STATE OF MINNESOTA
IN COURT OF APPEALS
A11-804
A11-969

Michael Ring,
individually and derivatively
o/b/o Minnesota ELV, Inc., et al.,
Respondents,

vs.

Harold Kaplan,
Appellant,

Robert Kaplan,
Appellant,

Metals Reduction Company, Inc.,
Defendant.

Filed March 9, 2012
Affirmed
Crippen, Judge[*]

Ramsey County District Court
File No. 62-CV-07-1704

Mark W. Gehan, Sarah J. McEllistrem, Collins, Buckley, Sauntry & Haugh, P.L.L.P., St. Paul, Minnesota (for respondents)

Patrick J. Rooney, Fafinski Mark & Johnson, P.A., Eden Prairie, Minnesota (for appellant Harold Kaplan and defendant Metals Reduction Company, Inc.)

Randy G. Gullickson, Anthony Ostlund Baer & Louwagie, P.A., Minneapolis, Minnesota (for appellant Robert Kaplan)

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Considered and decided by Ross, Presiding Judge; Minge, Judge; and Crippen, Judge.

U N P U B L I S H E D O P I N I O N

CRIPPEN, Judge

In these consolidated appeals from judgment and denial of posttrial motions, after an advisory jury and a bench trial, appellants advance again the arguments stated in their posttrial motions, including the argument that respondent's breach-of-contract claim was a shareholder derivative claim that had already been determined by a special litigation committee. Determining neither this nor any other contentions lack merit, we affirm.

FACTS

This appeal arises out of a jury trial on a breach-of-contract claim by respondent Michael Ring against appellants Robert and Harold Kaplan, and the company appellants jointly owned, Metals Recovery Corporation Inc. (MRC).[1] Harold Kaplan formed MRC, a St. Paul metal recycling company, approximately 30 years ago and was originally the sole owner. His son, Robert, eventually became a 25% owner.

Respondent Ring first had dealings with appellants while working for another employer. In November 2004, after severance from his prior employment, he inquired whether appellants would be interested in hiring him to develop a new, state-of-the-art

[1] The breach-of-contract claim at issue here is a single part of a complex proceeding involving eight total claims. The district court dismissed the remaining seven claims at various stages of this proceeding. No part of the district court's disposition of the other seven claims dictates our determination of the facts and law pertinent to the breach-of-contract claim at issue.

automobile-recycling facility for MRC. Appellants indicated their interest in this idea; they had already been discussing whether to move the automobile-recycling portion of their operation into an indoor facility to more easily comply with new environmental regulations.

On May 1, 2005, MRC hired respondent to locate a suitable site and manage the construction of the new facility at an annual salary of $100,000. Respondent claimed that he and appellants formed an oral agreement to transfer the automobile-recycling portion of MRC to a yet-to-be-formed business entity in which respondent would have an equity position. Before the transfer could take place, respondent had to locate a suitable site for the new facility.

In furtherance of this agreement, the parties created Minnesota ELV Inc. and ELV Properties LLC (names chosen in reference to end-of-life vehicles), sometime in May or June 2005. The plan was for ELV Properties to purchase land for the new facility and for Minnesota ELV to take transfer of MRC's auto-recycling business and equipment and operate the new facility. Each appellant owned 40% of Minnesota ELV and respondent owned 20%. The ratio of ownership in ELV Properties was the same. Appellants each capitalized ELV Properties with $80,000 and respondent invested $40,000.

For nearly a year, respondent unsuccessfully attempted to secure a suitable auto-recycling location. In April 2006, the mutual interest of the parties arose in terms of an alternative disposition of MRC to Northern Metals, which was seeking out scrap companies for purchase. Appellants were interested in selling MRC to Northern Metals, and respondent hoped that Northern Metals would allow him to purchase an equity

interest in the newly formed entity. Respondent testified that he informed appellants that he would forgo the agreement they had reached to transfer part of MRC to the ELV entities if he could secure such an equity interest.

Negotiations commenced between MRC and Northern Metals in June 2006, and the initial understanding of the parties protected respondent's equity interest. According to an unsigned, nonbinding memorandum of understanding (June MOU), Northern Metals would purchase MRC for $10,500,000, respondent and Robert Kaplan would sign employment agreements acceptable to all parties, and would have the option to purchase equity interests in the new entity.

After the June MOU was produced, respondent informed Robert Kaplan that he intended to negotiate with Northern Metals on his own, and that MRC should not negotiate on his behalf; it is disputed whether respondent intended to negotiate both his employment contract and his equity interest with Northern Metals or merely his employment contract. But respondent testified that he relied on Robert Kaplan's assurances throughout the summer and fall that the "essence of [the June MOU] was still in force" with respect to respondent's ownership option. Unbeknown to respondent, MRC and Northern Metals executed a new, nonbinding memorandum of understanding on August 1, 2006 (August MOU). The August MOU preserved Robert Kaplan's equity option but deleted respondent's; although Northern Metals would negotiate an employment contract with respondent, completion of an agreement was not a condition to completing the sale of MRC.

In November 2006, MRC and Northern Metals drafted an asset purchase agreement and set a closing date of January 31, 2007. Sometime just before closing, Robert Kaplan informed respondent that the funder behind Northern Metals, European Metal Recycling (EMR), would not permit any minority shareholders in the new entity. Respondent ultimately received no employment contract and no opportunity to purchase equity in EMR/Northern Metals. The sale of MRC to Northern Metals closed on January 31, 2007 at a purchase price of $11,050,000.

In August 2007, respondent sued for deletion of his equity, stating eight claims against appellants, some of them also naming MRC as a defendant. The complaint labeled counts 1-5 as direct claims belonging to respondent individually and counts 6-8 as derivative claims brought on behalf of the ELV entities. Respondent's breach-of-contract claim against all defendants, the sole claim at issue on appeal, was among the direct claims.

Appellants, in their capacity as directors of the ELV entities, formed a special litigation committee (SLC) to review the complaint. The SLC issued a lengthy report outlining "material difficulties" in respondent's claims and also issued a joint resolution that the ELV entities should not pursue any claims against appellants or MRC. On the basis of the SLC report, appellants and MRC moved to dismiss respondent's claims. The district court granted the motion as to the claims respondent labeled as derivative but denied it as to the counts respondent labeled direct, including the breach-of-contract claim at issue.

The direct claims proceeded to a jury trial. On the day trial commenced, the district court granted a motion in limine by appellants and MRC to remove counts 2-5 from the jury's consideration.[2] Thus, the only claim presented to the jury was respondent's breach-of-contract claim. At the close of evidence, the jury returned a special verdict form on which it found that: (1) a contract existed between respondent and appellants and MRC; (2) appellants and MRC breached the contract; (3) the breach caused respondent damage; (4) respondent had not waived his right to assert a claim for breach of contract; and (5) appellants each were liable to respondent in the amount of $365,625.[3] The jury found that MRC was not liable to respondent for any amount of damages.

Appellants moved for judgment as a matter of law under Minn. R. Civ. P. 50.02 or a new trial or amended findings under Minn. R. Civ. P. 59.01, arguing that respondent's breach-of-contract claim was a shareholder derivative suit and that respondent failed to fulfill a condition precedent to the contract to transfer MRC to Minnesota ELV. They also argued that a new trial was required because the district court failed to require respondent to elect his remedy by dismissing a promissory estoppel claim before giving the breach-of-contract claim to the jury. Finally, appellants argued that the jury verdict

[2] After a court trial based in part or in whole on the same evidence presented during the jury trial, the district court dismissed respondent's remaining claims as derivative and therefore barred by the SLC resolution, and as meritless.

[3] Respondent testified that his damages totaled $1.2 million. He derived this amount by taking the sale price of MRC, $11,050,000, as his starting point. He testified that appellants agreed to transfer 60% of this amount to Minnesota ELV. He then multiplied this amount by his 20% share of Minnesota ELV. Respondent then subtracted his share of the costs associated with building the new facility.

was confusing and inconsistent with the evidence. The district court denied appellants' motions.

D E C I S I O N

1.

Appellants first argue that the district court erred in concluding, in multiple dispositive motions, that respondent's breach-of-contract claim is direct and not derivative of ELV's breach-of-contract claim. A district court's decision whether a claim is direct or derivative is a legal issue, which we review de novo. *See Wessin v. Archives Corp.*, 592 N.W.2d 460, 463-66 (Minn. 1999) (reviewing de novo whether claim is direct or derivative).

As a general rule, "an individual shareholder may not assert a cause of action that belongs to the corporation." *Nw. Racquet Swim & Health Clubs, Inc. v. Deloitte & Touche*, 535 N.W.2d 612, 617 (Minn. 1995). In a proper derivative suit, the shareholder may "step into the corporation's shoes and seek in its right the restitution he could not demand in his own." *In re UnitedHealth Group Inc. S'holder Derivative Litig.*, 754 N.W.2d 544, 550 (Minn. 2008) (quotation omitted). The derivative action is intended to limit recovery to the real party in interest, prevent multiple and conflicting suits, and protect corporate creditors. *Wessin*, 592 N.W.2d at 466.

When a shareholder has alleged a derivative claim, the board of directors may form a special litigation committee (SLC) to determine whether the corporation's rights and remedies should be pursued. Minn. Stat. § 302A.241, subd. 1 (2010); *see also In re UnitedHealth Group*, 754 N.W.2d at 550. Under the business judgment rule, a court

should defer to an SLC's conclusions if the SLC was independent and if it conducted its investigation in good faith. *In re UnitedHealth Group*, 754 N.W.2d at 559.

In determining whether a claim is direct or derivative, the central inquiry is "whether the complained-of injury was an injury to the shareholder directly, or to the corporation." *Wessin*, 592 N.W.2d at 464. "Where the injury is to the corporation, and only indirectly harms the shareholder, the claim must be pursued as a derivative claim." *Id.*; *see also Seitz v. Michel*, 148 Minn. 80, 87, 181 N.W. 102, 105 (1921). "[T]he method in Minnesota for distinguishing between a direct and a derivative claim is to consider whether the injury to the individual plaintiff is separate and distinct from the injury to other persons in a similar situation as the plaintiff." *Nw. Racquet Swim & Health Club*, 535 N.W.2d at 617. Thus, "we look not to the theory in which the claim is couched, but instead to the injury itself." *Wessin*, 592 N.W.2d at 464.

At trial, respondent presented evidence from which the jury could conclude that he and appellants formed an oral agreement for appellants to give respondent an equity interest in the automobile recycling portion of MRC's business in exchange for services rendered toward the completion of a new facility. This transfer was to be accomplished through the transfer of MRC's assets to Minnesota ELV, a corporation in which respondent was a 20% owner. Appellants' conduct was found to have damaged respondent to the extent that he was denied a 20% equity interest in the business.

The determinative question is whether this injury was "separate and distinct from the injury to other persons in a similar situation as the plaintiff." *Nw. Racquet Swim &*

Health Club, 535 N.W.2d at 617. In other words, we must determine whether appellants, as shareholders of Minnesota ELV, were similarly injured.

Appellants argue that all shareholders of Minnesota ELV suffered identical injury because the contract was intended to benefit Minnesota ELV. They argue that respondent's claim is therefore a "shareholder value" claim. Appellants rely on *Staehr v. Western Capital Resource, Inc.*, No. 10-1806, 2011 WL 2633894, at *5 (D. Minn. July 6, 2011), in which the federal district court, applying Minnesota law, stated that claims "based on injury to 'shareholder value'" are derivative. Appellants contend that, like the claim at issue in *Staehr*, respondent's claim is dependent on a prior injury to the corporation, and therefore Minnesota ELV is the proper party in interest.

Although appellants failed to realize the benefit of the bargain as shareholders of Minnesota ELV, their injury is not identical to respondent's. By selling MRC to Northern Metals, appellants recovered the full value of the business and avoided the obligation to convey to respondent his 20% equity interest in MRC's automobile-recycling business. There is no evidence of the value of performance save for inclusion of an equity interest in respondent. On this record, we conclude that respondent's injury was separate and distinct.

Moreover, the evidence demonstrated that appellants contracted with respondent, not Minnesota ELV. As such, appellants breached a separate and personal obligation to respondent. Our conclusions harmonize with notable authority establishing that a shareholder's status as a party to a contract also benefitting the corporation entitles the shareholder to maintain a separate, direct action. 12B William M. Fletcher, *Fletcher*

Cyclopedia of the Law of Corporations § 5913, at 470 (rev. vol. 2000) (stating that a shareholder may sue individually "[w]here the wrongful acts are not only wrongs against the corporation but are also violations by the wrongdoer of a duty arising from contract or otherwise, and owing directly to the shareholders"); *id.* § 5916 at 479-81 ("A shareholder may sue as an individual on contracts made as an individual with corporate officers, other shareholders, or third persons . . . . In such cases the status of shareholder is of no importance, since the shareholder sues in an individual capacity."); *see also Nicholson v. Ash*, 800 P.2d 1352, 1356 (Colo. App. 1990) ("Of course, if the stockholder is a party to a contract, whether express or implied, with the directors or some other third party, he may maintain a personal suit against that third party."); *Hikita v. Nichiro Gyogyo Kaisha, Ltd.*, 713 P.2d 1197, 1200 (Alaska 1986) ("We now hold that a shareholder can sue for breach of contract to which he is a party, even if he has not suffered an injury separate and distinct from that suffered by other shareholders."); Restatement (Second) of Contracts § 305(1) (1981) ("A promise in a contract creates a duty in the promisor to the promisee to perform the promise even though he has a similar duty to an intended beneficiary.").[4]

Because respondent suffered an injury that was separate and distinct from the corporation's and appellants breached a separate and personal duty to respondent,

[4] These authorities suggest that it is solely a duty that gives rise to the shareholder's right to bring an individual action, irrespective of a unique injury. But a unique injury is required under Minnesota law. *Wessin*, 592 N.W.2d at 464 (stating that the primary question is "whether the complained-of injury was an injury to the shareholder directly, or to the corporation"). As discussed above, respondent has suffered a unique injury. (We note that other Minnesota cases have permitted a shareholder to advance a direct claim where the plaintiff alleged fraudulent misrepresentations flowing directly to the shareholder. *See Nw. Racquet Swim & Health Club*, 535 N.W.2d at 618-19. A contract, just like fraud, may create a duty to the individual shareholder.)

respondent's claim is direct, not derivative. The district court did not err by denying appellants' motions to dismiss.

2.

Appellants next argue that the district court erred in denying their motion for judgment as a matter of law because respondent failed to fulfill a condition precedent to the contract. This court's factual inquiry on a motion for judgment as a matter of law is a narrow one. *See Roettger v. United Hospitals of St. Paul, Inc.*, 380 N.W.2d 856, 860 (Minn. App. 1986) (rejecting argument that appellant was entitled to directed verdict for lack of expert testimony on controlling issue where evidence supported jury's conclusion). Judgment as a matter of law should be granted "only in those unequivocal cases where (1) in the light of the evidence as a whole, it would clearly be the duty of the [district] court to set aside a contrary verdict as being manifestly against the entire evidence, or where (2) it would be contrary to the law applicable to the case." *Jerry's Enters. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006) (quotation omitted). "We apply de novo review to the district court's denial of a Rule 50 motion." *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009). Upon such a review, "[w]e view the evidence in the light most favorable to the prevailing party." *Id.*

"A condition precedent calls for the performance of some act or the happening of some event after the contract is entered into, and upon the performance or happening of which its obligation is made to depend." *Nat'l. Union Fire Ins. v. Schwing Am., Inc.*, 446 N.W.2d 410, 412 (Minn. App. 1989) (quotation omitted). When a contract contains a condition precedent, a party to the contract does not acquire any rights under the contract

unless the condition occurs. *Aslakson v. Home Savings Assoc.*, 416 N.W.2d 786, 789 (Minn. App. 1987). But a condition may be waived "where a party continues to exercise rights under a contract even though he knows a condition has not occurred or cannot be performed." *Appollo v. Reynolds*, 364 N.W.2d 422, 424 (Minn. App. 1985). "A waiver in contract law is an intentional relinquishment of a known right, and it must clearly be made to appear from the facts disclosed." *Citizens Nat'l. Bank v. Mankato Implement, Inc.*, 427 N.W.2d 23, 27 (Minn. App. 1988) (quotations omitted), *aff'd*, 441 N.W.2d 483 (Minn. 1988).

We first note that appellants raise no question respecting the jury's verdict on respondent's breach-of-contract claim except this condition-precedent argument. The evidence at trial was uncontested that the selection of an appropriate site was a condition precedent to the transfer of MRC and that the condition was not met. But also there was evidence from which the jury could infer that the parties agreed to put aside their pursuit of a new automobile-recycling facility to pursue a sale of MRC to Northern Metals. Respondent testified that he told appellants that "if there is a deal that is good for you and I can maintain an equity position, then I would forego our original deal, starting at the new ELV business." Thus, the evidence permitted the jury to conclude that the parties had modified their agreement and that respondent would accept substitute performance—he would relieve appellants of their obligation to provide him with a 20% interest in MRC's automobile-recycling business if he could obtain an equity position in the Northern Metals-owned entity.

The district court concluded that the parties

> had waived any such contractual condition precedent by abandoning their efforts to find an appropriate site. Well before the events that gave rise to the contractual claim occurred, the parties' search for an appropriate site had become fruitless. Thereafter the emphasis of the parties shifted to an attempt to negotiate a sale of [MRC]. Accordingly, the failure to find an appropriate site was no longer an issue and not a bar to [respondent's] claim of breach of contract.

On this record, as the district court determined, the jury could have found that appellants waived the condition precedent by abandoning the ELV plan. Because we cannot say that the jury's verdict is manifestly and palpably contrary to the evidence, the district court did not err when it denied appellants' motion for judgment as a matter of law.

3.

Appellants argue that a new trial is required because the district court failed to require respondent to make a final election of either his breach-of-contract or promissory-estoppel claim before the case was submitted to the jury. This argument presents a question of law. *Christiensen v. Eggen*, 577 N.W.2d 221, 224 (Minn. 1998) (announcing de novo review on the legal question of election of remedies).

Under the doctrine of election of remedies, a party must choose one of two or more inconsistent remedies that the law permits based on the same set of facts. *Id.* "The purpose of the doctrine of election of remedies is not to prevent recourse to any remedy but to prevent double redress for a single wrong." *First Nat'l. Bank of Osakis v. Flynn*, 190 Minn. 102, 106, 250 N.W. 806, 808 (1933). But "if inconsistent remedies are sought and it is doubtful which one will bring relief, a party may claim either or both

alternatively until one affords a remedy and the claimant is not bound by his election until one remedy is pursued to a determinative conclusion." *Nw. State Bank, Osseo v. Foss*, 293 Minn. 171, 177, 197 N.W.2d 662, 666 (1972).

The district court precluded respondent from submitting his promissory-estoppel claim to the jury. And once respondent pursued the breach-of-contract claim to a determinative conclusion, he withdrew the promissory-estoppel claim. There is no suggestion in the record of a double-recovery being sought or permitted.

4.

Finally, appellants argue that the district court should have ordered a new trial or amended its findings because the jury's verdict is inconsistent with the evidence and is confusing. "On appeal from denial of a motion for a new trial, the verdict must stand unless it is manifestly and palpably contrary to the evidence, viewed in a light most favorable to the verdict." *ZumBerge v. Northern States Power Co.*, 481 N.W.2d 103, 110 (Minn. App. 1992), *review denied* (Minn. Apr. 29, 1992). "[T]he verdict is to be liberally construed to give effect to the intention of the jury and to harmonize answers to interrogatories if it is possible to do so. The test is whether the answers can be reconciled in any reasonable manner consistent with the evidence and its fair inferences." *Reese v. Henke*, 277 Minn. 151, 155, 152 N.W.2d 63, 66 (1967).

Appellants argue that the jury's answers to the special verdict form are inconsistent with the evidence because the jury found Robert and Harold Kaplan each separately liable to respondent in the amount of $365,625. For appellants to each be separately liable, they argue, the jury would have had to find two separate contracts. And

viewing the evidence in the light most favorable to the verdict, they argue the evidence only established one contract. Appellants conclude that the jury must have meant that they were jointly and severally liable for $365,625.

This argument lacks merit. The jury was instructed to "[a]nswer the questions [on the special verdict form] for each defendant as though the lawsuits were being tried separately. Each defendant must be judged separately." Under the heading "Damages," the instructions state, "you are to determine the amount of money that will fairly and adequately compensate [respondent] for damages caused by the breach of contract." Appellants did not object to the special verdict form or the jury instructions. Because the special verdict form did not ask the jury to determine respondent's total damages or to decide whether damages would be joint and several, it was reasonable for the jury to apportion respondent's total damages to appellants individually. And the jury's total damage award—$730,650—is supported by the evidence because respondent testified that his damages were $1.2 million. On this record, the verdict is not manifestly and palpably contrary to the evidence.

Affirmed.