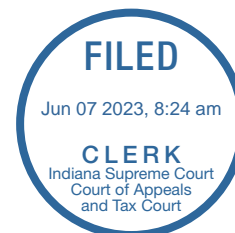


MEMORANDUM DECISION

Pursuant to [Ind. Appellate Rule 65\(D\)](#), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Jung Hee Kim,
Appellant-Plaintiff,

v.

Han Chong, Kyung Choi, Bo
Kang Park,
Appellee-Defendants

June 7, 2023

Court of Appeals Case No.
22A-PL-2747

Appeal from the Monroe Circuit
Court

The Honorable Nathan G. Nikirk,
Special Judge

Trial Court Cause No.
53C04-1611-PL-2260

Memorandum Decision by Judge Mathias
Judges May and Bradford concur.

Mathias, Judge.

[1] Jung Hee Kim appeals the trial court's entry of summary judgment in favor of Han Chong on her claim that Chong was responsible for the theft of Kim's

funds, which Kim intended to use to purchase a restaurant. The trial court relied on a vacated decision from our court to conclude that the law of the case doctrine warranted the entry of summary judgment.

- [2] Concluding that the trial court’s application of the law of the case doctrine was erroneous, but that Kim nonetheless failed to designate evidence that would establish a genuine issue of material fact concerning her theft claim, we affirm.

Facts and Procedural History

- [3] Chong manages a commercial building in Bloomington, owned by his parents, that previously had housed two restaurants, the Sake Bar and Japonese. The restaurants were owned by a company named Oya, whose sole shareholder was Bo Kang Park. Park had purchased Japonese from Chong’s father. Chong had access to Oya’s bank account and used the funds in that account to pay his brother’s credit card bills and to build another restaurant.
- [4] Kim, a South Korean national, desired to reside in the United States and learned that if she invested in a business, she could apply for an E-2 visa. This type of visa allows an individual to enter and work in the United States when the individual has invested in a business that he or she will work at while residing in the country. Kyung Sil Choi, Kim’s sister-in-law, encouraged Kim to invest in Sake Bar after she learned that Park was looking for someone to purchase the business. Kim claims that Choi represented that Chong was the owner of Sake Bar. Choi also owned and operated a restaurant in the building owned by Chong’s parents.

- [5] In March and April 2014, Kim sent a total of \$150,000 to Park's company, Oya, to purchase Sake Bar, and Park and Kim signed an Asset Purchase Agreement. Chong and Park used Kim's funds to build a hibachi grill in Chong's building that also housed Japonese. In the meantime, Choi hired an immigration attorney for Kim, who began the process of submitting Kim's E-2 visa application. Kim's first visa application was denied. But Kim filed a second application, with which Chong assisted by providing bank statements from Oya to establish that Kim had invested money in the United States. In January 2015, Kim received her E-2 visa.
- [6] In July, Kim and her children entered the United States on the E-2 visa. The family lived with Choi, and Kim worked at Choi's restaurant. Choi did not charge Kim rent, and Choi paid her a small salary. Kim did not work at Sake Bar. Park told Kim that she needed to open a bank account and transfer the utilities of Sake Bar into her name.
- [7] Kim did not enjoy working at Choi's restaurant and asked Chong if she could work at Japonese. Kim believed that Chong owned Japonese. In October 2015, Chong found Kim her own apartment, allowed her to use his car, and helped her get a job at Japonese. Toward the end of the month, Chong began to sexually harass Kim, and Kim became afraid of Chong.¹

¹ In November 2015, Kim filed a petition for an order of protection against Chong. The Monroe Circuit Court granted the petition after concluding that Kim had been a victim of stalking. Chong appealed and our

[8] On November 7, 2016, Kim filed a complaint alleging breach of contract, conversion, and fraud against Chong, Park, and Choi (collectively “the Defendants”). The trial court dismissed Kim’s fraud claim for failure to properly plead fraud. Oya intervened in the case and alleged breach of contract against Kim for failing to meet the contractual provisions of her agreement to purchase Sake Bar. A jury trial was held in April 2019. In relevant part, the jury concluded that the Defendants were guilty of theft and awarded Kim \$350,000. The trial court also awarded Kim attorney’s fees.

[9] The Defendants appealed the jury’s verdict and claimed that the judge had improperly communicated with the jury during deliberations and that the evidence was insufficient to support the theft verdict. Our court agreed that the trial judge’s communication “presented an extraneous influence on the jury’s deliberation and amounted to reversible error.” See *Choi et al. v. Kim*, 19A-PL-1429, 2020 WL 3478646 at *5 (Ind. Ct. App. June 26, 2020), *trans. granted*. This court also concluded that Kim failed to establish theft by a preponderance of the evidence and reversed the judgment issued in Kim’s favor. *Id.* at *6. Judge Tavitas disagreed with the majority’s decision to address the sufficiency of the evidence and would have remanded the case for a new trial. *Id.* at *7 (Tavitas, J., dissenting).

court reversed after concluding that there was insufficient evidence to issue the protective order. *Chong v. Kim*, 53A01-1609-PO-2073, 79 N.E.3d 1014 (Ind. Ct. App. Feb. 22, 2017).

[10] Thereafter, our Supreme Court granted Kim’s petition to transfer. *Choi et al., v. Kim*, 158 N.E.3d 774 (Ind. 2020) (per curiam). Our Supreme Court then agreed with Judge Tavitias that our Court should not have addressed the sufficiency of the evidence supporting the theft verdict “‘given the need for a new trial at which different evidence could be presented.’” *Id.* at 775 (quoting *Choi*, 2020 WL 3478646 at *6 (Tavitias, J., dissenting)). Our Supreme Court summarily affirmed our Court’s decision on the issue of the trial court’s improper communication with the jury but vacated our Court’s discussion of the sufficiency of the evidence supporting the theft claim. *Id.* Accordingly, the Court remanded the case for a new trial on Kim’s theft claim.

[11] After several trial settings were continued on the parties’ motions, on March 14, 2022, Chong filed a motion for summary judgment.² Kim filed a response to the motion and a hearing was held on July 29.

[12] The trial court granted Chong’s motion on October 20. In its order, the trial court cited the law of the case doctrine and adopted the first six paragraphs from our Court’s June 26, 2020, memorandum decision as “findings of undisputed fact.” Appellant’s App. p. 43. The trial court also found that the “Supreme Court of Indiana affirmed and adopted the Court of Appeals opinion, with the exception of remanding the case to this Court to permit the submission of additional evidence that could potentially meet the burden of

² Choi and Park did not participate in the summary judgment proceedings and do not participate in this appeal.

proof.” *Id.* at 46. Finally, the court observed that “[n]o additional admissible evidence beyond the pre-existing record was provided to this court.” *Id.* In its conclusions of law, the trial court noted that the Supreme Court had vacated our Court’s discussion of the sufficiency of the evidence to support the theft verdict but concluded that “the analysis by the Court of Appeals is well-considered, well-reasoned, and well-supported by the undisputed facts.” *Id.* at 48. The trial court then adopted our Court’s reasoning, and, after re-iterating that Kim had not presented any additional evidence, concluded that “there [are] no genuine issue of material fact as it relates to Han Chong’s liability.” *Id.* at 50. Therefore, the court granted Chong’s motion for summary judgment.

[13] Kim now appeals.

Standard of Review

[14] The trial court granted Chong’s motion for summary judgment and he is the only defendant participating in this appeal. Our standard of review is well settled.

We review summary judgment de novo, applying the same standard as the trial court: “Drawing all reasonable inferences in favor of . . . the non-moving parties, summary judgment is appropriate ‘if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’” *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (quoting T.R. 56(C)). “A fact is ‘material’ if its resolution would affect the outcome of the case, and an issue is ‘genuine’ if a trier of fact is required to resolve the parties’ differing accounts of the truth, or if the

undisputed material facts support conflicting reasonable inferences.” *Id.* (internal citations omitted).

The initial burden is on the summary-judgment movant to “demonstrate [] the absence of any genuine issue of fact as to a determinative issue,” at which point the burden shifts to the non-movant to “come forward with contrary evidence” showing an issue for the trier of fact. *Id.* at 761-62 (internal quotation marks and substitution omitted).

Hughley v. State, 15 N.E.3d 1000, 1003 (Ind. 2014) (alterations original to Hughley).

Discussion and Decision

[15] In his summary judgment motion, Chong argued that he is entitled to judgment as a matter of law because it is undisputed that Kim agreed to purchase Sake Bar, which was owned by Oya, and she paid the \$150,000 purchase price to Oya. Chong has never had any ownership interest in Oya and Oya’s owner, Park, admitted that Chong has no interest in or power over Oya. Accordingly, Chong argued that there is no evidence that he ever had any unauthorized control over Kim’s funds. Chong’s argument in the trial court mirrored our court’s vacated discussion concerning the sufficiency of the evidence to support the theft judgment. *Choi, et al.*, 158 N.E.3d at 775; *Choi et al.*, 2020 WL 3478646 at *5.

[16] The trial court granted Chong’s motion after adopting the facts set forth in our Court’s decision as “findings of undisputed fact.” Appellant’s App. p. 43. Relying on *Fair Share Organization, Inc. v. Mitnick*, 198 N.E.2d 765 (Ind. 1964),

the trial court concluded that the facts recited in our Court’s opinion “are not ‘in dispute’ unless additional or different evidence is presented to the trial court upon remand. No such new evidence was presented in this case.” *Id.* at 48-49. The trial court then concluded that, because Kim had not presented any new evidence, “judicial economy is best served by adopting the facts outlined by the Court of Appeals as the law of the case, rather than requiring re-litigation of those same matters.” *Id.* at 49.

[17] In her brief, Kim only argues that the trial court erred when it found that the facts recited in our Court’s opinion are law of the case, and, further, that the court incorrectly found that she was required to present new evidence in addition to the evidence presented in the 2019 trial. In response, Chong argues that Kim waived her argument and claims that she failed to argue in the proceedings below that the law of the case doctrine does not apply. Although Kim did not specifically state in her responsive pleading that the “law of the case” doctrine was inapplicable, she challenged Chong’s argument that the facts recited in our Court’s decision should be considered to be undisputed facts. Kim also responded to Chong’s law of the case argument in a subsequent pleading filed before the trial court issued its judgment. Appellant’s App. pp. 108-110. Accordingly, we conclude that Kim did not waive the argument she raises in this appeal.

[18] We also conclude that the trial court misapplied the law of the case doctrine. 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), *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.* 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*.

[19] The legal issue decided in our Court’s prior opinion relevant to this appeal was whether the evidence presented at trial supported the jury’s verdict that Han Chong and his fellow defendants had committed theft. But Kim sought transfer of our decision and our Supreme Court granted Kim’s transfer petition. The Supreme Court then vacated this Court’s discussion concerning the sufficiency of the evidence to prove theft. *See Choi et al.*, 158 N.E.3d at 775; *see also Ind. Appellate Rule 58(A)* (establishing that when transfer is granted, “the opinion or memorandum decision of the Court of Appeals shall be automatically vacated”). Because our Court’s discussion of that issue was vacated and the case was remanded for a new trial, the issue of whether Chong committed theft of Kim’s funds has not been determined by an Indiana appellate court. For this reason, the law of the case doctrine does not apply to this case, and the trial court erred when it relied on that doctrine when it granted Chong’s motion for summary judgment.

[20] However, “we may affirm a trial court’s order granting a motion for summary judgment on any grounds supported by the designated materials.” *See Bragg v.*

Kittle's Home Furnishings, Inc., 52 N.E.3d 908, 919 (Ind. Ct. App. 2016), *trans. denied*. Chong designated evidence establishing that he did not have an ownership interest in Oya or Sake Bar and that Kim entered into an agreement to purchase Sake Bar from Oya. Kim has not designated any evidence that Chong was involved in her decision to purchase Sake Bar.

[21] Choi assisted Kim and helped facilitate her purchase of Sake Bar. And Kim sent the funds to Oya, whose sole shareholder is Park. Park later allowed Chong to use the funds to build a hibachi grill but once Kim transferred the funds to Park, the funds were Park's to use as he saw fit. Whether Park, with Choi's assistance, intended to take Kim's funds without transferring ownership of Sake Bar to her is a genuine issue of material fact, but there is no evidence that Chong was involved in that transaction. The evidence designated by the parties established that Chong only had dealings with Kim after she arrived in the United States, but not that he was involved in Kim's decision to purchase Sake Bar. For all of these reasons, we affirm the trial court's grant of summary judgment in favor of Chong.

[22] Affirmed.

May, J., and Bradford, J., concur.