



Judith and Morris (“Morris”) Silverman (collectively “the Silvermans”) appeal from a negative judgment in their multi-count claim against Arden Johnson (“Johnson”), Southern Companies, Inc. (“SCI”), and Southern Pediatrics, LLC (“SPLLC”) (collectively “the Defendants”) alleging fraud, securities violations, theft, conspiracy, and breach of fiduciary duty among other things. The Silvermans raise the following issues for our review:

- I. Whether the trial court abused its discretion in failing to find SCI in contempt for alleged discovery order violations; and
- II. Whether the trial court abused its discretion in finding that the Silvermans failed to introduce sufficient evidence to pierce the corporate veil.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

The Silvermans and Johnson met in 1995 when Johnson became a tenant in a building owned by Morris in Indianapolis, Indiana. Johnson was in the construction business, and Morris was a licensed Indiana Securities Broker and sold life insurance. Johnson and Morris shared information with and became well-known to one another. Morris sold insurance to Johnson and had information about Johnson’s income, but did not know specific details relating to Johnson’s construction business. Johnson and Morris’s friendship continued after Johnson moved his business from Morris’s building. Johnson was a very good client of Morris’s insurance business.

Sometime in 2005, Johnson approached Morris with an investment opportunity in SPLLC, which is the subject of this appeal. Through Johnson, the Silvermans had previously invested in a medical facility in Plano, Texas, built by SCI. SPLLC was a new company that

would develop a freestanding pediatric surgical facility that would include doctors' offices that would be owned by the doctors and SPLLC jointly. Morris was shown a Revenue Distribution Example, but no other written information about the investment. Morris knew that there were no other investors besides himself, and Johnson gave Morris no indication that he would be paid personally, either directly or indirectly, from Morris's investment. Morris was aware of the risk associated with the investment, that there was no guarantee of any return on the investment, and that the Revenue Distribution Example he was shown was not a guarantee of any specific return on the investment.

The Silvermans wrote a check for \$150,000 payable to SCI, with "Southern Pediatrics" written on the memo line, and delivered it to Johnson. *Tr.* at 22. The check was endorsed "Southern Companies" and was deposited. *Id.* The next day, the Silvermans executed a Notice and Consent to Transfer form, in which they acknowledged receipt of a six percent interest in SPLLC and accepted its operating agreement, although the Silvermans were never presented with a copy of the operating agreement.

Several months after the Silvermans invested in SPLLC, Morris inquired of Johnson about SPLLC's success in obtaining development contracts for the pediatric surgical centers. Johnson indicated that there was no progress and that Johnson had decided not to pursue further opportunities associated with SPLLC. Morris requested that Johnson return his investment in SPLLC, and Johnson agreed to make the refund. The Silvermans were never refunded their investment in SPLLC.

On July 3, 2007, the Silvermans filed a nine-count complaint against Johnson, SCI, and SPLLC alleging actual fraud, securities act violations, conversion, theft, civil conspiracy, usurpation of a business opportunity, breach of fiduciary duty, and alter ego and sought to pierce the corporate veil. During discovery, the Silvermans sought the accounting detail of SCI's financial statements for the period of January 1, 2002 to August 2008, and later the shareholder loan account statements from that same period. The Silvermans filed motions to compel production of those documents, which were granted by the trial court. Ultimately, SCI produced the accounting detail of SCI's shareholder loan account from January 1, 2008 to December 31, 2009. The supplemental response to the Silvermans' set of interrogatories and requests for production of documents stated the following:

1. [SCI] produces the accounting detail of the "due from Shareholder" general ledger account for the period from January 1, 2008 to the present. [SCI] further advises no other detail for prior years is available as the Peachtree software on which the accounting information was maintained automatically deletes account detail annually, retaining only current year and the prior year detail.

*Appellants' App.* at 93.

The Silvermans filed a motion for contempt on December 30, 2009, and set forth that:

1. . . . [SCI's] controller indicated that she printed hard copies of the entire set of books and records of SCI at the end of each calendar year, and that such copies were available. The request was for the period of January 1, 2002 to August 2008.

\* \* \*

3. It appears that the paper copies, all of which are materially probative of the issue of piercing the corporate veil, were either lost or destroyed after the controller identified them in her deposition because no objection was made indicating that those copies were not available. It is therefore appropriate to infer that the loss or destruction occurred after the Order was entered. As such, SCI is in contempt of the Court's Order.

*Id.* at 97-98.

At the beginning of the bench trial in this case, counsel for the Silvermans addressed the motion for contempt and asked for the trial court to infer from SCI's failure to completely supply the requested shareholder loan account information that information favorable to the Silvermans' claims was contained therein. The trial court told the parties that it would be premature to rule on that motion prior to the trial, but would take the matter under advisement and make a ruling on that motion in the findings of fact and conclusions thereon at the close of evidence. Neither side objected to this procedure.

At the close of evidence, the Defendants moved for involuntary dismissal of all nine counts of the complaint. The trial court heard argument and granted the motion as to all counts except the counts alleging conversion, theft, and alter ego, and seeking to pierce the corporate veil. The trial court issued its findings of fact and conclusions thereon reiterating its prior involuntary dismissal of all but four counts of the complaint, found that the Silvermans had failed to meet their burden of proof as to the counts alleging conversion and theft, and entered an involuntary dismissal of the counts alleging alter ego and seeking to pierce the corporate veil. In addressing the Silvermans' argument on their motion for contempt, the trial court noted that the Defendants had objected to the discovery requests on the basis of relevance and made the following ruling:

The Court having considered the evidence presented at trial and having found the evidence insufficient to support the claim of the Plaintiffs on such counts, and the Court having dismissed involuntarily such claims, the Court now finds that Defendants are not in contempt of court for such discovery dispute.

*Id.* at 115. The Silvermans now appeal. Additional facts will be supplied where relevant.

## **DISCUSSION AND DECISION**

### **Standard of Review**

The Silvermans appeal from a negative judgment. Where a party who had the burden of proof at trial appeals, he appeals from a negative judgment and will prevail only if he establishes that the judgment is contrary to law. *Ruse v. Bleeke*, 914 N.E.2d 1, 11 (Ind. Ct. App. 2009). A judgment is contrary to law when the evidence is without conflict and all reasonable inferences to be drawn from the evidence lead to only one conclusion, but the trial court reached a different conclusion. *Id.*

After the bench trial, the trial court entered findings of fact and conclusions of law. Indiana Trial Rule 52(A) provides in pertinent part that “[o]n appeal of claims tried by the court without a jury . . . the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” *Id.* at 7-8. When a trial court has entered specific findings and conclusions along with its judgment under Trial Rule 52, we apply a two-tiered standard of review. *Id.* at 8. Construing the findings liberally in support of the judgment, we consider whether the evidence supports the findings. *Id.* Findings are clearly erroneous only when a review of the record leaves us firmly convinced that a mistake has been made. *Id.* We must then determine if the findings support the judgment. *Id.* A judgment is clearly erroneous when the findings of fact and conclusions thereon do not support it. *Id.* We will disturb the judgment only when there is no evidence supporting the findings or the findings fail to

support the judgment. *Id.* We do not reweigh the evidence, but consider only the evidence favorable to the trial court's judgment. *Id.*

### **I. Discovery Sanctions**

The Silvermans argue that the trial court abused its discretion by failing to find SCI in contempt for its alleged discovery order violations and by failing to rule on their motion for contempt prior to trial. The Defendants argue that the trial court's ruling was correct and that this issue is waived because the Silvermans did not object to the trial court's proposed method of addressing the issue at the conclusion of the evidence.

As a general rule, a party may not present an argument or issue to an appellate court unless the party raised that argument or issue to the trial court. *GKC Ind. Theatres, Inc. v. Elk Retail Investors, LLC.*, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002). An argument or issue not presented to the trial court is generally waived for appellate review. *Id.*

Here, in their motion for contempt, the Silvermans stated: :

It is not necessary to address this issue before the currently scheduled trial in this case, but Plaintiffs do request that the record reflect the apparent contempt as part of the trial herein.

*Appellants' App.* at 98. Further, prior to the start of the bench trial when the trial court announced its preference to take the matter under advisement until the close of the evidence in the bench trial, counsel for the Silvermans did not object to that procedure. Thus, any allegation of error in the trial court's decision to rule on the motion in its findings of fact and conclusions thereon has been waived.

Consequently, we now turn to the Silvermans' argument that the trial court abused its discretion by failing to find the Defendants in contempt for the alleged discovery order violation. "[A]" trial court enjoys broad discretion in determining the appropriate sanctions for a party's failure to comply with discovery orders." *Smith v. Smith*, 854 N.E.2d 1, 4 (Ind. Ct. App. 2006). An abuse of discretion occurs when the trial court's decision is against the logic and natural inferences to be drawn from the facts of the case. *Id.* Because of the fact-sensitive nature of discovery issues, a trial court's ruling is given a strong presumption of correctness. *Id.* Absent clear error and resulting prejudice, the trial court's determinations with respect to violations and sanctions should not be overturned. *Id.*

Indiana Trial Rule 26(B)(1) provides in relevant part that:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. . .

Here, the Silvermans sought to obtain the accounting detail of SCI's shareholder loan account for the period of January 1, 2002 to August 2008 in order to support their allegations that there was a commingling of assets for the purpose of obtaining funds for SCI or Johnson personally.

The Silvermans served their first combined set of interrogatories and requests for production on SCI on November 9, 2007. Interrogatory Number 12 and SCI's subsequent response follows.

Interrogatory No. 12: Identify the financial statements, including Balance Sheet, Income Statement, cash flow statements and operating budgets or projections for SCI and SPLLC for all periods from 2002 to present.

Answer: Southern Companies is not aware of any financial statements having been prepared for Southern Pediatric, LLC. Objection is made to the information sought concerning the financial statements of Southern Companies, Inc. as being irrelevant, unduly burdensome and not reasonably calculated to lead to admissible evidence.

*Appellants' App.* at 34. On February 6, 2008, the Silvermans filed a motion to compel SCI to respond and produce the documents requested in Interrogatory Number 12, and the trial court granted the motion.

On August 20, 2008, the Silvermans deposed Melissa Lugenbeal ("Lugenbeal"), SCI's comptroller. During the deposition, the Silvermans questioned Lugenbeal, who had been SCI's comptroller for approximately five years, about the availability of SCI's financial statements as follows:

Q: Can you create a report from the system on that general ledger account for a specific time period?

A: Yes.

Q: And that can go more than one year?

A: I think it's only two years, but I run reports. I mean I have hard copies stored.

Q: So, for example, could we go back and query that account back to 2002?

A: No. I would have to pull the hard copies of the year end reports that I ran.

Q: Okay. And you think you have all of those copies?

A: I would think so.

Q: Do you run a general ledger account on every account in the ledger?

A: At the end of the year I run a full general ledger, yes.

Q: Wow! And that is in paper form?

A: Yes.

Q: Not electronic?

A: No.

*Lugenbeal Dep.* at 37-38.

Following this deposition testimony, counsel for the Silvermans sent an e-mail to counsel for SCI specifically requesting the shareholder loan account documents to which Lugenbeal referred in her deposition testimony. *Appellants' App.* at 79. Counsel for SCI responded to the e-mail as follows:

After discussing the request for details of the shareholder loan account with SCI we have determine[d] that no response will be made to your informal request and I suspect a very strong objection will follow to any formal request. The account existed long before Silverman's action and the details are not relevant to any portion of the claims.

*Id.*

The Silvermans filed a second motion to compel the production of the financial statements relating to SCI's shareholder loan account on September 15, 2008. The trial court again granted the Silvermans' motion to compel.

On June 15, 2009, SCI supplemented its response by stating:

1. [SCI] produces the accounting detail of the "due from Shareholder" general ledger account for the period from January 1, 2008 to the present. [SCI] further advises no other detail for prior years is available as the Peachtree software on which the accounting information was maintained automatically deletes account detail annually, retaining only current year and the prior year detail.

*Id.* at 93.

On December 30, 2009, the Silvermans filed their motion for contempt, stating:

1. . . . [SCI's] controller indicated that she printed hard copies of the entire set of books and records of SCI at the end of each calendar year, and that such copies were available. The request was for the period of January 1, 2002 to August 2008.

\* \* \*

3. It appears that the paper copies, all of which are materially probative of the issue of piercing the corporate veil, were either lost or destroyed after the

controller identified them in her deposition because no objection was made indicating that those copies were not available. It is therefore appropriate to infer that the loss or destruction occurred after the Order was entered. As such, SCI is in contempt of the Court's Order.

\* \* \*

**WHEREFORE**, Plaintiffs respectfully request that the Court find [SCI] in contempt of its Order at the trial in this matter for failure to comply with the discovery requests enumerated above, and for all other relief just and proper in the premises.

*Id.* at 97-98.

The Silvermans did not ask for a continuance before trial due to the Defendants' failure to produce the requested documents. Furthermore, the Silvermans asked for a contempt finding, but did not specifically request any other sanctions.

Civil contempt is failing to do something a court in a civil action has ordered to be done for the benefit of an opposing party. A party who has been injured or damaged by the failure of another to conform to or comply with a court order may seek a finding of contempt. Whether a party is in contempt is a matter left to the sound discretion of the trial court, and we will reverse the trial court's contempt finding only if it is against the logic and effect of the evidence before it or is contrary to law. When reviewing a contempt order, we will neither reweigh the evidence nor judge the credibility of witnesses, and unless we have a firm and definite belief a mistake has been made, the trial court's judgment will be affirmed. To be punished for contempt of a court's order, there must be an order commanding the accused to do or refrain from doing something. To hold a party in contempt for a violation of a court order, the trial court must find that the party acted with willful disobedience. . . . [T]he primary objective of a civil contempt proceeding is not to punish the contemnor but to coerce action for the benefit of the aggrieved party. In a civil contempt action, imprisonment is for the purpose of coercing compliance with the order. Thus a contempt order that neither coerces compliance with a court order nor compensates the aggrieved party for loss, and does not offer an opportunity for the recalcitrant party to purge himself, may not be imposed in a civil contempt proceeding.

*Bartlemy v. Witt*, 892 N.E.2d 219, 227-28 (Ind. Ct. App. 2008) (internal quotations and citations omitted).

Here, the Silvermans' twice sought an order compelling the discovery of the disputed documents, and twice the trial court entered its order compelling such discovery. The second of such orders was entered more than eight months prior to the commencement of the trial. Assuming without deciding that SCI's failure to comply with the trial court's discovery orders was contemptuous, the imposition of a sanction for contempt at the end of trial would have been pointless because coercing the production of the documents by a contempt order after a completed trial would not have benefitted the Silvermans.

When the goals of the self-executing discovery system break down, Trial Rule 37 provides the trial court with tools to enforce compliance. *Hatfield v. Edward J. DeBartolo Corp.*, 676 N.E.2d 395, 399 (Ind. Ct. App. 1997). Trial Rule 37(B) provides trial courts with sanctions they may impose for failure to comply with discovery orders. *Id.* Trial Rule 37(B)(2)(c) provides that if a party disobeys a trial court's discovery order, the trial court may issue

[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any party thereof, or rendering judgment by default against the disobedient party.

The only limitation on the trial court in determining an appropriate sanction is that the sanction must be just. *Prime Mortg. USA, Inc. v. Nichols*, 885 N.E.2d 628, 649 (Ind. Ct. App. 2008).

Spoliation of evidence is "the intentional destruction, mutilation, alteration, or concealment of evidence." *Cahoon v. Cummings*, 734 N.E.2d 535, 545 (Ind. 2000) (quoting Black's Law Dictionary 1409 (7th ed. 1999)). If spoliation by a party to a lawsuit is proved,

rules of evidence permit the trier of fact to infer that the missing evidence was unfavorable to that party. *Id.* The Silvermans' claims could only be proven through the Defendants' records. However, by the time the trial court addressed the motion for contempt, it had already decided the substantive claims, and use of the inference was no longer an option. Moreover, the Silvermans failed to introduce any direct evidence at trial to support their allegation that SCI had intentionally destroyed the documents that they sought. While the discovery process here was flawed, we cannot say, on this record, that the trial court abused its discretion by failing to find SCI in contempt.

## **II. Piercing the Corporate Veil**

The Silvermans also contend that the trial court abused its discretion by finding that they lacked sufficient evidence to pierce the corporate veil. Again, the Silvermans appeal from a negative judgment and will prevail only if they establish that the judgment is contrary to law. *Ruse, supra.* A judgment is contrary to law when the evidence is without conflict and all reasonable inferences to be drawn from the evidence lead to only one conclusion, but the trial court reached a different conclusion. *Id.*

It is well settled that Indiana courts are reluctant to disregard a corporate entity; however, we may do so to prevent fraud or unfairness to third parties. When a court exercises its equitable power to pierce a corporate veil, it engages in a highly fact-sensitive inquiry. The legal fiction of a corporation may be disregarded where one corporation is so organized and controlled and its affairs so conducted that it is a mere instrumentality or adjunct of another corporation. Indiana courts refuse to recognize corporations as separate entities where the facts establish that several corporations are acting as the same entity. While no one talismanic fact will justify with impunity piercing the corporate veil, a careful review of the entire relationship between various corporate entities, their directors and officers may reveal that such an equitable action is warranted.

Our supreme court has held that the plaintiff bears the burden of proof with respect to piercing the corporate veil. To decide whether the plaintiff has met this burden, we consider whether the plaintiff has presented evidence showing: (1) undercapitalization; (2) absence of corporate records; (3) fraudulent representation by corporation shareholders or directors; (4) use of the corporation to promote fraud, injustice or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; or (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form.

*Oliver v. Pinnacle Homes, Inc.*, 769 N.E.2d 1188, 1191-92 (Ind. Ct. App. 2002) (internal quotations and citations omitted).

Here, the evidence presented to the trial court established that SPLLC was engaged in the business of soliciting the development of pediatric surgical centers. SPLLC would manage such facilities if and when they were developed and constructed, and would potentially own all or a portion of those facilities. There was evidence to show that SPLLC developed marketing programs and solicited business opportunities both before and after the Silvermans' investment in SPLLC. However, SPLLC was unsuccessful in obtaining the development contracts for pediatric surgical facilities. When asked, Johnson informed Morris that there had been no progress made and that Johnson had decided not to pursue further opportunities. Johnson agreed to refund Morris's investment in SPLLC, but did not.

The trial court concluded that Johnson was an active participant in both SCI and SPLLC, but that each entity existed for purposes independent of Johnson. Although the Silvermans argue on appeal that they presented sufficient evidence to pierce the corporate veil, that is not the issue before us. The issue before us is whether the evidence that is without conflict and all reasonable inferences to be drawn from such evidence lead to a

conclusion different from the conclusion that the trial court reached. It does not. The Silvermans' arguments regarding the previously listed factors we consider on review amount to a request to reweigh the evidence or reassess witness credibility, a function we are forbidden to do. The trial court did not abuse its discretion.

We further note, that in their prayer for relief, the Silvermans have requested that the judgment of the trial court be vacated with instructions to allow discovery and a re-trial of all of the counts of their complaint. In their opening brief, the Silvermans, however, did not challenge the trial court's involuntary dismissal of the other counts of their complaint. Accordingly, we do not reach any of the trial court's decisions related to those counts.

Affirmed.

CRONE, J., and BRADFORD, J., concur.