COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2937 **Cir. Ct. No. 2004CV712**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

RICHARD EDLER,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

STEVEN EDLER AND EDLER & SONS TRUCKING & EXCAVATING, INC.,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Steven Edler and Edler & Sons Trucking & Excavating, Inc. appeal from a judgment determining the amount to be paid to Richard Elder to buy his share of the corporation and damages for Steven's breach of his fiduciary duty toward Richard as a minority shareholder in the corporation.

The judgment also partitioned a jointly owned piece of property. Richard cross-appeals the judgment challenging certain calculations in the determination of the fair value of the corporation. We conclude that the circuit court properly exercised its discretion in fashioning equitable remedies and affirm the judgment.

¶2 Steven and Richard are brothers. Edler & Sons grew out of a business started by their father. Steven was his father's partner for a long time. Since high school, Richard was a truck driver for the business. When their father retired in 1986, the corporation was formed with Steven owning 60% of the shares and Richard owning 40%. Steven was named as the president of the corporation and Richard as the vice-president. Corporate formalities were not regularly followed. Steven ran the business while Richard drove a truck and did mechanical labor for the business.

¶3 As part of the corporate formation, a parcel of land in the Town of Lyndon was deeded to Steven and Richard as joint tenants. A piece of that parcel was separated out and is Richard's home. The corporation used the Lyndon property for storage, disposal and acquisition of raw materials like sand and gravel. Steven resides at a residence on property owned by the corporation which he leases for $150 a month.

¶4 In early 2003, Steven took away Richard's salary and made him an hourly employee who was required to submit time cards. Steven then took away Richard's corporate check writing privilege. Richard was away from the business in late 2003 due to cancer surgery. When he tried to return to the business in February 2004, Steven terminated Richard's employee status. Subsequently Richard was replaced as corporate vice-president by Steven's wife.

¶5 Richard commenced this action seeking partition of the Lyndon property on the ground that Steven was committing waste against the property by the removal of valuable crushed sand without accounting for the value of the sand. He also sought judicial dissolution of the corporation due to Steven's oppressive conduct in operation of the corporation. *See* WIS. STAT. § 180.1430(2)(b) (2005-06).[1] Richard alleged that Steven breached a fiduciary duty owed to him by such oppressive conduct. Steven counterclaimed for compensation for Richard's operation of a salvage yard and exclusive use of the building on the Lyndon property.

¶6 The matter was tried to the circuit court. The circuit court wrote a lengthy and detailed decision determining that Steven had breached his fiduciary duty by retaining certain income that should have gone to the corporation and that corporate oppression occurred by the diminishment of Richard's participation in the corporation. The court required Steven to buy Richard's 40% interest based on the fair value of the corporation. A 6% liquidation discount was applied to the fair value determination. Richard was awarded the Lyndon property as the partition remedy and one-half its value was offset against the buyout amount. Richard was also awarded $3,408 as damages for Steven's breach of his fiduciary duty. The net result was a judgment in favor of Richard for $334,092.56.

¶7 Minority shareholder oppression presents a mixed question of fact and law. ***Reget v. Paige***, 2001 WI App 73, ¶11, 242 Wis. 2d 278, 626 N.W.2d 302. The circuit court determines what occurred as question of historic fact and

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

we will not reverse those findings unless they are clearly erroneous. ***Id.*** Whether the facts constitute oppression is a question of law, which we decide de novo. ***Id.***

¶8 Steven does not dispute the findings of fact about what occurred over the years in the operation of the business and the parties' use of the Lyndon property. He argues that the circuit court committed a fundamental error of law by concluding that as a minority shareholder Richard was entitled to perpetual employment by the corporation and that Richard's termination as an employee was oppression. He claims that the circuit court has unwittingly obliterated the concept of employment-at-will for minority shareholders. Steven's argument is a red herring because the circuit court specifically rejected Richard's termination from employment as evidence of shareholder oppression.

¶9 The circuit court properly looked at the diminishment of Richard's role in the corporation. Oppressive conduct of a minority shareholder is defined as "burdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of the company to the prejudice of some of its members; or a visual departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely." ***Jorgensen v. Water Works, Inc***., 218 Wis. 2d 761, 783, 582 N.W.2d 98 (Ct. App. 1998) (citation omitted). Of particular import here is that oppression, particularly in a close corporation, includes the frustration of the reasonable expectations of the shareholders. ***Id.***, 783 n.10.

¶10 Edler & Sons is a close family corporation. Each brother was brought into the business started by their father. Upon their father's departure, the corporation was established to continue the goal of providing for each son. The corporation paid no dividends so it was compensation and corporate perks which

served that goal. The long history of both brothers using corporate assets for personal business and compensation above market rates cannot be ignored. Indeed the corporation's stock purchase agreement recognized the parties' "need to have equity ownership in this family Corporation in order to have family members continue their active association with the Corporation and to provide motivational resources and rewards for efforts contributed and risks undertaken." Steven's exclusion of Richard from the corporation, including corporate bonuses, frustrated the reasonable expectation that the business would provide certain benefits for each shareholder.

¶11 Additionally, there was direct evidence of Steven's "squeeze out" tactics. Steven relegated Richard to a mere employee by requiring him to fill out time cards and removing his check writing privilege. The ordering of "Edler & Son" stationery also negated Richard's corporate role. The last straw was removing Richard as an officer without any notice of a corporate meeting. That precluded Richard from receiving any benefit from the corporation except upon dissolution. Richard established shareholder oppression by conduct other than his termination from employment with the business.[2]

¶12 Steven obliquely argues that there was no evidence to support the conclusion that he breached his fiduciary duty to Richard. The circuit court found that Steven's underpayment of rent to the corporation for his home and the

[2] We summarily reject Steven's argument that because both he and Richard equally used corporate assets for personal gain on a de minimus basis there was no unequal treatment between shareholders. Oppression existed for reasons other than the brothers' use of corporate assets for personal gain. In any event, but for the items of personal gain which were designated as damages for Steven's breach of his fiduciary duty, the use of corporate assets for personal gain canceled each other out.

retention of earnings from the sale of scrap metal from underground tanks recovered by corporation breached his fiduciary duty. A corporate officer's fiduciary duty of loyalty, good faith and fair dealing in the conduct of corporate business precludes the officer from exploiting his or her position for personal gain when the benefit or gain properly belongs to the corporation. ***Modern Materials, Inc. v. Advanced Tooling Specialists, Inc.***, 206 Wis. 2d 435, 442, 557 N.W.2d 835 (Ct. App. 1996). "Whether one breached a fiduciary duty is … a question of law that we review independently." ***Zastrow v. Journal Communications, Inc.***, 2006 WI 72, ¶12, 291 Wis. 2d 426, 718 N.W.2d 51.

¶13 Steven does not dispute that he underpaid rent and retained cash sales of scrap metal. As the circuit court pointed out, those particular acts directly deprived the corporation of revenue to which it was entitled. The underground storage tanks were removed and broken down by corporation employees. A written lease required Steven to pay $150 monthly rent for his home on corporate property and Steven only paid $100. Although other types of personal use were made of corporate assets by both brothers and canceled each other out, nothing Richard did had the same characteristic of directly diverting corporate income.[3] We affirm the conclusion that Steven breached his fiduciary duty by self-dealing.

¶14 Both parties challenge the valuation of the corporation. Steven complains that the value assigned by the circuit court does not match the value any witness or expert testified to and therefore, is not supported by any evidence. He

[3] For example, Steven decries that the corporation paid the insurance on the site where Richard operates his salvage business and that Richard used corporate employees, trucks and equipment for that business. That use does not divert income from the corporation since the site of the salvage business is also used by the corporation and the employees, trucks and equipment of the corporation remained available for use by the corporation.

also argues that the value of the corporation was reduced when access to the Lyndon property was terminated and the circuit court failed to account for that reduction in value. Richard is, for the most part, satisfied with the court's valuation but believes the value should not have been reduced by the corporation's liability for sand and gravel removed from the Lyndon property, a sum of $10,257, when no damages were awarded for the removal of sand and gavel. He also contends that to be consistent, a liquidation discount should not have been applied when minority and marketability discounts were rejected.

¶15 Richard sought dissolution of the corporation. Dissolution is an equitable remedy. *Cf.* ***Gull v. Van Epps***, 185 Wis. 2d 609, 626-27, 517 N.W.2d 531 (Ct. App. 1994) (the winding up of a partnership is a proceeding in equity). The circuit court has broad discretion in determining the appropriate remedy in equity and there is no limit to the remedy that can be granted, whether it be ordinary in nature or newly adapted. *See* ***Mulder v. Mittelstadt***, 120 Wis. 2d 103, 116, 352 N.W.2d 223 (Ct. App. 1984) ("If the customary forms of relief do not fit the case, or a form of relief more equitable to the parties than those ordinarily applied can be devised, no reason is perceived why it may not be granted.") (quoting ***Meyer v. Reif***, 217 Wis. 11, 20, 258 N.W. 391 (1935)). We do not understand either party to challenge the decision to fashion a buy-out instead of dissolution.

¶16 The determination of the value of Richard's interest is fact-specific. *See* ***HMO-W Inc. v. SSM Health Care System***, 2000 WI 46, ¶55, 234 Wis. 2d 707, 611 N.W.2d 250. Here there is no dispute about the actual numbers that surround the determination of value. Indeed, the parties jointly retained an expert to determine the fair market value of a 40% share in the corporation. In as much as the circuit court adopted that expert's opinion as a starting point, we reject

Steven's contention that the ultimate determination of value has no basis in the evidence.

¶17 What is at issue is the circuit court's conclusion that it was inequitable to apply the minority interest and lack of marketability discounts (30% total) utilized in the expert's fair market value. That conclusion lies at the heart of the circuit court's equitable determination. "An appeal to equity requires a weighing of the factors or equities that affect the judgment—a function which requires the exercise of judicial discretion." ***Mulder***, 120 Wis. 2d at 115. We review the circuit court's equitable determination for an erroneous exercise of discretion. ***Id.*** at 115. We will sustain a discretionary determination "if the circuit court 'examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***Klawitter v. Klawitter***, 2001 WI App 16, ¶8, 240 Wis. 2d 685, 623 N.W.2d 169 (citation omitted). Our review is highly deferential. ***Id.*** Deference to the circuit court's decision in equity is appropriate because it is the type of discretionary ruling not susceptible of just one correct answer but really a matter of choice in which there oftentimes is no wrong answer. ***Singer v. Jones***, 173 Wis. 2d 191, 195-96, 496 N.W.2d 156 (Ct. App. 1992). Deference is also afforded where, as here, the determination is based on the circuit court's viewing of the witnesses, its reception of evidence, and its resulting superior opportunity to get the feel of the case. ***Schultz v. Schultz***, 194 Wis. 2d 799, 808, 535 N.W.2d 116 (Ct. App. 1995)

¶18 In rejecting the expert's discounts, the circuit court took guidance from ***HMO-W Inc.***, 234 Wis. 2d 707, ¶30, which recognized that a minority discount frustrates the equitable purpose of protecting a minority shareholder from a squeeze out. Although, as Steven points out, ***HMO-W*** applies the statutory

remedy of appraisal for a dissenter shareholder and this is not a dissenter shareholder case, remedying shareholder oppression has the same objective of protecting a minority shareholder. The exclusion of Richard from the corporation created the same situation faced by a dissenter shareholder in a closely held corporation: "The shareholder not only lacks control over corporate decision making, but also upon the application of a minority discount receives less than proportional value for loss of that control." ***Id.***, ¶37. Equity is served by allowing the "squeezed" shareholder his or her proportionate interest of the corporation as a going concern. ***Id.***, ¶31. The same rationale applies to the rejection of a lack of marketability discount. ***Id.***, ¶39. Moreover, when the buy-out will serve to create liquidity where it may not have existed, the discounts should not be applied. *See* Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and Its Impact Upon Valuation of Minority Shares*, 65 NOTRE DAME L. REV. 425, 486 (1990). On reconsideration the circuit court stated that it would not apply those discounts because it would minimize the finding of oppression. To serve equity, the circuit court acted within its discretion to reject the minority and lack of marketability discounts.

¶19 We summarily reject Richard's cross-appeal argument that it was improper to apply a 6% liquidation discount in determining the fair value of his interest.[4] Richard concedes in his respondent's brief that "it would be reasonable in fashioning a remedy in lieu of liquidation that the Court would try to put the parties in the same position they would have been in had the Corporation been liquidated." Richard cannot simultaneously complain that the liquidation discount

[4] Expert testimony established that the costs of liquidation could be between 4-8%, and the parties agreed to a discount of 6%.

was inequitable when it had the effect of putting the parties in the same position as if the corporation had been liquidated. *See* ***Godfrey Co. v. Lopardo***, 164 Wis. 2d 352, 363, 474 N.W.2d 786, 790 (Ct. App. 1991) (judicial estoppel prohibits a party from asserting in litigation a position that is contrary to, or inconsistent with, a position asserted previously in the litigation by that party).

¶20 Steven's claim that the reduction in corporate value occasioned by the loss of access to the Lyndon property should have been accounted for ignores the fact that the Lyndon property is not a corporate asset.[5] The parties' expert did not include any value attributable to use of the Lyndon property. The expert used a net-asset approach. He testified that the corporation was appraised "including going concern" which acknowledges that a business isn't expected to continue to operate indefinitely in a fashion similar to past operation. The valuation accounted for changes in business operations. Steven characterizes the Lyndon property as a "strategic asset" that generated business the corporation would not have otherwise secured. The amorphous nature of that characterization is apparent

[5] Although Steven raised this issue in his post-judgment motion for reconsideration, he did not take the opportunity at the start of the reconsideration hearing to focus the circuit court's attention to the issue. The circuit court defined the issue as whether it failed to give proper consideration to Steven's reliance on the gravel pit in making the ruling that the Lyndon property would be awarded to Richard. Steven did not correct or clarify for the circuit court that he also sought a reduction in the value of the corporation due to the loss of access to the Lyndon property. Steven's claim on appeal that the circuit court refused to address the issue is without a basis. We could conclude that Steven waived the issue. *See* ***Zindell v. Central Mut. Ins. Co.***, 222 Wis. 575, 582, 269 N.W. 327 (1936) (where a party has induced certain action by the trial court, he or she cannot later complain on appeal); ***State v. Salter***, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984) (we properly decline to review an issue on appeal when the appellant has failed to give the circuit court fair notice that it is raising a particular issue and seeks a particular ruling).

in that Steven does not identify any evidence of the value of the "strategic asset."[6] We conclude the circuit court did not erroneously exercise its discretion in refusing to apply a nonexistent reduction in the value of the corporation due to loss of access to the Lyndon property.

¶21 Richard argues in his cross-appeal that the corporation's liability for sand and gravel removed from the Lyndon property should have been added back to corporate value because no provision was made that the corporation actually pay that sum to Richard and Steven. Richard concedes that at trial neither party developed the issue. It appears Richard only raised the issue before the circuit court at the reconsideration motion hearing where he asked that the sum of $10,257 be added back to the value of the corporation because he had "lost out" since the time for appeal was extended by Steven's motion for reconsideration. That request did not serve to raise in the circuit court the issue as it is argued on appeal. We do not address an issue raised for the first time on appeal.[7] ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

¶22 Steven's final challenge to the judgment is to the award of the Lyndon property to Richard as the partition remedy. Steven argues that because both brothers are prejudiced by granting exclusive use of the property to the other,

[6] Steven rejects the notion that the value of the Lyndon property to the corporation can be measured by the cost of materials removed from the property. The circuit court found that the sand and gravel pit on the Lyndon property was "not a major factor" for the corporation and only had generated $10,000 income for the corporation in 2004.

[7] Even if not waived, the circuit court's denial of damages for the removal of sand and gravel from the Lyndon property and the refusal to add back the value of those materials to the corporation's value would be sustained on the circuit court's finding that benefits to the Lyndon property and use by both brothers of that property canceled out the corporate liability for materials. That is particularly true in light of testimony that the Lyndon property was benefited by reclamation efforts by the corporation.

WIS. STAT. § 842.17(1),[8] requires the property to be sold. He equates a judicial sale as allowing each to "self-value" his economic interest in the property. He also argues that the circuit court placed too much weight on Richard's ownership of an adjoining parcel of land.

¶23 "In Wisconsin partition is a remedy under both the statutes and common law." ***Watts v. Watts***, 137 Wis. 2d 506, 535, 405 N.W.2d 303 (1987). Although partition is now codified in WIS. STAT. § 842.02(1), partition remains an equitable remedy. ***Klawitter***, 240 Wis. 2d 685, ¶7. The circuit court's authority to act in equity is not limited to the statutory partition remedies found in § 842.02(2).[9] ***Schmit v. Klumpyan***, 2003 WI App 107, ¶26, 264 Wis. 2d 414, 663 N.W.2d 331. The objective of equity is to do justice between the parties. ***Jezo v. Jezo***, 23 Wis. 2d 399, 404, 127 N.W.2d 246, 129 N.W.2d 195 (1964). As set forth earlier in this opinion, our review is highly deferential. ***Klawitter***, 240 Wis. 2d 685, ¶8.

¶24 We conclude that the circuit court's decision demonstrates a proper exercise of discretion in utilizing a buyout as the partition remedy. The court acknowledged that each brother has ongoing economic interests in the property. It determined that Richard's interest was paramount because his homestead was located on adjacent property, his home utilized the same access driveway and is directly affected by large trucks making access to the pit, and his family used the

[8] WIS. STAT. § 842.17(1) provides: "If the court finds that the land or any portion thereof is so situated that partition cannot be made without prejudice to the owners, and there are no tenants or lienholders, it may order the sheriff to sell the premises so situated at public auction."

[9] Steven cites ***Boltz v. Boltz***, 133 Wis. 2d 278, 282-83, 395 N.W.2d 605 (Ct. App. 1986), as mandating a judicial sale. ***Boltz*** cannot be read to mandate the result in every equitable action.

property for recreational purposes. It is within the circuit court's discretion to assign weight to those facts. The determination that the equitable solution was to have Richard buyout Steven's interest is affirmed.

¶25 Counsel for Richard cites to an unpublished opinion: ***Senty v. Senty***, 2004AP1556, unpublished slip op. (WI App Mar. 28, 2006). It is a violation of WIS. STAT. RULE 809.23(3), to cite and quote from an unpublished opinion of the Court of Appeals. Violations of the non-citation rule will not be tolerated and $100 penalty is imposed against Richard's counsel.[10] *See* ***Hagen v. Gulrud***, 151 Wis. 2d 1, 8, 442 N.W.2d 570 (Ct. App. 1989); RULE 809.83(2). Richard's counsel shall pay the $100 penalty to the clerk of this court within thirty days of the release of this opinion.

¶26 No costs to either party.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[10] Steven's counsel also discusses the unpublished case but does so in his reply brief. We do not impose a similar penalty against Steven's counsel because, even though counsel could have advised the court that the case was unpublished and did not, his citation to the unpublished case was in fair reply to Richard's citation.