

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 5, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2006AP2154

Cir. Ct. No. 2005CV93

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**KATHY ELROD, KENNETH BROMMER, CHERYL DENNY AND STEVE
BROMMER,**

PLAINTIFFS-RESPONDENTS,

v.

ELROY BROMMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Buffalo County:
ROBERT W. WING, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Elroy Brommer appeals a summary judgment in favor of Kathy Elrod, Kenneth Brommer, Cheryl Denny and Steve Brommer,¹ holding that he violated his fiduciary duty as attorney in fact for his mother Sylvina Brommer. Elroy argues the circuit court erred in granting summary judgment because there are disputed issues of material fact. Elroy also argues the court erred by not reducing the damages by the amount already paid to the Brommers from the sale of a farm, and in awarding prejudgment interest and punitive damages. We disagree with Elroy that the court erred in granting summary judgment. Additionally, the court did reduce the amount of compensatory damages. However, we conclude the court erred in awarding prejudgment interest and punitive damages. The judgment is therefore affirmed in part, reversed in part and remanded.

BACKGROUND

¶2 Sylvina Brommer had three children: Robert, Donald, and Elroy. Prior to 1994, Robert, his wife, and his children assisted Sylvina and her husband Oliver with the farm operations on property known as the “Severson Farm.” After Oliver died, Robert continued to operate this farm for Sylvina.

¶3 On September 1, 1994, Sylvina executed a will. The will specifically gave the Severson Farm to Robert. The remaining property was to be split equally between Robert, Elroy, and Donald. In the event Robert predeceased Sylvina, Robert’s children were to receive the Severson Farm and his third share

¹ For clarity, we will refer to the plaintiffs collectively as the Brommers, except where noted.

of the residual property. The will also gave Robert power of attorney, and named Elroy as the alternate.

¶4 Robert predeceased his mother, creating a situation where his issue would take by representation and Elroy had power of attorney for his mother. In 1997, Sylvina was placed in a private nursing home, where she remained until her death in December 2003.

¶5 To pay for Sylvina's nursing home expenses, Elroy sold equipment, livestock, and real estate. He first sold a forty-acre dairy farm to the Smart family for \$95,000. He then sold another forty-acre parcel containing a gravel pit to the Kraemer Company for \$41,800. From the Kraemer sale, Elroy gifted \$10,000 to himself, \$10,000 to Donald, and \$2,500 to each of the Brommers. Both sales involved land that would have passed under the residual clause of Sylvina's will.

¶6 Following the first two sales, Sylvina still owned approximately 450 acres. Of the 450 acres, 170 acres comprised the Severson farm. Under Sylvina's will, the remaining acres would have passed in thirds to Donald, and Elroy and Robert's children.

¶7 After the first two sales, Elroy decided to sell portions of the Severson Farm. When one of Robert's children, Kathy Elrod, found out about the plan she had her attorney ask Elroy to not sell the property. Elroy's attorney responded that Elroy had several reasons for selling the property. First, he wanted to ensure he had sufficient finances for his mother's care. Second, the sale would result in tax and insurance savings. Third, while providing for Sylvina's future care, it would be unfair to solely use funds and assets which would pass under the residuary clause of Sylvina's will to her three sons, while the Severson farm,

specifically devised to Robert's family, would escape having to contribute an equal share to her care.

¶8 On January 15, 2001, Elroy accepted an offer to purchase the Severson Farm for \$141,670. Kathy attempted to enjoin the sale. The circuit court denied her motion because she lacked standing as a prospective heir. We affirmed that decision. The Severson Farm was then sold.²

¶9 The Brommers then requested the court establish a guardianship for Sylvina. The court determined Sylvina needed a guardian and appointed Elroy as her guardian. Following this appointment, Elroy filed a guardianship inventory and annual accounts. The November 2, 2001 guardianship inventory stated Sylvina had a tax basis of \$155,650 in the remaining acres, \$69,971.56 in cash, and \$91,670 in principal owed on the land contract for the Severson Farm. Thereafter, Elroy filed two annual account statements. The final annual account statement stated Sylvina had a tax basis of \$155,650 in the remaining acres and \$69,945.38 in cash. In 2005, Elroy sold the remaining acres for \$751,410.

¶10 Following Sylvina's death, the Brommers sued Elroy for breach of his fiduciary duties and intentionally interfering with their expected inheritance. Both parties moved for summary judgment. The court granted summary judgment in favor of the Brommers, holding that Elroy breached his fiduciary duties by defeating the express intent of his mother's will and by engaging in self-dealing.

² Elroy points out in his brief that he consulted with Richard's widow about what portion of the Severson Farm she wished to keep and did not sell that portion in the sale. However, whether all of the property was sold in this transaction is immaterial because it is undisputed that the Severson Farm was sold and did not pass to the Brommers. Therefore, the only question is whether Elroy met his duty as attorney-in-fact for his mother by selling this property.

The court also concluded that Elroy had intentionally interfered with the Brommers' inheritance. The court then awarded damages of \$275,670.34, including prejudgment interest and punitive damages of \$9,000. Elroy appeals.

DISCUSSION

¶11 We review the grant of summary judgment de novo and apply the same standard as the trial court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).³ Because we conclude Elroy breached his fiduciary duty and the Brommers are entitled to damages, we do not need to reach the merits of the intentional interference claim. *See Patrick Fur Farm, Inc. v. United Vaccines, Inc.*, 2005 WI App 190, ¶8 n.1, 286 Wis. 2d 774, 703 N.W.2d 707.

¶12 Elroy contends summary judgment was inappropriate because there are material facts in dispute. However, both Elroy and the Brommers moved for summary judgment. By doing so, they, in essence, conceded that there are no material issues of fact. *Staver v. Milwaukee County*, 2006 WI App 33, ¶13, 289 Wis. 2d 675, 712 N.W.2d 387. Thus, both parties agreed that this case could be decided on the legal issues via summary judgment. *See id.* Elroy cannot now claim that there were disputed facts because he is unhappy that the circuit court granted judgment against, rather than in favor of, him. *See id.*

³ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶13 Alternatively, Elroy argues the Brommers do not have standing to bring a breach of fiduciary duty claim because he had not engaged in fraud or self-dealing and that his actions only benefited Sylvina. We addressed the same argument in *Praefke v. American Enterprise Life Insurance Co.*, 2002 WI App 235, ¶¶11-12, 257 Wis. 2d 637, 655 N.W.2d 456. There, the defendant argued the plaintiff did not have standing because she did not owe him a fiduciary duty and the plaintiff failed to show how the defendant's actions harmed the principal. Like the defendant in *Praefke*, Elroy misses the basic policy concern behind those cases allowing third-party beneficiaries to sue the fiduciary for fraud or self-dealing. *Id.* This policy is not necessarily linked to any duty the fiduciary may have to the third parties. *Id.* Instead, it is meant to address the potential for fraud that exists when a fiduciary, acting pursuant to a durable power of attorney, has the power to distribute property. *Id.* Therefore, we conclude allowing the Brommers standing is consistent with the policy concerns underlying third parties suing fiduciaries.

¶14 We also conclude the undisputed material facts establish Elroy breached his fiduciary duty. Sylvina's will specifically devised the Severson Farm to Robert or his children. Elroy had power of attorney over his mother's estate and he had a fiduciary duty to his mother. Elroy sold two other parcels of land before the Severson sale, totaling \$136,800. Elroy gifted \$10,000 to himself, \$10,000 to Donald, and \$10,000 to the Brommers before the Severson sale. When Elroy sold the Severson Farm, Sylvina had other property in her estate, which Elroy concedes would have been easier to sell. There is no evidence Elroy attempted to sell other property by listing it with a broker or posting a for sale sign. Elroy benefited by selling the Severson Farm because part of the residual property, from which he was entitled to inherit, was not used to care for his mother. Elroy's attorney sent a letter to Kathy Elrod, stating one of the reasons for

selling the property was that it would be unfair for the Severson property to not bear some of the burden of Sylvina's care.

¶15 These facts are sufficient to conclude Elroy breached his fiduciary duty by engaging in self-dealing. The will specifically devised the Severson Farm to the Brommers and the residue to be divided three ways. Like the circuit court, we conclude the only reasonable reading of the will is that Sylvina's intent was to give this farm to Robert and, if anything was left over, those items were to be divided equally three ways. Elroy argues the will does not establish his mother's intent because she was alive at the time the property was sold. However, Elroy has not pointed to anything which would contradict the express terms of his mother's will in establishing her intent.

¶16 Moreover, the record reveals Elroy took inconsistent positions regarding the necessity of selling the Severson Farm. He argues he needed to sell the property to pay for his mother's future care. Yet, he gifted \$30,000 from property sold before the Severson Farm to himself, Donald and the Brommers, explaining later these gifts were appropriate because he had enough money to provide for his mother for three years.⁴ He also surprisingly contends the Severson Farm was a harder property to sell, which required him to sell it first. Yet, he made no attempt to sell the other property, which eventually sold for

⁴ Elroy argued below and on appeal that an affidavit he submitted with motion for summary judgment establishes he needed to sell the property because he was going to run out of money in approximately eight months. The Brommers respond this affidavit is a sham affidavit because it contradicts previous deposition testimony. *See Yahnke v. Carson*, 2000 WI 74, ¶21, 236 Wis. 2d 257, 613 N.W.2d 102. However, even assuming the veracity of Elroy's affidavit, it still does not establish Elroy could not sell other property to care for his mother. Therefore, it is conceivable that Elroy breached his fiduciary duty by not at least attempting to sell other property first, even though he may have needed the money.

\$751,410. Coupled with the letter sent from his attorney, the only logical conclusion is that Elroy sold the property which he did not have an interest in to protect the property in which he did have an interest. This is the definition of self-dealing. See *Losee v. Marine Bank*, 2005 WI App 184, ¶19, 286 Wis. 2d 438, 703 N.W.2d 751. Therefore, summary judgment was appropriate.

¶17 Finally, Elroy asserts the circuit court made three errors in awarding damages.⁵ First, he argues the compensatory damages awarded to the Brommers should be offset by the amount they have already received from the sale of the Severson Farm. We agree. However, the circuit court's compensatory damages figure of \$236,310 explicitly accounted for "the amount previously received by Plaintiffs from the sale of the Severson Farm." Therefore, we conclude the compensatory damages awarded to the Brommers included the offset.

¶18 Second, Elroy argues the court erred by granting punitive damages because his actions were not malicious or an intentional disregard of the Brommers' rights. See WIS. STAT. § 895.85(3) (2003-04).⁶ Despite his failings as attorney-in-fact for his mother's estate, Elroy did use the funds from the Severson sale for his mother's care and did pay the Brommers their portion of the monies remaining from the sale upon Sylvina's death. He also consulted with an attorney before selling the Severson Farm. Therefore, while his conduct was inconsistent with his fiduciary duties, we cannot conclude punitive damages are justified.

⁵ We are troubled by the fact that the estate was not included as a party to this dispute, necessitating the court awarding damages against Elroy and not the estate. However, Elroy does not dispute this on appeal and neither party presents arguments on this issue. Therefore, we will not address it.

⁶ WISCONSIN STAT. § 895.85(3) has been renumbered § 895.043 by 2005 Wis. Act 155, § 71, effective April 5, 2006.

¶19 Third, Elroy argues the court erred in granting prejudgment interest on the current value of the property because that value had yet to be determined. Elroy is correct; prejudgment interest is awarded “only if the amount of damages is ascertainable or determinable prior to judicial determination....” *Klug & Smith Co. v. Sommer*, 83 Wis. 2d 378, 384, 265 N.W.2d 269 (1978). Here, the court based the damages on a value other than the 2001 sale price of the property, requiring a determination of that value. Therefore, prejudgment interest was inappropriate. *See id.*

¶20 Consequently, we reverse that portion of the judgment awarding punitive damages and prejudgment interest and remand the matter to the trial court to amend the judgment accordingly.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs to the parties.

Not recommended for publication in the official reports.

