

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 6, 2007

David R. Schanker
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. 2006AP936

Cir. Ct. No. 2004CV152

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

DANIEL H. HEFTER, D/B/A HEFTER TRUCKING,

PLAINTIFF-APPELLANT,

V.

ENNIS TRUCKING, INC., JANE M. ENNIS AND WAYNE R. ENNIS,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Daniel H. Hefter appeals from a judgment after a trial to the court that dismissed his claims against Jane Ennis and Wayne Ennis. He argues that the Ennises, as corporate officers of Ennis Trucking, are personally liable to him because they breached a fiduciary duty owed to him. We conclude

that the relationship between the parties was contractual and there was no trust created. Consequently, we affirm the judgment of the circuit court.

¶2 Hefter, who does business under the name of Hefter Trucking, entered into an agreement with Ennis Trucking, Inc. Ennis Trucking is owned and operated by Jane Ennis and Wayne Ennis. Under this agreement, Ennis Trucking would provide him with leads about potential customers seeking transportation for their goods. If Hefter transported goods based on those leads then he would report his charges to Ennis Trucking. Ennis Trucking, in turn, would then bill the customer. At the end of each month, Ennis Trucking was to account to Hefter for all of the amounts paid to it by Hefter's customers. Ennis Trucking had thirty days to pay Hefter, and kept ten percent as payment for its services.

¶3 Eventually, Ennis Trucking did not pay Hefter what it owed him, and instead used the money for the corporation's own needs. Hefter sued both Ennis Trucking, and Jane Ennis and Wayne Ennis individually. Ennis Trucking did not contest the claim and the circuit court entered summary judgment in Hefter's favor. The case went to trial on Hefter's claims against Jane Ennis and Wayne Ennis.

¶4 At trial, Hefter argued that the Ennises were personally liable to him. He asserted that their written contract created a broker/agent relationship between him and Ennis Trucking, and that the monies collected by Ennis Trucking on his behalf were held in trust for him. As a result of this trust, Ennis Trucking owed him a fiduciary duty to account for his funds. His argument continued that Ennis Trucking converted the money held in trust for him to its own use. He then argued that a corporate officer who converts funds is personally liable for the conversion.

¶5 The circuit court rejected this argument. It concluded that the contract language was clear and unambiguous. The court acknowledged that Ennis Trucking owed Hefter the monies he alleged in his complaint. It found, however, that “[t]here is nothing in the contract that creates any additional special relationship between the parties.”

¶6 On appeal, Hefter again argues that the relationship between him and Ennis Trucking was a broker/agent relationship, and as such, the Ennises owed him a fiduciary duty to account for his funds. Further, he argues that the parties’ agreement created a trust, and that the Ennises are liable for breaching that trust agreement.

¶7 We conclude that this case involves a mixed standard of review. We sustain a trial court’s findings of fact unless they are clearly erroneous. *Klinefelter v. Dutch*, 161 Wis. 2d 28, 33, 467 N.W.2d 192 (Ct. App. 1991). The legal significance of those facts, however, is a question of law which we review de novo. *Id.* We conclude that this was not a broker/agent relationship but rather a simple commercial contract for services. Further, the essential question presented by this appeal is whether Hefter presented sufficient evidence at trial to show that the parties intended to create a trust. We conclude that Hefter did not establish the intent to create a trust.

¶8 A trust is created only if the settlor properly manifests an intention to create such a trust. RESTATEMENT (SECOND) OF TRUSTS § 23 (1959). Intent is established by the “external expression of intention.” *Id.* In this case, Hefter was the settlor of the alleged trust. He, however, did not testify at trial, and consequently did not testify about his intent. Consequently, the only evidence in

support of his position was the contract. The document must also clearly identify the intent. See *Otjen v. Frohbach*, 148 Wis. 301, 308, 134 N.W. 832 (1912).

[N]o particular form of words is necessary to create a trust. A trust may be created without the use of the words “trust” or “trustee,” and, on the other hand, the use of the words “trust” or “trustee” do not necessarily show an intention to create or declare a trust. The intention to create a trust must be clear, and the writing employed must be reasonably certain in its material terms.

Id. Further:

The intention to create a trust must be sufficiently expressed, and the declaration of trust must show the intention with reasonable certainty. It is necessary that there be a definite, unequivocal, explicit declaration of trust, or circumstances which show with reasonable certainty or beyond a reasonable doubt that a trust was intended to be created. The expression of intention, however, is sufficient if the language used shows the intention to create a trust, even though the parties may not understand what a trust is.

90 C.J.S. *Trusts* § 41 (2002) (footnotes omitted).

¶9 In this case, the circuit court found that the contract between the parties created a contractual relationship and not a trust. We agree. The contract referred to Ennis Trucking as an independent contractor and not a trustee. Hefter argues that Jane Ennis and Wayne Ennis testified that they knew that the funds were being held for Hefter’s benefit. This is true. But they also testified that they knew that they could use the money for corporate purposes until it was time to pay Hefter. We conclude that this was a simple commercial contract that created a debt relationship and nothing more.

¶10 We also conclude that the contract did not create a broker/agent relationship, and that Ennis Trucking was not Hefter’s agent. The contract stated

that Ennis Trucking was “an independent contractor.” Further, a broker does not have the right to receive monies in its own name. *See* 12 AM. JUR. 2D *Brokers* § 1 (1997). The contract did not restrict Ennis Trucking’s ability to receive and use the funds it collected for corporate purposes. Because the agreement did not create either a broker relationship or a trust, the Ennises did not owe a fiduciary duty to Hefter. For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

