

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 15, 2010

David R. Schanker
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. 2009AP438

Cir. Ct. No. 2007CV391

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DAVID BUSHARD,

PLAINTIFF-RESPONDENT,

v.

STEVEN A. REISMAN AND PRESSENTER, LLP,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Pierce County:
ROBERT W. WING, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PETERSON, J. Steven Reisman and PressEnter, LLP, appeal an order (1) directing Reisman and David Bushard to complete the wind-up of PressEnter, (2) requiring Reisman to reimburse PressEnter for funds he took as a salary, and (3) dismissing Reisman's counterclaims against Bushard for breach of

fiduciary duty and unjust enrichment. Reisman argues the circuit court erred by granting the order without resolving key factual issues or applying equitable principles to the dispute. We affirm.

BACKGROUND

¶2 Bushard and Reisman formed PressEnter, an internet service provider, as a partnership in 1995. They registered PressEnter as a limited liability partnership, but did not enter into a written partnership agreement. Bushard and Reisman contributed an equal amount of capital to the partnership's formation and initially were both involved in the business's day-to-day operations. They later disagreed about how they should run the business. Bushard notified Reisman by letter from his attorney in August 1999 that "Mr. Bushard has chosen to exercise his right to dissolve the partnership, PressEnter, L.L.P., effective August 31, 1999." The letter further stated: "Please be assured that, during the winding up of the partnership, Mr. Bushard intends to cooperate fully in the interim management of the business"

¶3 Around the same time, Bushard and Reisman unsuccessfully tried selling PressEnter. Bushard all but ceased his involvement in the business's management. Reisman continued to operate the business for the next nine years.

¶4 During this time, PressEnter paid Bushard and Reisman equal partnership draws out of the business's profits, as it had before Bushard's dissolution notice. In addition, Reisman began taking a "guaranteed draw"—or salary—in 2004. When Bushard learned of this two years later, he notified Reisman he objected to Reisman taking a salary. Reisman nevertheless continued taking guaranteed draws.

¶5 Bushard sued, seeking, as relevant here, an order dissolving the partnership and requiring Reisman to repay money he took as a salary. Reisman counterclaimed, alleging Bushard breached his fiduciary duty to Reisman and was unjustly enriched by PressEnter’s post-August 1999 profits. Reisman also moved for summary judgment dismissing Bushard’s claim that Reisman was not entitled to take a salary.

¶6 The circuit court denied Reisman’s motion for summary judgment, concluding that Reisman was prohibited, as a matter of law, from taking a salary from the partnership without Bushard’s agreement. Bushard then moved for orders directing the winding up of the partnership and compelling Reisman to repay the amounts he took as a salary.

¶7 The court granted the motion, directing the parties “to complete the winding up of the affairs of PressEnter ... and to report to the court in 60 days regarding the progress.” It also ordered Reisman “as part of the winding up of the affairs of PressEnter ... to account to and reimburse PressEnter ... for the amounts which he took as guaranteed draws or salary,” and dismissed his counterclaims for unjust enrichment and breach of fiduciary duty.

DISCUSSION

¶8 This appeal requires us to determine whether the circuit court erred when it (1) ordered the parties to complete the winding up of their partnership, (2) directed Reisman to reimburse money he took as a salary, and (3) dismissed Reisman’s counterclaims. The court’s decision was based on its interpretation of

the Uniform Partnership Act, as set forth in WIS. STAT. ch. 178.¹ The interpretation of statutes is a question of law we review independently. *Garcia v. Mazda Motor*, 2004 WI 93, ¶7, 273 Wis. 2d 612, 682 N.W.2d 365.

1. Order to wind up the partnership.

¶9 Reisman argues the court should not have ordered the parties to complete PressEnter’s winding up because (a) it is not clear Bushard elected to force the business to wind up, and (b) the court neglected to consider equitable principles. We reject both arguments.

a. Whether Bushard elected to wind up the business.

¶10 When a partner dissolves a partnership, he or she may either (1) “permit the business to continue and claim his or her interest in the dissolution value as a creditor, or (2) ... force the dissolved business to wind up and take his or her part of the proceeds.” *Matteson v. Matteson*, 2008 WI 48, ¶25, 309 Wis. 2d 311, 749 N.W.2d 557. “[T]he settlement of the former partner’s account differs depending on whether it is a wind-up or a continuation.” *Lange v. Bartlett*, 121 Wis. 2d 599, 601-02, 360 N.W.2d 702 (Ct. App. 1984). Therefore, it is important “for a trial court faced with making a settlement of a former partner’s account ... to determine what election the retiring partner made at the point of dissolution.” *Id.*

¶11 Reisman argues Bushard’s election is disputed because he permitted Reisman to continue operating the business for years after initiating the

¹ References to the Wisconsin Statutes are to the 2007-08 version.

dissolution. He therefore contends the court should not have ordered the parties to complete PressEnter's winding up without determining whether Bushard in fact elected to wind up the business.

¶12 Bushard's letter dissolving the partnership explicitly referred to "the winding up of the partnership" Moreover, wind-up is the default option. "Every partnership dissolution causes a wind-up rather than a continuation unless the outgoing partner 'consents' to a continuation." *Id.* at 601-02. Thus, unless the dissolving partner expressly elects continuation, we presume he or she elected to force the business to wind up. *See id.* at 601.

¶13 In any event, Reisman is prohibited from arguing Bushard's election is disputed for two reasons. First, he did not argue this to the circuit court and has therefore forfeited the argument. *See Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983) (Generally, this court will not consider issues raised for the first time on appeal.). Second, contrary to his argument on appeal, his briefs to the circuit court are replete with assertions PressEnter was winding up in the years following Bushard's notice of dissolution. Accordingly, he is also judicially estopped from arguing Bushard did not elect to wind up PressEnter. The doctrine of judicial estoppel "is intended to protect against a litigant playing 'fast and loose' with the courts by asserting inconsistent positions." *Harrison v. Industrial Review Comm'n*, 187 Wis. 2d 491, 497, 523 N.W.2d 138 (Ct. App. 1994) (citation and internal punctuation omitted). Because Reisman represented

to the circuit court the business was winding up—a position the court accepted—he is estopped from arguing on appeal Bushard elected continuation.² *See id.*

b. Whether the court should have considered equitable principles.

¶14 Reisman argues the circuit court should not have ordered the parties to complete PressEnter’s winding up without first considering equitable principles. He contends that when partners cannot agree about how to wind up a business, courts should exercise discretion to achieve a fair accounting. True or not, that is a different issue from whether, after a partner has initiated dissolution, a court can order the other partner to complete the business’s winding up.

¶15 A partner may unilaterally terminate a partnership unless the partnership agreement specifies to the contrary. WIS. STAT. § 178.26. As stated above, dissolution triggers a wind-up unless the dissolving partner elects to permit the business to continue. *Lange*, 121 Wis. 2d at 601. Further, WIS. STAT. § 178.32 provides:

Unless otherwise agreed, the partners... ha[ve] the right to wind up the partnership affairs; provided, however, that any partner ... upon cause shown, may obtain winding up by the court.

Thus, Bushard was entitled, by statute, to demand the winding up of PressEnter and to request the court compel Reisman to comply with this election. The court

² Reisman contends he should not be judicially estopped from making this argument because this doctrine requires his position to have been accepted by another court. He argues it was not because the court ruled against him. However, what matters is not that the court’s ultimate decision was unfavorable to Reisman, but that it accepted his position PressEnter was winding up.

was therefore not required to consider equitable principles when ordering the parties to complete PressEnter's winding up.

2. Whether Reisman was entitled to a salary.

¶16 Reisman argues equitable principles permitted him to take a salary because he managed PressEnter's day-to-day operations after Bushard ceased participating in the business's management.

¶17 Under WIS. STAT. § 178.15(1), partners share equally in the profits and losses of the partnership. However, unless the parties agree otherwise, "No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his or her services in winding up the partnership affairs." WIS. STAT. § 178.15(6). Wisconsin courts have long interpreted this to mean exactly what it says: absent an agreement to the contrary and absent the death of a partner, partners may not be compensated for work they do for the partnership. *Thompson v. Beth*, 14 Wis. 2d 271, 278-79, 111 N.W.2d 171 (1961) (prohibition against compensation applies even "where a partner has been active in contributing his skill and labor toward the affairs of the partnership on a day-to-day basis").³ This rule also applies to partners who perform work following dissolution. *Gull v. Van Epps*, 185 Wis. 2d 609, 626, 517 N.W.2d 531 (Ct. App. 1994) (While some jurisdictions have held that a partner doing substantial extra work winding up a partnership is entitled to

³ The statute referred to in *Thompson v. Beth*, 14 Wis. 2d 271, 278-79, 111 N.W.2d 171 (1961), was WIS. STAT. § 123.15(6) (1961). It has since been renumbered. The language remains the same.

compensation, “if the rule against extra compensation is to be modified [in Wisconsin], we believe the legislature must revise § 178.15(6) STATS.”).

3. Reisman’s counterclaims.

¶18 Finally, Reisman argues the circuit court erred when it dismissed his counterclaims for unjust enrichment and breach of fiduciary duty. We disagree.

¶19 Reisman claims Bushard was unjustly enriched because he continued to receive an equal share of PressEnter’s profit draws even after he ceased participating in the business’s management. A claim for unjust enrichment requires the plaintiff to show (1) he or she conferred a benefit on the defendant, (2) the defendant knew of the benefit, and (3) the defendant accepted or retained the benefit under circumstances that make it inequitable for him or her to retain the benefit. *Staver v. Milwaukee County*, 2006 WI App 33, ¶24, 289 Wis. 2d 675, 712 N.W.2d 387. Here, Bushard was entitled, by statute, to an equal share of the profits until the partnership’s termination. *See* WIS. STAT. § 178.15(1). Because Bushard received nothing more than he was entitled to receive by law, he received no inequitable benefit.

¶20 Nor do we discern any claim for breach of fiduciary duty. Reisman claims “issues of fact exist as to whether Mr. Bushard breached his fiduciary duty ... by trying to sell the business without Mr. Reisman’s knowledge or consent and by abandoning the partnership.” However, WIS. STAT. § 178.18 provides the contours of the fiduciary duty partners owe the partnership:

Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him or her without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him or her of partnership property.

Here, there is no dispute the only benefits Bushard received from the partnership after notifying Reisman he was dissolving the partnership were his profit draws, funds Reisman and PressEnter voluntarily paid to him. Therefore, the circuit court did not err when it dismissed Reisman's claim for breach of fiduciary duty.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

