

IN THE COURT OF APPEALS OF IOWA

No. 8-145 / 07-0277
Filed May 14, 2008

PALMER COLLEGE OF CHIROPRACTIC,
Petitioner-Appellant,

vs.

**PALMER COLLEGE OF CHIROPRACTIC
ALUMNI ASSOCIATION,**
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve,
Judge.

The petitioner appeals from the denial of its request for the imposition of a
constructive trust and from a contempt order issued by the district court.

AFFIRMED.

Jeffrey Bittner of Jeff Bittner Law, P.C., Davenport, and R. Richard Bittner
and Robert D. Lambert of Bittner, Lambert & Werner, Davenport, for appellant.

Robert M. Hogg and Patrick Roby of Elderkin & Pirnie, P.L.C., Cedar
Rapids, for appellee.

Heard by Vogel, P.J., and Zimmer and Baker, JJ.

BAKER, J.

Palmer College of Chiropractic (Palmer) appeals from the denial of its request for the imposition of a constructive trust on funds held by the Chiropractic International Alumni Association (Alumni Association) and from a contempt order issued by the district court. We affirm.

Background Facts and Proceedings.

This appeal arises out of a longstanding dispute between Palmer and its alumni association, which was separately incorporated in 1991 and was originally known as the Palmer College of Chiropractic International Alumni Association (PCCIAA). The Alumni Association eventually became a vocal critic of the leadership at Palmer. Alumni Association president Scott Harris characterizes it as merely a dispute with the current administration, while Palmer characterizes it as criticism of the school itself.

In February 2005, Palmer's Board voted to disassociate itself with the Alumni Association and shortly thereafter it filed suit (*Palmer I*) to restrain the Alumni Association from using the Palmer name, the Palmer logo, and other Palmer symbols. In a December 14, 2005 order, the district court prohibited the Alumni Association from using the Palmer name, crest, or logo, but refused to impose a constructive trust over funds held by the Alumni Association.

Following the entry of this order, the Alumni Association continued to use the acronym PCCIAA. Palmer, in response, filed a second action (*Palmer II*) seeking a second injunction against the use of the initials "PCC" and to again impose a constructive trust. Following a hearing, the district court denied Palmer's request for temporary injunctive relief. However, it set a trial date on

the permanent injunction request and ordered that the Alumni Association's assets remain in the custody of the Scott County Clerk of Court pending that trial.

Palmer then instituted two separate contempt actions. The first was denied but the second was granted. The Alumni Association was found in contempt for its use of the initials PCCIAA, but the court declined to impose the per diem sanction requested by Palmer. The court also again declined to establish a constructive trust of the Alumni Association's assets. Palmer had requested the constructive trust after it had alumni that had donated testify that they did not intend their donations to be used to either insult the College or pay legal fees for this conflict.

Palmer appeals, contending (1) a constructive trust or similar remedy should have been imposed to insure the Alumni Association will follow its bylaws and mission statement, (2) the court should have found the Alumni Association in contempt for failing to immediately take down a website entitled www.officialpalmeralumni.org, and (3) the court should have imposed per diem sanctions for the Alumni Association's continued use of the initials "PCCIAA."

Scope of Review.

We generally review this equity action de novo. Iowa R. App. P. 6.4. We have a duty to examine the entire record and "adjudicate anew rights on the issues properly presented." *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the trial court's fact findings, especially regarding witness credibility, but they are not binding. Iowa R. App. P. 6.14(6)(g). However, on the contempt issue, our review is for correction of errors at law and not de novo. *Rolek v. Iowa Dist. Ct.*, 554 N.W.2d 544, 547 (Iowa 1996).

Constructive Trust.

As noted, the district court declined to impose a constructive trust on the Alumni Association's funds. "A constructive trust is an equitable remedy courts apply to provide restitution and prevent unjust enrichment." *Berger v. Cas' Feed Store, Inc.*, 577 N.W.2d 631, 632 (Iowa 1998) (citation omitted). It is imposed "because the person holding title to the property would profit by a wrong or would be unjustly enriched if he or she were permitted to keep the property." *Cox v. Waudby*, 433 N.W.2d 716, 720 (Iowa 1988). Constructive trusts fall into three categories: (1) those arising from actual fraud; (2) those arising from constructive fraud (appropriation of property by fiduciaries or others in confidential relationships); and (3) those based on equitable principles other than fraud. *Slocum v. Hammond*, 346 N.W.2d 485, 493 (Iowa 1984). A party seeking imposition of a constructive trust must establish the right by clear, convincing, and satisfactory evidence. *Id.*

There were no allegations of fraud here, therefore, only the third option remains--those based on equitable principles other than fraud. Our supreme court has noted that other circumstances supporting imposition of equitable principles include "bad faith, duress, coercion, undue influence, abuse of confidence, or any form of unconscionable conduct or questionable means by which one obtains the legal right to property which they should not in equity and good conscience hold." *In re Estate of Welch*, 534 N.W.2d 109, 111 (Iowa Ct. App. 1995).

As the district court noted, Palmer only alleged two of these issues below, namely abuse of confidence and bad faith. Because the evidence does

not evince a “dominant influence” of either party here, but rather that Palmer and the Alumni Association are separate and distinct entities, we agree Palmer cannot establish an abuse of confidence. See *Wagner v. Wagner*, 45 N.W.2d 508, 509 (Iowa 1951). Furthermore, we conclude the court did not err when it held “the entirety of the evidence introduced at trial does not provide clear and convincing evidence of bad faith on the part of the alumni association.” While the Alumni Association unquestionably directed pointed criticism toward some of Palmer’s trustees and other administration members, it also continued to provide other support to the college and its students. We concur in the judgment that there can be a distinction between being critical of Palmer’s board and its current direction and being critical of and working to undermine the school itself. It does not appear that the Alumni Association did the latter. We affirm the denial of Palmer’s request for the imposition of a constructive trust.

Contempt Action.

On the day the court’s first writ of injunction was issued, counsel for Palmer sent Alumni Association president Scott Harris a letter asking that he take down the association’s website. As of January 27, 2006, the website was still running. Palmer sought to hold Harris in contempt for this delay. The district court concluded the Alumni Association was not in contempt for violating its first writ of injunction and failing to take down its website immediately upon issuance of the injunction. Specifically, it determined Harris’s actions were not willful. On appeal from this ruling, Palmer claims the trial court improperly applied the law to the undisputed facts.

The Alumni Association asserts that Palmer has no right of appeal and failed to seek a writ of certiorari. Although no appeal lies from an order to punish for a contempt, when the application to punish for contempt is dismissed, a direct appeal is permitted. *State v. District Court in and for Polk County*, 231 N.W.2d 1, 4 (Iowa 1975).

In order to justify a finding of contempt, violation of the court order or injunction must be willful. *Lutz v. Darbyshire*, 297 N.W.2d 349, 353 (Iowa 1980) (citing *Lane v. Oxberger*, 224 N.W.2d 245, 247 (Iowa 1974)). Willfulness is proved by “evidence of conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemnor had the right or not.” *Lutz*, 297 N.W.2d at 353. When one’s defense bears on the issue of willfulness, the alleged contemnor may avoid an adjudication of contempt by proving he made a good faith effort to comply. *Matlock v. Weets*, 531 N.W.2d 118, 124 (Iowa 1995). In examining a contempt citation for violating an injunctive order, “we take into consideration the spirit as well as the letter of the injunction to determine if its intent has been honestly and fairly obeyed.” *Orkin Exterminating Co. v. Burnett*, 160 N.W.2d 427, 431 (Iowa 1968).

In denying Palmer’s request, the court found that around the time the writ of injunction was served on him, Harris had recently undergone surgery and was still recovering. Harris testified that his intention was to take the website down and had in fact requested that it be taken down. However, he and the Alumni Association’s “web page person” mistakenly believed that by installing the new website, the old one would automatically be taken offline. It was then not until

January 27 that Harris learned the site was still online. At that time, Harris called the web master again, and it was immediately taken down. Upon our review of the record, we conclude substantial evidence supports the trial court's fact findings. Harris took what he believed were the necessary steps to comply with the injunction, however, through mere inadvertence he fell short. We therefore affirm the determination that Harris's actions were not willful and did not warrant a finding of contempt.

Per Diem Sanctions.

In its December 11, 2006 order, the district court found the Alumni Association in contempt for its violation of the ruling prohibiting it from using the initials PCCIAA. The court imposed a \$500 fine on the Alumni Association and rejected Palmer's urging that it find each day the website employing the initials PCCIAA remained active to constitute a new contempt. The court determined the act of posting the website constituted one continuous offense.

On appeal,¹ Palmer claims the court should have imposed per diem sanctions. Because we agree with the district court that there was only one continuous act of contempt and not a separate contempt each day, we affirm its refusal to issue per diem sanction on the Alumni Association. *See Palmer College of Chiropractic v. Iowa Dist. Ct.*, 412 N.W.2d 617, 622 (Iowa 1987).

AFFIRMED.

¹ While appeal from a finding of contempt is a matter subject to certiorari review, Iowa Code § 665.11 (2007), we shall nonetheless proceed as though the proper form of review was sought in accordance with Iowa Rule of Appellate Procedure 6.304.