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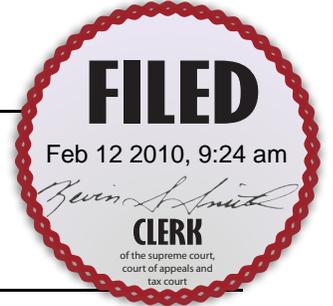
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**IN THE
COURT OF APPEALS OF INDIANA**



BABYBACK'S INTERNATIONAL, INC.,)
)
Appellant-Plaintiff,)

vs.)

No. 49A04-0903-CV-175

THE COCA-COLA COMPANY and)
COCA-COLA ENTERPRISES, INC.,)
)
Appellees-Petitioners,)

JP MORGAN CHASE BANK;)
MITCHELL HURST JACOBS &)
DICK, LLP; MONFORT, INC.;)
NEW CONCEPTS IN MARKETING, INC.; and)
DEVRO-TEEPAK, INC., BERRY PLASTICS)
CORPORATION, FOUR MUSKETEERS, INC.,)
f/k/a O'MALIA FOOD MARKETS, INC., and)
BEVERAGE AIR COMPANY,)
)
Interpleaded Parties.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-0101-CT-62

February 12, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Approximately twelve years after first filing its complaint and several appeals later, Babyback's International, Inc. now appeals the trial court's entry of summary judgment in favor of Coca-Cola Enterprises, Inc. ("CCE"). Specifically, Babyback's contends that the trial court erred in determining that the measure of damages for the tort of constructive fraud is reliance damages and not the loss of its benefit of its bargain, consequential damages, and lost profits. However, because, in a recent appeal, this Court held, as a matter of law, that Babyback's has failed to establish constructive fraud, this is the law of the case. Since there is no constructive fraud, there can be no damages; therefore, the issue of the appropriate measure of damages is moot. Accordingly, we affirm the trial court.

Facts and Procedural History

The underlying facts of this case, as taken from the Indiana Supreme Court's opinion from an earlier appeal in this case, are as follows:

Early in 1997, Babyback's, a processor and seller of barbeque meat products, entered into an agreement with Hondo, Incorporated, d/b/a Coca-Cola Bottling Company Indianapolis, a/k/a Coca-Cola Bottling Company of Indianapolis, Inc. ("Coke Indy"), a bottler of Coca-Cola products with its main office in Chicago, and its market area including Indianapolis. Under this agreement, Coke Indy was to pay Babyback's to arrange for and prominently place coolers in grocery stores in and around Indianapolis, displaying Babyback's products side-by-side in the coolers with Coca-Cola

products. After Babyback's and Coke Indy experienced success with this "meals to go" concept in Indianapolis, CCE [another Coca-Cola bottler with a larger distribution territory] and Babyback's began discussions about similarly co-marketing their products in the Louisville market, which was outside the Coke Indy territory but within that of CCE. Babyback's thereafter arranged to have coolers delivered to several Louisville area grocery stores. At this time, Babyback's and CCE did not have a written contract regarding this arrangement. Babyback's and CCE representatives met on October 24, 1997, to discuss further expanding the arrangement into other CCE market areas. Following this meeting, Babyback's faxed to CCE a proposed contract. This contract, however, was never signed. On November 18, 1997, Babyback's and CCE representatives met again, this time at CCE's Atlanta headquarters, to discuss expanding their co-marketing arrangement to stores on a nationwide basis.

Coca-Cola Co. v. Babyback's Int'l, Inc. (Babyback's I), 841 N.E.2d 557, 560-61 (Ind. 2006). Thereafter, according to the facts as set forth in an opinion in a more recent appeal in this case,

On November 19, 1997, a representative of [CCE] drafted and faxed a memo to Babyback's, which stated that [CCE] believed that the parties had made further strides toward reaching an agreement during their November 18th meeting, but cautioned that Babyback's objective to have an absolute agreement by the upcoming Friday would be difficult to achieve. [CCE] attached a "recap" of the parties' discussion during the November 18th meeting to the memo. Also on November 19, 1997, the president of Babyback's sent a fax to [CCE] stating, "I would like to emphasize that Babyback's . . . [is] taking pride in having reached an agreement with [CCE] and its first class rate organization." Later that same day, [CCE] responded to Babyback's fax, stating:

We have received your fax dated November 19 and feel compelled to remind you that contrary to your cover letter, we have not reached an agreement with your company.

* * *

Following a cursory review of the "Agreement" you forwarded, we note a number of issues which will require further dialogue internally with our legal, financial and field sales management. We are very aware of your urgency to get this deal done, but request your patience. Though you have been working through the Coca-Cola USA group for some time, you have only recently engaged in dialogue with our

company. The magnitude of your proposal demands we be thorough in evaluation.

* * *

As promised in our meeting, we have been, and will continue to treat your proposal with high priority, but unfortunately we will be unable to finalize an agreement with you in the timeframe you have outlined.

Babyback's responded to [CCE]'s fax the next day stating, "I am fully aware that we do not have a signed contract, but I left our Tuesday meeting with 100% confidence that [we] had reached a verbal agreement." Following these exchanges, Babyback's and [CCE] continued discussions regarding co-marketing their products in the Atlanta market for some time. However, these discussions eventually terminated and the co-marketing program never materialized.

Babyback's Int'l, Inc. v. Coca-Cola Co. (Babyback's II), Cause No. 49A02-0810-CV-946 (Ind. Ct. App. July 31, 2009) (citations omitted), *reh'g denied, trans. pending*.

On December 31, 1998, Babyback's filed a complaint against CCE and The Coca-Cola Company ("Coke") (owner of the drink formula) alleging that CCE had breached the parties' contract for a national co-marketing program, CCE had breached its fiduciary duty to Babyback's, CCE had engaged in constructive fraud, and Coke had tortiously interfered with the alleged contractual relationship between Babyback's and CCE.¹ Coke and CCE filed separate motions for summary judgment, which the trial court denied. CCE and Coke appealed.

In *Babyback's I*, CCE argued that its summary judgment motion should have been granted because the multiple-year agreement alleged by Babyback's was unenforceable under the Statute of Frauds because it could not be performed within a year and no written contract was ever signed by the parties. Our Supreme Court held that the faxed

¹ The original complaint of Babyback's also included claims against Coke Indy. Coke Indy, however, is not a party to this appeal.

memo was not sufficient to satisfy the Statute of Frauds. *Babyback's I*, 841 N.E.2d at 565. The Court further held that the facts of the case did not permit application of the part performance or promissory estoppel exceptions which would remove the alleged agreement from the writing requirement of the Statute of Frauds. *Id.* at 565-70. The Court specifically held, "In light of CCE's immediate and unequivocal denial of the national agreement sought by Babyback's, it clearly was not reasonable for Babyback's to take any actions in reliance upon its belief that CCE had promised to perform the alleged national agreement." *Id.* at 70. Thus, the Court found that CCE was entitled to summary judgment and remanded for further proceedings.² *Id.*

On remand, Babyback's filed amended contentions claiming that the alleged national agreement was not required to be in writing because the alleged constructive fraud by CCE excused the parties' non-compliance with the writing requirement of the Statute of Frauds. *See* Appellant's App. p. 50-56 (amended complaint). CCE and Coke again filed separate motions for summary judgment, which the trial court granted in January 2007 and certified for interlocutory appeal in October 2008. Babyback's appealed.

In *Babyback's II*, Babyback's argued that the trial court erroneously granted summary judgment in favor of CCE because CCE engaged in constructive fraud, which in turn excused the parties' oral multi-year national agreement from the writing

² Our Supreme Court summarily affirmed that portion of the Court of Appeals' opinion which affirmed the trial court's denial of summary judgment as to Coke. *Babyback's I*, 841 N.E.2d at 560.

requirement of the Statute of Frauds.³ Slip op. at 7. We concluded that, as a matter of law, it was clearly unreasonable for Babyback's to take any actions in reliance upon its belief that CCE had promised to perform the alleged national agreement following CCE's explicit rejection of Babyback's claim that the parties had reached an agreement. *Id.* at 9.

Because Babyback's does not have a reasonable right to rely upon its belief that the parties had entered into a national agreement, Babyback's will be unable to successfully establish that [CCE] engaged in constructive fraud, *see Darst*, 716 N.E.2d at 582. Therefore, in light of the parties' failure to satisfy the writing requirement of the Statute of Frauds, no valid contract existed between Babyback's and [CCE]. *See [Babyback's I]*, 841 N.E.2d at 565 (providing that the memo sent from [CCE] to Babyback's on November 19, 1997, recapping the parties' November 18, 1997 discussion did not satisfy the Statute of Frauds).

Id. at 9-10. In addition, we held that it is well-established that parties may not rely on a contractual relationship to create a duty that, if breached, would form the basis of a constructive fraud claim. *Id.* at 10. "Therefore, insomuch as the only possible basis for [CCE]'s duty to Babyback[']s is the alleged contract, we can only conclude that Babyback's has failed, as a matter of law, to establish that it is entitled to relief on its constructive fraud claim. Consequently, we conclude that the trial court properly entered summary judgment in [CCE]'s favor on this claim." *Id.*

Before this Court issued its July 31, 2009, opinion in *Babyback's II*, the trial court in this case entered the following order in March 2009:

This matter came before the Court on the motion of the Plaintiff, Babyback's International, Inc., by counsel, to enter final judgment on the Court's partial summary judgment order entered on October 6, 2008^[4]

³ Babyback's also appealed the trial court's entry of summary judgment in favor of Coke. But because Coke is not a party to this appeal, we do not further discuss Coke.

⁴ The trial court's October 2008 order provides:

regarding the damages recoverable in a claim based on the tort of constructive fraud theory.

The Court hereby approves Babyback's withdrawal of all claims to reliance damages as set forth in its motion of January 26, 2009.

And the Court being duly advised finds that final judgment should be entered since the Plaintiff has filed its stipulation withdrawing any claim to reliance damages, which means that based on the earlier ruling there are no damages which the Plaintiff can pursue under this theory of liability.

IT IS THEREFORE ORDERED:

1. That Babyback's claims for reliance damages is hereby ordered withdrawn.

2. That the partial summary judgment order entered in favor of [CCE] on October 6, 2008 regarding damages recoverable under the tort of constructive fraud being limited to reliance damages is hereby made a final judgment.

3. That this order disposes of the remaining issue in this case since the issue regarding constructive fraud as an exception to the statute of frauds is on appeal from the Court's grant of summary judgment in favor of [Coke] and [CCE] on that issue and the Court's grant of summary judgment in favor of [Coke] on Babyback's tortious interference claim is also being appealed. The Court hereby determines that there is no just reason for delay and it hereby expressly directs entry of this final judgment.

Appellant's App. p. 353-54. Babyback's filed a motion to consolidate this case with *Babyback's II*, which, as noted above, was pending at the time of this order but was decided during the briefing process of this case. This Court denied the motion. Babyback's now appeals the trial court's March 2009 order.

1. The Court's order of February 1, 2007 is hereby clarified so that the Court's ruling is that the measure of damages for the tort of constructive fraud is limited to reliance damages and specifically not lost profits, and this order is hereby certified for interlocutory appeal, and

2. This Court's partial summary judgment heretofore entered on January 2, 2007 in favor of CCE to the effect that constructive fraud does not excuse the writing requirements of the statute of frauds is hereby made final pursuant to T.R. 54(B); the Court having determined that there is no just reason for delay, and the Court hereby expressly directs the entry of judgment.

Appellant's App. p. 310.

Discussion and Decision

Babyback's contends that "[t]he trial court erred when it limited Babyback[']s to the recovery of reliance damages for" its claim of constructive fraud. Appellant's Br. p.

10. Specifically,

Babyback[']s is seeking for damages for the loss of its benefit of its bargain, consequential damages and lost profits. It has stipulated that it is not seeking reliance damages. This appeal is before the Court on the trial court's determination of law that the measure of damages for the tort of constructive fraud is limited to reliance damages and specifically not lost profits. Therefore, if the trial court is correct, then there is no claim for damages recoverable by Babyback[']s . . . for the tort of constructive fraud.

Id. at 11. CCE makes several arguments in response, one of which is that this Court, in *Babyback's II*, has already considered Babyback's claim of constructive fraud as a purported exception to the Statute of Frauds and rejected that argument, finding, as a matter of law, the essential element of reasonable reliance to be absent. Therefore, CCE argues that the doctrine of law of the case applies here, thereby rendering moot any issue about the proper measure of damages.

The law of the case doctrine provides that an appellate court's determination of a legal issue binds both the trial court and the appellate court in any subsequent appeal involving the same case and substantially the same facts. *Dutchmen Mfg., Inc. v. Reynolds*, 891 N.E.2d 1074, 1082 (Ind. Ct. App. 2008) (citing *Pinnacle Media, L.L.C. v. Metro. Dev. Comm'n of Marion County*, 868 N.E.2d 894, 901 (Ind. Ct. App. 2007), *trans. denied*), *trans. denied*. The purpose of the doctrine is to minimize unnecessary relitigation of legal issues once they have been resolved by an appellate court. *Id.* (citing *Luhnow v. Horn*, 760 N.E.2d 621, 625 (Ind. Ct. App. 2001)). Accordingly, all issues

decided directly or by implication in a prior decision are binding in all further portions of the same case. *Id.* (citing *Keesling v. T.E.K. Partners, LLC*, 881 N.E.2d 1025, 1029 (Ind. Ct. App. 2008)). However, the law of the case doctrine ““is a discretionary tool.”” *Id.* (quoting *Hanson v. Valma M. Hanson Revocable Trust*, 855 N.E.2d 655, 662 (Ind. Ct. App. 2006)). To invoke this doctrine, the matters decided in the earlier appeal must clearly appear to be the only possible construction of an opinion. *Id.* at 1082-83. Thus, questions not conclusively decided in the earlier appeal do not become the law of the case. *Id.* at 1083. Moreover, statements that are not necessary in the determination of the issues presented are dicta, are not binding, and do not become the law of the case. *Id.* This doctrine is based upon the sound policy that once an issue is litigated and decided, that should be the end of the matter. *Godby v. Whitehead*, 837 N.E.2d 146, 152 (Ind. Ct. App. 2005), *trans. denied*.

After our Supreme Court determined in *Babyback's I* that CCE was entitled to summary judgment as a matter of law, Babyback's amended its constructive fraud claim. See Appellant's App. p. 50-56. “Constructive fraud arises by operation of law from a course of conduct which, if sanctioned by law, would secure an unconscionable advantage, irrespective of the existence or evidence of actual intent to defraud.” *Allison v. Union Hosp., Inc.*, 883 N.E.2d 113, 122 (Ind. Ct. App. 2008) (quotation omitted); see also *Sees v. Bank One, Ind., N.A.*, 839 N.E.2d 154, 164 n.8 (Ind. 2005) (Boehm, J., concurring and dissenting). This theory of fraud is based on the premise that there are situations which might not amount to actual fraud but which are so likely to result in injustice that the law will find a fraud despite the absence of fraudulent intent. *Wagner v.*

Spurlock, 803 N.E.2d 1174, 1183 (Ind. Ct. App. 2004); *see also Sees*, 839 N.E.2d at 164 n.8 (Boehm, J., concurring and dissenting). The elements of constructive fraud are: (1) a duty owing by the party to be charged to the complaining party due to their relationship; (2) a violation of that duty by the making of deceptive material misrepresentations of past or existing facts or remaining silent when a duty to speak exists; (3) reliance thereon by the complaining party; (4) an injury to the complaining party as a proximate result thereof; and (5) the gaining of an advantage by the party to be charged at the expense of the complaining party. *Rice v. Strunk*, 670 N.E.2d 1280, 1284 (Ind. 1996).⁵ In January 2007 the trial court granted summary judgment in favor of CCE, concluding that the alleged constructive fraud on the part of CCE did not excuse the absence of an adequate writing. Appellant's App. p. 165. The court made this a final, appealable order in October 2008.

In *Babyback's II*, Babyback's argued that the trial court erroneously granted summary judgment in favor of CCE because CCE engaged in constructive fraud, which in turn excused the parties' oral multi-year national agreement from the Statute of Frauds' writing requirement. This Court first observed:

[A]lthough Babyback's dedicated a notable portion of its appellate brief to establishing that constructive fraud may, under some circumstances, excuse non-compliance with the writing requirement of the Statute of Frauds, Babyback's has failed to adequately demonstrate that [CCE] engaged in constructive fraud. Nevertheless, we will review whether, as a matter of law, [CCE] engaged in constructive fraud and, if so, whether such fraud

⁵ Babyback's argues on appeal that there are "several formulations" for the tort of constructive fraud and that because reliance is not requirement for each of these formulations, "its existence is not a condition to Babyback's claim." Appellant's Reply Br. p. 13. However, we have provided the elements of constructive fraud as set forth by our Supreme Court, which unmistakably includes the element of reliance.

would exclude the parties' agreement from the writing requirement of the Statute of Frauds.

Babyback's II, slip op. at 7. After setting forth the above-stated elements of constructive fraud and emphasizing that to establish constructive fraud, the complaining party must have a reasonable right to rely upon the statements made or omitted, *id.* at 8, we engaged in the following analysis:

It is undisputed that on November 19, 1997, after receiving a fax from the president of Babyback's stating, "I would like to emphasize that Babyback's . . . [is] taking pride in having reached an agreement with [CCE]," [CCE] immediately responded stating, "We have received your fax dated November 19 and feel compelled to remind you that contrary to your cover letter, we have not reached an agreement with your company." The president of Babyback's later acknowledged that the parties did not have a signed contract, but stated that he believed the parties had reached a verbal agreement. Contrary to this belief, however, the president of Babyback's and representatives for [CCE] continued discussions regarding co-marketing their products in the Atlanta area until the discussions eventually terminated without a finalized agreement or plan regarding the nationwide co-marketing program.

The Indiana Supreme Court previously considered these same facts in [*Babyback's I*], the parties' prior appeal in this matter, and held that summary judgment was proper with respect to Babyback's' promissory estoppel claim, because, as a matter of law, it was clearly unreasonable for Babyback's to take any actions in reliance upon its belief that [CCE] had promised to perform the alleged national agreement. 841 N.E.2d at 570. Like the Supreme Court, we also conclude that, as a matter of law, it was clearly unreasonable for Babyback's to take any actions in reliance upon its belief that [CCE] had promised to perform the alleged national agreement following [CCE]'s explicit rejection of Babyback's' claim that the parties had reached an agreement. Because Babyback's does not have a reasonable right to rely upon its belief that the parties had entered into a national agreement, Babyback's will be unable to successfully establish that [CCE] engaged in constructive fraud, *see Darst*, 716 N.E.2d at 582. Therefore, in light of the parties' failure to satisfy the writing requirement of the Statute of Frauds, no valid contract existed between Babyback's and [CCE]. *See [Babyback's I]*, 841 N.E.2d at 565 (providing that the memo sent from [CCE] to Babyback's on November 19, 1997, recapping the parties' November 18, 1997 discussion did not satisfy the Statute of Frauds).

Further, it is well-established that “parties may not rely on a contractual relationship to create a duty that, if breached, would form the basis of a constructive fraud claim.” *Allison*, 883 N.E.2d at 123; *Whiteco Indus., Inc. v. Kopani*, 514 N.E.2d 840, 844 (Ind. Ct. App. 1987), *trans. denied*.

Were this not the rule the statute would be rendered virtually meaningless because the frustrated claimant would always assert an oral promise/agreement to defeat by means of estoppel [or constructive fraud] the statute’s requirement for a written one. The contest would then concern the credibility of the evidence of an oral promise or agreement. That, of course, is precisely what the statute seeks to avoid.

Whiteco, 514 N.E.2d at 844. Therefore, inasmuch as the only possible basis for [CCE]’s duty to Babyback[’]s is the alleged contract, we can only conclude that Babyback’s has failed, as a matter of law, to establish that it is entitled to relief on its constructive fraud claim. Consequently, we conclude that the trial court properly entered summary judgment in [CCE]’s favor on this claim.

Id. at 8-10 (citation omitted).

Thus, in *Babyback’s II*, we held, as a matter of law, that Babyback’s failed to establish constructive fraud. Specifically, we concluded, also as a matter of law, that it was clearly unreasonable for Babyback’s to take any actions in reliance upon its belief that CCE had promised to perform the alleged national agreement following CCE’s explicit rejection of Babyback’s’ claim that the parties had reached an agreement. This is the law of the case.⁶ Because this Court has already determined that Babyback’s cannot

⁶ Babyback’s argues on appeal that the law of the case doctrine does not apply because the trial court, in September 2008 (which is before the order being appealed here), denied CCE’s motion for summary judgment on Babyback’s constructive fraud claim. *See* Appellant’s App. p. 305-07 (“CCE has not demonstrated the absence of any genuine issue of fact as to a determinative issue under the several formulations of the tort of constructive fraud.”). However, this order, which came before the trial court’s later order in March 2009, has no effect on the law of the case doctrine since this doctrine provides that an *appellate* court’s determination of a legal issue binds both the trial court and the appellate court in any subsequent appeal involving the same case and substantially the same facts.

establish constructive fraud, the issue that Babyback’s now raises—the appropriate measure of damages for the tort of constructive fraud—is moot. We only decide live controversies. *See Ind. High Sch. Athletic Ass’n, Inc. v. Durham*, 748 N.E.2d 404, 410 (Ind. Ct. App. 2001) (“An issue becomes moot when it is no longer live and the parties lack a legally cognizable interest in the outcome An actual controversy must exist at all stages of the appellate review”) (citations omitted). Since there is no constructive fraud, there can be no damages. Although this Court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, as a rule it should be loathe to do so in the absence of extraordinary circumstances. *Certain Ne. Annexation Area Landowners v. City of Ft. Wayne*, 622 N.E.2d 548, 549 (Ind. Ct. App. 1993), *reh’g denied, trans. denied*. Extraordinary circumstances do not exist here. As such, we do not choose to exercise our discretion to revisit the prior decision in *Babyback’s II*. We therefore affirm the trial court’s entry of summary judgment in favor of CCE on Babyback’s constructive fraud claim. *See Indianapolis Car Exch., Inc. v. Alderson*, 910 N.E.2d 802, 804 (Ind. Ct. App. 2009) (noting that we will affirm summary judgment if it may be sustained on any legal theory or basis found in the record).

Affirmed.

RILEY, J., and DARDEN, J., concur.