STATE OF MICHIGAN

COURT OF APPEALS

EDWARD JELONEK, J. D.O.

Plaintiff-Appellant/Cross Appellee,

v

EMERGENCY MEDICINE SPECIALISTS, P.C., ANTHONY C. SOUTHALL, JAMES M. FOX, MARSON MA, CHADA REDDY, CHARLENE BABCOCK IRVIN, ERIC J. GLOSS, DOUGLAS WHEATON, and JERE BALDWIN, jointly and severally.

Defendant-Appellant.

UNPUBLISHED
August 28, 2001

No. 220244
Oakland Circuit Court
LC No. 96-530546-CK

DUANE WISK, D.O.,

Plaintiff-Appellant/Cross-Appellee,

v

EMERGENCY MEDICINE SPECIALISTS, P.C., ANTHONY C. SOUTHALL, JAMES M. FOX, MARSON MA, CHADA REDDY, CHARLENE BABCOCK IRVIN, ERIC J. GLOSS, DOUGLAS WHEATON, and JERE BALDWIN, jointly and severally.

Defendant-Appellee.

No. 220245
Oakland Circuit Court
LC No. 96-533875-CK

JAMES M. FOX, MARSON MA, CHADA REDDY, CHARLENE BABCOCK IRVIN, and ERIC GLOSS,

Plaintiff-Appellees,

v

No. 220246

Oakland Circuit Court
DUANE WISK, D.O., LC No. 96-532530-CK

Defendant-Appellant.

Before: Cavanagh, P.J., and Cooper and K.F. Kelly, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants summary disposition and further granting defendants' motion for a directed verdict at the close of plaintiffs' proofs. Defendants cross-appeal the trial court's order invalidating a stock transfer on the ground that defendants failed to provide plaintiffs with written notice pursuant to the governing contract. We affirm.

I. Basic Facts and Procedural History

This case involves a dispute among shareholders of a closely held corporation. Emergency Medicine Specialists, P.C. (hereinafter "EMS") is comprised of emergency medical physicians who have an exclusive contract with St. John Hospital and its affiliates to provide emergency medical services.

Until 1993, defendant Southall provided emergency medical services to St. John Hospital through his corporation, Anthony C. Southall and Associates, which, in turn, employed most of the defendant physicians. In 1993, Dr. Southall became an employee of the hospital in order to establish and seek accreditation of an emergency medical residency program. Accordingly, in late January of 1993, plaintiffs Jelonek and Wisk along with defendants Fox, Ma, Reddy, Irvin, Gloss, Wheaton and Baldwin met to form EMS in order to continue providing emergency medical services to the hospital in place of Southall's corporation. EMS also had similar agreements with St. John affiliates.

On February 1, 1993, these physicians executed a Shareholders' Agreement and thereafter an Employment Agreement. The pivotal provision of the Shareholder's Agreement governing stock transfers is section 2.1 which provides in pertinent part that:

> DESIRE TO DISPOSE OF STOCK. If any Shareholder desires to sell, transfer, assign, mortgage, pledge, make a gift of or otherwise dispose of his stock in the Corporation, the remaining shareholders . . . shall have an option to purchase all the shares owned by the Shareholder, at the price and upon terms of payment provided in sections 4 and 5 below. The Shareholder shall give the remaining Shareholders who each own at least sixty (60) shares of stock ninety days *written notice of his intention to sell, transfer, assign, mortgage, pledge, make a gift of or otherwise dispose of his shares of stock*. The notice shall identify any intended purchaser, transferee, assignee, mortgagee, pledgee or other recipient. The remaining Shareholders who each own at least sixty (60) shares of stock, within

> thirty (30) days after receipt of the notice, shall notify the Shareholder in writing . . . if they desire to exercise the option.

From 1993 to 1995, EMS provided emergency medical services to St. Johns Hospital. In 1995, after Dr. Southall established the emergency medicine residency program at the hospital and it received accreditation, the hospital wanted Dr. Southall to leave the hospital's employ and return to providing emergency medical services when EMS's contract expired on January 31, 1996.

Clearly, St. John hospital wanted to deal with Dr. Southall and have Dr. Southall provide the hospital with emergency medical services. Respecting the hospital's desire to contract with Dr. Southall for those services and thereby protect the financial relationship between Dr. Southall and St. John hospital, in a meeting on February 21, 1996, the board of directors voted to transfer one hundred percent interest in EMS to defendant Southall. The board voted to effect this transfer by having all of the shareholders sell their respective interests in the corporate enterprise for $10.00 per share pursuant to the terms of the Shareholders' Agreement. Both plaintiffs attended the February 21, 1996 meeting. Pursuant to the board's decision, the documentation was prepared to effect the transfer. These documents were to be executed by the shareholders at another meeting on May 20, 1996. In reliance on the outcome of the February 21, 1996 meeting, Dr. Southall signed another contract with St. John Hospital as president of EMS to provide emergency medical services through June of 1999.

On May 20, 1996, plaintiffs Jelonek and Wisk appeared at the meeting wherein all of the shareholders, except for plaintiffs, signed the requisite stock transfer. When it became abundantly clear that plaintiffs were not going to transfer their shares of stock in accordance with the majority's vote, defendants terminated both plaintiffs' employment effective September 30, 1996. After plaintiffs' termination became effective, defendants transferred all shares of stock to defendant Southall in October of 1996 pursuant to the terms of the Employment Agreement. [1]

Seeking to invalidate the transfer of shares, plaintiffs filed a multi-count complaint alleging *inter alia*, unauthorized termination, breach of contract, breach of the shareholders' agreement, breach of the implied covenant of good faith and fair dealing, specific performance of the right of first refusal, breach of fiduciary duties, and interference with advantageous business relationship. Plaintiffs also sought injunctive relief to stop their termination. Defendants filed a

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[1] Section Six of the Employment Agreement states:

> SALE OF STOCK Upon termination of employment of Employee **for any reason**, he shall be required to sell all of his shares of stock in the Employer pursuant to the terms of a Shareholders' Agreement to be executed by Employee simultaneously with this Agreement. [Emphasis added.]

In accord with the Shareholder's Agreement, plaintiffs were provided the required 90 days notice to effectuate the termination.

counter-complaint seeking specific performance of the buy-out provisions of the Shareholders' Agreement.

Plaintiffs moved for motion for summary disposition on Count III of Plaintiffs' Second Amended Complaint relative to the breach of contract claim. Plaintiffs argued that defendants breached the Shareholders Agreement because they failed to provide written notice of their intent to transfer stock to a third party (Southall). In response, defendants argued that plaintiffs received written notice by way of a handout provided at the February 21, 1996 meeting. Alternatively, they argued even if plaintiffs did not receive written notice, plaintiffs otherwise waived their right to same.

The trial court granted plaintiffs' first motion for summary disposition and invalidated the sale and transfer of stock to defendant Dr. Southall on the ground that defendants failed to provide written notice as required by the Shareholders' Agreement.

Plaintiffs filed another motion for summary disposition seeking specific performance of plaintiffs' right of first refusal regarding their option to purchase the shares of the remaining shareholders pursuant to paragraph 2.1 of the Shareholders' Agreement. Defendants also filed a motion for summary disposition on the same issue. After a hearing, the trial court ruled that plaintiff's *exclusive remedy* is controlled by Section 7 of the Shareholders' Agreement, which provides in pertinent part that:

> [n]o sale . . . of any shares of stock in the Corporation, now owned or later acquired by any Shareholder, shall be binding or valid if it shall be in violation of any of the terms, provisions or conditions of this Agreement. The Corporation *shall not recognize or be compelled to recognize* as binding or valid any such sale . . . of any shares of stock. [Emphasis added.]

Three years after plaintiffs filed their complaint, plaintiffs filed a Motion to Amend [Plaintiffs'] Second Amended Complaint.[2] The motion sought to include a claim for money damages for breach of contract as opposed to specific performance.

The defendants countered arguing that Judge Mester already heard the motion and conclusively determined that the *only* remedy to which plaintiffs were entitled was to have the offending transfer set aside. Defendants also argued that "discovery is long closed. The case has mediated and it's a bit late to add a new theory." After oral argument, the court denied plaintiffs' motion to amend their Second Amended Complaint stating: "It's too late in the game. Period. Denied."

After two weeks of testimony, at the close of plaintiff's proofs, defendants moved for a directed verdict and the trial court granted the motion. Plaintiffs' appeal as of right. Defendants cross appeal on the issue of written notice. We affirm.

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[2] At this time, this matter was transferred from Judge Fred Mester to visiting Judge Robert Templin who heard the motion.

II. Summary Disposition

Plaintiffs first argue that the trial court erred by holding that invalidation of the offending stock transfer was plaintiffs' only remedy and further erred by not specifically enforcing plaintiff's option to purchase defendants' shares of stock. We disagree.

This Court reviews a trial court's decision with regard to a motion for summary disposition *de novo*. *Kefgen v Davidson*, 241 Mich App 611, 617; 617 NW2d 351 (2000). A motion pursuant to 2.116(C)(10) "[t]ests whether there is factual support for a claim." *Id.* Consequently, resolving all reasonable inferences in the nonmoving party's favor, "[a] court must consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party in deciding whether a genuine issue of material fact exists." *Id*.

A. Invalidation of Stock Transfer

The Shareholders' Agreement and the corresponding Employment Agreement are contracts. This court reviews issues pertaining to contract construction *de novo*. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). The principal goal of contract construction is to give effect to the parties' intent and to construe the contractual language pursuant to its plain and ordinary meaning thus avoiding contrived constructions. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). Indeed, this Court "does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning.'" *Id.* (Citations omitted.) As our Supreme Court once observed, "if a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear." *Farm Bureau Mutual Ins Co of Michigan v Nikkel*, 460 Mich 558, 567; 596 NW2d 915 (1999).

The language in the Shareholder's Agreement is clear and unambiguous. By its own terms, Section 7.0 provides that any sale occurring in violation of the Shareholders' Agreement is void *ab initio*. Accordingly, any such transfer not in compliance with the Shareholder's Agreement is automatically invalidated. In the instant case, plaintiffs argue that the trial court erred by not specifically enforcing plaintiffs' option to purchase defendants' stock. However, the Shareholders' Agreement does not specifically address the remedies available in the event of a breach. Section 7.0 simply provides that any transfer in violation of the agreement is automatically void. Here, defendants failed to provide plaintiffs with written notice of their intent to transfer their shares of stock to defendant Southall. Thus, plaintiffs' option to purchase their shares never materialized.

Nothing in the agreement states that failure to provide written notice of intent to sell or otherwise transfer stock *automatically* necessitates that the breaching shareholders relinquish their stock to the non-breaching shareholders. The agreement simply provides that any transfer in violation thereof is absolutely void. Thus, the trial court did not commit error requiring reversal by ruling that the exclusive remedy available to plaintiffs occasioned by defendants' breach was invalidation of the transfer pursuant to Section 7.0 of the Shareholders' Agreement.

B. Written Notice

Defendants argue that plaintiffs received the requisite written notice at the February 21, 1996 meeting wherein plaintiffs received a handout delineating the three alternatives available to complete the transfer to defendant Southall. We do not agree.

The Shareholders' Agreement addresses the notice requirement and specifically provides in paragraph eleven that "[a]ny written notice required or permitted to be given under this Agreement shall be sufficient *if in writing*, sent by certified mail return receipt requested, to his last known residence . . . ." [Emphasis added.] The language employed in the parties' contract is clear and unambiguous. The explicit terms of the contract provide for written notice. The contract does not state that actual notice or knowledge will supersede the written notice requirement. Indeed, "`one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms.'" *Farm Bureau*, 460 Mich 558, 567-568. (Citations omitted.)

Defendants further argue that even if they failed to provide written notice, plaintiffs waived this right by their failure to indicate that they would not transfer their stock at the February 21, 1996 meeting. We do not agree. "[A] waiver of a breach of contract must be a `voluntary, intentional relinquishment of a known right.'" *Bissell v L.W. Edison Co*, 9 Mich App 276 , 287; 156 NW2d 623 (1967). Indeed, to constitute a waiver, "there must be an existing right . . . and an actual intention to relinquish it, or such conduct as warrants an inference of relinquishment . . . ." *H J Tucker and Associates, Inc v Allied Chucker and Engineering Co*, 234 Mich App 550, 564; 595 NW2d 176 (1999). Here, plaintiffs did not relinquish their contractual right to receive written notice of defendants' intent to transfer their stock.

On May 20, 1996, when defendants learned that plaintiffs were not going to sell their shares of stock to defendant Southall pursuant to the February 21, 1996 meeting, defendants had an unambiguous obligation to provide plaintiffs with 90 days written notice of their intent so that plaintiffs could decide whether to exercise their option to purchase those shares pursuant to the Shareholders' Agreement. Defendants did not provide the requisite written notice. Accordingly, defendants breached the contract and the trial court correctly held the transfer was invalid.

III. Motion to Amend Complaint

Plaintiffs next argue that the trial court should have permitted them the opportunity to amend their Second Amended Complaint to include a claim for breach of contract seeking damages rather that specific performance.[3] We do not agree.

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[3] Section 2.1 of the Shareholders' Agreement provided plaintiffs with the option of purchasing defendants' shares of stock for $10.00 per share; a price that plaintiffs surmised was far below fair market value. Consequently, plaintiffs argue that their measure of damages for defendants' breach would be the difference between the fair market value for those shares and $10.00 per share.

Decisions pertaining to motions to amend the pleadings lie within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Doyle v Hutzel Hospital*, 241 Mich App 206, 212; 615 NW2d 759 (2000). Indeed, "the trial court must specify its reasons for denying the motion; failure to do so requires reversal unless the amendment would be futile." *Sharp v City of Lansing*, 238 Mich App 515, 522 ;606 NW2d 424 (2000).

The trial court observed that three years elapsed since plaintiffs filed their original complaint. The trial court also noted that in a prior motion for summary disposition, the judge ruled that the *only* remedy available to plaintiffs was invalidation of the offending transfer and not specific performance. Accordingly, the trial court opined, "it's been ruled on before. It's too late in the game. Period. Denied."

A review of the record indicates that plaintiffs' motion to amend their Second Amended Complaint to include a claim for damages was nothing more than a thinly veiled attempt to circumvent a prior, much less favorable ruling. Accordingly, it would be futile to permit plaintiffs to amend their Second Amended Complaint to request damages for defendants' breach of contract. The trial court properly denied plaintiffs' motion and we do not find error in this regard.

IV. Motion for Directed Verdict

Plaintiffs contend that the trial court erred by granting defendant's motion for a directed verdict on their breach of fiduciary duty, tortious interference and minority oppression claims. Again, we do not agree.

"This Court reviews de novo the trial court's decision on a motion for a directed verdict. When evaluating a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, and make all reasonable inferences in favor of that party. Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ." *Kubisz v Cadillac Gage Textron Inc*, 236 Mich App 629, 634-635; 601 NW2d 160 (1999). (Citations omitted.)

A. Breach of Fiduciary Duty Claim

"A `fiduciary duty' is `[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person." *Wallad v Access BIDCO, Inc*, 236 Mich App 303, 307; 600 NW2d 664 (2000). (Quoting Black's Law Dictionary (6th ed.)). Indeed, if an officer or director fails to act for the corporation's benefit, opting instead to advance some other personal interest, that director or officer breaches a fiduciary duty owed to the corporation's shareholders. *Id.* Additionally, MCL 450.1545a provides that "a director or officer shall discharge his duties in good faith with the care of an ordinary prudent person under like circumstances, and in a manner believed to be in the best interests of the corporation." See *Camden v Kaufman*, 240 Mich App 389, 394; 613 NW2d 335 (2000).

A review *de novo* of the record revealed that both plaintiffs admitted that they freely and voluntarily entered into the Shareholders' Agreement. Plaintiff Jelonek testified that he understood that the agreement provided that if his employment terminated for *any reason*, the

terms of the agreement automatically required plaintiff to sell his shares of stock to the corporation for $10.00 per share. Similarly, plaintiff Wisk also acknowledged that portion of the agreement specifying that in the event that a shareholder's employment is terminated, pursuant to the terms of the agreement, and for any reason, that shareholder must relinquish his shares of stock to the corporation for $10.00 per share. Plaintiff Jelonek recognized that he received the requisite ninety days written notice before his employment was terminated and further acknowledged that a terminated employee was required to transfer his shares of stock back to the corporation.

Additionally, all of the individual defendants testified that after consulting with independent legal counsel, their decision to terminate plaintiffs' employment by signed resolution was a decision that each of them felt was "fair" under the circumstances and in the corporation's best interest. Indeed, defendants acted as reasonably prudent individuals by consulting with independent legal counsel and seeking legal advice before undertaking any course of action that defendants believed was in EMS's best interests.

Plaintiffs did not present any evidence to establish how the defendants' decision to terminate plaintiffs' employment to transfer all shares of stock to defendant Southall so that he could receive the contract with St. John's Hospital on behalf of EMS was a decision so saturated with self-interest that it rose to the level of a breach of defendants' fiduciary duty to the corporation or to plaintiffs as the minority. At best, the evidence establishes that the defendants determined that the best interest of EMS, as a going concern, was to transfer one hundred percent interest to defendant Southall, even though plaintiffs believed that the value of their interest in the corporation was significantly greater. Defendants exercised their contractual rights under the Employment Agreement to effectuate the transfer. Defendants' conduct did not rise to a breach of fiduciary duty and the trial court properly directed a verdict for defendants on this issue.

B. Tortious Interference With Contractual Relations.

Plaintiffs also claim that defendant Southall tortuously interfered with their valid business expectations in EMS. The elements of tortuous interference with a business relationship are:

> [T]he existence of a valid business relation or expectancy, knowledge of the relationship or expectancy on the part of the interferer, an intentional interference inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the party whose relationship has been disrupted. *Lakeshore Community Hosp, Inc v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995).

One of the essential elements to successfully state a claim for tortious interference is "[a]n unjustified instigation of the breach by the defendant." *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996).

The evidence adduced at trial did not establish that defendant Southall improperly or unjustly instigated defendants to breach their agreement with plaintiffs. The testimony adduced at trial revealed that the defendant shareholders and directors of EMS, by a majority vote, decided to sell their interest in EMS to defendant Southall pursuant to the terms delineated in the

Shareholders' Agreement. The individual defendants wanted to complete the transaction so that they could continue working with defendant Southall under a renewed contract to provide emergency medical services to St. John's Hospital and its affiliates. In fact, the testimony at trial clearly established that each of the individual defendants felt comfortable with the decision to turn control of the corporation over to defendant Southall to achieve that purpose.

A review of the entire record does not reveal a shred of evidence to suggest that at any time, defendant Southall ever pressured the individual defendants into adopting a resolution to terminate plaintiffs' employment in order to obtain their shares of stock so that he could control one hundred percent interest in the corporation. Each of the individual defendants testified that in their estimation, allowing defendant Southall to assume control of the corporation was the most desirable option and after consulting with independent counsel, determined that terminating plaintiffs' employment was necessary to achieve that goal.

The only evidence provided by plaintiffs that suggest improper instigation, was plaintiff Jelonek's testimony that defendant Southall had communications with defendant Fox ostensibly to determine how to obtain plaintiffs' stock so that the transfer could be completed and plaintiff Wisk's testimony that "[a] great individual did a wrong thing. And my family suffered for it." This testimony is a far cry from establishing the requisite "unjustified instigation" or "intentional interference inducing or causing a breach" required to sustain a cause of action for tortuous interference. See *Mahrle*, *supra* at 350; *Lakeshore*, *supra* at 401. Since the record is devoid of any factual dispute upon which reasonable minds could differ, the trial court properly directed a verdict for defendants on this issue.

C. Minority Oppression

Finally, plaintiffs submit that the trial court erred by directing a verdict for defendants and thus dismissing plaintiffs' claim relative to minority oppression in accord with MCL 450.1489. We disagree.

The Michigan Business Corporation Act at MCL 450.1489 provides that:

> (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:
>
> (a) The dissolution and liquidation of the assets and business of the corporation.
>
> (b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.

> (c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.
>
> (d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.
>
> (e) The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.
>
> (f) Award of damages to the corporation or a shareholder.

In *Baks v Moroun*, 221 Mich App 472; 576 NW2d 413 (1998) this Court unequivocally stated that:

> [section 489] does not by its terms create a cause of action. Rather, it identifies (1) persons with standing to initiate a derivative action (shareholders), (2) courts with jurisdiction over such actions (circuit) and (3) proper venue in such actions (county in which the principal place of business or registered office of the corporation is located.)

Accordingly, the *Baks* court held that plaintiffs' claim failed because it presumed that MCL 450.1489 independently created a cause of action.[4]

In the case at bar, plaintiffs recognize that although MCL 450.1489 does not state a cause of action by its own terms, it does however, provide remedies for a breach of the fiduciary duties recognized at common law. According to plaintiffs, the trial court could have applied the remedies provided by section 1489 in the event that the trial court found that the defendants breached their fiduciary duties as officers and directors of EMS toward both the corporation and plaintiffs as the minority shareholders.

Since a review of the record *de novo* revealed that defendants did not breach any fiduciary duty to either the corporation or the plaintiffs as minority shareholders, plaintiffs are not entitled to any of the remedies set forth in section 1489. Indeed, if plaintiffs did establish that defendants breached their fiduciary duties or acted in a manner contrary to the standard of

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[4] Although recently, in *Estes v Idea Engineering & Fabricating, Inc*, _____ Mich App _____; ____ NW2d _____ (2001) this Court considered the decision in *Baks* and determined that "[t]he plain language of the section [MCL 450.1489] states a cause of action by shareholders of closely held corporations against directors or those in control for various relief including damages to the corporation or the shareholder." The court in *Estes*, however, constrained by the decision in *Baks* had to affirm the trial court's decision dismissing one of plaintiffs' counts for failure to state a claim upon which relief can be granted "since neither 489 or 541a states a cause of action at all." *A conflict panel has been convened to address this conflict.*

conduct provided for in MCL 450.1541a[5], then plaintiffs may have been entitled to the remedies provided for in section 1489 at the trial court's discretion. Since a de novo review of the record fails to indicate any breach of fiduciary duty, there remains no factual issue upon which reasonable minds could differ. Accordingly, the trial court did not commit error requiring reversal by directing a verdict in favor of defendants on this issue.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly

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[5] MCL 450.541a (1) provides that:

> A director or officer shall discharge his or her duties as a director or officer including his or her duties as a member of a committee in the following manner:
>
> (a) In good faith.
>
> (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.
>
> (c) In a manner he or she reasonably believes to be in the best interests of the corporation.