WISCONSIN COURT OF APPEALS
DISTRICT III

Appeal No. 2019AP000288

DANIEL J. PLATKOWSKI,

Plaintiff-Respondent,

V.

HOWARD BEDFORD,

Defendant-Appellant,

QUOTIENT PARTNERS, TISSUE TECHNOLOGY, LLC and RON VAN DEN HEUVEL,

Defendants

Appeal from a Final Judgment of the Circuit Court of Brown County, the Honorable Kendall M. Kelley Presiding, Circuit Court Case No. 2016CV001137

BRIEF OF PLAINTIFF-RESPONDENT DANIEL J. PLATKOWSKI

Michele M. McKinnon
State Bar No. 1041053
Attorneys for Plaintiff-Respondent
Daniel J. Platkowski

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C.
231 South Adams Street
P.O. Box 23200
Green Bay, WI 54305-3200
Phone: 920-437-0476
Fax: 920-437-2868
3120128

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STATEMENT OF THE ISSUES

1. Did the parties mutually intend to enter into an enforceable Equipment Purchase Agreement, such that the Equipment Purchase Agreement was not void as against public policy?

   Circuit Court correctly answered yes.

2. Did Platkowski commit any wrongdoing in negotiating the Equipment Purchase Agreement with Bedford, such that Platkowski was prohibited from enforcing the Equipment Purchase Agreement by the doctrine of unclean hands?

   Circuit Court correctly answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Platkowski agrees with Bedford's position that oral argument is not necessary, as this case can be adequately addressed by written briefs.

However, publication of this Court's decision is not warranted. The issues involve the sufficiency of the evidence to support the Circuit Court's findings of fact, and the briefs

reveal that the evidence is sufficient. The opinion will be specific to the facts of this case, and will have no significant precedential value.

STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW

Bedford's Statement of Facts ignores the Circuit Court's finding that the Equipment Purchase Agreement at issue in this appeal was one small part of a much larger (and more complex) series of transactions in which Bedford was involved in late 2010. The Circuit Court relied on the existence of these "parallel" negotiations in finding that the Equipment Purchase Agreement was valid and enforceable (R. 266:232; App. 112), and the existence of these "parallel" negotiations are equally as important to this Court's review on appeal.

a. The Equipment Purchase Agreement Effective December 1, 2010.

The Equipment Purchase Agreement (the "Purchase Agreement") involved the sale of two Bretting Machines (collectively the "Machines") by Platkowski to Bedford on December 1, 2010. (R. 116; App. 129). Bedford admittedly signed the Purchase Agreement. (R. 266:120; R.App. 152). Bedford stipulated to the authenticity of the Purchase Agreement, and its admission into evidence. (R. 265:4-5; R.App. 103-104). Bedford also admitted that he was represented by Attorney Robert Winner in negotiations of the Purchase Agreement (R. 266:147-148; R.App. 157-158).

The negotiations between Bedford (through Attorney Robert Winner) and Platkowski resulted in several drafts of the Purchase Agreement. (R. 120-122; R.App. 192-217). As a result of those negotiations, Platkowski agreed, at Attorney Winner's request, to make various changes for the benefit of

Bedford (such as giving Bedford a grace period for future monthly payments, providing for immediate title transfer to Bedford upon execution of the Purchase Agreement, and Platkowski's agreement to "loan back" Bedford's down payment). (R. 265:108-111; R.App. 109-112). The Purchase Agreement disclosed that at least some of the negotiated concessions were necessary to accommodate a separate "Business Agreement" that Bedford was negotiating contemporaneously with a company called Stonehill Converting, LLC ("Stonehill"). (R. 116; App. 130).

Bedford ultimately agreed to purchase the Machines from Platkowski in exchange for the payment of $3.2 million over a five-year period. (R. 116; App. 129). As required by the terms of the Purchase Agreement, Platkowski signed a Bill of Sale in favor of Bedford. (R. 265:111, 117; R.App. 112, 169). Bedford made a $700,000.00 cash down payment to Platkowski as required in paragraph 5 of the Purchase

Agreement. (R. 265:112-114, 124; R. App. 113-115, 219-221). Platkowski deposited the down payment into his personal account, and then loaned that sum back to Bedford, which Bedford needed for his purchase of a company called Straubel Company, Inc. ("Straubel"). *Id*.

Thereafter, the Purchase Agreement required Bedford to make monthly payments to Platkowski. (R. 116; App. 129). Bedford never made the payments, despite repeated written demands by Platkowski. (R. 265:126-129, 137; R.App. 123-126). Bedford testified that he never disputed the payments demanded by Platkowski prior to the litigation. (R. 266:167-168; R.App. 159-160).

b. <u>The Settlement Agreement and Mutual Release Effective December 31, 2010.</u>

The second negotiation involved a Settlement Agreement and Mutual Release among numerous non-party entities (the "Settlement Agreement") effective December 31,

2010. (R. 159; R.App. 230-239). Bedford signed an acknowledgment of the Settlement Agreement in both his individual capacity and as the manager of a company called Tissue Depot, Inc. ("Tissue Depot"). (R. 159; R.App. 238). Bedford also stipulated to the authenticity of the Settlement Agreement, and its admission into evidence. (R. 265:4; R.App. 103). Attorney Winner testified that he, again, represented Bedford with respect to the Settlement Agreement. (R. 266:73; R.App. 142).

The Settlement Agreement was, in fact, the "Business Agreement" that Bedford had disclosed in the Purchase Agreement with Platkowski. At trial, Bedford could identify no other agreements to which the Purchase Agreement referred. (R. 266; 158-159).

The Settlement Agreement required Bedford, who represented himself to be the fee simple owner of the

Machines he purchased from Platkowski, to lease the Machines to Stonehill as consideration for certain promises made by Stonehill in favor of a third party, Ronald Van Den Heuvel. (R. 159; R.App. 231). Attorney Donald Swenson (an owner of Stonehill at the time of the Settlement Agreement) testified that Bedford stepped in as an "angel" investor who was interested in getting into the paper industry, generally. (R. 265:217; R.App. 130). Attorney Winner testified that Bedford was interested in investing in Van Den Heuvel's paper converting idea, specifically. (R. 266:74; R.App. 143).

The parties to the Settlement Agreement acknowledged that the Machines had significant value to them. (R. 159; R.App. 233, ¶6(c)). Stonehill – the intended recipient of the Machines from Bedford – valued the Machines at $3.2 million. (R. 265:229; R.App. 139). Not so coincidentally, Stonehill's valuation was the exact value that

Bedford agreed to pay Platkowski pursuant to the Purchase Agreement. (R. 116; App. 129). Despite the high valuation, the lease extended by Bedford to Stonehill gave Stonehill the unilateral option to purchase the Machines for a nominal payment of only $49.00. (R. 160; R.App. 254, ¶4). The remaining value of the machines ($3,199,951.00) constituted a portion of the $5 million in consideration that Stonehill required under the terms of the Settlement Agreement. (R. 265:217-218; R.App. 130-131).

Prior to Bedford's execution of the Settlement Agreement, Attorney Swenson testified that either Bedford or his attorney, Robert Winner, produced the signed Bill of Sale that Bedford had received from Platkowski as part of the Purchase Agreement as evidence that Bedford, in fact, had ownership of the Machines. (R. 265:223-224, 117; R.App. 134-135, 169). This was buttressed by the warranties and representations made by Bedford in the subsequent lease of

the Machines to Stonehill on the heels of the Purchase Agreement – warranties that were required by Stonehill. (R. 160, 265:225-226; R.App. 254, 136-137). Specifically Bedford warranted to Stonehill:

> . . . THAT [BEDFORD] IS OWNER OF THE EQUIPMENT FREE AND CLEAR OF ALL LIENS AND ENCUMBRANCES AND HAS THE SOLE RIGHT TO LEASE THE EQUIPMENT, AS PROVIDED IN THIS LEASE AND THIS LEASE SHALL BE BINDING AND ENFORCEABLE AGAINST [BEDFORD] IN ACCORDANCE WITH ITS TERMS.
>
> [BEDFORD] REPRESENTS AND WARRANTS THAT IT [SIC] HAS THE RIGHT AND AUTHORITY TO LEASE THE EQUIPMENT AND ENTER INTO THIS LEASE AND THAT THIS LEASE SHALL BE BINDING AND ENFORCEABLE AGAINST [STONEHILL] IN ACCORDANCE WITH ITS TERMS.

(R. 118; R.App. 172).

Attorney Winner testified that he would not have allowed his client, Bedford, to make false representations in that regard. (R. 266:78-79; R.App. 144-145).

To guaranty Bedford's compliance with the option to purchase, Bedford further agreed to place a bill of sale for the Machines into escrow so that title of the Machines would

transfer to Stonehill upon Stonehill's payment of the $49.00 option price. (R. 161; R.App. 262-268). Stonehill exercised the $49.00 purchase option, and Stonehill took title to the Machines. (R. 265:229; R.App. 139).

In exchange for Bedford's transfer of the Machines to Stonehill, Stonehill gave Tissue Depot (an entity of which Bedford claimed to be the managing member) the right to purchase certain products produced by the Machines at negotiated prices (referred to as the "Tolling Agreement"). (R. 162; R.App. 269-282). According to Stonehill, the Tolling Agreement could have yielded more than $4 million to Tissue Depot – if adequate sales were made. (R. 265:228; R.App. 138). Attorney Winner acknowledged that the Tolling Agreement was "where the value was to be generated [to Bedford] … out of this whole settlement." (R. 266:81; R.App. 146).

c. Platkowski's Termination of Pre-Existing Lease With Stonehill.

In order to transfer the Machines to Bedford free and clear of all liens, Platkowski needed to terminate an existing lease (the "Pre-Existing Lease") of the Machines between Platkowski and Stonehill. (R. 265:113-117; R.App. 114-118). The lessee was the same Stonehill entity that was contemporaneously acquiring fee simple ownership of the Machines from Bedford through the Settlement Agreement. (R. 265:218, 221; R.App. 131-132). Bedford's attorney, Robert Winner, was also part of the negotiations between Platkowski and Stonehill regarding termination of the Pre-Existing Lease. (R. 265:113-114; R.App. 114-115). In fact, Attorney Winner gave Platkowski advice on Platkowski's communications with Stonehill to evidence a valid sale between Platkowski and Bedford. (R. 265:117-118, 120-122; R.App. 118-122). Attorney Winner did not deny that he

provided advice to Platkowski on this issue. (R. 266:83-86, 120; R.App. 148-152).

Attorney Don Swenson testified that Platkowski's termination of the Pre-Existing Lease was ultimately a non-issue because, via the Settlement Agreement, Stonehill became the title owner of the Machines as opposed to a mere lessee. (R. 265:232; R.App. 140). In Attorney Swenson's own words, the lease termination became "moot" as a result of the Settlement Agreement. *Id*. Even Attorney Winner testified that the Settlement Agreement rendered the lease termination a moot point. (R. 266:85-86; R.App. 150-151).

d. <u>Bedford's Acquisition of Straubel Company, Inc. n/k/a Bedford Paper, Inc.</u>

In 2011, on the heels of the Purchase Agreement and the Settlement Agreement, Bedford testified that he purchased Straubel Company, Inc., n/k/a Bedford Paper, Inc. (R. 266:141; R.App. 156). Bedford admits that he paid about

$5 million for that company. *Id*. The Circuit Court identified the similar nature of Straubel's business – a paper converting business - with the intended use of the Machines. (R. 265:135-137; R.App. 127-129).

e. <u>Other Subsequent Acknowledgements of Bedford's Debt to Platkowski Under the Purchase Agreement</u>.

In the years following the Purchase Agreement and Settlement Agreement, Bedford's attorney, Robert Winner, authored numerous correspondence acknowledging the debt owed by Bedford to Platkowski under the Purchase Agreement. For example, in September 2011 – nine months after the execution of the Purchase Agreement – Attorney Winner circulated a letter acknowledging a goal of "satisfying the equipment purchase for the Machines (currently leased to Stonehill) with Dan Platkowski" as an open issue for resolution. (R. 147; R.App. 284-286).

Also, in April of 2012 – 16 months after the Purchase Agreement – Attorney Winner proposed a letter of intent on behalf of Bedford, which would have required a third party to "assume all of Bedford's obligations to Dan Platkowski under that certain Purchase Agreement effective as of December 1, 2010… ." (R. 156; R.App. 222-227).

Both letters acknowledged the enforceability of the Purchase Agreement and Bedford's debt to Platkowski.

ARGUMENT

At the trial, Bedford challenged the enforceability of the Purchase Agreement based on the exact factual argument he brings to this Court on appeal – specifically, Bedford argued that the Purchase Agreement was unenforceable because it was a "sham" agreement used by Platkowski to intentionally defraud Stonehill. (R. 266; App. 232). The Circuit Court rejected that argument finding Platkowski

perpetrated no fraud at all, and, instead, found that Platkowski and Bedford mutually intended to enter into a valid and enforceable Purchase Agreement. (R. 266:234; App. 114).

On review, this Court must not set aside a Circuit Court's factual findings unless the findings are clearly erroneous. *See* Wis. Stat. §805.17(2) (2013–14); *see also M.Q. v. Z.Q.,* 152 Wis. 2d 701, 708, 449 N.W.2d 75. When reviewing the Circuit Court's factual findings, this Court must "search the record for evidence to support findings reached by the Circuit Court, not for evidence to support findings the Circuit Court could have reached but did not." *See Noble v. Noble,* 2005 WI App 227, ¶15, 287 Wis. 2d 699, 706 N.W.2d 166. This Court should assume the Circuit Court made the findings of fact necessary to support its decision and accept any such implicit findings if supported by the record. *See Town of Avon v. Oliver,* 2002 WI App 97, ¶23, 253 Wis. 2d 647, 644 N.W.2d 260.

In this case, the Circuit Court started and ended with its findings of fact that Platkowski and Bedford mutually intended to enter into a valid and enforceable Purchase Agreement, and did in fact enter into a valid and enforceable Purchase Agreement, and those findings of fact should not be disturbed on appeal.

I. THE CIRCUIT COURT'S FINDINGS OF FACTS WITH RESPECT TO THE INTENT OF THE PARTIES WERE SUPPORTED BY THE TESTIMONY AND THE STIPULATED EXHIBITS.

An abundance of credible evidence, as required by Wis. Stat. §805.17(2), supported the Circuit Court's findings with respect to Platkowski and Bedford's intent in entering into the Purchase Agreement and surrounding transactions. The Circuit Court considered several key pieces of evidence – almost all of which were undisputed at trial – as well as the demeanor of the witnesses to conclude that the parties'

actions "appeared at all times to be consistent with the conclusion that they thought this was a valid deal, so I don't find it is void at all." (R. 266:232-233; App. 112-113). Those key facts included the following:

A. Bedford was Represented by Counsel who Assisted Bedford in Negotiating Both the Purchase Agreement and the Settlement Agreement.

The evidence undisputedly shows that Attorney Robert Winner represented Bedford throughout the negotiation and execution of both the Purchase Agreement and the Settlement Agreement. (R. 266:147-148; R.App. 157-158) (R. 266:73; R.App. 142). Platkowski and Swenson both testified that they negotiated the agreements with Attorney Winner, and the stipulated exhibits further confirm their testimony. (R. 120-122, 159). The Circuit Court concluded that, based on the evidence presented, Attorney Winner had clearly gone to great lengths to assist Bedford in accomplishing Bedford's

goals, and that "[Attorney Winner], too, believed that [the Purchase Agreement and the Settlement Agreement] was a series of transactions that were worthy of careful attention and tr[ied] to craft, as he sort of described it, an ultimate outcome consistent with [Bedford's] interests." (R. 266:233; App. 113).

Not fewer than 13 stipulated exhibits supported Attorney Winner's involvement in the transactions and demonstrated that he facilitated the Purchase Agreement and the Settlement Agreement on Bedford's behalf. (R. 128, 130, 131, 133, 134, 136, 139, 156, 160, 164, 167, 169, 171). Bedford did not contest the fact that Attorney Winner was working in furtherance of Bedford's goals in regard to these transactions. In fact, Bedford made no allegation at trial that Attorney Winner had acted without Bedford's authority, or in any manner that was inconsistent with Bedford's wishes.

B. Platkowski's Testimony was Consistent With the Stipulated Exhibits.

In addition to the witnesses' testimony, the Court relied on the consistency of the 62 stipulated exhibits to buttress the credibility of Platkowski. (R. 266:228; App. 108). The record is saturated with exhibits involving Attorney Winner evidencing his negotiation of the Purchase Agreement. (R. 120-123, 127-131, 133, 134, 137, 147, 157, 167, 169, 171). By the Purchase Agreement between Bedford and Platkowski, Bedford acquired ownership of the Machines so that he could, in turn, lease the Machines to Stonehill as consideration for the Settlement Agreement. (R. 117, 159). Either Bedford or Attorney Winner gave Stonehill the Bill of Sale as evidence of Bedford's ownership of the Machines. (R. 265:223-224, 117; R.App. 134-135, 169).

Even after execution of the Purchase Agreement and Bedford's lease of the Machines to Stonehill, the record

evidences the parties' continuing communications concerning the enforceability of the Purchase Agreement, ranging from Platkowski's continuing demands for payment (see Section I(a), above), and Attorney Winner's continued efforts to satisfy Bedford's obligation to Platkowski from subsequent transactions (see Section II(b), above). After reviewing all of the evidence, the Court found that:

> ". . . from the memos to the interactions before, during the contracting process, clearly after the contracting process, are all consistent with [Platkowski's] position here, and in addition, I'd have to say that the actions of [Platkowski] are consistent with [Platkowski's] position."

(R. 266:228; App. 108).

Now, on appeal, Bedford cites to just 1 of the 62 stipulated exhibits admitted into evidence in his effort to challenge the Circuit Court's findings of fact. (App. Br., p. 18). Bedford focuses narrowly on one e-mail authored by Platkowski on December 29, 2010 as evidence of Platkowski's purported "plan to defraud Stonehill." *Id*.

Bedford's challenge fails for two reasons. First, the Circuit Court heard testimony about that specific e-mail, and the purpose for which it was authored. That testimony lends no support to the argument that Platkowski planned to defraud Stonehill. Instead, Platkowski testified that the terms of that e-mail were actually proposed by Bedford and were only reduced to writing by Platkowski. (R. 265:118-122; R.App. 119-122). Bedford's testimony provided no contradiction. Bedford only testified that Platkowski sent the e-mail to him. (R. 266:159).

Moreover, even if the December 29, 2010 e-mail and the testimony surrounding it somehow conflicted with the remaining 61 exhibits and the testimony of all the witnesses, it is the province of the Circuit Court to judge its credibility. *Stevenson v. Stevenson*, 2009 WI App 29, ¶14, 316 Wis. 2d 442, 765 N.W.2d 811. When more than one reasonable inference can be drawn from the credible evidence, the

reviewing court must accept the inference drawn by the trier of fact. *Id*. It is implicit in the Circuit Court's finding of fact that it afforded less credibility to the lone December 29, 2010 e-mail than it did to the two days of testimony and the remaining 61 stipulated exhibits. Ultimately, with respect to the Circuit Court's task of determining credibility, the Court held:

> "It's not difficult to do that because I think that the paper trail associated with [Platkowski's] position is clear and consistent throughout the transaction. Very thorough and consistent throughout."

(R. 266:228; App. 108).

C. Bedford's Testimony was Inconsistent With the Stipulated Exhibits.

Unlike Platkowski's position, the Court found that the subjective intent of Bedford espoused at trial was not "supported by any of the facts or realities of the circumstances that presented themselves." (R. 266:228; App.

108). In considering Bedford's testimony, the Court specifically found that:

> "[Bedford's] statements, frankly, are contradicted by the paper trail that exists. There are a number of times in which a signature appears. Frankly, his initials appear on critical documents throughout, so the documents themselves would present a different presentation than the testimony during the course of the trial."

(R. 266:229; App. 109).

Nor was the Circuit Court persuaded by Bedford's general statements that he had no desire to "get into the paper business," as that position was subsequently refuted by Bedford's purchase of (and successful operation of) Straubel, a paper converting business. (R. 266:230-231; App. 110-111).

Moreover, the Circuit Court interpreted Bedford's admitted lease and sale of the Machines to Stonehill as an action that was consistent with Bedford's intention to take ownership of the Machines from Platkowski via the Purchase

Agreement. (R. 266:231-232; App. 111-112). With respect to Bedford's ratification of the Purchase Agreement via Bedford's lease of the Machines to Stonehill, the Circuit Court found:

> "If there was not a contract basis for this, if this is an invalid contract that transferred the ownership of that equipment, then the only other conclusion one could draw would be that it was stolen [by Bedford], and so I didn't draw that conclusion because it appears clear that the transaction here is a valid transaction."

(R. 266:231; App. 111).

D. Stonehill, the Purported "Victim" of the Alleged Fraud, was Actively Involved in the Negotiations of the Settlement Agreement Which Rendered the Termination of the Pre-Existing Lease a Moot Issue.

Bedford's appeal rests on the factual allegation that Platkowski intended to defraud Stonehill by using the existence of the Purchase Agreement to terminate the Pre-Existing Lease. But the Circuit Court found no support of any ill intent by Platkowski. Instead, the Circuit Court acknowledged that Stonehill – the purported "victim" – was intimately involved in and aware of Bedford's negotiations with Platkowski. In this vein, the Circuit Court recognized that Bedford was working in a "sort of parallel program" in which Stonehill was hardly a victim. (R. 266:232; App. 112).

The "fraud" alleged by Bedford on appeal is Platkowski's termination of the Pre-Existing Lease. However, because of the Purchase Agreement and the Settlement Agreement, Stonehill obtained clear ownership of

the Machines. Attorney Swenson (an owner of Stonehill) testified that Platkowski's termination of the Pre-Existing Lease between Platkowski and Stonehill was necessary in order for Bedford to transfer clear title of the Machines to Stonehill and that, upon execution of the Settlement Agreement, the termination of the Pre-Existing Lease became *moot* as far as Stonehill was concerned. (R. 265:232; R.App. 140). The issue was moot because Stonehill's positon had been improved by the transactions – while Stonehill had lost the rights of a lessee under the Pre-Existing Lease with Platkowski, Stonehill had acquired fee simple ownership rights under the Settlement Agreement with Bedford. *Id*. Stonehill was actively participating for its own benefit, and the Circuit Court was persuaded by the testimony of Attorney Swenson who believed both transactions were legitimate so as to transfer clear ownership of the Machines to Stonehill. (R. 266:232; App. 112).

Even Attorney Winner, who represented Bedford in these transactions, testified that the signed Settlement Agreement rendered Platkowski's termination of the Pre-Existing Lease a "moot" issue, and that any potential disagreement between Platkowski and Stonehill regarding termination of the Pre-Existing Lease would be "resolved inside of the settlement document." (R. 266:86; R.App. 151).

The Circuit Court made the ultimate determination that Platkowski and Bedford entered into the Purchase Agreement as a valid and enforceable agreement, and that neither had any intent to defraud Stonehill. For the reasons cited above, the Circuit Court found ample support in the record for these findings. The Circuit Court's findings of fact should not be disturbed on appeal.

II. BECAUSE THE CIRCUIT COURT FOUND NEITHER AN INTENT TO DEFRAUD NOR A "VICTIM" OF ANY FRAUD, THE CIRCUIT COURT WAS NOT REQUIRED TO ADDRESS THE LEGAL ISSUE OF WHETHER THE PURCHASE AGREEMENT VIOLATED PUBLIC POLICY.

Whether the Purchase Agreement is void as to public policy presents a mixed question of law and fact, which requires a two-step analysis. *State v. Gollon*, 115 Wis. 2d 592, 600, 340 N.W.2d 912 (Ct. App. 1983). In the first step, this Court must affirm the Circuit Court's findings of fact unless those facts are clearly erroneous. The second is whether the established facts fulfill the legal standard of "fraud". See *Janesville Cmty. Day Care Ctr., Inc. v. Spoden*, 126 Wis. 2d 231, 236–37, 376 N.W.2d 78, 81 (Ct. App. 1985).

On review, this Court only reaches the second step – the legal determination of whether an alleged fraud serves to void an agreement as a matter of public policy – <u>if</u> the

underlying factual analysis results in a finding of fraud by the parties. *Id*. In this case, the lack of any fraudulent intent by either Platkowski or Bedford, as found by the Circuit Court, negates any requirement for this Court to perform a de novo review of whether the Purchase Agreement violates public policy as a matter of law.

Bedford's feigned concern for the well-being of Stonehill fails for another reason: the purported "victim" of the fraud, Stonehill, was not duped at all. In fact, Stonehill's positon with respect to the Machines was dramatically improved by virtue of the transactions: Stonehill went from a mere lessee of the Machines to a fee simple owner of them. That fact distinguishes this case from the cases of *Twentieth Century Co. v. Quilling*, 130 Wis. 318, 110 N.W. 174 (1907) and *Shea v. Grafe*, 88 Wis. 2d 538, 274 N.W.2d 670 (1979), both of which are cited by Bedford.

In *Quilling*, the parties set up a pyramid scheme in which Quilling would dupe third party buyers into purchasing an exclusive sales territory to sell a worthless patent owned by Twentieth Century. Those third party buyers would, in turn, further divide their respective sales territory, with Quilling and Twentieth Century contractually sharing in the sales proceeds from each victim down the line. The Court found:

> "… the real arrangement was a joint scheme to make money by selling similar nominal territorial rights to others who should, also, become parties to the scheme and sell similar territorial rights to still others, and so on – the idea being that the process should go on in constantly broadening circles as long as purchasers could be found who were foolish enough to buy, and thus necessarily leave the ultimate purchasers with nothing to show for their money or notes save the practically worthless right to sell the patented device in some backwoods county."

Id. at 176. The Court found that there was no legitimate purpose to the contract, and found the contract between the parties contrary to public policy and void.

In *Shea*, which was originally filed under the Wisconsin Consumer Act, a buyer and seller of a motor home admitted their creation of a false sales contract with an inflated purchase price in order to get financing from the buyer's lender. The Court cited the broad public policy underlying a healthy economy and the need for lending institutions to be able to rely on the integrity of the documents produced by buyers and sellers. *Shea*, 88 Wis. 2d 538, 544, 274 N.W.2d 670 (1979). Moreover, the Court found that the illegality "appeared on the face of the contract, in the evidence, and by the admissions of the parties… ." *Id*. at 546.

In both *Quilling* and *Shea*, the Court first found the contracts at issue intrinsically illegal and then identified *broad* public policy reasons against enforcement because the agreements harmed third parties. Those elements are simply not present here. The Purchase Agreement evidences the sale

of the Machines from Platkowski to Bedford. There are few things more basic in the business world than a contract for the sale of commercial goods. Such contracts certainly cannot reasonably be deemed illegal on their face – especially considering that the negotiations by both Bedford and Stonehill were guided by their respective counsel (Attorney Robert Winner on behalf of Bedford and Attorney Don Swenson on behalf of Stonehill).

In addition, Stonehill, the only party that Bedford alleges to have been "defrauded", was aware of the transaction, and negotiated and then ultimately benefited from that very transaction. With all affected parties having a seat at the negotiation table, there was no need for the Circuit Court to resort to public policy determinations.

III. BEDFORD FORFEITED THE ISSUE OF UNCLEAN HANDS BY FAILING TO RAISE THE ISSUE BEFORE THE CIRCUIT COURT AND, IN ANY EVENT, THE CIRCUIT COURT'S FINDINGS OF FACT ARE EQUALLY APPLICABLE TO THE DOCTRINE OF UNCLEAN HANDS.

Bedford next urges this Court to reverse the Circuit Court's decision due to the Circuit Court's lack of express findings regarding Bedford's affirmative defense of "unclean hands". However, this Court is not obliged to consider issues raised for the first time on appeal. *See, e.g.*, *Shadley v. Lloyds of London*, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838. Bedford has the burden of establishing, by reference to the record, that the error was first raised in the Circuit Court. *Id.* ¶26.

Bedford asserted the doctrine of unclean hands as an affirmative defense in Bedford's Answer (R. 22). However, Bedford did not raise that issue before the Circuit Court at the trial. In fact, a review of the transcript reveals that the term

"unclean hands" was not uttered even once during the two-day trial. (R. 265, 266). At the end of the trial, when the trial judge asked the parties "[is] there anything that I have not covered that, for purposes of review or anything else, that you would like me to address," Bedford answered "[n]othing from the defense, your Honor." (R. 266:235; App. 115). Bedford cannot now, for the first time, criticize the Circuit Court for not making specific finding on an issue Bedford never raised.

Notwithstanding Bedford's forfeiture of this affirmative defense at trial, when a trial court does not make an express finding of fact, this Court is not obligated to reverse the trial court's decision. Instead, this Court may adopt one of three courses: (1) affirm the judgment if clearly supported by the preponderance of the evidence, (2) reverse if not so supported, or (3) remand for the making of findings and conclusions. *Walber v. Walber*, 40 Wis. 2d 313, 319, 161 N.W.2d 898 (1968). Here, neither reversal nor remand are

warranted because the preponderance of the evidence upon which the Circuit Court found an enforceable contract also supports a finding that the doctrine of unclean hands is inapplicable.

The doctrine of unclean hands applies when a plaintiff (here, Platkowski) seeks relief from the consequences of *his own* unlawful act. *Timm v. Portage County Drainage Dist.*, 145 Wis. 2d 743, 752-523, 429 N.W.2d 512, 516-17 (Ct. Appl. 1988). It first requires factual findings of an unlawful act. In this case, the Circuit Court's findings of facts with respect to the intent of the parties adequately addresses that affirmative defense because the Circuit Court expressly found that Platkowski and Bedford intended to enter into an enforceable Purchase Agreement. The Circuit Court found:

> "The validity of the process was clear and was known and there's no reason to believe that anybody here was actually misled through the process, and again, the series of unanswered emails following this in terms of the debt and so forth are all consistent with the conclusion that this was always perceived as a legitimate transaction."

(R. 266:233; App. 113). Absent any finding of an unlawful act by Platkowski, Bedford's affirmative defense of unclean hands is simply not applicable.

For all the same reasons, the Circuit Court's failure to specifically address the doctrine of unclean hands in its decision is harmless error. Wis. Stat. §805.18(2) guards against reversal of the Circuit Court's findings unless the error complained of has affected the substantial rights of the party seeking relief. For an error to affect the substantial rights of a party under Wis. Stat. §805.18(2), there must be a "reasonable possibility" that the error contributed to the outcome of the action or proceeding. *Evelyn C.R. v. Tykila S. (In re Termination of Parental Rights to Jayton S.),* 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768 (citing *State v. Dyess*, 124 Wis. 2d 525, 370 N.W.2d 222 (1985)). Had the Circuit Court expressly applied its factual findings to

Bedford's affirmative defense of unclean hands, there is no "reasonable probability" that the Circuit Court would have used those findings to reach a different conclusion. The Circuit Court found that Bedford and Platkowski intended to enter into an enforceable Purchase Agreement, and that finding of intent adequately resolves the affirmative defense in a manner consistent with the Circuit Court's ruling.

CONCLUSION

For the reasons argued above, this Court should affirm the factual findings of the Circuit Court and dismiss Bedford's appeal.

Dated this 19th day of June, 2019.

LAW FIRM OF CONWAY,
OLEJNICZAK & JERRY, S.C.
Attorneys for Plaintiff-Respondent,
Daniel J. Platkowski

By: s/Michele M. McKinnon
Michele M. McKinnon

CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in §§808.10 and 809.62 for a brief produced with a proportional serif font. The length of this Brief is 5,166 words.

LAW FIRM OF CONWAY,
OLEJNICZAK & JERRY, S.C.
Attorneys for Plaintiff-Respondent,
Daniel J. Platkowski

By: s/Michele M. McKinnon
Michele M. McKinnon
State Bar No. 1041053

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §809.19(12)

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of June, 2019.

LAW FIRM OF CONWAY,
OLEJNICZAK & JERRY, S.C.
Attorneys for Plaintiff-Respondent,
Daniel J. Platkowski

By: s/Michele M. McKinnon
Michele M. McKinnon
State Bar No. 1041053