COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0492 **Cir. Ct. No. 98-CV-987**

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

RONALD A. SCHAEFER,

PLAINTIFF-APPELLANT,

V.

MARK T. ULINSKI AND SCHAEFER MOTOR SALES, INC., A WISCONSIN CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed*.

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

¶1 PER CURIAM. Ronald A. Schaefer appeals from a judgment dismissing his action against Mark T. Ulinski and Schaefer Motor Sales, Inc., alleging illegal, oppressive and fraudulent corporate acts and the misapplication of corporate opportunities and assets. This case was tried to the court and Schaefer

argues that the trial court failed to apply the proper standard with respect to corporate fiduciary duties and preemptive stock rights, and that it misinterpreted corporate documents. We conclude that the trial court properly applied the law and that Schaefer's claims really focus on the sufficiency of the evidence. The trial court's findings are supported by sufficient evidence. We affirm the judgment.

¶2 For fifty years, Schaefer Motor Sales, an automobile dealership, was a family business. In 1987, Ronald Schaefer and Mark Ulinski, as equal investors, purchased the business from Ronald's father and created Schaefer Motor Sales, Inc. (SMS). Under a stock voting agreement, Schaefer and Ulinski were each named to the board of directors and each was to select another director. A fifth director was agreed upon and terms for his replacement set forth in the agreement. Schaefer and Ulinski were to share management of corporate operations, but in early 1989, Schaefer asked to be relieved of management authority and Ulinski was assigned full management authority.[1] While distributions to Schaefer and Ulinski were made equally, Ulinski received annual bonuses approved by the board of directors for services as corporate president, general manager, sales manager and used car manager. In April 1991, Ulinski acquired an interest to purchase a Dodge dealership. Ulinski assigned this interest to SMS in July 1991, and SMS completed the dealership purchase. Over Schaefer's objection, stock options were granted to Timothy Soetenga, who had been hired to manage the Dodge dealership and had done so successfully. In 1993, Schaefer and Ulinski

[1] Schaefer's employment agreement was amended to reflect that he would work less than full time on corporate matters and the changes in responsibilities. By August 1989, Schaefer returned to full-time status but did not reacquire the managerial responsibilities he originally had. In September 1991, Schaefer was removed as president of SMS.

began to discuss separation of their interests. Also in 1993, Schaefer was replaced as the designated "dealer-operator" authority so that SMS could obtain General Motors Corporation's approval of a required relocation of SMS's Pontiac franchise. Throughout this period of corporate operations, Schaefer was experiencing personal difficulties creating personal credit and legal problems.

¶3 In 1998, Schaefer commenced this action alleging shareholder oppression under WIS. STAT. § 180.1430(2)(b) (1999-2000),[2] occasioned by Ulinski's control of the board of directors and the diversion of dividends as bonuses to Ulinski. He alleged that Ulinski breached his fiduciary duty as a shareholder, corporate officer and director. He further alleged that SMS assets and opportunities were wasted and misappropriated. In addition to alleging misconduct with respect to Ulinski's acquisition of the Dodge dealership, Schaefer claimed that Ulinski's 1992 purchase of a Racine Harley-Davidson motorcycle dealership was a misappropriation of an SMS corporate opportunity. Finally, Schaefer alleged a civil conspiracy among Ulinski and others to injure him. As alternative forms of relief, Schaefer sought judicial dissolution of SMS, the declaration of a dividend or capital distribution, voiding of additional stocks, buy-out of his or Ulinski's interest, an accounting, and injunctive relief against further acts of oppression or unfair prejudice.

¶4 A trial to the court was conducted over seven days. The trial court addressed each of Schaefer's claims in a well written and detailed twenty-seven page opinion. With two exceptions, the trial court found that neither Ulinski nor

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

SMS had acted in a manner contrary to Schaefer's interests or expectations. While the court found that Ulinski improperly obtained a loan from SMS of $126,000 to make his investment in the Harley-Davidson dealership, it determined that the loan had been repaid at a higher yield of return than SMS would have otherwise earned and that there was no harm to SMS. The court also found that Ulinski's personal investment of $2,500 with other dealers to form a mechanical maintenance reinsurance corporation was the usurpation of an SMS corporate opportunity. At the time of trial, Ulinski had offered his stock in the reinsurance corporation to SMS and a decision of the board of directors was pending. The trial court found both improprieties by Ulinski to be de minimus in light of the absence of actual harm to SMS and otherwise tremendous profitability. Other than these two occurrences, the court found that Ulinski acted in the best interests of the corporation and in good faith.

¶5 The trial court's conclusion that Schaefer failed to meet his burden of proof on claims of oppression and breach of fiduciary duties was best summarized by the court's holding: "Based upon the evidence produced at trial, Schaefer's list of expectations is more properly characterized as his list of disappointments which resulted from legitimate business decisions made by the Board." The court further explained:

> While [Schaefer] may be frustrated by simply being an owner with no active role in the corporation's daily operations, he has only himself to blame. He withdrew himself from the corporation initially due to wanting to pursue other interests. He absented himself from the corporation for drug treatment, and his ability to be productive was affected by his abuse. His financial problems contributed to his inability to productively contribute to the corporation where creditors, including GMAC, sought to locate him for personal financial problems and small claims actions were filed against him. His conduct earned him a reputation for being contentious,

> short-tempered and at times belligerent .... In short, Schaefer's frustration is understandable. But it is not due to the conduct of the Defendants. Rather, it is due to his own conduct.

¶6 Schaefer argues that the trial court applied the wrong legal standard when examining the evidence. Specifically, he characterizes the decision as resting on fiduciary standards applicable in a general corporate setting rather than standards applicable to closely held corporations like SMS. We reject Schaefer's contention that the trial court's examination of the evidence ignored the "openness and fairness" component which he argues is applicable to a closely held corporation.

¶7 The trial court relied on the standard set forth in ***Jorgensen v. Water Works, Inc.***, 218 Wis. 2d 761, 779, 582 N.W.2d 98 (Ct. App. 1998), which recognized a common law cause of action for breach of fiduciary duty by the directors and majority shareholders that results in an injury primarily to the minority shareholders as individuals. ***Jorgensen*** defines oppressive conduct 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." ***Id.*** at 783 (citation omitted). It confirms the melding of claims of oppression and breach of fiduciary duty in the context of a closely held corporation. "In the context of a close corporation, oppressive conduct of those in control is closely related to breach of the fiduciary duty owed to minority stockholders." ***Id.*** As the trial court recognized, this definition of oppressive conduct also permits consideration of the frustration of the reasonable expectation of shareholders in a closely held

corporation. ***Id.*** at 783 n.10. The trial court's reliance on ***Jorgensen*** reflects application of the correct legal standard.

¶8 The remainder of Schaefer's argument that Ulinski breached his fiduciary duty simply challenges the sufficiency of the evidence. In determining whether corporate oppression occurred, the trial court's findings of historic facts will not be reversed unless they are clearly erroneous. ***Reget v. Paige***, 2001 WI App 73, ¶11, 242 Wis. 2d 278, 626 N.W.2d 302. The evidence supporting the court's findings need not constitute the great weight and clear preponderance of the evidence; reversal is not required if there is evidence to support a contrary finding. ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979). The trial court is the ultimate arbiter of the witnesses' credibility when it acts as the fact finder and there is conflicting testimony. ***Id.***

¶9 Considering, as we must, the evidence in the light most favorable to the trial court's judgment, we reject Schaefer's myopic presentation of the facts.[3] We do not detail the evidence in support of the judgment because it would only unduly prolong this opinion. *See* ***Plante v. Jacobs***, 10 Wis. 2d 567, 574, 103 N.W.2d 296 (1960). The trial court's opinion adequately addresses each claim and we adopt the relevant portions of the opinion as our own. *See* WIS. CT. APP. IOP VI(5)(a) (Oct. 1, 2001) (court of appeals may adopt trial court opinion). Much of the case hinges on the credibility determination between Schaefer and Ulinski and their explanations of various transactions. This credibility

[3] Schaefer's brief is merely a one-sided portrayal of the facts and law. It is dangerously close to demonstrating poor appellate advocacy for its omission of relevant facts.

determination may not be disturbed on appeal. *See* ***Plesko v. Figgie Int'l***, 190 Wis. 2d 764, 775-76, 528 N.W.2d 446 (Ct. App. 1994).

¶10 In challenging the trial court's refusal to void stock issued to employee Soetenga, Schaefer returns to a claim that legal error occurred. He argues that the board meeting at which the bylaws were amended was not properly noticed and that creation of the stock options violated his preemptive rights under WIS. STAT. § 180.1705, and the parties' stock retirement agreement. We conclude there was no error in the refusal to void Soetenga's stock.[4]

¶11 Notice of the board of directors' meeting to be held August 18, 1993, and the shareholders' meeting to follow made reference to the proposed action of granting Soetenga stock options and amendment to the bylaws for the purpose of creating class B common stock. Schaefer contends that the meeting notice for the proposed amendments to the bylaws was improper because it did not issue after a shareholder deadlock was found to exist but issued in anticipation that a shareholder deadlock would occur over the proposal to grant Soetenga stock options. Schaefer advances a hypertechnical reading of the notice requirement. The notice given was sufficient because it gave notice of the proposed amendment to break the anticipated deadlock, a deadlock which in fact occurred. Moreover, Schaefer attended the meeting and did not object to the notice. He waived any defect in the notice. WIS. STAT. § 180.0706.

¶12 Statutory preemptive rights do not apply when the right to acquire stock is given for consideration other than cash. WIS. STAT. § 180.1705(1)(b).

[4] We address this issue notwithstanding Schaefer's failure to join Soetenga, an indispensable party, to the action.

The record establishes that the stock options were given to Soetenga based on employee performance and for the purpose of retaining him as an employee. This purpose governs regardless of the fact that in exercising his stock options, Soetenga had to pay cash for stock. Additionally, preemptive rights do not apply to "shares issued to ... employees pursuant to approval by the affirmative vote of the holders of a majority of the shares entitled to vote thereon." *See* § 180.1705(1)(a). Under the parties' voting agreement, the board of directors broke the deadlock between Ulinski and Schaefer by voting all shares in favor of granting the stock options to Soetenga. There was no violation of Schaefer's preemptive rights.

¶13 Schaefer's claim that the parties' stock retirement agreement was violated by the issuance of stock to Soetenga also fails. That agreement governs the parties' sale or transfer of their own shares; it does not contain a prohibition against the creation and issuance of a new class of stock. Furthermore, the agreement is not rendered meaningless since Soetenga's stock option agreement mandated that all shares he acquired were subject to the terms and conditions of the stock retirement agreement.

¶14 Schaefer contends that the stock options were not exercised exactly as required by Soetenga's stock option agreement. He points out that several of Soetenga's notices exercising the option came after the January 31 deadline and that stocks were issued the same day as the notice and payment rather than waiting the required five-day period. His argument merely elevates form over substance. Since Soetenga could carry over his right to purchase to the following year, the stock would have issued in any event by strict compliance with the agreement in the following year. The elevation of form over substance does not justify reversal of the challenged action. *See* ***Flynn v. Dep't of Admin.***, 216 Wis. 2d 521, 544,

576 N.W.2d 245 (1998). The trial court found that the options were executed in a manner consistent with the agreement. Substantial compliance is sufficient.[5]

¶15 Finally, Schaefer argues that under the bylaws, the fifth board director was to be elected annually and that the trial court erred by not recognizing this requirement.[6] He challenges the trial court's finding that "reelection of the fifth director is inconsistent with the intent of the Common Stock Voting Agreement because allowing either voting shareholder to remove the mutually-selected fifth director would allow that shareholder to defeat the tie-breaking mechanism set forth in that agreement."

¶16 Despite Schaefer's attempt to identify this issue as a question of law forming an independent basis for relief, the issue does not stand independent of his allegation that Ulinski suppressed his shareholder interest. The trial court found that Schaefer did not have a reasonable expectation that he could unilaterally remove the fifth director. This finding is supported by the deadlock breaking mechanism which the voting agreement put in place. The voting agreement provides that the fifth director be mutually selected and when a vacancy occurs, the agreement has its own mechanism for determining the fifth director. We do not deem the issue to be whether the trial court properly construed the corporate

[5] We do not address Schaefer's oblique suggestion that stock was issued to Soetenga without determining if Soetenga met minimum sales requirements because the argument is undeveloped. *See* ***Fryer v. Conant***, 159 Wis. 2d 739, 746 n.4, 465 N.W.2d 517 (Ct. App. 1990) (we will not consider an argument that is inadequately briefed).

[6] Although Schaefer expressed that he no longer agreed to the person selected as the fifth director in 1998, that director was not removed. Schaefer's contention is that each year the director was to be elected and that once the parties ceased to agree on the fifth director, that person would be removed. A new director would then be selected by virtue of the appointment process in the voting agreement.

documents.[7] The trial court was asked to examine Ulinski's conduct in light of the parties' agreement in determining whether Ulinski acted in an oppressive manner. To the extent that Ulinski relied on the advice of corporate legal counsel to refuse an election of the fifth director in the absence of a vacancy, and regardless of whether that advice was a correct or incorrect interpretation of the corporate documents, reliance on the corporation's attorney was reasonable and not willfully adverse to Schaefer's interest. It was not error to deny relief based on the refusal to conduct annual elections of the fifth director.

By the Court.—Judgment affirmed.

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

[7] If we were to consider the issue as one of contract construction, our review is de novo. ***Heritage Mut. Ins. Co. v. Truck Ins. Exch.***, 184 Wis. 2d 247, 252, 516 N.W.2d 8 (Ct. App. 1994). Our objective is limited to discovering the true intention of the parties and to construing the contract so as to give reasonable meaning to every provision of the agreement. ***Id.*** Between Schaefer and Ulinski the voting agreement controls. The trial court's finding that the parties intended a deadlock breaking device by the mutual appointment of the fifth director is not clearly erroneous. Likewise, the finding that a yearly election of the fifth director would subvert the parties' intent is not clearly erroneous. Thus, it was not error to conclude that the fifth director would be selected pursuant to the voting agreement when a vacancy occurs rather than an annual election under the bylaws.