COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0717 **Cir. Ct. No. 01CV000547**

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

AUBREY VAUGHN,

PLAINTIFF-APPELLANT,

V.

ELECTRONIC TECHNOLOGIES INTERNATIONAL, LLC,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Jefferson County: RANDY R. KOSCHNICK, Judge. *Affirmed*.

Before Deininger, P.J., Vergeront and Higginbotham, JJ.

¶1 VERGERONT, J. Aubrey Vaughn appeals the summary judgment dismissing his claim that economic duress requires rescission of an agreement to sell his membership interest in Electronic Technologies International, LLC (ETI) to ETI. We conclude summary judgment is proper because the undisputed facts

show no wrongful threat or act, a necessary element for economic duress. Accordingly, we affirm.

BACKGROUND

¶2 ETI is a manufacturer of specialized electronic equipment. It was organized as a limited liability company pursuant to an operating agreement executed in December 1994. Vaughn was a minority owner with a participating percentage of 4.9928%. The operating agreement valued the company at $350,500 as of January 1, 1995, and Vaughn's share was valued at $17,500. The operating agreement defined two classes of members: Class A members Ralph J. Rio and Phillip S. Pelanek and several Class B members, including Vaughn.

¶3 In addition to having an interest in ETI, Vaughn owned and operated his own separate business, Automation Supplies, Inc. (ASI), as a sales agent for electronics firms. ETI entered into a manufacturer's representative agreement either with ASI or with Vaughn personally,[1] under which Vaughn acted as ETI's representative in the southeast. The agreement provided that either party could terminate the agreement upon thirty days' advance written notice. Vaughn was ETI's representative for one of its most important customers, Digicourse, which by 1998 accounted for 48% of ETI's gross revenues.

[1] Vaughn signed his name to the agreement on the blank following "Agent" and in the blank underneath following "By:"; in the blank following "Title" he wrote "President." The parties dispute whether the agreement was between ETI and Vaughn, with Vaughn an employee of ETI, or between ETI and ASI, with Vaughn an employee of ASI and an independent contractor with ETI. As we discuss later in the opinion, *see infra* ¶20, it is not necessary to resolve this dispute.

¶4 By the end of 1999 ETI had lost the business from Digicourse. In November 1999 Rio, the president and CEO of ETI, initiated discussion with Vaughn on the sale of his membership interest in ETI. In his affidavit, Rio averred that he and Pelanek believed ownership in the company should be vested only in key employees or agents who either had a substantial investment at risk or were active full time in the business of the company; with the loss of the Digicourse account, ETI had become an insignificant aspect of Vaughn's separate business, ASI, which caused Rio and Pelanek to worry that Vaughn would not devote sufficient effort to the success of ETI. According to ETI, it requested that Vaughn sell his interest for $17,500, plus Vaughn's share of the undistributed income of ETI, for a total of $81,130.52. According to Vaughn, Rio demanded he sell back his membership for $17,500, and the undistributed income of $63,630.52 was due him in any event. In either case, it is undisputed that ETI tendered Vaughn a check in the amount of $81,130.52 and stated that it would terminate the manufacturer's representative agreement if Vaughn did not comply in selling his membership interest. Vaughn declined, and on December 29, 1999, ETI notified Vaughn it was terminating the manufacturer's representative agreement.

¶5 In early January 2000, Vaughn signed a purchase agreement with ETI for the sale of his interest. In his affidavit, Vaughn avers the only reason he signed that agreement was the threat of termination and the termination of the manufacturer's representative agreement. Pursuant to the purchase agreement, ETI paid Vaughn $17,500, which, the agreement stated, "represent[ed] Vaughn's initial capital account with ETI," and $63,630.52, which "represent[ed] Vaughn's share of the undistributed income of ETI through October 31, 1999." In the purchase agreement both parties acknowledged that no coercion or undue influence had been used against them, and each party released the other from all

claims arising from or relating to Vaughn's relationship as a member of ETI from the inception of the relationship to the date of the agreement.

¶6 After Vaughn signed the purchase agreement, ETI notified him on January 11, 2000, that the manufacturer's representative agreement was not terminated and would continue pursuant to the October 27, 1998 written agreement. Vaughn continued to work under that manufacturer's representative agreement until ETI terminated it on July 3, 2001.

¶7 Following the termination of the manufacturer's representative agreement, Vaughn filed this action. He alleged that ETI used economic duress to coerce him into selling his membership interest and also fraudulently and intentionally misrepresented to him that it would continue to employ him under the manufacturer's representative agreement so long as his performance remained satisfactory. Vaughn sought a rescission of the purchase agreement or, in the alternative, damages for the inadequate consideration paid him under that agreement.

¶8 The trial court granted ETI's motion for summary judgment. It concluded ETI was entitled to judgment as a matter of law on the economic duress claim because Vaughn failed to establish that ETI committed any wrongful act and because he had an adequate legal remedy. The court also concluded ETI was entitled to summary judgment on the fraudulent misrepresentation claim. On appeal, Vaughn challenges only the court's ruling on the economic duress claim.

DISCUSSION

¶9 In reviewing a grant of summary judgment, we apply the same analysis as the trial court. ***Strasser v. Transtech Mobile Fleet Serv., Inc.***, 2000 WI 87, ¶30, 236 Wis. 2d 435, 613 N.W.2d 142. A party is entitled to summary judgment if there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2001-02). A "material fact" is one that impacts on the resolution of the controversy. ***Strasser***, 236 Wis. 2d 435, ¶32. In deciding whether there are genuine issues of material fact, the court is to draw all reasonable inferences in favor of the nonmoving party. ***Id***.

¶10 The elements of a claim for economic duress are: (1) the party claiming duress is the victim of a wrongful or unlawful act or threat; (2) the act or threat deprives the party of his or her unfettered will; (3) as a result of the first and second elements, the party is compelled to make a disproportionate exchange of values or to give up something for nothing; and (4) there is no adequate legal remedy. ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 109-10, 293 N.W.2d 155 (1980). The party claiming duress must prove these elements by clear and convincing evidence. ***Id.*** at 110-11.

¶11 Vaughn contends the trial court erred in granting summary judgment on his claim of economic duress because there are disputed issues of fact regarding ETI's conduct and he is therefore entitled to a trial. According to Vaughn, the evidence viewed most favorably to him shows that ETI or Rio committed the following wrongful acts that satisfy the first element of a claim for economic duress: (1) ETI threatened to terminate the manufacturer's representative agreement unless Vaughn sold his membership interest and did terminate it to pressure him into selling his interest; (2) ETI incorrectly claimed

that it had the right to redeem Vaughn's membership interest without his consent under a provision of the operating agreement stating that an employee's interest could be redeemed upon termination of employment; and (3) Rio violated his fiduciary duty to Vaughn by coercing him to sell his shares at an inadequate price and ignoring the valuation formula in the operating agreement.

¶12 We agree with the trial court that the material facts regarding ETI's conduct are not disputed and, based on these undisputed facts, ETI did not engage in a wrongful act toward Vaughn.

¶13 With respect to ETI's threat to terminate the manufacturer's representative agreement and the termination of the agreement on December 29, 1999, Vaughn argues this conduct was wrongful because ETI had no real desire to terminate the agreement but simply used the threat of termination and the termination to coerce Vaughn into selling his membership interest. Vaughn also refers to the evidence that the manufacturer's representative agreement was reinstated after he sold his interest, citing it as proof that ETI had no real desire to terminate that agreement.

¶14 ETI does not dispute that it threatened to and did terminate the manufacturer's representative agreement in order to pressure Vaughn into selling his membership. Thus, there is no factual dispute about ETI's motive for those acts. The critical question is whether that motive makes those acts wrongful for purposes of satisfying the first element of the claim for economic duress. It is undisputed that ETI, like Vaughn, had the right under the manufacturer's representative agreement to terminate the agreement if it chose to do so, upon the

requisite notice;[2] the agreement did not require that ETI have any ground for doing so. Therefore, the precise question is whether the threat of termination and termination for the purpose of putting pressure on Vaughn constitute wrongful conduct, given that ETI had the right under the agreement to terminate it at any time for any reason.

¶15 Both Vaughn and ETI contend that ***Wurtz*** supports their position. In ***Wurtz,*** Fleischman claimed he had been coerced by Wurtz into agreeing at the last minute to transfer additional real estate in order to ensure the deal went through and avoid financial ruin. ***Id.*** at 104. After the supreme court set forth the elements for economic duress, it reversed and remanded to the trial court to make findings of fact on those elements and stated:

> Applying these authorities to the present case will require the trial court to consider whether Wurtz's refusal to close the deal unless Fleischman consented to modifying the agreement was wrongful. This determination will depend, in part, on whether Wurtz was under any legal obligation to close the deal after March 31, 1974 on the terms originally contemplated. "Threats to do what the threatening party has a legal right to do, do not constitute duress."

Id. at 110 (citation omitted).

¶16 Vaughn asserts that, in reversing and remanding to the trial court, the supreme court in ***Wurtz*** "did not reject the Court of Appeals finding that [Wurtz's] threat to withdraw from the offer to exchange property was wrongful." Rather,

[2] It does not appear that ETI gave a thirty-day advance notice in its termination notice of December 29, 1999, although it did in the July 3, 2001 notice. Vaughn does not argue that the lack of advance notice in December 29, 1999, contributed to the wrongfulness of ETI's conduct, and therefore we do not consider the issue of advance notice for the December 29, 1999 termination.

according to Vaughn, the supreme court left it to the trial court on remand to decide if that threat was wrongful when made to secure an advantage in another transaction, even if Wurtz had the contractual right to withdraw the offer. We do not agree with this reading of ***Wurtz***. The supreme court expressly stated that the court of appeals erred in making findings of fact—one of which was that Wurtz's threat was "wrongful"—because this court may not find facts. ***Id.*** at 109. And the paragraph we have quoted above makes plain that, if the trial court on remand were to find that Wurtz had the right to withdraw the original offer if the deal did not close by March 31, 1974, then threatening to do so to obtain additional consideration was not wrongful.

¶17 Vaughn also relies on ***Stillwell v. Linda***, 110 Wis. 2d 388, 329 N.W.2d 257 (Ct. App. 1982). In ***Stillwell***, the seller of a farm property was the mortgagor on an underlying mortgage on the property and defaulted, with the result that the land contract purchasers of the property were faced with foreclosure proceedings. ***Id.*** at 389. The seller would not agree to allow the purchasers' neighbor to pay off the mortgage unless the purchasers would sign a promissory note for $15,600, which they did. We upheld the jury's determination that the purchasers signed the note under economic duress. We rejected the argument that, because the purchasers stopped making payments on the land contract, the seller had a legal right to demand "more satisfactory evidence of [that] prior existing debt." ***Id.*** at 390. We reasoned that the seller had no legal right to collect on the land contract, because it had defaulted on the mortgage and was in no position to perform under the land contract. ***Id***. at 391.

¶18 Vaughn argues that the facts in this case are similar to those in ***Stillwell***, analogizing the note there, which the seller did not have a legal right to demand, with the sale of his membership interest in ETI, which in his view ETI

did not have a legal right to demand. But that is not the proper analogy for determining whether the conduct that put the pressure on Vaughn to sell his interest—ETI's threat of termination and termination of the manufacturer's representative agreement—was wrongful. The conduct of the seller in ***Stillwell*** that put the pressure on the purchasers to sign the note was the seller's defaulting on the mortgage, which the seller did not have a legal right to do, and then refusing to allow the purchasers to arrange to prevent the resulting foreclosure. We therefore do not view ***Stillwell*** as support for Vaughn's position that ETI's threat of termination and termination of the manufacturer's representative agreement were wrongful for purposes of economic duress.

¶19 Because Vaughn has not presented any other authority for his position, we conclude ***Wurtz*** is controlling. Applying ***Wurtz***, we conclude ETI's threat of termination and termination of the manufacturer's representative agreement were not wrongful. ETI was under no legal obligation to continue the agreement and had the right under the agreement to terminate it when it chose for any reason or no reason. That ETI's conduct was intended to and did put pressure on Vaughn does not make it wrongful for purposes of economic duress. "Merely driving a hard bargain or taking advantage of another's financial difficulties is not duress." ***Wurtz***, 97 Wis. 2d at 110.

¶20 We next consider ETI's conduct in asserting to Vaughn that under the operating agreement it had the right to redeem his membership interest. Vaughn contends this was a wrongful act because it was an incorrect interpretation of the operating agreement. The provision states, "If any Class B Member's employment with the Company terminates for any reason," that member's share may be redeemed by ETI in prescribed ways. Vaughn's position is that he was not an employee of ETI because the manufacturer's representative agreement was

with ASI, not with him, and he was an employee of ASI. In order to prevail on his correct view, he contends, he would have had to engage in a prolonged legal battle with ETI at a time when ASI was without the commissions from the manufacturer's representative agreement.

¶21 We do not agree with Vaughn that resolution of the issue whether he was an employee of ETI is material to his claim for economic duress. It is Vaughn's own testimony that the sole reason he agreed to sell his membership interest was the threat of termination and the termination in December 1999 of the manufacturer's representative agreement. The provision of the operating agreement quoted above, no matter how construed, has no bearing on ETI's authority to terminate the manufacturer's representative agreement, and ETI never claimed that it did have a bearing. Rather, the provision addresses ETI's authority to redeem Vaughn's membership interest without his consent; it becomes relevant, if at all, only after the manufacturer's representative agreement is terminated. That is, if after ETI terminated the manufacturer's representative agreement in December 1999, Vaughn had not agreed to sell his membership interest, a construction of this provision of the operating agreement would have been necessary to determine whether ETI had the authority to redeem Vaughn's membership interest without his consent. But that scenario never occurred because Vaughn agreed to sell his interest in order to avoid termination of the manufacturer's representative agreement.

¶22 Even if we assume that ETI did not have the authority under the operating agreement to redeem Vaughn's interest without his consent and also assume that ETI's assertion to the contrary constituted a wrongful act for purposes of the first element, there is no evidence that ETI's incorrect contract construction pressured Vaughn into agreeing to sell his interest. The only evidence, and it is

from Vaughn, is that the pressure came from the threat of termination and termination of the manufacturer's representative agreement. Thus, ETI's contract construction, even if it meets the first element of the claim, does not meet the second.

¶23 Finally, we consider Vaughn's contention that Rio breached his fiduciary duty to Vaughn and this constitutes a wrongful act that satisfies the first element of the claim. According to Vaughn, Rio, as president and CEO of ETI, had a fiduciary duty to Vaughn as a minority member, and breached this duty by coercing him to sell his shares at an inadequate price, without regard to the valuation formula in the operating agreement.[3]

¶24 Vaughn's discussion of Rio's fiduciary duty is not fully developed.[4] To the extent Vaughn is asserting that Rio breached his fiduciary duty by threatening to terminate and terminating the manufacturer's representative agreement to pressure Vaughn to sell his membership interest, we have already concluded that is not wrongful conduct by ETI. Vaughn provides no argument for a different conclusion regarding Rio, who was acting on behalf of ETI in the transaction. Regarding the consideration Vaughn received for his interest, the

[3] Vaughn argues that an amendment to ETI's operating agreement establishes that redemptions of membership interests were to be based upon a value determined by an appraiser selected by the mutual agreement of the LLC and the redeemed member; the appraiser would value the entire company, with the member receiving a redemption value corresponding to the percentage of his or her interest in the company. Vaughn's experts valued Vaughn's membership interest at the end of 1999 at about $237,700 to $275,000. ETI argues that the Class A members had enough voting power under the operating agreement to adopt any revision to the redemption price, and that the price ETI determined for Vaughn's membership interest was consistent with the values determined under prior redemptions of Class B interests.

[4] The complaint does not allege a claim against Rio for a breach of his fiduciary duty to Vaughn and therefore we consider only whether the conduct that Vaughn asserts constitutes Rio's breach of duty satisfies the first element of the claim for economic duress.

asserted inadequacy of that goes to the third element of the claim—that he was compelled to make a disproportionate exchange of values. We agree there are disputed issues of fact on this element. However, Vaughn does not explain, and we do not see, how the inadequacy of the consideration supplies the requirements of the first two elements—a wrongful act that deprives him of his unfettered will and so compels him to accept the inadequate consideration.

¶25 In summary, the undisputed evidence is that the only conduct that pressured Vaughn into signing the purchase agreement was the threat of termination and the termination of the manufacturer's representative agreement. Because ETI had the right under the agreement to terminate it, ETI's conduct was not wrongful within the meaning of the first element of the claim for economic duress, even if its motive was to pressure Vaughn into signing the purchase agreement.[5] Accordingly, the trial court properly granted summary judgment in favor of ETI.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[5] Because of this conclusion, it is unnecessary for us to address Vaughn's claim that the trial court erred in concluding there were no factual disputes on whether he had an adequate remedy at law.