

The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
April 19, 2018

2018COA59

No. 17CA0634, Franklin Drilling v. Lawrence Construction — Construction Law — Public Works — Contractor’s Bonds and Lien on Funds — Public Works Trust Fund; Crimes — Theft

As a matter of first impression, we adopt the reasoning of *In re Gamboa*, 400 B.R. 784 (Bankr. D. Colo. 2008), *abrogated in part by Bullock v. BankChampaign, N.A.*, 569 U.S. 267 (2013), and hold that the funds entrusted to a contractor under the Public Works Trust Fund statute, section 38-26-109, C.R.S. 2017, for the payment of subcontractors and suppliers constitute a “res.” The complete exhaustion of those funds without paying the subcontractors, constitutes a violation of the Trust Fund statute, and may constitute civil theft.

Plaintiff here could have succeeded on its claim for civil theft by proving that the defendant possessed one of two alternative

culpable mental states in section 18-4-401(1)(a), (b), C.R.S. 2017.

Because the trial court's findings and conclusions either addressed only the first of the two alternatives, or the trial court misconstrued the second, we reverse that portion of the judgment and remand for the court to address the second alternative.

Court of Appeals No. 17CA0634
San Miguel County District Court No. 13CV30050
Honorable David S. Westfall, Judge

Franklin Drilling and Blasting Inc.,

Plaintiff-Appellant,

v.

Lawrence Construction Company,

Defendant-Appellee.

JUDGMENT AFFIRMED IN PART, REVERSED
IN PART, AND CASE REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE BERGER
Bernard and Freyre, JJ., concur

Announced April 19, 2018

Law Office of John C. Seibert, LLC, John Seibert, Durango, Colorado, for
Plaintiff-Appellant

Miller & Law P.C., Curtis R. Henry, Littleton, Colorado, for Defendant-Appellee

¶ 1 Plaintiff-Appellant, Franklin Drilling and Blasting Inc. (Franklin), was a subcontractor on a Colorado Department of Transportation (CDOT) road project. Defendant-Appellee, Lawrence Construction Company (Lawrence), was the general contractor. Although Lawrence was paid in full by CDOT, Lawrence refused to pay Franklin. That failure led Franklin to sue Lawrence on a variety of claims. All but one of Franklin’s claims — a claim for civil theft — were arbitrated in favor of Franklin.

¶ 2 After the arbitration, the parties tried Franklin’s civil theft claim to the court. That claim was premised on Lawrence’s violation of the Public Works Trust Fund statute (Trust Fund statute), section 38-26-109, C.R.S. 2017. At the conclusion of Franklin’s case-in-chief, the trial court granted Lawrence’s motion for directed verdict, finding that Franklin had not proved that Lawrence intended to permanently deprive Franklin of the monies it was owed.

¶ 3 The theft statute, section 18-4-401(1), C.R.S. 2017, provides, as relevant here, two separate ways that Lawrence could possess the culpable mental state required for civil liability under the theft statute: intent to deprive or knowing use. Because the trial court’s

findings and conclusions either addressed only the first of the two alternatives, or the trial court misconstrued the second, we must reverse that portion of the judgment and remand for the court to address the second alternative. We affirm that portion of the judgment that rests on the trial court's finding regarding intent to permanently deprive.

I. Relevant Facts and Procedural History

¶ 4 The facts, as found by the arbitrator, tell us that this dispute began when Lawrence was hired by CDOT to reconstruct the Leopard Creek Bridge on State Highway 145 near Telluride. Lawrence hired Franklin as its subcontractor to provide drilling and blasting services on the project. As relevant here, the subcontract required Lawrence to pay Franklin within seven days of receipt of payment from CDOT.

¶ 5 Franklin completed its work on the project, and, after various delays, the project was finished. CDOT paid Lawrence the full contract price for the work. Lawrence, however, did not pay Franklin. Instead, it notified Franklin that it planned to withhold all payments because Franklin allegedly failed to meet the contractually promised production rates.

¶ 6 Franklin sued in the trial court, alleging that Lawrence wrongfully withheld those payments in violation of section 38-26-109. That statute provides as follows:

(1) All funds disbursed to any contractor or subcontractor under any contract or project subject to the provisions of this article *shall be held in trust* for the payment of any person that has furnished labor, materials, sustenance, or other supplies used or consumed by the contractor in or about the performance of the work contracted to be done or that supplies laborers, rental machinery, tools, or equipment to the extent used in the prosecution of the work where the person has:

(a) Filed or may file a verified statement of a claim arising from the project; or

(b) Asserted or may assert a claim against a principal or surety under the provisions of this article and for whom or which such disbursement was made.

Id. (emphasis added).

¶ 7 Importantly, the statute also provides that “[a]ny person who violates the provisions of subsections (1) and (2) of this section commits theft within the meaning of section 18-4-401, C.R.S.”¹

¹ Section 38-26-109(2), C.R.S. 2017, provides generally that the Trust Fund statute is not violated if the contractor has a good faith belief that a subcontractor’s claim is not valid or the contractor has a good faith claim for setoff.

§ 38-26-109(4). Section 18-4-405, C.R.S. 2017, provides a civil remedy for the owner of stolen property:

The owner may maintain an action not only against the taker thereof but also against any person in whose possession he finds the property. In any such action, the owner may recover two hundred dollars or three times the amount of the actual damages sustained by him, whichever is greater, and may also recover costs of the action and reasonable attorney fees

¶ 8 Franklin pleaded a claim for civil theft under section 18-4-405 based on Lawrence’s violation of the Trust Fund statute. Lawrence countersued. The parties arbitrated all of their claims except for their respective claims for civil theft, which were stayed pending arbitration.²

¶ 9 The arbitrator found that Lawrence breached its subcontract with Franklin, that Lawrence had no good faith defenses to its failure to pay, and that Lawrence had failed to prove its

² The parties agreed, with the trial court’s concurrence, that the civil theft claims were not subject to arbitration because section 13-21-102(5), C.R.S. 2017, prohibits arbitrators from awarding exemplary damages under the Colorado Uniform Arbitration Act, §§ 13-22-201 to -230, C.R.S. 2017. For present purposes, we assume that treble damages are “exemplary” damages within the meaning of section 13-21-102(5).

counterclaims against Franklin.³ The arbitrator awarded Franklin \$80,099.62 in damages, which Lawrence immediately paid.

¶ 10 The parties then proceeded in court with their respective claims for civil theft. The court dismissed Lawrence’s claim for civil theft on Franklin’s C.R.C.P. 12(b)(5) motion. (Lawrence does not appeal that dismissal.) Franklin also moved for summary judgment on its civil theft claim, which the court granted in part and denied in part. Based on the arbitrator’s findings, the court held that Lawrence violated the Trust Fund statute, meaning Lawrence “knowingly obtain[ed], retain[ed], or exercise[ed] control over” the trust funds without authorization, thus satisfying the first element of theft under section 18-4-401(1). But the court denied summary judgment because it concluded there was a disputed issue of material fact as to whether Lawrence had the requisite intent under section 18-4-401(1)(a)-(e).

¶ 11 At a bench trial limited to determining Lawrence’s intent, Franklin presented evidence that CDOT paid Lawrence in full; that

³ Although the Trust Fund claims were arbitrated, the arbitrator did not expressly determine if Lawrence violated the Trust Fund statute. The only issue that was before the trial court, and now before us on appeal, is whether Franklin is entitled to treble damages, costs, and fees under section 18-4-405, C.R.S. 2017.

Lawrence used those monies for other projects; and that, at various relevant times, Lawrence's bank account into which the CDOT funds were deposited had either a zero or negative balance.

¶ 12 At the conclusion of Franklin's case-in-chief, Lawrence moved for a directed verdict, claiming that Franklin had failed to make a prima facie case. The trial court granted Lawrence's motion, finding that Franklin had failed to prove that Lawrence intended to permanently deprive Franklin of the trust monies owed to Franklin. The court entered judgment in favor of Lawrence on the civil theft claim and awarded costs to Lawrence. Franklin appeals.

II. Lawrence's Motion for Directed Verdict

¶ 13 We first conclude that a motion for directed verdict under C.R.C.P. 50 is unavailable when the trial is to the court. Instead, the governing rule is C.R.C.P. 41(b). *People v. Shifrin*, 2014 COA 14, ¶ 131.

¶ 14 The question presented on a C.R.C.P. 41(b)(1) motion is not — as in the case of a motion for a directed verdict — whether the evidence, when viewed in the light most favorable to the plaintiff, is such that no reasonable jury could find in the plaintiff's favor.

Shifrin, ¶ 132. Instead, after the plaintiff has completed the presentation of its evidence, under C.R.C.P. 41(b)(1),

the defendant . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render judgment until the close of all the evidence.

¶ 15 Accordingly, we analyze the court’s ruling under C.R.C.P. 41(b)(1).

III. The Trial Court Erred by Not Addressing the “Knowingly Uses” Element of Franklin’s Civil Theft Claim

¶ 16 The dispositive question is this: When does a violation of the Trust Fund statute result in civil theft liability under section 18-4-405?

¶ 17 The Trust Fund statute is clear in at least two respects. First, funds paid to a contractor must be “held in trust” for the benefit of the subcontractors and material suppliers who have performed work on that project. § 38-26-109(1). Second, a contractor is not required to segregate those funds by project. § 38-26-109(3). But how do these two requirements work together in determining when a contractor commits civil theft?

¶ 18 To prove civil theft a plaintiff must prove that the defendant “knowingly obtains, retains, or exercises control over anything of value of another without authorization” *and* must prove one of five alternative culpable mental states, the first two of which are relevant here. § 18-4-401(1)(a)-(e).⁴ The plaintiff must show that the defendant either:

(a) Intends to deprive the other person permanently of the use or benefit of the thing of value;

(b) Knowingly uses, conceals, or abandons the thing of value in such manner as to deprive the other person permanently of its use or benefit;

(c) Uses, conceals, or abandons the thing of value intending that such use, concealment, or

⁴ If we were writing on a clean slate, the words of the Trust Fund statute could be read to mean that proof of a violation of the Trust Fund statute establishes theft. But, at least in the criminal context, the supreme court has held otherwise. *See People v. Mendro*, 731 P.2d 704, 706-07 (Colo. 1987); *People v. Anderson*, 773 P.2d 542, 545 (Colo. 1989); *see also Itin v. Ungar*, 17 P.3d 129, 133-35 (Colo. 2000); *AC Excavating, Inc. v. Yale*, 297 P.3d 937, 941 (Colo. App. 2010), *rev'd on other grounds*, 2013 CO 10. We do not see any principled basis to distinguish the interpretation of this statute in the civil context from the supreme court's interpretation in the criminal context. Moreover, Franklin did not claim in the trial court, and does not argue on appeal, that under the plain language of the Trust Fund statute its entitlement to treble damages under the civil theft statute was complete once the trial court found that Lawrence violated the Trust Fund statute.

abandonment will deprive the other person permanently of its use or benefit;

(d) Demands any consideration to which he or she is not legally entitled as a condition of restoring the thing of value to the other person; *or*

(e) Knowingly retains the thing of value more than seventy-two hours after the agreed-upon time of return in any lease or hire agreement.

Id. (emphasis added).

¶ 19 After hearing Franklin’s evidence, the trial court found that Franklin had not proved that Lawrence intended to permanently deprive Franklin of the use of the monies paid to Lawrence in trust by CDOT.

¶ 20 In ruling against Franklin, the trial court made extensive findings regarding Lawrence’s intent to permanently deprive. For the reasons discussed below, the evidence is sufficient to require us to affirm the court’s conclusion that Franklin did not prove civil theft under section 18-4-401(1)(a).

¶ 21 But the court’s findings do not resolve the “[k]nowingly uses” alternative mental state in section 18-4-401(1)(b).

¶ 22 In *People v. Anderson*, a criminal case, the supreme court held that the government’s burden to prove the defendant’s culpable

mental state under section 18-4-401(1)(b) is entirely different than under 18-4-401(1)(a). 773 P.2d 542, 545 (Colo. 1989). The “knowingly uses” element does *not* require that the defendant have a “conscious objective to deprive another person of the use or benefit of the construction trust funds, but instead requires the [defendant] to be aware that his manner of using the trust funds is practically certain to result in depriving another person of the use or benefit of the funds.” *Id.*

¶ 23 That is, if a person “knowingly obtains control over the property of another without authorization and, *even though not intending to deprive the other person permanently of the use or benefit of the property*, nonetheless knowingly uses the property in such manner as to deprive the other person permanently of the use or benefit of the property,” he commits theft within the meaning of section 18-4-401(1)(b). *Id.* (emphasis added). Thus, a finding of a lack of intent to permanently deprive under section 18-4-401(1)(a) is *not* dispositive of whether the contractor possessed the culpable mental state of “[k]nowingly uses” in section 18-4-401(1)(b).

¶ 24 But neither *Anderson* nor any other reported Colorado case specifically addresses the significance either of a contractor’s use of

the entrusted funds to pay creditors on an entirely separate construction project, or the exhaustion of those funds before the payment of the subcontractor.

¶ 25 In a well-reasoned opinion, the United States Bankruptcy Court for the District of Colorado addressed this otherwise unanswered question. *In re Gamboa*, 400 B.R. 784 (Bankr. D. Colo. 2008), *abrogated in part by Bullock v. BankChampaign, N.A.*, 569 U.S. 267 (2013).^{5, 6} The court reasoned that while the Trust Fund

⁵ Other bankruptcy courts in the District of Colorado have reached similar conclusions. *See, e.g., In re Cupit*, 514 B.R. 42, 56 (Bankr. D. Colo. 2014); *In re Helmke*, 398 B.R. 38, 40 (Bankr. D. Colo. 2008); *In re Dorland*, 374 B.R. 765 (Bankr. D. Colo. 2007). We reject only one small portion of one of these holdings. In *In re Dorland*, the court held that it had discretion to decline an award of treble damages under the civil theft statute. 347 B.R. at 780. We disagree because nothing in the civil theft statute confers such discretion on a trial court, if all the elements of civil theft have been proved by a preponderance of the evidence. § 18-4-405.

⁶ In *In re Cupit*, 514 B.R. at 49-50, the bankruptcy court (in fact the same bankruptcy judge who authored *In re Gamboa*, 400 B.R. 784 (Bankr. D. Colo. 2008)), recognized that a later Supreme Court case, *Bullock v. BankChampaign, N.A.*, 569 U.S. 267 (2013), required the abrogation of part of *Gamboa*. *Bullock* resolved a split among the federal circuits as to the meaning of the term “defalcation” under federal bankruptcy law. The *Cupit* court concluded that for federal bankruptcy purposes, the relatively low mens rea requirement applied in *Gamboa* was at odds with the definition of the bankruptcy concept of “defalcation” as applied by the Supreme Court. The present case presents only issues of Colorado law; this is not a bankruptcy case and no party contends

statute does not require the contractor to segregate funds, either by project or by subcontractor, the use of the entrusted funds for a separate project, at least when the funds are entirely depleted, may violate the Trust Fund statute and may establish liability for civil theft. *Id.* at 795.

¶ 26 But the analysis cannot end there because money is inherently fungible. *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 335 (2012). To address that reality, the bankruptcy court focused on the “res” created when the government entity (here CDOT) pays monies to the contractor to be held in trust for its subcontractors and suppliers. *Gamboa*, 400 B.R. at 795. When that “res” is exhausted prior to the payment of the subcontractor, a violation of the Trust Fund statute, and perhaps the civil theft statute, may be established. *Id.*

¶ 27 As the bankruptcy court correctly noted, “the issue is not whether the [defendant] had, or reasonably expected to have, other funds available to replenish the trust. The question is whether the [defendant’s] actions made it practically certain that the Plaintiff[]

that any aspect of bankruptcy law applies here. As a result, our reliance on the reasoning in *Gamboa* is unaffected by any abrogation recognized in *Cupit*.

would be deprived of the use of *the trust funds*, an identifiable *res*.”
Id. at 794-95 (citation omitted).

¶ 28 Although we are not bound by the decisions of lower federal courts, we find the bankruptcy court’s analysis highly persuasive and thus apply it here. *See Kovac v. Farmers Ins. Exch.*, 2017 COA 7M, ¶ 19. Indeed, without the concept of the payments by the government entity constituting a “res” that is held in trust, the operation of the Trust Fund statute would be frustrated and rendered wholly ineffective to meet its obvious legislative purpose.

¶ 29 Though Lawrence was not required to segregate in separate trust fund accounts the funds paid to it by CDOT for this project, it was required to hold those monies in trust for Franklin. Here, the evidence presented by Franklin at trial established that at various relevant times, the bank account into which Lawrence deposited the CDOT payments had a zero or negative balance. This evidence is highly relevant to a determination of whether Franklin proved that Lawrence had the culpable mental state defined by section 18-4-401(1)(b).

¶ 30 We therefore reverse the trial court’s judgment in favor of Lawrence as to section 18-4-401(1)(b), and remand for the court to consider the “[k]nowingly uses” element.

IV. The Trial Court’s Findings That Lawrence Did Not Intend to Permanently Deprive Franklin of the Funds Are Not Manifestly Against the Weight of the Evidence

¶ 31 Franklin also argues that the trial court’s ruling in Lawrence’s favor regarding the intent to permanently deprive element was unsupported by the record. We disagree.

¶ 32 Our review is constrained by the following two principles. First, “[i]t is the trial court’s sole province to resolve disputed factual issues and to determine witnesses’ credibility, the weight to accord testimony, and the inferences to be drawn from the evidence.” *Target Corp. v. Prestige Maint. USA, Ltd.*, 2013 COA 12, ¶ 24. Thus, “[w]e may not reweigh evidence or substitute our judgment for the trial court’s.” *Id.*

¶ 33 Second, on appeal from an order granting a C.R.C.P. 41(b) motion, “[i]f reasonable [people] could differ in the inferences and conclusions to be drawn from the evidence as it stood at the close of the plaintiff[s] case, . . . we cannot interfere with the findings and

conclusions of the trial court.” *Teodonna v. Bachman*, 158 Colo. 1, 4, 404 P.2d 284, 285 (1965).

¶ 34 Franklin argues that the trial court should have focused on Lawrence’s intent at the time it used the CDOT funds to pay its other expenses. It claims that by using those funds, Lawrence intended to permanently deprive Franklin of that money. Lawrence, however, argues that Franklin did not prove that Lawrence intended to permanently deprive Franklin of the CDOT funds, but only that Lawrence put the CDOT funds “to other uses, specifically, payroll.”

¶ 35 Because reasonable minds could differ as to whether Franklin proved that Lawrence intended to permanently deprive Franklin of the CDOT funds under section 18-4-401(1)(a), we cannot conclude that “the findings and conclusions of the trial court are so manifestly against the weight of evidence as to compel a contrary result.” *Shifrin*, ¶ 135 (quoting *Am. Guarantee & Liab. Ins. Co. v. King*, 97 P.3d 161, 165 (Colo. App. 2003)).

¶ 36 Therefore, we affirm the trial court’s judgment that Franklin failed to prove Lawrence’s liability under section 18-4-401(1)(a).

V. Attorney Fees

¶ 37 Franklin requested an award of attorney fees under section 18-4-405 in the event that we reversed *and* entered judgment in its favor under the civil theft statute. We have reversed the trial court's judgment in part, but we have not entered judgment in Franklin's favor pursuant to section 18-4-405. Accordingly, we deny Franklin's request for attorney fees on appeal.

VI. Conclusion

¶ 38 The judgment is affirmed in part and reversed in part, and the case is remanded. It is affirmed to the extent the trial court determined that Franklin failed to prove Lawrence's culpable mental state under section 18-4-401(1)(a). It is reversed and the case is remanded for the trial court to determine whether Lawrence possessed the culpable mental state defined by section 18-4-401(1)(b).

¶ 39 If the court finds that Franklin met its burden of proof under the "[k]nowingly uses" culpable mental state of section 18-4-401(1)(b), the court must reconvene the trial to allow Lawrence to present its defenses, and then make findings of fact and conclusions of law and enter an appropriate judgment. If, after

applying our construction of section 18-4-401(1)(b), the court concludes that Franklin failed to meet its burden of proof, then it must again enter judgment in favor of Lawrence.

JUDGE BERNARD and JUDGE FREYRE concur.