

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 26, 2012

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. 2011AP2325

Cir. Ct. No. 2010CV2976

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

TWP ARCHITECTURE, LTD.,

PLAINTIFF-RESPONDENT,

V.

WILLIAM A. PATCH, DONALD KRAUSE AND DEBORAH KRAUSE,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Waukesha County:
DONALD J. HASSIN, JR. Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. William A. Patch and Donald Krause and Deborah Krause (“Krause,” if referring only to Donald) appeal a judgment holding them individually liable under the theft-by-contractor statute, WIS. STAT. § 779.02(5)

(2009-10).¹ The trial court’s finding that Patch and the Krauses misappropriated, within the meaning of the statute, approximately \$156,458 owed to subcontractor TWP Architecture, Ltd. is not clearly erroneous. We affirm.

¶2 The Krauses are the sole members of Fairview Center, LLC, which owned a real estate project situated on property the Krauses had owned. Patch is the owner and president of Commonwealth Partners, Ltd., the project’s developer. TWP vice president John Curran testified that he, Krause and Patch initially met to “basically put together our plan of attack,” and they subsequently “were always in contact as far as ... how to develop the plan.” Between 2004 and 2008, TWP provided approximately \$298,000 in architectural services for the project. Neither the quality of the work nor any of the invoices were objected to.

¶3 In 2006, Fairview obtained a \$3.5 million dollar loan for project improvements and gave the bank a mortgage on the project’s real property. The Krauses and Patch personally guaranteed the loan. When the loan was funded, TWP had outstanding invoices for past services. The loan had a \$50,000 architectural line item to TWP. The record is clear that Deborah Krause and Patch paid TWP \$80,000 from the loan proceeds, but it does not establish that TWP received any earmarked money from an escrow authority. Loan proceeds also were used to pay interest on the loan and to reimburse the Krauses or Fairview for funds expended before the date of the loan. It is undisputed that \$156,458.12 of

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

TWP's invoiced services have gone unpaid. They also do not allege a deficiency such that TWP should be paid only proportionately. *See* WIS. STAT. § 779.02 (5).²

¶4 TWP commenced this action against Patch, his wife Mary Patch and the Krauses alleging theft by contractor in violation of WIS. STAT. §779.02(5) and fraud in the inducement. The trial court's dismissal of defendant Mary Patch and the fraud-in-the-inducement cause of action are not challenged on appeal. The court granted judgment against each remaining defendant individually in the full amount of the outstanding invoices. Patch and the Krauses appeal.

² WISCONSIN STAT. § 779.02(5) provides in relevant part:

(5) THEFT BY CONTRACTORS. The proceeds of any mortgage on land paid to any prime contractor ... for improvements upon the mortgaged premises ... 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 The use of any such moneys by any prime contractor ... for any other purpose until all claims ... have been paid ... 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. Any of such misappropriated moneys which have been received as salary, dividend, loan repayment, capital distribution or otherwise by any shareholder, member, or partner not responsible for the misappropriation shall be a civil liability of that person and may be recovered and restored to the trust fund specified in this subsection by action brought by any interested party for that purpose.

¶5 On review of a case tried to the court, we will not reverse the court’s factual findings unless they are clearly erroneous. *Pindel v. Czerniejewski*, 185 Wis. 2d 892, 898, 519 N.W.2d 702 (Ct. App. 1994); *see also* WIS. STAT. § 805.17(2). We examine the record, not for evidence to support a finding the trial court did not make, but for facts to support the findings it did make. *Hawes v. Germantown Mut. Ins. Co.*, 103 Wis. 2d 524, 543, 309 N.W.2d 356 (Ct. App. 1981). The trial court is the ultimate arbiter of witness credibility and of the weight to be given to each witness’s testimony. *Pindel*, 185 Wis. 2d at 898. “We review the application of [WIS. STAT. §] 779.02(5) to the facts independently because it presents a question of law.” *W.H. Major & Sons, Inc. v. Krueger*, 124 Wis. 2d 284, 296, 369 N.W.2d 400 (Ct. App. 1985). Since the trial court’s legal conclusions and factual findings are intertwined, we give some weight to the court’s decision, although it is not controlling. *See Capen Wholesale, Inc. v. Probst*, 180 Wis. 2d 354, 361-62, 509 N.W.2d 120 (Ct. App. 1993).

¶6 Patch’s and the Krauses’ appellate argument hinges on their strict portrayal of Patch as the prime contractor and the Krauses as the owners. They frame the issue as being whether, because WIS. STAT. §779.02(5) proscribes a *prime contractor*’s other use of funds owed to subcontractors, the statute mandates that subcontractors be paid before the *owner* receives reimbursement for funds the *owner* advanced. They assert that the evidence was that only Krause, as owner, reimbursed himself for prior expenditures and that there is no evidence that Patch, as prime contractor, used loan proceeds for other than project-related expenses.

¶7 Like the trial court, we are not swayed by this coloring of the facts or persuaded that Patch and the Krauses had such distinct roles. The main purpose of WIS. STAT. § 779.02(5) is to protect subcontractors through a trust fund “until all the claims have been paid.” *See Kraemer Bros., Inc. v. Pulaski State Bank*, 138

Wis. 2d 395, 399-400, 406 N.W.2d 379 (1987). Were we to accept appellants' argument, the protection afforded a subcontractor would depend too greatly on what hat a loan recipient wore.

¶8 The trial court noted that Patch and the Krauses were jointly represented by the same counsel who insisted there was no conflict or finger-pointing between the two. It found that Krause and Patch both met and worked with TWP and Deborah made at least one payment to TWP, signing the check on behalf of Fairview. Both Patch and the Krauses personally guaranteed the loan, Patch at the Krauses' request to ensure that he "had some skin in the game." TWP was neither a part of nor aware of the escrow agreement in the loan assigning a \$50,000 line item for architectural services. TWP's Curran testified that Patch was designated a co-owner on zoning and building matters before the city plan commission and that he believed both Patch and Krause were principals of Fairview. The court's finding that TWP did not have a "bifurcated" subcontractor arrangement with Fairview and Commonwealth is not clearly erroneous.

¶9 Appellants also argue that the trial court erred in finding Patch personally liable when no evidence linked him or Commonwealth to receipt of any of the funds. Patch testified, for example, that it was the bank, not he and the Krauses, that directly diverted loan proceeds to make interest payments. There is no requirement that a corporate officer responsible for the misappropriation of funds receive a benefit from his or her acts before he or she may be held personally liable. *Burmeister Woodwork Co. v. Friedel*, 65 Wis. 2d 293, 298, 222 N.W.2d 647 (1974). The trial court found that any dispute between the bank and the borrowers was not an issue for TWP. We agree with the court's assessment that "the fundamental postulate" of the theft-by-contractor statute is that a loan recipient is not entitled to use money from loan proceeds for another purpose,

including reimbursing oneself for pre-loan outlays, “until every chirping bird that did work has been paid.” We affirm the judgment.

By the Court.—Judgment affirmed.

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

