COURT OF APPEALS
DECISION
DATED AND FILED

August 29, 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. 2011AP2154 **Cir. Ct. No. 2010CV5309**

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

DANIEL K. ANDERSON, LTD. CERTIFIED PUBLIC ACCOUNTANTS,

PLAINTIFF-RESPONDENT,

V.

GOOD TO GO QUICK MART, INC.,

DEFENDANT-APPELLANT,

DOMINIC ALIOTO, JR. AND CAROL ALIOTO,

DEFENDANTS.

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

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Good to Go Quick Mart, Inc., appeals from a judgment and an order[1] granting summary judgment in favor of Daniel K. Anderson, Ltd. Certified Public Accountants (DKA) on DKA's claim for unjust enrichment. Good to Go contends the circuit court improperly granted summary judgment because material facts remain in dispute or, in the alternative, it should be allowed to raise the defense that it is an innocent transferee for value. We conclude the court reasonably applied the theory of unjust enrichment and properly exercised its discretion in allowing recovery to DKA. We affirm.

¶2 The following facts are not in dispute. Larry Shinabarger stole an estimated $100,000 while working for Good to Go, a gas station and convenience store, by falsifying daily receipts and ledgers. Good to Go fired Shinabarger in August 2008 and negotiated a deal by which it agreed to accept $60,000 in final settlement of all claims. Almost immediately, Shinabarger found a position as an accountant with DKA, an Illinois accounting firm, and, within a few months, stole $60,000 from DKA and used it to pay Good to Go.

¶3 Upon learning of the theft, DKA's counsel informed Good to Go that the money was stolen. Good to Go refused to return it and DKA filed this unjust enrichment action. Concluding that this essentially was a case of "rob[bing] Peter to pay Paul," where "Paul" was not naïve about Shinabarger, the circuit court granted DKA's summary judgment motion. Good to Go appeals.

[1] The notice of appeal states that Good to Go is appealing from both the August 8, 2011 order granting Anderson's motion for summary judgment and the August 30, 2011 judgment awarding costs. As Good to Go's brief raises no appellate challenges to the amount of costs, we limit this decision to a review of the grant of summary judgment.

¶4 We review summary judgments independently, employing the same methodology as the circuit court. ***Mid Wis. Bank v. Forsgard Trading, Inc.***, 2003 WI App 186, ¶8, 266 Wis. 2d 685, 668 N.W.2d 830. The summary judgment methodology is well established and need not be repeated here. *See, e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶21-23, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. ***Id.***, ¶24.

¶5 The circuit court found that, knowing all too well that Shinabarger was a thief, Good to Go had reason to be wary when, a short while after being fired, Shinabarger "rolls up with $60,000 in satisfaction of a larger debt[] he acknowledged he had stolen … you can't basically cover up and say I don't want to know where you got that money." The court continued:

> One is [left] with the thought it's simply nothing more than a case of rob Peter to pay Paul. Somehow Paul seems to want to keep the money even though he knew it was in satisfaction of a theft.
>
> ….
>
> If nothing else it's not a matter of good public policy that we permit people to keep money that is stolen regardless of whatever circumstances they may have been victimized.

¶6 An action for recovery based upon unjust enrichment is grounded on the moral principle that one who has received a benefit has a duty to make restitution where retaining such a benefit would be unjust. ***Puttkammer v. Minth***, 83 Wis. 2d 686, 689, 266 N.W.2d 361 (1978). A claim of unjust enrichment requires proof that the plaintiff provided the defendant with a benefit, the defendant appreciated or knew of the benefit and the defendant retained the benefit under circumstances that make its retention inequitable. ***Tri-State Mech., Inc. v.***

Northland Coll., 2004 WI App 100, ¶14, 273 Wis. 2d 471, 681 N.W.2d 302. "[T]he application of the facts to the unjust enrichment legal standard is a question of law that we review de novo." ***Id.***, ¶13. A circuit court's "decision to grant equitable relief in an action for unjust enrichment is discretionary." ***Id.***

¶7 The first two elements are satisfied. Good to Go does not dispute that it received and appreciated a $60,000 benefit and that it knew, albeit not at the time of receipt, the source of the money. The timing of the choice to accept or reject the benefit need not coincide precisely with the time the benefit is conferred if the nature of the benefit is such that it can be returned. ***Buckett v. Jante***, 2009 WI App 55, ¶17, 316 Wis. 2d 804, 767 N.W.2d 376. Money is returnable.

¶8 Good to Go and DKA part ways on the third element, whether it would be inequitable for Good to Go to retain the $60,000. Good to Go argues it was not unjustly enriched because the money was in satisfaction of a legitimate debt; that, by accepting the money from Shinabarger, it lost out on any insurance recovery; and that it is a reasonable inference that DKA has realized a recovery from other sources, such as the $63,620 civil judgment it has against Shinabarger in Illinois or the restitution order in his Illinois criminal conviction.

¶9 DKA's answers to interrogatories expressly state that "[DKA] has received no payment or other reimbursement for Mr. Shinabarg[e]r's theft." The circuit court found that Good to Go rejected its options of making an insurance claim or prosecuting the matter in favor of accepting money from a known thief, and that allowing Good to Go to keep the money would make for poor public policy.

¶10 Good to Go alternatively contends that the circuit court should have ruled that being a bona fide, or "innocent," transferee or payee for value is a

defense to an unjust enrichment claim, as the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 67 (2011) and some other jurisdictions recognize. *See, e.g.*, ***Chicago Title Ins. Co. v. Ellis***, 978 A.2d 281, 291 (N.J. Super. Ct. App. Div. 2009) (stating that one who innocently receives money in exchange for something of equivalent or comparable value, without participation in or knowledge of a fraud, "has a greater right to keep the money than the victim of the fraud has to its return from that person"); *see also* ***Plitt v. Greenberg***, 219 A.2d 237, 241 (Md. 1966) (stating that a plaintiff cannot recover funds that come in good faith into the possession of a transferee who pays a good and valuable consideration for it). Good to Go points out that since Wisconsin law already recognizes that being a bona fide purchaser of property for value is a defense, *see, e.g.*, ***Dairyman's State Bank v. Tessman***, 16 Wis. 2d 314, 317-22, 114 N.W.2d 460 (1962), the foundation is there for taking the next step. We are not convinced.

¶11 The key feature of Good to Go's citations to authority is the complete and total innocence of the person who received the money. The trial court could not put Good To Go in that category. It felt that Good to Go's prior knowledge of Shinabarger's character should have led Good to Go to at least question from where the $60,000 in cash had come. Because it did not, Good to Go could not stand side-by-side with the innocent person contemplated by the Restatement and related cases.

¶12 A finding of unjust enrichment is a discretionary call by the circuit court because such decisions are equity-based. We have no hesitation upholding the circuit court's equity determination which, using a demonstrated rational process based on the facts and law, reached a conclusion that a reasonable judge could reach. ***Gaugert v. Duve***, 2001 WI 83, ¶44, 244 Wis. 2d 691, 628 N.W.2d

861. Therefore, this is not the case to comment upon, much less adopt or refuse to adopt, the Restatement and related cases.

By the Court.—Judgment and order affirmed.

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