COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2429

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

MICHAEL A. DOWNEY AND ANNA M. DOWNEY,

PLAINTIFFS-APPELLANTS,

V.

JOHN P. KENDALL AND MARGARET T. KENDALL,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Michael A. and Anna M. Downey appeal from a judgment awarding John P. and Margaret T. Kendall additional damages for wages John Kendall lost when he was induced to entered into a business venture

with Michael Downey.[1] Downey argues that because there was no corroborating evidence of Kendall's lost wages, the award is not supported by sufficient evidence. He also claims that the award fails to deduct a sum that this court previously suggested was inconsistent with lost wages recovery. We affirm the award of lost wages but reverse the trial court's refusal to vacate the award of $12,654 to Kendall, as it constitutes a windfall. The trial court is directed to vacate that portion of the original judgment.

This case has been before this court once before. *See* ***Downey v. Kendall***, No. 95-2061, unpublished slip op. (Wis. Ct. App. Apr. 9, 1997). Relevant to this appeal is that Kendall quit his job as a mortician to join Downey in a machine shop business venture, Eighty Fourth, Inc. The venture failed and Downey was found to have breached the parties' agreement to transfer certain assets from another corporation to Eighty Fourth. It was also determined that Downey misrepresented facts about the asset transfer and fraudulently obtained Kendall's personal guaranty of the venture's obligations. Kendall was awarded the return of his investment of $45,229, punitive damages of $10,000, and a sum of $12,654 to adjust the "owners loans accounts." On appeal, we reversed the trial court's determination that there was insufficient evidence to establish Kendall's claim for lost wages. *See* ***id.*** at 7-8. The trial court was directed on remand to make factual findings as to the total amount of Kendall's wage loss based on the record made at trial. Subsequently, the trial court awarded Kendall $84,500 for wages lost during his twenty-six month involvement with the failed business venture. Downey appeals.

[1] Although their wives are named as parties to the action, the active participants in the venture were Michael Downey and John Kendall. Therefore, we refer to the parties as Downey and Kendall.

Downey takes issue with the absence of Kendall's tax return as corroborating evidence of Kendall's wage loss. In our opinion in the first appeal, we stated: "Kendall testified that he had earned $39,000 annually in the job he quit because of his joint venture with Downey. He introduced his income tax return to corroborate his claim. Thus, the evidence was sufficient for a determination of damages." ***Id.*** at 8. Downey argues that this court should take judicial notice that there was in fact no tax return in the record evidencing Kendall's lost wages, and therefore, the trial court's original determination that the evidence was insufficient was correct and should be reinstated. It does not matter whether Kendall's tax return was introduced at trial.[2] The tax return would only have been corroborating evidence.

Whether the evidence is sufficient for a party to meet the burden of proof is a question of law. *See* ***Ehlinger v. Sipes***, 148 Wis.2d 260, 265, 434 N.W.2d 825, 828 (Ct. App. 1988), *aff'd*, 155 Wis.2d 1, 454 N.W.2d 754 (1990). Kendall's testimony, uncontested at trial,[3] was alone sufficient evidence to support a determination of the amount of lost wages. Kendall's testimony referred to his W-2 as reflecting approximately $39,000 in earned income in the year before he quit his job to join the venture. The trial court found this evidence to be credible. The trial court's credibility determination may not be disturbed on appeal. *See* ***Plesko v. Figgie Int'l***, 190 Wis.2d 764, 775-76, 528 N.W.2d 446, 450 (Ct. App.

[2] Apparently the statement in the first opinion was incorrect. Downey never brought the potential misstatement to the attention of this court and did not seek review before the supreme court. He has waived his right to claim error.

[3] Downey now tries to impugn Kendall's trial testimony by suggesting that Kendall had not proved that he did not have any earned income during the period at issue. Downey did not make the challenge at trial and cannot do so now.

1994). The trial court's findings as to the dates that Kendall was involved with the venture are not clearly erroneous. The award of lost wages is affirmed.

The other issue is whether the failure to deduct from the lost wages award the $12,654 previously awarded to Kendall violates our previous proscription against double dipping. We held:

> [T]he trial court may not award both lost wages and income from the corporation …. It would be inconsistent to negate the business arrangement for misrepresentation and yet give Kendall the benefit of that arrangement to the extent of income realized by Eighty Fourth. While Kendall may recover lost wages, he may not "double dip." On remand, the trial court will have to either vacate the award of damages which includes Kendall's share of the $47,000 payment, or offset any income Kendall realized from the corporation against the award of lost wages.

Downey, slip op. at 8 (footnote omitted).

Downey argues that the $12,654 Kendall was awarded as an adjustment to the owners' loan accounts was calculated by giving Kendall credit for some of the income earned by the venture. We suspected in the first appeal that the $12,654 award included in some way income realized by the venture and hence our warning against double dipping was made. However, on remand the trial court determined that the $12,654 award "balances the owner's loan accounts and brings Kendall back to zero invested." Downey claims that the trial court misinterpreted the evidence with respect to the adjustments made to Downey's account records.

Even if we accept the trial court's explanation and our concerns about double dipping with respect to income are extinguished, it still appears that

Kendall received a windfall by virtue of the $12,654 award.[4] Kendall was awarded $45,229 as the return of the money he put into the venture. Kendall indicates that the owners' loan accounts "merely record cash advances by the shareholders for business expenses" and that the $12,654 award "simply balanced the account and put Kendall in a zero position in relation to Downey as far as advances to the company." Yet the $45,229 award put Kendall in a zero position in relation to any advances of money he made to the venture. Kendall is not entitled to twice be put in a zero position with relation to money he paid into the venture. Again, it is inconsistent to negate the business arrangement by returning to Kendall the entire amount of money he put into the venture but also zero out the business accounts by giving Kendall the benefit of his only thirty percent responsibility for business capital requirements.[5] The $12,654 award is a windfall to Kendall. We reverse the trial court's refusal to vacate that award and remand to the trial court with directions to vacate the $12,654 award in the original judgment.

[4] We need not resolve the exact source of the adjustments made to the owners' loan accounts. Both parties present a reasonable interpretation of what the $12,654 award represents. We sustain the trial court's choice between the two reasonable inferences to be drawn from the evidence. *See* ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis.2d 462, 472, 529 N.W.2d 594, 598 (1995) (when more than one inference may be drawn from the evidence presented at trial, we are bound to accept the inference drawn by the fact finder). Thus, we summarily reject Downey's request that he be credited with $17,304 as Kendall's share of income realized by the venture. Additionally, the claim is raised for the first time on appeal and is not within the scope of the issues the trial court dealt with on remand.

[5] This point is illustrated by Kendall's explanation that upon adjusting the owners' loan accounts for Downey's improper charges and transactions, the $108,852 balance was then compared to "Kendall's accurate account to determine whether [the parties] had truly advanced monies for the corporation in accordance with the agreed 70% Downey/30% Kendall ratio." Kendall states that his share was only $32,574 but that he in fact advanced $45,229; therefore, he was entitled to the $12,654 payment from Downey to balance the accounts. But Kendall had already been awarded his $45,229.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.