

**IN THE COURT OF APPEALS OF IOWA**

No. 9-135 / 05-1480  
Filed May 29, 2009

**TOM CONLEY, KAREN CONLEY, and  
THE CONLEY GROUP, INC.,**  
Plaintiffs/Counterclaim Defendants-Appellants,

**vs.**

**PUBLIC SAFETY GROUP, INC. d/b/a  
CONLEY SECURITY AGENCY/PSG,**  
Defendant/Counterclaim Plaintiff-Appellee.

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Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg,  
Judge.

The plaintiffs appeal from the district court's judgment denying their claims for relief against the defendant and awarding the defendant actual damages and punitive damages on its counterclaims. **AFFIRMED IN PART AND REVERSED IN PART.**

Michael L. Mock of Bradshaw, Fowler, Proctor, & Fairgrave, P.C., Des Moines, for appellants.

Kathryn S. Barnhill of Barnhill & Associates, P.C., West Des Moines, for appellee.

Heard by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

**MANSFIELD, J.**

Tom Conley, Karen Conley, and the Conley Group (collectively “the Conleys”) appeal the district court’s judgment denying their claims for relief against Public Safety Group, Inc. (PSG) and awarding PSG \$220,935.02 in actual damages and \$75,000 in punitive damages on its counterclaims. For the reasons stated herein, we affirm the district court with respect to the Conleys’ claims against PSG, but reverse the counterclaim award in favor of PSG.<sup>1</sup>

**I. FACTS AND PROCEDURAL BACKGROUND**

As both parties acknowledge, this case has been around for awhile. The centerpiece of this litigation is the formerly harmonious—now acrimonious—relationship between Tom Conley and his foster mother, Rhoda Shirley.

Tom Conley has been in the security business for years. In the 1980s, Conley opened a small security company, which eventually ran into financial problems, including unpaid payroll taxes. The company entered Chapter 11 and disbanded. At that point, in 1988, Rhoda Shirley arranged to purchase the assets of the business, using funds from Shirley Medical Clinic, P.C. (SMC), a clinic owned by her physician-husband, who has since passed away.

The new business became known as Public Safety Group, Inc. (PSG). For the next eleven years, until October 22, 1999, Tom Conley ran the day-to-day operations of PSG with the assistance of his wife Karen. Rhoda Shirley was the exclusive shareholder of the company, as well as a director and the president, and was responsible for funding its operations. Until February 1995, Tom and Karen served as directors and officers of PSG. However, at that time,

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<sup>1</sup> We deny the Conleys’ motion for partial summary reversal as moot.

Shirley caused the Conleys to be removed from those positions because she was concerned about the amount of information she was getting from them. Both Tom and Karen, nevertheless, continued to be in charge of the company on a day-to-day basis.

In the late 1990s, Tom Conley and Rhoda Shirley, with the help of their respective counsel, had negotiations and discussions about a potential purchase of PSG by Tom Conley. However, the negotiations reached an impasse, and on October 4, 1999, Tom threatened in writing to “leave employment here now” if Shirley did not move forward with a purchase agreement immediately. On October 22, 1999, having apparently found a third-party buyer for PSG, Shirley terminated the Conleys’ employment in person.

Subsequently, Shirley’s planned sale of PSG fell through, and she continued to operate the business until 2001, when its assets were sold to another security company owned and operated by her children.

Meanwhile, the Internal Revenue Service pursued the Conleys for unpaid payroll taxes for the time period when they were running the company. Eventually, the Conleys were forced to pay substantial tax penalties.

The Conleys sued PSG and Shirley in late 1999, and they promptly counterclaimed. By the time these matters came to trial in the spring of 2005, the principal claims were the Conleys’ claims for certain employment benefits, for reimbursement of alleged loans to the company, and for contribution for the payroll tax penalties they had paid, and PSG’s counterclaims for breach of fiduciary duty, largely relating to the Conleys’ alleged concealed use of company funds to pay personal expenses.

Prior to trial, in September 2004, the Conleys purchased a judgment that a creditor, Agans Brothers, Inc., had obtained against PSG in the amount of \$13,114.30. The Conleys then arranged for execution upon that judgment. Pursuant to that writ of execution, a levy on PSG's counterclaims took place on October 6, 2004, and a sheriff's sale of those counterclaims occurred on December 2, 2004, at which the Conleys purchased PSG's claims against themselves. The Conleys then sought to dismiss PSG's counterclaims, arguing that they now owned them.

The district court tried the case over several days in April and May 2005. At the conclusion of the trial, the district court dismissed the Conleys' claims as not supported by the evidence, and awarded PSG \$220,935.02 in actual damages and \$75,000 in punitive damages on its counterclaims against the Conleys. The court rejected the Conleys' argument that they had acquired PSG's counterclaims in December 2004, and could therefore dismiss them. The court reasoned that SMC, as the secured creditor of PSG, had a higher priority with respect to those counterclaims than the Conleys, whose rights derived from those of an unsecured creditor (i.e., Agans Brothers). Alternatively, the district court found the Conleys' interest in the counterclaims was limited to \$13,114.30, the amount of the Agans Brothers judgment they had purchased in the fall of 2004.

While this case was on appeal, the Internal Revenue Service—seeking to satisfy additional payroll tax obligations that arose *after* Shirley fired the Conleys—levied on the judgment in favor of PSG in this case. There too, the argument was raised that SMC had a valid security interest in PSG's

counterclaims that took precedence over any claims of PSG's unsecured creditors (here the IRS, rather than Agans Brothers). That priority dispute was litigated to conclusion in the federal courts. The United States District Court for the Southern District of Iowa (Hon. Robert W. Pratt), essentially disagreeing with the Polk County District Court's ruling here, found PSG's claims were "commercial tort claims" and that under the UCC (Iowa Code section 554.9108(5)(a) (2000)) SMC did not have a valid security interest in such claims because they were not specifically described in the alleged security agreement. See *Shirley Med. Clinic, P.C. v. United States*, 446 F. Supp. 2d 1028, 1033 (S.D. Iowa 2006). This decision was affirmed by the United States Court of Appeals for the Eighth Circuit and has become final. *Shirley Med. Clinic, P.C. v. United States*, No. 06-3347 (8th Cir. July 6, 2007).<sup>2</sup>

The Conleys appeal. They argue that the district court erred (1) in refusing to allow them to dismiss PSG's counterclaims as the "owners" of those counterclaims; (2) in denying their claims for repayment of funds allegedly loaned to PSG; (3) in finding they breached their fiduciary duties to PSG; and (4) in awarding punitive damages to PSG for such breaches. We reverse the district

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<sup>2</sup> On appeal, SMC changed course and asserted that it had *acquired* PSG's interest in the counterclaims on November 22, 2004. In affirming the federal district court, the Eighth Circuit declined to consider SMC's "newly minted theory." Regardless, the "newly minted theory" does not affect the relative priorities that are at issue in this case, because the levy initiated by the Conleys on PSG's counterclaims took place before November 22, 2004. The record also reflects that PSG and SMC's counsel has stated in subsequent proceedings that still other entities "own" PSG's counterclaims. We need not discuss any of this other coinage because it does not affect the outcome of this appeal and, thus, is not valid currency in this litigation.

court on the first point, and affirm it on the second. Because of our ruling on the first issue, we do not need to reach issues three and four.<sup>3</sup>

## **II. LEGAL ANALYSIS**

### **A. Standard of Review**

Our review is for corrections of errors at law. Iowa R. App. P. 6.4. The district court's findings of fact have the effect of a special verdict and are binding if supported by substantial evidence. *Id.* "Because we review only for the correction of errors at law, we will not reweigh the evidence nor assess the credibility of witnesses." *EnviroGas, L.P. v. Cedar Rapids/Linn County Solid Waste Agency*, 641 N.W.2d 776, 785 (Iowa 2002).

### **B. The Sheriff Sale of the Counterclaims**

The Conleys contend the district court erred in refusing to recognize the sheriff's sale of PSG's counterclaims to them, and their subsequent efforts to dismiss those claims. The Conleys' position is that (1) their 2004 purchase of PSG's counterclaims at the sheriff's sale is valid unless SMC had a prior security interest in those claims; (2) those counterclaims are commercial tort claims; (3) when commercial tort claims serve as collateral, they must be described specifically rather than by type in order for any security interest therein to be valid; (4) the 2001 security agreement between PSG and SMC purported to grant

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<sup>3</sup> The Conleys also originally appealed the district court's failure to award damages for contribution pursuant to 26 U.S.C. § 6672(d) (2000) based on the payroll tax penalties they paid. At oral argument, the Conleys indicated they are no longer seeking contribution from Shirley. The district court never ruled on their request for contribution from PSG (as opposed to Shirley), and the Conleys did not file a motion to enlarge or amend findings pursuant to Iowa R. Civ. P. 1.904(2), so we consider that matter waived. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.").

SMC a security interest only in “proceeds from any lawsuit due or pending”; and (5) this description is insufficiently specific for commercial tort claims. Accordingly, the Conleys maintain that SMC did not have a valid security interest in PSG’s counterclaims, and their own acquisition of those counterclaims should have been given effect by the district court. In its briefing, PSG accepts most of the steps in the Conleys’ reasoning. It strongly disputes, however, that its counterclaims were commercial tort claims.

The Conleys also insist that collateral estoppel precludes PSG from relitigating the federal court’s conclusion that the claims in question are commercial tort claims and that SMC does not have a valid security interest in them. However, in this case collateral estoppel presents some potential complications, including the fact that PSG and SMC are at least technically different parties (although represented by the same counsel), and the fact that Judge Pratt’s ruling was inconsistent with the prior ruling of the lower court in this case. *See Hunter v. City of Des Moines*, 300 N.W.2d 121, 124 (Iowa 1981) (noting that allowing offensive collateral estoppel may be unfair if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments). We believe instead that we should follow the federal district court’s lead for a different reason: We agree with it on the merits.

The counterclaims on which PSG was awarded damages by the district court were for breach of fiduciary duty. “The evidence clearly establishes that there was a breach of fiduciary trust between Tom and Karen Conley and PSG,” the district court stated. “In determining the amount of damages proximately

caused by this breach of fiduciary duty, the Court finds the following damages . . . .”

We agree with the federal district court that breach of fiduciary duty is a tort. *Estate of Harris v. Papa John’s Pizza*, 679 N.W.2d 673, 682 (Iowa 2004); *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 137-38 (Iowa 1996). Additionally, PSG is unquestionably an organization. Thus, the relevant counterclaims of PSG were “commercial tort claims.” See Iowa Code § 554.9102(m) (defining a commercial tort claim to include a “claim arising in tort with respect to which . . . the claim is an organization”). This means, necessarily, that the generic reference in the security agreement (“proceeds from any lawsuit due or pending”) was insufficient to create a valid security interest in those claims. See Iowa Code § 554.9108(5)(a); *Helms v. Certified Packaging Corp.*, 551 F.3d 675, 681 (7th Cir. 2008) (holding that a reference to “all commercial tort claims” was insufficient to create a security interest in a particular commercial tort claim). Therefore, the sheriff’s sale transferred ownership of those claims to the Conleys, and the Conleys should have been permitted to dismiss them.

PSG concedes its counterclaims are essentially for breach of fiduciary duty, but argues that these are contract rather than tort claims because they would not exist “but for” the employment contracts between PSG and the Conleys. We disagree. Fiduciary duty claims, like other tort claims, arise essentially out of duties imposed by law, not contract. The Conleys’ positions of trust and responsibility with PSG established their fiduciary duties, which the district court found they breached. Hence, the counterclaims in question were commercial tort claims. See also *Waltrip v. Kimberlin*, 79 Cal. Rptr. 3d 460, 467-



69 (Cal. Ct. App. 2008) (finding that a company's claims for breach of fiduciary duty and fraud sounded primarily in tort and were subject to the UCC's requirement that they be specifically described in order to create a valid security interest, even though certain "agreements" entered into those claims).

The district court also found that even if the Conleys had properly acquired PSG's counterclaims against them, their interest in the counterclaims would be limited to the amount of the Agans Brothers judgment—\$13,114.30. We respectfully disagree. On December 2, 2004, there was an auction of the *entirety* of PSG's counterclaims. The Conleys, as assignee of Agans Brothers, were the winning bidder, and paid \$5,229.77 (using the judgment as their currency) to acquire *all* those claims. Thus, the Conleys acquired all of PSG's counterclaims, not just the first \$13,114.30 of recovery.

Accordingly, we reverse the judgment of the district court awarding PSG damages on its counterclaims against the Conleys.

### **C. The Conleys' Repayment of Loans Claim**

The Conleys also assert that the district court erred in denying their claim for repayment of alleged loans to PSG. We believe the district court's rejection of this claim was amply supported by the evidence. The Conleys claim they borrowed money on their credit cards and infused it into the corporation. However, the record also shows that the Conleys repeatedly used corporate funds to pay off personal credit card charges, such as women's clothing, that were not legitimate corporate expenses. Moreover, the Conleys apparently mischaracterized a number of these personal items in the corporate records to make them appear to be legitimate corporate expenses. Furthermore, the district

court made specific credibility findings, noting that the “testimony of Tom and Karen Conley throughout the entire trial was at times illogical, unbelievable, contradictory, and in denial of what the facts actually showed” and “at a minimum unreliable.” Therefore, we agree with the district court that the Conleys did not meet their burden of proof that PSG owed them money for repayment of loans. We hold the district court properly dismissed this claim.

### **III. CONCLUSION**

We reverse the judgment of the district court awarding PSG damages on its counterclaims against the Conleys. We affirm the district court’s denial of the Conleys’ affirmative claims for relief.

**AFFIRMED IN PART AND REVERSED IN PART.**