

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 25, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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. 01-2854
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-404

**IN COURT OF APPEALS
DISTRICT II**

STRIP-RITE, INC. AND ALBERT R. GOLL,

PLAINTIFFS-APPELLANTS,

v.

TODD C. SMITH AND MARY E. ADAMS,

DEFENDANTS-RESPONDENTS,

EDWARD ADAMS AND JANICE GOLL,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Kenosha County:
WILBUR W. WARREN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Strip-Rite, Inc. and Albert R. Goll (collectively, Goll) appeal from a judgment in favor of Todd C. Smith and Mary E. Adams

(collectively, Smith) for payments they made under an agreement to purchase Strip-Rite from Goll. Goll argues that the trial court's findings regarding breach of contract are clearly erroneous, that the court improperly applied a rescission remedy, and that the evidence supports a finding that Smith breached a fiduciary duty. We affirm the judgment.

¶2 In December 1997, the parties entered into an agreement for Smith to purchase Strip-Rite, a corporation solely owned and operated by Goll and engaged in a commercial metal laundry and chemical de-rusting enterprise. Common stock was delivered to Smith and payments of \$2,000 per month were due Goll until the purchase price of \$72,000 was paid in full.¹ Unhappy with complaints he received from Strip-Rite customers, Goll returned to the business and took over operations on November 1, 1999. Smith made no payments after October 1999.

¶3 Goll brought this action to recover costs he incurred in making Strip-Rite operational again, for debts resulting from Smith's operation of the business, and for damages occasioned by Smith's conduct in running the business into the ground and ruining customer and creditor relationships. Smith counterclaimed for damages. The matter was tried to the court.

¶4 The trial court found that Smith was current in payments due under the contract until November 1, 1999, and therefore was in full compliance with the agreement until that date. Paragraph six of the agreement warranted that Goll "now has good right to assign the goodwill, stock in trade, fixtures and effects,

¹ Stock was to be distributed to Smith at three separate intervals. One thousand shares were delivered to Smith at closing. Goll retained the remaining 1,671 shares.

book and other debts, and premises,” and “that same shall be enjoyed by [Smith,] free from any interruption or disturbances.” The trial court found that Goll’s conduct in taking over the operation of the business on November 1, 1999, and operating the business to the exclusion of Smith violated the agreement. It found that the agreement did not permit Goll to enter the premises and take control of the business. The court rejected the parties’ competing unjust enrichment and business devaluation claims, except for a \$2,500 pressure washer purchased by Smith. Judgment was entered for Smith for \$44,500, representing \$42,000 in purchase price payments and the cost of the pressure washer.

¶5 We first address Goll’s claim that the trial court’s findings of fact are clearly erroneous. For purposes of appellate review, 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). Rather, the evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. *Id.*

¶6 Goll’s argument does not discuss or cite the evidence in support of contrary findings. Rather, Goll merely points out that there is no finding that his return to Strip-Rite was to the exclusion of Smith’s right to run the business or impaired Smith’s ability to make payments under the agreement. He contends that absent any evidence that he told Smith and Adams they could not work at Strip-Rite, the trial court’s finding that Goll breached the agreement is without a factual basis. His argument is conclusory and we address it in an equally conclusory fashion.

¶7 The agreement vested ownership in Smith and provided for the operation of the business without interference.² Goll returned to the business over Smith's objection and with knowledge that Smith deemed the agreement void by Goll's conduct. Even if Goll did not exclude Smith from working, his management and presence at the business was a violation of Smith's entitlement to enjoy ownership without interference. The trial court's finding that Goll materially breached the agreement is not clearly erroneous.

¶8 Goll contends that the trial court erred in rescinding the agreement when both parties had confirmed the agreement and sought breach of contract damages. In addition, he argues that rescission is not a proper remedy because Smith did not attempt to restore the status quo and the trial court did not address whether rescission had been sought in a reasonable time.

¶9 Goll mischaracterizes the trial court's determination. It was not based on a cause of action for rescission. The trial court explicitly stated that Smith was entitled to relief on claims of breach of contract, breach of duty of good faith and fair dealing, and unjust enrichment. The \$42,000 damages awarded for breach of contract represent Smith's loss of an entity valued at \$72,000, less the

² Goll argues that the trial court's finding that he retained stock only as security for payment of the purchase price was an erroneous interpretation of the agreement. We reject any notion that Goll was entitled to run the business as a part-owner. Not only did the agreement vest possession of the business in Smith, it prohibited Goll from directly or indirectly engaging in the business of commercial metal laundry, de-rusting and stripping, "except as an employee" of Smith. The noncompete provision does not make any allowance for Goll to operate the business as a part-owner but only as an employee. Additionally, there is no basis for Goll's suggestion that the parties modified the agreement by their conduct and that the trial court was required to address this possibility. The day after Goll took over operation of the business, Adams expressed her objection to his conduct and that the agreement was therefore void.

\$30,000 unpaid purchase price.³ Thus, while the agreement was functionally rescinded, it was an award of contract damages and not as a cause of action for rescission.⁴ Any additional arguments Goll makes with respect to the trial court's failure to truly restore the status quo by compensating him for monies expended in restoring the business are disposed of by the court's findings that the parties' competing claims were offsetting and that the value of the business had not substantially changed.

¶10 Goll claims that Smith had a fiduciary duty to him as a shareholder to not run the business into the ground. Goll could not recover on this claim for several reasons. First, this was an action based on the agreement. The breach of an officer's or director's fiduciary duty is enforceable only by a shareholder's derivative suit. Second, the trial court found that the value of the business had not decreased during Smith's operation. That finding is not clearly erroneous and precludes recovery for a breach of a fiduciary duty. Finally, we agree with the trial court's assessment that Smith could have closed down Strip-Rite altogether as long as payments remained current. The fact remains that Goll returned to the business when he had no right to do so and cannot seek to benefit from his own breach of the purchase agreement.

³ Not until after the notice of appeal was filed was the judgment modified to require Smith to return the 1,000 shares of Strip-Rite stock to Goll. The trial court modified the judgment as a form of relief under WIS. STAT. § 806.07(1)(h) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

⁴ Even if the trial court intended to grant rescission, it could do so by amending the pleadings to conform to the proof at trial. *See* WIS. STAT. § 802.09(2). The evidence included a letter to Goll's attorney the day after Goll took over the business which indicated that because of Goll's conduct, the agreement was void. The letter offered to return the stock. Thus, the evidence demonstrates a timely request for rescission and an attempt to return the parties to the status quo.

¶11 Smith moves for costs and attorney's fees on the ground that Goll's appeal is frivolous.⁵ WIS. STAT. RULE 809.25(3)(c)2. Although we have rejected Goll's arguments, it cannot be said that his arguments were without a basis in the law or equity. All doubts about whether an appeal is frivolous must be resolved in favor of the appellant. *Rabideau v. City of Racine*, 2001 WI 57, ¶46, 243 Wis. 2d 486, 627 N.W.2d 795. The appeal is not completely frivolous and the motion is denied.

By the Court.—Judgment affirmed.

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

⁵ Goll appears to challenge the timeliness of the motion. A request included in the respondents' brief is timely under WIS. STAT. RULE 809.25(3)(a).

