COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP766

Cir. Ct. No. 2001CV636

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

GREGORY GOTTSACKER AND NEW JERSEY LLC,

PLAINTIFFS-APPELLANTS,

V.

JULIE A. MONNIER, PAUL GOTTSACKER, AND 2005 NEW JERSEY LLC,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 NETTESHEIM, J. This is the third appellate opinion generated by the dispute in this case. Gregory Gottsacker and New Jersey, LLC, appeal from a

judgment in favor of Julie Monnier, Gregory's brother Paul Gottsacker, and 2005 New Jersey, LLC. Without Gregory's knowledge, Monnier and Paul (the Monnier Group) transferred real estate from New Jersey, LLC (New Jersey), to 2005 New Jersey, LLC (2005 New Jersey). Gregory argues that, upon remand from the Wisconsin Supreme Court, the circuit court improperly dismissed his claim because it failed to find that the Monnier Group dealt with him and New Jersey in a willfully unfair manner. We disagree with Gregory and New Jersey and affirm.

¶2 We largely confine ourselves to the procedural facts, as the historical facts have been laid out at length in the two prior appellate opinions. *See* ***Gottsacker v. Monnier***, 2004 WI App 25, 269 Wis. 2d 667, 676 N.W.2d 533 (***Gottsacker I***); *and* ***Gottsacker v. Monnier***, 2005 WI 69, 281 Wis. 2d 361, 697 N.W.2d 436 (***Gottsacker II***). In a nutshell, the litigation stems from a 2001 transfer by the Monnier Group of an over-half-million-dollar parcel of real estate owned by New Jersey LLC to the recently created 2005 New Jersey LLC. ***Gottsacker II***, 281 Wis. 2d 361, ¶¶7-9. Monnier, Paul and Gregory were the three members of New Jersey, an LLC investment real estate vehicle. ***Id.***, ¶¶3-4. According to the Member's Agreement, Monnier held a 50% interest; Paul and Gregory collectively held the other 50%, interpreted by the supreme court to mean 25% each. ***Id.***, ¶¶4, 25.

¶3 Relationships among the three members eventually strained to the breaking point, assertedly because Gregory did not pull his weight. ***Id.***, ¶6. The Monnier Group formed a new two-member LLC, the somewhat similarly named 2005 New Jersey. ***Id.***, ¶¶5, 7. Monnier's and Paul's ownership interests in 2005 New Jersey were 60% and 40%, respectively. ***Id.***, ¶7. Without advising Gregory, the Monnier Group voted to transfer the only real estate New Jersey held, for the property's original purchase price, to 2005 New Jersey. ***Id.*** Monnier sent Gregory

a check for $22,000, which ostensibly represented his interest in the transferred property. ***Id.***, ¶8. Gregory did not cash the check. ***Id.***

¶4 Gregory sued Monnier, Paul and 2005 New Jersey on his own behalf and on behalf of New Jersey. ***Id.***, ¶9. The originally assigned circuit court, Judge Gary Langhoff presiding, held that the conflict-of-interest rules under WIS. STAT. §§ 183.0402 and 184.0404 (2001-02)[1] precluded the Monnier Group from voting to transfer the property to 2005 New Jersey. ***Id.***, ¶1. On appeal, this court agreed that the Monnier Group had a conflict of interest, but held that it did not bar them from voting on the transfer. ***Gottsacker I***, 269 Wis. 2d 667, ¶27. However, we also concluded that the Monnier Group was required, but failed, to vote their interest fairly, and so affirmed the judgment compelling the return of the property to New Jersey on that ground. ***Id.***

¶5 On further review, the Wisconsin Supreme Court agreed with our holding that the Monnier Group possessed the majority necessary to authorize the transfer to 2005 New Jersey and that the material conflict of interest did not prohibit its vote. ***Gottsacker II***, 281 Wis. 2d 361, ¶2. However, the court reversed our holding that the Monnier Group had acted unfairly, on grounds that we improperly had engaged in factfinding. ***Id.***, ¶¶35, 37. The court remanded the case for the circuit court to determine whether the Monnier Group willfully failed to deal fairly with Gregory or New Jersey. ***Id.***, ¶37.

¶6 On remand, upon the Monnier Group's request for a substitution of judge, the case was assigned to Judge Timothy Van Akkeren. The parties

[1] These statutes are unchanged in the current version. All further references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

stipulated that Judge Van Akkeren could decide the case on the record made before Judge Langhoff and the parties' trial briefs. In his decision, Judge Van Akkeren first addressed New Jersey's derivative claim, but declined to address the issue on the merits, ruling that the complaint did not establish Gregory's authorization to bring the action on New Jersey's behalf. *See* WIS. STAT. § 183.1101(3). As to the merits of Gregory's claim, the court concluded that the Monnier Group had not willfully failed to deal fairly with Gregory and New Jersey. Gregory and New Jersey again appeal.

DISCUSSION

¶7 Gregory asks that we reverse Judge Van Akkeren's decision, order the reconveyance of the property back to New Jersey, order an accounting of 2005 New Jersey, and order New Jersey to reimburse him for bringing this suit on its behalf. He essentially urges us to look past Judge Van Akkeren's decision and instead focus on Judge Langhoff's earlier findings and our previous opinion and hold once again that the Monnier Group's actions were unfair so as to nullify their vote to transfer the property.

Standard of Review

¶8 First, however, we must establish the appropriate standard of review. The parties present a mixed bag of arguments on this point. Gregory contends that our review of this documentary record is de novo, but, in the next breath, he suggests that we should defer to Judge Langhoff's findings because that court had the benefit of viewing the witnesses firsthand, a suggestion smacking more of a clearly erroneous standard than a de novo standard. The Monnier Group argues for the clearly erroneous standard as applied to Judge Van Akkeren's—not Judge Langhoff's—findings. The Monnier group contends that de novo review of a

paper record is proper only when the underlying questions involve issues of law. *See, e.g.,* ***Racine Educ. Ass'n v. Board of Educ. for Racine Unified Sch. Dist.***, 145 Wis. 2d 518, 521, 427 N.W.2d 414 (Ct. App. 1988) (mandamus action to compel record release); ***McCauley v. Tropic of Cancer***, 20 Wis. 2d 134, 148, 121 N.W.2d 545 (1963) (constitutional determination of obscenity); *and* ***Weinberger v. Bowen***, 2000 WI App 264, ¶7, 240 Wis. 2d 55, 622 N.W.2d 471 (construction of statutes and trust documents). Here, by contrast, the Monnier Group contends we must uphold Judge Van Akkeren's findings unless they are clearly erroneous because the underlying question of unfairness implicates the circuit court's findings on controverted evidence.

¶9 Although we ultimately rule for the Monnier Group on this appeal, we reject its argument that the de novo standard of review is limited to instances of a documentary record raising only a question of law. To the contrary, we have employed a de novo standard in documentary evidence cases where the issue was one of fact. ***Cohn v. Town of Randall***, 2001 WI App 176, 247 Wis. 2d 118, 633 N.W.2d 674, offers an example. In that common law dedication case, the issue was the long-deceased grantor's intent. ***Id.***, ¶7. We acknowledged that intent usually is resolved by the trier of fact and reviewed subject to the clearly erroneous rule, but that only documentary evidence remained from which to glean the grantor's intent. ***Id.*** Accordingly, we stated that we were in as good a position as was the trial court to make factual inferences based on documentary evidence and so did not need to defer to the trial court's findings. ***Id.*** We reject the Monnier Group's argument for the clearly erroneous standard of review.

¶10 We also reject Gregory's argument that we should review Judge Langhoff's findings under the clearly erroneous standard. True, in the first trial, Judge Langhoff heard the live testimony from Gregory, Paul, Monnier, and

Monnier's husband, Tom Schafer. If we were directly reviewing that ruling, we would uphold the judge's findings if not clearly erroneous. *See* ***Racine Educ. Ass'n***, 145 Wis. 2d at 521. But Judge Van Akkeren did not have the opportunity to observe these witnesses firsthand. Rather, the parties agreed that the judge should decide the case without taking further evidence. When reviewing the documentary record, Judge Van Akkeren was not reviewing the correctness of Judge Langhoff's decision, nor was Judge Van Akkeren bound by Judge Langhoff's factual and/or credibility determinations. Instead, Judge Van Akkeren was conducting a new trial ab initio, albeit upon a record made in the prior proceeding.

¶11 From that it follows that our review is of the same paper record that was before Judge Van Akkeren. We therefore need not give special deference to the judge's findings because we are equally well-situated to address the issue. *See* ***Weinberger***, 240 Wis. 2d 55, ¶7. Accordingly, our review is de novo. That said, we hasten to add that we value a circuit court's decision under a de novo review, often finding the decision helpful and informative. *See* ***id.***, ¶¶7-8. To the degree we also must construe WIS. STAT. ch. 183, the Wisconsin Limited Liability Company Law (WLLCL), that review also is de novo. ***Gottsacker II***, 281 Wis. 2d 361, ¶13. With that, we move to the merits.

Willful Unfairness

¶12 In ***Gottsacker II***, the supreme court determined that the Monnier Group possessed the necessary majority to authorize the property transfer, but that it amounted to a material conflict of interest because, while seemingly made to 2005 New Jersey, the transfer actually was to themselves. ***Id.***, ¶26. The court concluded, however, that properly authorized members with a material conflict of

interest can vote their ownership interest unless their act or failure to act constitutes a "willful failure to deal fairly" with the LLC or its members. ***Gottsacker II***, 281 Wis. 2d 361, ¶¶29, 31.

¶13 The supreme court's holding rested on WIS. STAT. § 183.0402(1)(a), which provides in relevant part:

> **183.0402 Duties of managers and members.** Unless otherwise provided in an operating agreement:
>
> (1) No member or manager shall act or fail to act in a manner that constitutes any of the following:
>
> (a) A willful failure to deal fairly with the limited liability company or its members in connection with a matter in which the member or manager has a material conflict of interest.

¶14 Here, the parties did not have an operating agreement and the Monnier group does not contend that their Member Agreement relieved them from the statutory obligation to deal fairly with New Jersey and its members. Therefore, the statute applies to the instant case and barred the Monnier Group from willfully acting unfairly. As the supreme court said, members with a material conflict of interest may not "willfully act or fail to act in a manner that will have the effect of injuring the LLC or its other members." ***Gottsacker II***, 281 Wis. 2d 361, ¶31. This concept presents an "intertwined" inquiry, which "contemplates both the conduct [and] the end result." ***Id.*** The court remanded for that evaluation.

¶15 on remand, Judge Van Akkeren found that certain actions of the Monnier Group vis-à-vis Gregory could be construed as unfair. For instance, the judge found that the Monnier Group gave Gregory no notice of meetings, or an opportunity to be heard or to vote on the sale; made no effort to offer the property

to other possible purchasers nor to formalize the process; did not conduct an arm's-length transaction; did not provide a current third-party appraisal; and left New Jersey without assets. Against that, however, the judge found that even had the Monnier Group given Gregory notice, it held sufficient votes to proceed without him; the lack of an arm's-length transaction is not in and of itself fatal under the statute; the Monnier Group provided evidence of current value in the form of a tax bill, showing an assessment $20,000 *less* than the amount of the transaction; the sale eliminated all debt; Gregory received $22,000 from the sale; the sole tenant of the warehouse property was on a short-term lease and had expressed an intent to vacate; and there was an surfeit of warehouse space in the area. In sum, Judge Van Akkeren concluded that based on all of the evidence, the sale price was not unfair to Gregory, and the sale was not adverse to New Jersey. Although the Monnier Group's actions were not, in the words of the judge, "appropriate," they fell short of a willful failure to deal fairly.

¶16 This reasoned approach notwithstanding, Gregory continues to play a single-note refrain: unfairness. He entreats us to reverse because Judge Langhoff implicitly concluded that the transaction was not fair, the court of appeals held the Monnier Group's treatment of him was not fair,[2] and Judge Van Akkeren's decision is "full of statements indicating the transaction was unfair." But Gregory's "unfairness" contention addresses only half of the inquiry. The offending conduct must not only be "unfair," but "willfully unfair." In ***Gottsacker***

[2] Gregory actually contends that this court previously found that the Monnier Group "willfully failed" to treat him and New Jersey fairly. We disagree that our initial opinion incorporated "willfulness" in its analysis and conclusion.

II, the supreme court explained that a determination of "willful unfairness" necessitates both unfairness (conduct) and injury (end result). *See* ***id.***, ¶31.

¶17 While Gregory believed or hoped that New Jersey's retention of the property would produce a greater return on his investment, it does not necessarily follow that the sale of the property produced the "injury" contemplated under the "willfully unfair" test. As Judge Van Akkeren explained, the sale price exceeded the assessed value of the property, Gregory was paid his proportionate amount of the sale proceeds, the sale eliminated the debt resulting from the purchase of the property, the tenant had indicated an intent to vacate, the building was functionally obsolete, and the abundance of warehouse property in the Sheboygan area dimmed the prospect of a profitable future rental. In short, these facts support the judge's determination that Gregory had not demonstrated the requisite "injury" under WIS. STAT. § 183.0402 and ***Gottsacker II***.

CONCLUSION

¶18 ***Gottsacker II*** offered our supreme court its first opportunity to examine LLCs in Wisconsin. ***Gottsacker II***, 281 Wis. 2d 361, ¶13. Neither Judge Langhoff nor this court at the time of our earlier opinion had the benefit of the supreme court's analysis of WIS. STAT. § 183.0402. Now, with ***Gottsacker II*** on the books, Judge Van Akkeren was required to analyze the issue in that somewhat different framework, and our review is similarly governed. ***Gottsacker II*** teaches that in scenarios like the one here, Wisconsin's LLC law forbids willful unfairness, which requires both unfair conduct and resulting injury. We agree that Judge Van Akkeren's decision is sound. We affirm.

By the Court.—Judgment affirmed.

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