim, arguing that, if we reverse the circuit court’s dismissal of the conspiracy claim, we should also decide “ab initio” that the contract between NTM and Fong is unenforceable. Because we affirm, we do not reach Fong’s second argument.

¶3 Gary Fong, Inc. designs and sells photography equipment, and Gary Fong is its CEO. NTM, Inc. manufactures injection-molded plastic products, and Larry Ormson is its CEO.

¶4 From 2007 to 2009, Fong contracted with NTM for the manufacture of photographic equipment using molds and designs developed by Fong.

¶5 For each transaction during the term of the contract, Fong submitted a purchase order to NTM, NTM delivered the product with its invoice, Gary Fong approved a charge on his American Express credit card for the invoiced amount, and NTM deposited the payment from the credit card into an account established for that purpose.

¶6 The Fong-NTM contract required that NTM provide Fong with weekly invoices for the products it manufactured. Gary Fong typically reviewed the NTM invoices before they were paid and ensured that the pricing on the invoices he reviewed complied with the terms and prices in the contract.

¶7 Fong employee Brian Fry received invoices from NTM on behalf of Fong during the term of the contract. He was an employee who was not entitled to commission payments.

¶8 Fong failed to pay several NTM invoices before terminating the contract in August 2009. NTM sued, seeking payment from Fong and Gary Fong for the unpaid invoices.

¶9 Fong and Gary Fong filed a third-party complaint against NTM's CEO, Ormson. Fong and Gary Fong alleged that Ormson had engaged in a conspiracy with Fong employee Fry to commit civil theft, and that the alleged conduct of Ormson and Fry rendered the contract between Fong and NTM void.

Specifically, Fong and Gary Fong alleged that Ormson inflated the manufacturing costs charged to Fong on the NTM invoices by ten percent and paid Fry an illegal kickback from those extra funds.

¶10 The parties' claims were tried over two days to the circuit court. Three witnesses testified as to matters relevant to the third-party conspiracy claim: Gary Fong, Ormson, and Fry's assistant Angela Oliver. In its post-trial briefing, Fong sought reimbursement of the ten percent kickbacks allegedly paid by Ormson to Fry in the total amount of \$80,454.

¶11 The circuit court ruled in favor of NTM on its breach of contract claim seeking payment from Fong for unpaid invoices. The court determined that the third-party conspiracy claim was not supported by "sufficient evidence" and dismissed the third-party complaint. Fong alone appeals the circuit court's order dismissing the third-party complaint.

DISCUSSION

¶12 Fong argues that the circuit court's finding that the conspiracy claim is not supported by sufficient evidence "is simply against the great weight and clear preponderance of the evidence and must accordingly be reversed." More specifically, Fong argues that the great weight and clear preponderance of the evidence that supports Fong's conspiracy claim comprises the following four categories of evidence that, Fong asserts, the court disregarded or insufficiently credited: (1) Ormson's testimony in his initial deposition; (2) annotated invoices provided by Ormson after that initial deposition; (3) a spreadsheet showing deposits and withdrawals for Ormson's bank account together with a calendar showing Fry's work schedule; and (4) testimony regarding Fry's conduct when Fry left the company. As we explain, Fong fails to show that the circuit court

erroneously determined that any or all of these categories of evidence do not suffice to prove Fong's conspiracy claim.

¶13 We begin with the standard of review that governs this appeal, and then explain why, under that standard of review, Fong's argument as to each of the four categories of evidence fails.

I. Standard of Review

¶14 We review a circuit court's factual findings at a bench trial under the clearly erroneous standard. WIS. STAT. § 805.17(2) (2013-14).³ This standard is well established:

Findings of fact by the trial court will not be upset on appeal unless they are against the great weight and clear preponderance of the evidence. The evidence supporting the findings of the trial court need not in itself constitute the great weight or clear preponderance of the evidence; nor is reversal required if there is evidence to support a contrary finding. Rather, to command a reversal, such evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. In addition, when the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.

Cogswell v. Robertshaw Controls Co., 87 Wis. 2d 243, 249-50, 274 N.W.2d 647 (1979) (citations omitted).

³ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶15 In sum, we will not set aside a fact found by the circuit court unless the record shows it to be clearly erroneous—meaning that, after accepting all credibility determinations made and reasonable inferences drawn by the factfinder, the great weight and preponderance of the evidence supports a contrary finding. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983). The standard for reversal is heavily weighted on the side of sustaining circuit court findings of fact in cases tried without a jury. *Leimert v. McCann*, 79 Wis. 2d 289, 296, 255 N.W.2d 526 (1977).

II. Fong's Four Categories of Evidence

¶16 The circuit court expressly identified the deficiencies in each of the four categories of evidence that Fong argues support his third-party conspiracy claim. Fong essentially asks that we disregard the circuit court's determinations of the weight and credibility of the evidence and make those determinations ourselves, in a way that is favorable to Fong. As the standard set forth in paragraph fourteen makes clear, that is not our role. As we explain, Fong fails to show that the circuit court's findings are clearly erroneous.

A. Ormson's Testimony

¶17 Fong argues that Ormson's testimony at his first deposition established that Ormson paid kickbacks to Fry and that the circuit court erroneously failed to give proper weight to that testimony either on its own or in light of the other evidence presented at trial.

¶18 Ormson was first deposed in January 2012. During that deposition, he described a process for the parts invoices whereby he was told to increase the prices to include the two and one-half percent fee charged to NTM by American

Express and a ten percent “kickback” for Brian Fry. Ormson testified that the ten percent “would be drawn out in cash, put in an envelope, and when Brian Fry came in he would get the envelope.” Ormson was deposed again in October 2014. At that deposition he testified that Fry proposed a ten percent commission plan, but that he never paid Fry any money.

¶19 At trial, Ormson testified that it was his understanding that, when he gave the testimony at the first deposition summarized above, he was responding to a hypothetical question about how such a commission plan would work. Ormson also testified that he did not in fact “give Brian Fry any money.”

¶20 The circuit court noted the potential appearance of conflict in Ormson’s testimony at the two depositions and explained that, in making its ruling, the court would go through the other evidence at trial to attempt to “confirm ... any information that would help or assist” it in ruling on Fong’s conspiracy claim.

¶21 Fong argues that the circuit court should have relied on Ormson’s testimony at the first deposition, which according to Fong “speaks for itself.” However, Fong provides no legal authority for his suggestion that the court may not consider other evidence in order to clarify or resolve any conflicts in the evidence. Accordingly, we reject his argument. *See Industrial Risk Insurers v. American Eng’g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (“Arguments unsupported by legal authority will not be considered, and we will not abandon our neutrality to develop arguments.” (citations omitted)).

¶22 In the alternative, Fong argues that the other evidence that the circuit court considered actually supports his conspiracy claim and refutes Ormson’s

ultimate denial that he made any cash payments to Fry. Accordingly, we proceed to address that other evidence.

B. Annotated Invoices

¶23 Fong points to certain annotated documents that he asserts support his claim that Ormson paid Fry kickbacks.

¶24 After Ormson's first deposition, Ormson's attorney sent a letter to Fong's attorney, stating, "Enclosed please find the documentation referred to by my client in the deposition. They show the billings submitted to American Express. The handwritten notes on the top show the deduction of 10% and the date the cash was given to Mr. Fry and his initials indicating he received the cash." The documents comprise five sets of "transaction details" printouts. At the top of the first page of each set, there is a handwritten annotation showing the total dollar amount of the set of invoices, a dollar amount purportedly equal to ten percent of that amount, the initials "BF," and a date.

¶25 These documents were addressed during the cross-examination of Ormson at trial. Ormson testified that he did not annotate these documents until *after* his first deposition, and that the amounts at the top of each statement are only his estimates of ten percent of the invoiced amounts. Thus, as Ormson testified, these documents are not copies of original statements of kickback payments actually made to Fry. The circuit court found, based on the testimony of Fry's assistant Oliver, that none of the "transaction details" printouts could be relied on to indicate that there was a conspiracy between Fry and Ormson.

¶26 The circuit court found all of the "documents and recordkeeping" presented at trial "woefully inadequate." The court credited Ormson's trial

testimony that his American Express and bank statements do not match Fong's American Express and bank statements, and that an audit would need to be undertaken in order to assess the accuracy and significance of these and other business records on which Fong purports to rely. The court found, based on Oliver's testimony, that it was impossible to determine which products were associated with which invoices. In addition, Gary Fong admitted in a deposition that his purchase orders and invoices did not match up, so that he could not document what was paid and what was not paid.

¶27 As to these "transaction details" printouts and the other documents presented at trial, the circuit court found that "[t]here was nothing in the record based upon review of the purchase orders or invoices and other documentation that there was anything unusual or out of the ordinary or that varied." This finding is supported by Gary Fong's trial testimony that he reviewed and approved invoices to ensure they complied with the price list drawn up at the start of the contract. It is also supported by Oliver's testimony that she was not aware of any overcharges, and that she "didn't find any documents that said [Fry] received any cash monies." Finally, it is also consistent with Ormson's trial testimony that he did not pay Fry any kickbacks.

¶28 In sum, the circuit court gave little weight to the "transaction details" printouts in light of the other evidence before it, and Fong fails to provide any basis for us to disturb the court's determination that these documents do not support Fong's conspiracy claim.

C. Spreadsheet and Calendar

¶29 Fong points to a spreadsheet that it prepared to accompany Fry's work calendar; Fong argues that these documents together show that Fry received

kickbacks paid by Ormson. Fong asserts that the spreadsheet shows payments by Fong to the account set up by NTM to receive Fong's payments, as well as deposits into and withdrawals from Ormson's bank account, based on records presented at trial. The calendar shows when, according to Oliver's testimony, Fry was away from his Florida office.⁴ Together, Fong argues, these documents show that Fry was away from his office when he was alleged to have picked up "envelopes of cash" from Ormson in Wisconsin, and that Fry did so. Fong faults the circuit court for not addressing the spreadsheet and for finding the calendar inconclusive.

¶30 As for the spreadsheet, as noted above, the circuit court found all of the "documents and recordkeeping" presented at trial "woefully inadequate." Ormson and Fong both testified that none of the invoices or bank statements could be used to show what was actually paid. Moreover, most of the records related to the Fong-NTM contract were irretrievable, because, as Oliver testified, the server containing the records had been corrupted when Fry left Fong approximately two years after the NTM contract ended. Thus, the circuit court did not erroneously decide not to rely on Gary Fong's spreadsheet taken from the records that were available.

¶31 As for the calendar, the circuit court found that it did not indicate where Fry was when he was marked as being out of the office. The court also found that all but one of the sets of dates that Fry was marked as being out of the office did not coincide with the dates that Ormson provided, in his deposition and

⁴ Fry worked remotely from his home in Florida, and we refer to his home in Florida as his office.

on the annotated “transaction details” printouts, as dates when Fry may have picked up cash payments from Ormson in Wisconsin. The circuit court went on to consider that there was no other testimony or evidence to confirm where Fry was, or even whether he was in Wisconsin, when he was marked as being out of the office.

¶32 Fong argues that the circuit court was wrong to give little weight to the calendar merely because the dates did not “exactly” match up with the dates provided by Ormson. But the determination of the weight of the evidence is peculiarly within the province of the circuit court, and we will not disturb that determination. See *Tang v. C.A.R.S. Prot. Plus, Inc.*, 2007 WI App 134, ¶19, 301 Wis. 2d 752, 734 N.W.2d 169 (“the weight of the testimony and the credibility of the witnesses are matters peculiarly within the province of the [circuit] court acting as the trier of fact” (quoted source omitted)). Moreover, Fong does not address a second reason why the court gave little weight to the calendar, which is the absence of evidence showing that Fry was in Wisconsin, where he might have been picking up cash from Ormson, when Fry was away from his office. Further, Fong does not address at all the evidence supporting the circuit court’s finding that the financial records that Fong attempted to connect to the calendar were insufficiently reliable.

¶33 In sum, Fong fails to provide a basis for upsetting the circuit court’s failure to accord weight and credibility to the spreadsheet and calendar as evidence showing a conspiracy by Ormson and Fry.

D. Testimony Related to Fry

¶34 Fong makes two arguments about the testimony related to Fry. Fong’s first argument challenges the inference the circuit court drew from Fong’s

failure to call Fry to testify at trial. Fong's second argument challenges as improper the circuit court's failure to draw Fong's preferred inferences from testimony about certain actions taken by Fry. As to both, Fong asks that we draw inferences different from those drawn by the circuit court, but that is not our role. Even if either of the inferences suggested by Fong may be reasonable, "[w]hen more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact." *Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979). We proceed to explain why Fong fails to persuade us that the circuit court's inferences were not reasonable.

¶35 First, it is not disputed that Fry would have had critical information about a kickback conspiracy, and Fong argues that the circuit court erroneously inferred from Fong's failure to secure the testimony of Fry as a witness at trial that Fry's testimony would *not* support Fong's conspiracy claims. Fong argues that "any inference to be drawn from Fry's absence at trial must logically be drawn in Fong's favor." This is so, according to Fong, because Gary Fong testified that he tried to contact Fry, and Fry's failure to respond must be taken as an indication that Fry had conspired to take the kickbacks as Fong alleged.

¶36 Fong fails to persuade us that the circuit court's inference is not reasonable. Gary Fong testified at trial that he had sent Fry a copy of Ormson's January 2012 deposition transcript and that "efforts [were] undertaken to gain Mr. Fry's voluntary cooperation," but that Gary Fong never heard back from Fry. The circuit court could have reasonably found that, even if true, this in itself signifies nothing in the context of a missing trial witness. If Fry failed to respond to Gary Fong, that could have been caused by virtually any number of reasons, and it certainly need not be taken as an admission of liability.

¶37 Moreover, there is no room to dispute the critical nature of Fry’s testimony. As the circuit court noted, Gary Fong acknowledged in deposition testimony that Fry “would be able to” provide “all the information needed to establish the conspiracy ... [and] support [the conspiracy] claim.” The court indicated that, because Fry was a critical witness and his testimony was not secured by Fong or Gary Fong, the court would infer that Fry would have given testimony unfavorable to Fong’s kickback theory at trial. The court appropriately applied the law reflected in WIS JI—CIVIL 410, which states:

If a party fails to call a material witness within his control, or whom it would be more natural for that party to call than the opposing party, and the party fails to give a satisfactory explanation for not calling the witness, you may infer that the evidence which the witness would give would be unfavorable to the party.

¶38 If litigants produce no evidence where litigants normally would, the circuit court may infer that the true facts are the exact opposite of those asserted. *See Village of West Milwaukee v. Bergstrom Mfg. Co.*, 242 Wis. 137, 143, 7 N.W.2d 587 (1943) (“The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party.” (citing 1 Wigmore, Evidence, 2d Ed., § 285; *Booth v. Frankenstein*, 209 Wis. 362, 370, 245 N.W. 191 (1932))). Fong fails to show that the circuit court unreasonably inferred, from the record before it, that Fry’s testimony would not have supported Fong’s conspiracy claim.

¶39 Fong’s second argument is that the circuit court improperly failed to infer from testimony about certain conduct by Fry that Fry did take kickbacks as

Fong alleged. The court heard testimony by Gary Fong that Fry left the company after the company discovered that Fry failed to pay a tax lien. The court also heard testimony by Oliver that the server containing NTM transaction details was damaged while in Fry's possession. Fong argues that the only logical inference from this testimony is that Fry quit his job and "destroy[ed] incriminating computer files" so that the alleged kickback scheme would not be discovered. However, the circuit court drew different inferences, based on the fact that both Fry's leaving the company and the damaging of the files on the server took place when Fong discovered that Fry failed to pay the tax lien, before Ormson's first deposition. Fong fails to persuade us that the court's inference, that Fry's conduct as described at trial related to the unpaid tax lien and not to the alleged kickback scheme, is unreasonable.

¶40 In sum, Fong fails to provide a basis for us to upset the circuit court's decisions to infer that Fry would have given unfavorable testimony to Fong if Fry had testified as a witness at trial, and to decline to infer from testimony about certain conduct by Fry that Fry did take kickbacks as Fong alleged.

CONCLUSION

¶41 For the reasons stated, we conclude that Fong fails to show that the circuit court's finding that the evidence did not support the third-party conspiracy claim is clearly erroneous. Therefore, we affirm the circuit court's order dismissing the third-party complaint.

By the Court.—Order affirmed.

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

