COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1944 **Cir. Ct. No. 2005CV1148**

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

HARVEY A. ALTERGOTT,

PLAINTIFF-RESPONDENT,

V.

HELENE ALTERGOTT FAMILY CORPORATION,

DEFENDANT-APPELLANT,

ESTATE OF HARRY D. ALTERGOTT, SR.,

DEFENDANT.

APPEAL from an order of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Reversed*.

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

¶1 PER CURIAM. The Helene Altergott Family Corporation (Family Corp.) appeals an order involuntarily dissolving the corporation on the grounds its

board engaged in oppressive conduct. Family Corp. argues the circuit court's findings do not support the conclusion that its board acted oppressively. We agree and therefore reverse the order.

BACKGROUND

¶2 Family Corp. is one of two corporations Helene Altergott established before she died. Family Corp. owned and controlled various properties, including Helene's home and a parcel of land with a plumbing shop on it. The other corporation, Altergott, Inc. operated the plumbing shop. Helene's daughter-in-law, Evelyn Altergott, is now the majority shareholder of Family Corp. She is also the sole owner of Altergott, Inc.[1] Family Corp. and Altergott, Inc. are run by Evelyn's son, Harry Altergott, who serves as president of both.

¶3 Harvey Altergott is one of Family Corp.'s minority shareholders. None of the minority shareholders have any control over Family Corp.'s management or hold a stake in Altergott, Inc. Harvey brought this suit seeking judicial dissolution of Family Corp. because he believed Harry was using his control over Family Corp. to enrich his own personal and business interests at the expense of Family Corp. and its minority shareholders.[2] Harvey contended this conduct was oppressive, and he alleged several instances in which Harry allegedly advanced his own, and Altergott, Inc.'s interests at the expense of Family Corp.'s minority shareholders.

[1] An employee of Altergott, Inc. also holds a token share of each company.

[2] Although Harvey broadly claims the board's conduct disenfranchised the minority shareholders, he brought this suit as a direct action on behalf of himself.

¶4 The first concerned various arrangements between Family Corp. and Altergott, Inc. for the use of the plumbing property that Family Corp. owned. Until recently, Altergott, Inc. did not pay rent, utilities, taxes or maintenance to use the property. Ostensibly, this was justified by a system in which Altergott, Inc. performed services for Family Corp. in exchange for use of the property. In 2000 Altergott, Inc. also began charging Family Corp. $2,000 per month for its services. Harvey argued this was unfair because Altergott, Inc. continued to pay no rent, utilities, taxes, or maintenance costs. Harvey also claimed the terms of a lease Harry executed on behalf of both Family Corp. and Altergott, Inc. in 2007 for the property were overly favorable to Altergott, Inc.

¶5 The second pertained to an agreement Harry made on behalf of both corporations in December 2006. The agreement stated Altergott, Inc. owed Family Corp. $12,000 for rent from January 2005 to December 2006.[3] The agreement then satisfied this obligation by reducing the amount of a loan from Altergott, Inc. to Family Corp. by $12,000. It then raised the interest rate for the remaining loan balance. Harvey argued that $12,000 was inadequate for two years' rent, and that the interest rate change unfairly shifted money from Family Corp. to Altergott, Inc. without good reason.

¶6 Harvey alleged two further examples of Harry's oppressive conduct. First, he claimed Harry lived in the Altergott residence at Family Corp.'s expense. Harry's father possessed a life estate in the residence, but when he died Harry and

[3] Although there was no lease in effect between the corporations during this time, Harry testified that the reason rent was deemed owed was because his father's death resulted in a loss of service hours provided to Family Corp. in lieu of rent.

Evelyn continued to live there rent free.[4] Second, Harvey contended Harry refused to provide meeting minutes and other corporate information when Harvey requested them.

¶7 The circuit court agreed with Harvey that Harry's conduct was oppressive. It concluded, "The self-serving actions of the board [and] its members[,] and the failure of the board to plan responsibly over time, fits the definition of oppressive conduct." It then ordered Family Corp. be dissolved.

DISCUSSION

¶8 This appeal requires us to determine whether the circuit court's dissolution of Family Corp. was an erroneous exercise of its discretion. *See* WIS. STAT. § 180.1430[5] ("circuit court … may dissolve a corporation"). We affirm a circuit court's exercise of discretion if the court "examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, arrived at a conclusion a reasonable judge could reach." ***Dickman v. Vollmer***, 2007 WI App 141, ¶27, 303 Wis. 2d 241, 736 N.W.2d 202. The proper standard of law here is § 180.1430. As relevant here, this statute permits a court to dissolve a corporation if a shareholder establishes "[t]hat the directors or those in control of the corporation have acted, are acting or will act in a manner that is illegal, oppressive or fraudulent." WIS. STAT. § 180.1430(2)(b).

[4] In May 2007, Harry executed a lease on behalf of Family Corp. to himself to rent the property for $900 per month.

[5] References to the Wisconsin Statutes are to the 2007-08 version.

¶9 Family Corp. contends the court's findings do not support the conclusion that its board engaged in oppressive conduct because it did not find Harry directly inflicted an injury on Harvey. We agree.[6] The circuit court held the board's management of Family Corp. was oppressive because its actions were self-serving and lacked a sense of planning. But this misstates the standard Wisconsin courts have articulated for determining whether a board's actions are oppressive. Rather, we have interpreted oppressive conduct to require a showing that those in control of a corporation inflicted a direct injury on a minority shareholder.

¶10 Our case law defines oppressive conduct in terms of the controlling directors' actions vis-à-vis minority shareholders, not the directors' actions toward the corporation as a whole. We clarified this in ***Reget v. Paige***, 2001 WI App 73, 242 Wis. 2d 278, 626 N.W.2d 302, where we explained that our definition of oppressive conduct "requires that those in control of a corporation willfully treated *some of the shareholders* in a wrongful manner to which other shareholders were not subjected." ***Id.***, ¶25 (emphasis added).

¶11 Therefore, to show the directors acted oppressively, a shareholder must show any injury was primarily inflicted on the shareholder, not the corporation. *See* ***Read v. Read***, 205 Wis. 2d 558, 570, 556 N.W.2d 768 (Ct. App. 1996). Where the injury is primarily to the corporation, however, the shareholder must bring a derivative action on behalf of the corporation for damages. ***Rose v. Schantz***, 56 Wis. 2d 222, 230, 201 N.W.2d 593 (1972).

[6] We need not reach Family Corp.'s argument that the court erred by not determining whether the board's actions were willful, because we conclude any injury Harvey sustained was not directly inflicted on him.

¶12 The injuries Harvey complains of essentially boil down to two claims, neither of which show an injury directly inflicted on him. The first pertains to Harry's alleged self-dealing. This claim includes the allegations that Harry enjoyed free rent for himself and Altergott, Inc. at Family Corp.'s expense, and that he transferred money from Family Corp. to Altergott, Inc. by structuring transactions that worked primarily to Altergott, Inc.'s benefit—such as the agreement to pay Altergott, Inc. $2,000 per month for its services, the lease renting the property to Altergott, Inc. at a favorable rate, and the contract to raise the interest rate on the loan to Family Corp. The second claim concerns Harry's failure to provide Harvey with meeting minutes and other corporate information.[7]

1. Self-dealing

¶13 Harvey's claims of Harry's self-dealing allege injuries that are primarily injuries to Family Corp., not Harvey. This conclusion is compelled by our supreme court's recent decision in ***Notz v. Everett Smith Group, Ltd.***, 2009 WI 30, 764 N.W.2d 904. In that case, all of the directors of Albert Trostel and Sons (ATS) also controlled another corporation, the Smith Group. ATS had begun focusing on the potential for growth in plastics. To that end it acquired one plastics company and contemplated other acquisitions as well. ***Id.***, ¶8. When an opportunity arose to purchase Dickten & Masch, a competing plastics company, ATS conducted due diligence. ATS's board decided not to buy Dickten and

[7] The circuit court also discussed Harry's failure to plan for the future. Harvey does not attempt to justify the court's decision on the basis of Harry's lack of a cogent business plan. Instead, he tangentially argues, without elaboration, that it was correct for the court to question Harry's business decisions, because "Harry Jr. … has been acting in his own best interest and that of his family throughout this case, to the direct injury of [the] minority shareholders." This argument, though, is no different from Harvey's primary charge that Harry engaged in self-dealing.

Masch, but shortly thereafter the Smith Group bought the company. Months later, Dickten and Masch—now a Smith Group affiliate—purchased ATS's plastics subsidiary. ***Id.***, ¶9.

¶14 Notz, a minority shareholder in ATS who held no stake in the Smith Group, alleged ATS's directors engaged in self-dealing by rejecting the opportunity to purchase Dickten and Masch for ATS, and instead purchasing it for the Smith Group and then selling ATS's plastics division to Dickten and Masch. ***Id.***, ¶17. The court held that Notz did not sustain an injury from any purported self-dealing, concluding the alleged injuries were primarily to ATS. ***Id.***, ¶23.

¶15 The same is true here. Although Harry may have benefited from arranging transactions that favored his own interests, a director's self-dealing alone does not transform the injury from one that is primarily to the corporation to one that is primarily to minority shareholders. Rather, the ***Notz*** court observed that "it is clear from ***Read v. Read***, 205 Wis. 2d 558, 556 N.W.2d 768 (Ct. App. 1996), that a majority shareholder's self-dealing may result in an injury that is primarily to the corporation." ***Notz***, 764 N.W.2d 904, ¶22. In ***Read***, a minority shareholder alleged the controlling shareholders "engaged in self-dealing 'through their transactions with other corporations in which they were stockholders but he was not.'" ***Id.*** (quoting ***Read***, 205 Wis. 2d at 562). The ***Read*** court concluded that these allegations would mean that "the resulting primary injury is to the corporation, not the individual stockholder." ***Read***, 205 Wis. 2d at 570 (citation omitted).

¶16 Harvey's claims that Harry advanced business and personal interests not shared by the minority shareholders at Family Corp.'s expense allege precisely the types of injuries we recognized in ***Read*** and ***Notz*** as primarily to the

corporation.[8] While Harvey may also have sustained an injury as a result of Harry's self-dealing, any primary injury was nevertheless to Family Corp. *See* ***Notz***, 764 N.W.2d 904, ¶20.

2. Failure to provide corporate documents

¶17 We agree with Harvey that his claim he was injured by Family Corp.'s board's failures to respond to his requests for meeting minutes and other corporate information alleges a direct injury. But we conclude there was no actionable claim because Harvey did not follow the statutory procedure entitling him to the information. Under WIS. STAT. § 180.1602, a shareholder may inspect and copy certain corporate records. However, to claim this statutory right, the shareholder must notify the corporation in writing and describe the purpose for the request and the records he or she desires to inspect. WIS. STAT. § 180.1602(2). Harvey acknowledges he did not do this. Family Corp. was therefore under no legal obligation to provide Harvey with the records.[9]

[8] The self-dealing Harvey alleges Harry engaged in contrasts with the oppressive conduct we found in ***Jorgensen v. Water Works, Inc.***, 2001 WI App 135, 246 Wis. 2d 614, 630 N.W.2d 230. There, the Jorgensens started a corporation with two other couples, the Barbers and the Tesches. Initially, the Jorgensens participated in the management of the corporation and all six individuals received equal, weekly payments from its profits. When disagreements arose, the Barbers and Tesches froze the Jorgensens out of the control of the corporation. They then ceased making weekly payments to the Jorgensens despite continuing payments to themselves. Unlike the injuries Harvey alleges, this conduct was primarily directed toward the Jorgensens, not the corporation.

[9] We agree with Family Corp. that the court's language strongly indicated it treated dissolution as mandatory, rather than discretionary, upon a finding of oppression. The court stated, "If the actions of the Board of Directors … particularly its President, Harry Jr., are oppressive under Wis. Stat. § 180.1430, *then the Court is required to dissolve the Family Corp*." (Emphasis added.) However, because we conclude the court's findings do not support a conclusion that Family Corp.'s management acted oppressively, we need not reach this issue.

CONCLUSION

¶18 Because Harvey did not show Family Corp.'s board inflicted a direct injury upon him, he was not entitled to the remedy of judicial dissolution on the grounds the board acted oppressively. Rather, the injuries Harvey alleged were to the corporation, and Harvey's remedy was to bring a derivative action on Family Corp.'s behalf for damages. *See* ***Notz***, 764 N.W.2d 904, ¶23 (citing ***Rose***, 56 Wis. 2d at 230).

By the Court.—Order reversed.

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