

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

SEPTEMBER 10, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3534

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**MYRON J. BRUEGGEMAN, JO ANNE BRUEGGEMAN,
GALE L. COLVIN, JR., ROBERT P. CRONIN,
CHRISTINA D. CRONIN, ABRAHAM DELEEUWE,
JOHN FEITH, RICHARD J. GALLA, ANNETTE F.
GALLA, RICHARD W. HERZFELD, ELIZABETH L.
HERZFELD, ROBERT M. MURPHY, CATHLEEN P.
ROSE, QUENTIN F. ROSE, RICHARD SCHAFER,
RICHARD J. SCHELLER, PENNY I. SCHELLER,
RICHARD L. STILES, RICHARD W. STUEBER,
PENELOPE J. STUEBER, JAMES P. ZIERK,
AND GAIL J. ZIERK, INDIVIDUALLY, AND ON
BEHALF OF THE CLASS CONSISTING OF ALL
OWNERS OF CONDOMINIUM UNITS AT THE
LANDMARK RESORT CONDOMINIUM WHO ARE
MEMBERS OF THE LANDMARK RESORT CONDOMINIUM
OWNERS ASSOCIATION, INC., A WISCONSIN
NONPROFIT CORPORATION, AND ON BEHALF OF
THE LANDMARK RESORT CONDOMINIUM OWNERS
ASSOCIATION, INC., A WISCONSIN NONPROFIT
CORPORATION,**

Plaintiffs-Respondents,

v.

KATHERINE M. COLVIN AND HETTY DELEEUWE,

Plaintiffs,

LANDMARK RESORT RENTAL ASSOCIATION
INCORPORATED, A WISCONSIN CORPORATION,
RICHARD VEENSTRA, PETER HAGAN, ROBERT
GEYER, WILLIAM MARKWARDT AND THE
LANDMARK RESORT CONDOMINIUM OWNERS
ASSOCIATION, INC., A WISCONSIN
NONPROFIT CORPORATION,

Defendants-Appellants,

SAWYER HILL, LTD., A WISCONSIN
CORPORATION, JEFFREY RITTER AND
FRAN SHEFCHIK,

Defendants.

APPEAL from a judgment of the circuit court for Door County:
RICHARD J. DIETZ, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. The Landmark Resort Rental Association, Inc., a wholly owned subsidiary of The Landmark Resort Condominium Owners Association, Inc., and other defendants, appeal a summary judgment that enjoined the Rental Association's purchase of a restaurant.¹ The Owners Association board of directors twice failed to obtain the necessary three-fourths vote of Owners Association membership to allow the Rental Association to purchase the restaurant. They then acted, in their capacity as the board of the Rental Association, to amend the Rental Association bylaws authorizing the purchase by a simple majority of the Owners Association membership.² We

¹ By order dated April 3, 1996, we granted leave to appeal because the matters raised met the standards for an interlocutory appeal under § 808.03(2), STATS. However, we limited the issues on appeal to the grant of partial summary judgment.

² The Owners Association bylaws provide in part:

3.2 Power and Duties of the Board of Directors. The affairs of the Association

conclude that the trial court could invoke equitable principles to prevent the board of directors from using a wholly owned subsidiary as a means to avoid what was unambiguously prohibited by the parent corporation's bylaws. We therefore affirm the trial court's partial summary judgment.

The material facts are undisputed. Sawyer Hill, Ltd., built the Landmark Resort Condominium complex. The complex consists primarily of one restaurant and 293 condominium units. Sawyer Hill owned the restaurant from the time it was built until the disputed sale to the Rental Association.

The condominium unit owners formed the Owners Association as a nonprofit corporation, pursuant to the Wisconsin Non-Stock Corporation Law, ch. 181, STATS., for the purpose of governing the operation of the condominium. Each unit owner is a member of the Owners Association.

The Owners Association began providing services to its members for the purpose of maintaining the property. These services included making rental reservations for the unit owners, as well as other routine maintenance and administrative functions. Several unit owners testified that they earned a profit renting their units.

(..continued)

shall be governed by the Board of Directors. All powers and duties as shall be necessary for the administration of the affairs of the Association shall be exercised by the Board of Directors. Such powers and duties shall be exercised in accordance with the provisions of the Declaration, the Articles of Incorporation and these By-laws.

....

5.5 Borrowing Money and Acquiring and Conveying Property. The Association, by a three-fourths (3/4ths) vote of the unit owners, may borrow money and purchase or convey property, and direct any two (2) officers of the corporation to execute such documents in connection therewith as is deemed necessary or appropriate by counsel for the Association.

The Owners Association board of directors became concerned about a potential securities law violation resulting from the Association's assistance in providing the members with rental profits. To avoid this potential violation, and a challenge to its nonprofit stock status, the Owners Association formed a wholly owned subsidiary, the Rental Association, to conduct its for-profit activities. Unit owners then contracted with the Rental Association to perform rental management services. The same individuals serve on the boards of both entities.

Sawyer Hill eventually decided to sell the restaurant. In order to preserve group rental facilities, the Owners Association formed a restaurant committee to examine the need for the restaurant and the restaurant's value.

The restaurant committee decided it was in the best interests of the Owners Association to have the Rental Association buy the restaurant. The Owners Association held two votes of its membership on the issue. In each vote a majority, but less than three-fourths of the voting members, favored purchasing the restaurant.

Initially, when the Owners Association board had formed the Rental Association, it did not expressly deal with the purchase of real estate in either the articles of incorporation or the bylaws. However, after the Owners Association membership rejected the purchase, they amended the Rental Association bylaws to require that for any purchase of property in excess of \$500,000, which includes the restaurant, the Rental Association directors must obtain approval from a simple majority of votes cast by members of the Owners Association.³

The Rental Association directors proceeded with the purchase of the restaurant without another formal vote. They reached an agreement with Sawyer Hill for a purchase price of \$1,100,000. According to the stipulated facts,

³ We note that § 8.1 of the Owners Association bylaws also allows its bylaws to be amended by an affirmative vote of at least 67% of the members.

the Rental Association financed the purchase with a \$750,000 down payment and seller financing of \$400,000.⁴

Certain members of the Owners Association brought this action to declare the Rental Association's contract to purchase the restaurant from Sawyer Hill null and void, to enjoin the Rental Association and the Owners Association from purchasing any property without obtaining a three-fourths vote of the members of the Owners Association, and for damages associated therewith. The plaintiffs moved for summary judgment on the grounds that the directors of the Owners Association breached their fiduciary duties to the members of the Owners Association by using the Rental Association to purchase the restaurant. The defendants responded by filing a cross-motion for summary judgment, arguing that the actions taken by the directors to purchase the restaurant were within their powers under the bylaws of the Rental Association. The trial court granted the plaintiffs' motion for partial summary judgment.

We review summary judgment de novo. *Park Bancorp. v. Sletteland*, 182 Wis.2d 131, 140, 513 N.W.2d 609, 613 (Ct. App. 1994). When reviewing a summary judgment, we apply the standard set forth in § 802.08(2), STATS., in the same manner as the circuit court. *Kreinz v. NDII Secs. Corp.*, 138 Wis.2d 204, 209, 406 N.W.2d 164, 166 (Ct. App. 1987). The methodology has been described in many cases, including *Grams v. Boss*, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980), and need not be repeated here.

The plaintiffs argue that the Owners Association directors breached their fiduciary duty by purchasing the property through the subsidiary and thereby defeating the purpose of the three-fourths voting requirement. *See* note 2. The purpose of the three-fourths voting requirement is to involve the members in major decisions regarding management of the assets of the Owners Association.

The defendants argue that nothing in the Owners Association bylaws prevented the creation of a subsidiary with the power to purchase real

⁴ Assumably the difference between the extra \$50,000 represents interest.

estate, citing *O'Leary v. Board of Directors*, 89 Wis.2d 156, 167, 278 N.W.2d 217, 221 (Ct. App. 1979). *O'Leary* notes, however, the mere fact that acts performed by a board of directors are intra vires ("within the power") does not necessarily mean they cannot be set aside upon action of the membership. *Id.* at 167, 278 N.W.2d at 221. *O'Leary* recognized the right of members to invoke equity jurisdiction where the board of directors used their power to deprive members of their basic participating right, the right to vote. *Id.* at 169, 278 N.W.2d at 221-22.

Plaintiffs also cite *Aiple v. Twin City Barge & Towing Co.*, 143 N.W.2d 374 (Minn. 1966). In *Aiple*, the directors of a parent corporation were enjoined from using a subsidiary to avoid a statutorily required shareholder voting requirement. A majority of the shareholders, but not the statutorily required two-thirds, wanted to increase the capital of a corporation. *Id.* at 376. The majority shareholders, through the directors, created a wholly owned subsidiary, transferred part of its business to the subsidiary, and used the stock of the new subsidiary for the purpose of acquiring new capital. *Id.* Although it noted that the directors' plan might be a good business idea, the *Aiple* court enjoined the directors from executing the plan because it interfered with the legal rights of the minority stockholders who opposed the plan. *Id.* at 379.

While the directors in *Aiple* created a subsidiary for the purpose of avoiding the voting requirement and the directors here did not, the distinction is not significant in light of the circumstances. The board's sole purpose in amending the Rental Association bylaws was to avoid the voting rights of the members of the Owners Association. This is a breach of the directors' fiduciary duty.

By the Court. — Judgment affirmed.

Not recommended for publication in the official reports.