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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1275**

Thomas M. Fafinski,
Respondent,

vs.

Douglas Johnson,
Appellant.

**Filed May 10, 2021
Affirmed
Reilly, Judge**

Dakota County District Court
File No. 19HA-CV-18-4454

Nathan W. Nelson, Steven V. Rose, Virtus Law, PLLC, Minneapolis, Minnesota (for respondent)

Chad McKenney, Bradley D. Hendrikson, Donohue McKenney Ltd., Maple Grove, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Reilly, Judge; and Kirk, Judge.*

NONPRECEDENTIAL OPINION

REILLY, Judge

After seeking to recover his judgments for unpaid wages, respondent discovered that his former employer, appellant's son, had transferred all of his business assets to appellant. Respondent sued appellant pursuant to the Minnesota Uniform Fraudulent

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Transfer Act; the district court found for respondent and awarded damages. On appeal, appellant argues that a transfer of assets did not occur, the district court made erroneous findings of fact and conclusions of law, and the district court erroneously awarded damages. We affirm.

FACTS

In July 2005, the son of appellant Douglas Johnson secured a \$900,000 personal loan from Wells Fargo Bank to purchase the assets of a law firm. Following the purchase, appellant's son formed a new law firm (the law firm), and entered into an employment agreement with respondent Thomas M. Fafinski. Respondent worked for the law firm as an attorney from 2005 until 2009.

In 2007, the law firm began to experience financial problems and was unable to pay its expenses or make its loan payments, and failed to pay respondent the wages he earned. Appellant's son therefore refinanced his \$900,000 personal Wells Fargo loan by obtaining a \$600,000 personal loan from First Dakota National Bank in November 2009. At the direction of appellant's son, the law firm simultaneously obtained a \$150,000 business credit line also from First Dakota National Bank for operational expenses. The law firm used its assets as collateral to secure both loans. But as a part of granting the loans, First Dakota National Bank required a personal guarantee and collateral from appellant, who did a substantial amount of business with the bank. Appellant personally guaranteed both his son's personal loan and the law firm's loan, and gave First Dakota National Bank a security interest in real estate he solely owned.

About a month and a half after appellant's son and the law firm received loans from First Dakota National Bank, respondent resigned because of the law firm's continued failure to pay his wages earned. Respondent brought two lawsuits, the first against appellant's son and the law firm in July 2010, and the second against appellant's son in 2014. Between 2011 and 2016, respondent obtained seven judgments in these lawsuits.

In January 2011, the law firm shut down. About four months later, appellant's son and the law firm stopped making loan payments, and First Dakota National Bank sought payment from appellant as guarantor. In September 2011, Western Comfort Limited Partnership (Western Comfort), a registered South Dakota limited partnership of which appellant and his wife are the sole partners, satisfied appellant's guarantee on the First Dakota National Bank loans. To do so, Western Comfort obtained a loan from First Dakota National Bank in the amount of \$1,447,500, which appellant personally guaranteed. Western Comfort paid off appellant's son's personal loan of \$553,406.89 and dispersed \$43,636.30 to satisfy the law firm's loan.

Following satisfaction of the First Dakota National Bank loans and while the first lawsuit was pending, appellant's son prepared a pledge agreement that pledged all of the law firm's assets to appellant. The pledge agreement was deemed effective January 1, 2012, and listed appellant's son and the law firm as "[p]ledgors" and appellant as "[l]ender." The pledge agreement states that because appellant "paid a loan owed" by pledgors, pledgors now owe appellant "the amounts he paid to First Dakota National Bank." The pledge agreement provided appellant with a first priority security interest in all of the tangible and intangible assets owned by the law firm. The day before the pledge

agreement was deemed effective, December 31, 2011, the law firm valued its total assets at \$3,864,976.57.

On May 12, 2015, respondent tried to interject into the law firm's accounts receivable to collect his judgments, but appellant's son and the law firm refused to comply. Three days later, appellant sold property and used the proceeds to pay off the Western Comfort loan. Respondent then scheduled a sheriff's execution sale of the accounts receivable for September 1, 2015. The night before the sale, appellant's counsel delivered a copy of the pledge agreement to respondent's counsel for the first time. Appellant, however, did not restrain the sale, and respondent moved forward with it.

At the sheriff's sale, respondent bought the accounts receivable for one dollar. Respondent had a short period to collect on the accounts receivable before the statute of limitations prohibited recovery. He managed to collect between \$4,000 and \$5,000. The day before appellant's son transferred the law firm's assets to appellant, the law firm valued its accounts receivable at \$3,381,222.40. By September 2015, however, the value had significantly diminished and could no longer be used to satisfy respondent's judgments.

In 2018, respondent sued appellant seeking to recover \$93,345.46 pursuant to the Minnesota Uniform Fraudulent Transfer Act (MUFTA)¹ and unjust enrichment, alleging that appellant's son and the law firm fraudulently transferred assets to appellant to avoid payment. Appellant moved for summary judgment; a district court judge granted summary

¹ In 2015, MUFTA was amended to the Minnesota Uniform Voidable Transactions Act (MUVTA). *See* Minn. Stat. §§ 513.41-.51 (2020). The amended statute does not apply in this case because the amendments do not apply to a transfer made before August 1, 2015. *See* 2015 Minn. Laws ch. 17, § 13, at 10.

judgment on respondent's unjust-enrichment claim, and the parties proceeded to a bench trial in January 2020 on the MUFTA claim. The district court found that appellant violated MUFTA and awarded respondent \$93,345.46 in damages. This appeal followed.

DECISION

I. The district court did not err by concluding that appellant's son and the law firm transferred some assets to appellant.

Appellant argues that the district court erred by finding that appellant's son and the law firm violated MUFTA when they transferred assets to appellant because the pledge agreement was invalid and thus a transfer of assets did not occur. On appeal from judgment following a bench trial, we do not reconcile conflicting evidence. *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002), *review denied* (Minn. June 26, 2002). We review whether the district court's findings were clearly erroneous and whether the district court erred as a matter of law. *In re Distrib. of Attorney's Fees between Stowman Law Firm, P.A. & Lori Peterson Law Firm*, 855 N.W.2d 760, 761 (Minn. App. 2014), *aff'd*, 870 N.W.2d 755 (Minn. 2015). "A finding is clearly erroneous if we are left with the definite and firm conviction that a mistake has been made." *Id.* (quotation omitted). We however "are not bound by and need not give deference to the district court's decision on a purely legal issue." *Porch*, 642 N.W.2d at 477. When reviewing mixed questions of law and fact, we correct "erroneous applications of law, but accord the district court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard." *Id.* (quotation omitted).

The purpose of MUFTA is “to prevent debtors from placing property that is otherwise available for the payment of their debts out of the reach of their creditors.” *Citizens State Bank Norwood Young Am. v. Brown*, 849 N.W.2d 55, 60 (Minn. 2014). MUFTA thus “prohibits a debtor from transferring [assets] with the intent to hinder, delay, or defraud any creditors.”² *New Horizon Enters., Inc. v. Contemporary Closet Design, Inc.*, 570 N.W.2d 12, 14 (Minn. App. 1997). When a debtor transfers an asset with actual intent to hinder, delay, or defraud a creditor, the transfer is voidable. Minn. Stat. § 513.44(a)(1) (2010).

The act defines asset as “property of a debtor.” Minn. Stat. § 513.41(2) (2010). And it defines transfer broadly as “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.” Minn. Stat. § 513.41(12) (2010). Determining whether a transaction is a transfer is a threshold question under MUFTA. *In re Butler*, 552 N.W.2d 226, 231 (Minn. 1996). A transfer is made when it is “so far perfected that a creditor . . . cannot acquire a judicial lien that is superior to the interest of the transferee.” Minn. Stat. § 513.46(1)(ii) (2010).

² The district court found that the transfer of the law firm’s assets constituted actual and constructive fraud. During oral arguments, appellant asserted that he challenged the district court’s constructive-fraud finding on appeal. Based on appellant’s briefing, however, it is not clear that appellant challenged this finding. Because appellant inadequately briefed any constructive-fraud claim, we decline to reach this issue. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).

The district court found that the pledge agreement transferred all of the law firm's assets to appellant. Appellant argues that the pledge agreement did not perfect and thus no transfer of assets occurred. The pledge agreement granted appellant "a continuing lien and security interest in all of [the law firm's] . . . property of every kind and nature . . . now owned or hereafter acquired by [the law firm or appellant's son]." And it specified that the law firm's property included eight specific assets: cash, accounts receivable, inventory, fixtures, fittings, machinery, apparatus, and equipment, and one catch-all category of any other property. A pledge "is one of the simplest forms of security devices" and creates an interest in tangible or intangible property "for the purpose of securing the payment of a debt." *Koch v. Han-Shire Invs., Inc.*, 140 N.W.2d 55, 62 (Minn. 1966) (quotation omitted).

Generally, under the Uniform Commercial Code (UCC), to perfect a security interest, a financing statement must be filed. Minn. Stat. § 336.9-310(a) (2010). Here, a UCC financing statement was not filed to perfect the pledge agreement. The UCC, however, provides exceptions to the general rule and states that filing is unnecessary to perfect certain categories of security interests. Minn. Stat. § 336.9-310(b) (2010). In holding that the pledge agreement perfected, the district court found that two exceptions to the general rule applied. First, filing is unnecessary to perfect a security interest in "deposit accounts, electronic chattel paper, electronic documents, investment property, or letter of credit rights . . . under section 336.9-314" when the secured party has control of the interest. Minn. Stat. § 336.9-310(b)(8). Second, filing is unnecessary to perfect a security interest "in collateral in the secured party's possession under section 336.9-313." Minn. Stat. § 336.9-310(b)(6).

A. The district court erred by finding that appellant's security interest in the law firm's assets perfected through the control exception to the UCC filing requirement.

Respondent argues that the district court properly concluded that appellant's security interests in all of the law firm's assets perfected because appellant was in control of the assets. We disagree. Minn. Stat. § 336.9-314(a) (2010) dictates what assets are subject to the control exception to the UCC filing requirement. It provides that "[a] security interest in investment property, deposit accounts, letter of credit rights, electronic chattel paper, or electronic documents may be perfected by control." Since none of the law firm's assets included an investment property, deposit accounts, letter of credit rights, electronic chattel paper, or electronic documents, there were no assets to be perfected by control. So to the extent that the district court found that the pledge agreement perfected a security interest through control, and thus transferred the law firm's assets to appellant, we conclude that the district court erred as a matter of law.

B. The district court did not abuse its discretion by finding that appellant's security interest in the law firm's inventory, fixtures, fittings, machinery, apparatus, equipment, and cash assets perfected through the possession exception to the UCC filing requirement.

Turning to the possession exception to the UCC filing requirement, Minn. Stat. § 336.9-313(a) (2010) provides that a secured party may perfect a security interest in "tangible negotiable documents, goods, instruments, money, or tangible chattel paper" by taking possession. Perfection occurs when the secured party takes possession. Minn. Stat. § 336.9-313(d) (2010). And "[t]he transfer of possession necessary to a valid pledge does not require a manual delivery of the pledged property by the pledgor, or a manual receipt

of it by the pledgee.” *Goza v. Fairmont Nat’l Bank of Fairmont*, 195 N.W.2d 424, 426 (Minn. 1972) (quotation omitted). Instead, possession occurs when the property “is committed by the pledgor to the exclusive control and charge of the pledgee.” *Id.* (quotation omitted).

The pledge agreement created a security interest that appellant could perfect through possession in seven of the eight specified assets: goods (inventory, fixtures, fittings, machinery, apparatus, and equipment) and money (cash). Appellant argues that he never possessed any pledged assets and received no money under the pledge agreement. At trial, both appellant and appellant’s son testified that appellant did not receive any assets under the pledge agreement, but the district court “simply did not find the testimony of [appellant] or [appellant’s son] to be credible.” And possession does not require that appellant manually received the assets. By its express terms, the pledge agreement granted appellant possession of the law firm’s current and future assets on its effective date of January 1, 2012. Thus, the pledge agreement perfected on January 1, 2012, when appellant took possession of the law firm’s assets. We conclude that the district court did not abuse its discretion when it found that cash, inventory, fixtures, fittings, machinery, apparatus, and equipment transferred from appellant’s son and the law firm to appellant in violation of MUFTA.

C. The district court erred by finding that appellant’s security interest in the law firm’s accounts receivable perfected.

Having addressed seven of the eight specified assets in the pledge agreement, we now turn to the remaining asset, the accounts receivable. Accounts receivable fall under

the security interest category of “account,” which is defined as “a right to payment of a monetary obligation, whether or not earned by performance . . . for services rendered.” Minn. Stat. § 336.9-102(a)(2) (2010); *see also Black’s Law Dictionary* 21 (11th ed. 2019) (defining an account receivable as “[a]n account reflecting a balance owed by a debtor”). Although the district court found that all of the law firm’s assets transferred to appellant through the control and possession exceptions to the UCC filing requirement, an account is not an articulated security interest that perfects under either exception. Minn. Stat. §§ 336.9-313(a), -314(a). Under Minnesota law, there is only one exception under which a security interest in an account may perfect without satisfaction of the UCC filing requirement. Minn. Stat. § 336.9-310(b)(2). This exception provides that a security interest in an account is perfected when it attaches as long as the account “by itself or in conjunction with other assignments” does not transfer a significant part of the assignor’s outstanding accounts to the secured party. Minn. Stat. § 336.9-309(2) (2010).

Here, the accounts receivable represented a significant portion of the law firm’s outstanding accounts. They were valued at over \$3.3 million when the pledge agreement was deemed effective, and accounted for 87% of the law firm’s total assets. The pledge agreement assigned every other law firm asset to appellant. The attachment exception to the UCC filing requirement is therefore not applicable, and because no UCC financing statement was filed, appellant’s security interest in the accounts receivable did not perfect. We conclude that the district court erred as a matter of law by finding that appellant’s security interest in the law firm’s accounts receivable perfected through any exception to the UCC filing requirement.

II. The district court did not make other erroneous findings of facts or conclusions of law.

On appeal, appellant also argues that the district court made erroneous findings of fact and conclusions of law. We review whether the district court's findings were clearly erroneous and whether the district court erred as a matter of law. *In re Stowman Law Firm*, 855 N.W.2d at 761. Appellant filed a posttrial motion challenging 27 findings of fact and 20 conclusions of law, and then at a May 2020 hearing withdrew his challenges to six findings of fact and seven conclusions of law. Yet on appeal, appellant challenges those specific six findings and seven conclusions that he withdrew from the district court's consideration. We do not consider matters that were not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Because the six findings of fact and seven conclusions of law that appellant withdrew were not considered by the district court, we decline to consider them on appeal.

We next turn to the remaining 21 findings of fact and 13 conclusions of law. After a careful review of the record, we conclude that none of the district court's findings of fact were erroneous. Similarly, except for the district court's misapplications of law discussed in section I, we conclude that the district court did not make any additional erroneous conclusions of law.

III. The district court did not err by awarding respondent damages.

Appellant seeks review of the district court's award and determination of damages under MUFTA. Appellant argues that the district court had no basis to award damages to

respondent, we must reduce the damage award, the damage award was speculative, and the district court awarded an inappropriate amount of damages.

In reviewing a damage award, we consider the evidence in the light most favorable to the verdict. *Rayford v. Metro. Transit Comm'n*, 379 N.W.2d 161, 165 (Minn. App. 1985), *review denied* (Minn. Feb. 14, 1986). We will set aside a damage award only if it is “manifestly and palpably contrary to the evidence.” *Levienn v. Metro. Transit Comm'n*, 297 N.W.2d 272, 273 (Minn. 1980). In other words, we will not disturb the damage award “unless the failure to do so would be shocking or would result in plain injustice.” *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008) (quotation omitted). We review a district court’s determination of damages under an abuse-of-discretion standard. *Peters v. Mut. Benefit Life Ins. Co.*, 420 N.W.2d 908, 916 (Minn. App. 1988).

“MUFTA is a remedial statute and is meant to be construed broadly.” *Finn v. All. Bank*, 838 N.W.2d 585, 599 (Minn. App. 2013), *aff'd*, 860 N.W.2d 638 (Minn. 2015). Under MUFTA, when a debtor makes a transfer with actual intent to hinder, delay, or defraud a creditor, it is voidable even if the transfer were made before or after the creditor’s claim arose. Minn. Stat. § 513.44(a)(1). And when a transfer of assets is voidable, a creditor may recover judgment against the first transferee. Minn. Stat. § 513.48(b)(1) (2010).

We address each of appellant’s damages arguments in turn.

A. The district court had a legal basis to award respondent damages.

Appellant argues that the district court had no legal basis to award damages to respondent and thus any award of damages resulted from passion or prejudice. When a

debtor fraudulently transfers assets, MUFTA allows a creditor to recover judgment against the first transferee for the amount of the assets transferred or the amount necessary to satisfy the creditor's claim, whichever is less. Minn. Stat. §§ 513.44(a)(1), .48(b)(1).

Here, while appellant's security interest in accounts receivable did not perfect, his security interest in seven of the law firm's assets—cash, inventory, fixtures, fittings, machinery, apparatus, and equipment—did perfect and constituted a fraudulent transfer. When the pledge agreement was deemed effective, by its own accounting, the law firm valued its total assets at \$3,864,976.57. Of that total amount, the accounts receivable consisted of \$3,381,222.40, meaning that all other assets accounted for \$483,754.17. We therefore determine that appellant's son and the law firm fraudulently transferred assets valued at \$483,754.17 to appellant. Respondent had an outstanding claim of \$93,345.46 against appellant's son and the law firm. Given that respondent's claim is less than the value of the assets transferred, MUFTA permits respondent to recover \$93,345.46, the amount necessary to satisfy his outstanding claim, from appellant. *See* Minn. Stat. § 513.48(b)(1).

Appellant agrees that respondent should be permitted to recover from someone. But he argues that it would be unfair to allow respondent to recover from appellant based solely on the wrongdoing of appellant's son, and that if this court were to permit recovery under these circumstances, it would be the first time in the history of Minnesota that a court has done so. While we are sympathetic to appellant's argument and circumstances, we disagree. The purpose of MUFTA is to prevent *debtors* from placing property out of reach of their *creditors*. *Citizens State Bank Norwood Young Am.*, 849 N.W.2d at 60. And when

determining whether a fraudulent transfer occurred, the intent of the transferee—innocent or otherwise—is of no concern. Minn. Stat. § 513.44 (2010). Minnesota courts have also permitted a creditor to levy execution on assets that a relative-debtor fraudulently transferred to a relative-transferee. *See Reilly v. Antonello*, 852 N.W.2d 694, 701-02 (Minn. App. 2014) (holding that a creditor may levy execution on assets that a husband fraudulently transferred to his wife); *See also Citizens State Bank Norwood Young Am.*, 849 N.W.2d at 66 (permitting a creditor to levy execution on assets that an ex-husband fraudulently transferred to his ex-wife in a divorce decree).

B. There is no basis for reduction of the damage award.

Appellant also argues that “[p]ursuant to equity and under applicable rules related to fraudulent transfer claims,” respondent’s damage award should be reduced. Appellant, however, cites no such rules. Having concluded that Minn. Stat. § 513.48(b)(1) permits respondent to recover, we analyze appellant’s equity argument under this statutory section. When a creditor recovers judgment against a first transferee for the value of the assets transferred, the judgment is “subject to adjustment as the equities may require.” Minn. Stat. § 513.48(c) (2010). Respondent’s recovery, however, was for the amount necessary to satisfy his claim. No such principles of equity apply to judgments for the amount necessary to satisfy a creditor’s claim. Minn. Stat. § 513.48(b)(1).

C. The district court’s damage award was not speculative.

Appellant argues that the district court erred by awarding respondent damages that “were not only entirely speculative, but utterly unsupported by the evidence at trial.” Appellant’s argument is unsupported by the record. The district court made specific

findings about the amounts of the prior judgments respondent obtained against the law firm in prior actions and awarded respondent \$93,345.46—the exact amount of his outstanding judgments. Because there is nothing speculative about the district court’s damage award, the district court did not abuse its discretion.

D. The district court did not award an inappropriate amount of damages.

Appellant argues, with no legal citations, that the district court overlooked the timing of respondent’s underlying judgments, which he claims was critical to the determination of damages. He also argues that because respondent only had one judgment of \$1,131.25 against appellant’s son and the law firm at the time that the pledge agreement was deemed effective and the law firm’s assets were transferred to appellant, \$1,131.25 is the full extent of respondent’s possible damages. We disagree. As to a creditor under MUFTA, a transfer is fraudulent even if it occurred before the creditor’s claim arose. Minn. Stat. § 513.44(a)(1). That means that even though the majority of respondent’s claims arose after the fraudulent transfer, respondent is still entitled to recovery.

In sum, we decline to reduce respondent’s damage award and conclude that the district court had a legal basis to award respondent damages, did not award speculative damages, and did not award an inappropriate amount of damages. The district court did not abuse its discretion by awarding respondent \$93,345.46 in damages under MUFTA.

Affirmed.