

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 6, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1616

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN RE THE JUDICIAL
DISSOLUTION OF
CORPORATIONS KNOWN
AS BAUER INDUSTRIES:**

VICTORIA A. BAUER UNGER,

Appellant,

v.

**BAUER INDUSTRIES, INC.,
MODERN INSULATION, INC.,
CHAMPION INSULATION, INC.,
FACSA, INC. and
B & B SPECIALTIES, INC.,**

Respondents.

APPEAL from a judgment of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Victoria Bauer Unger appeals a judgment enforcing a settlement agreement between her and Bauer Industries and denying her motion to reform an appraisal. She argues that the appraisal was inaccurate due to a misrepresentation by Bauer regarding the existence of any stockholder agreements that restrict or facilitate the transfer or sale of the company's stock. She also argues that the appraisal was based on mutual mistake of fact or by her unilateral mistake and fraud on the part of Bauer Industries. Finally she argues that the real controversy has not been fully and fairly tried and requests discretionary reversal under § 752.35, STATS. We reject these arguments and affirm the judgment.

Unger brought this action against Bauer and its subsidiaries for dissolution of the corporation. She had previously commenced an action venued in Fond du Lac County in which she sought imposition of a constructive trust on insurance proceeds that were paid to Champion Insulation, Inc., as a result of her husband's death. The Fond du Lac court ruled in Unger's favor and Champion and Bauer appealed that decision. During the pendency of that appeal, the parties reached a settlement agreement in the Marathon County dissolution case calling for valuation of Unger's stock by Madison Valuation Associates and purchase of the shares by Bauer at the price determined by the appraiser. The court of appeals subsequently reversed part of the Fond du Lac County judgment, ruling that a buy-sell agreement was valid. Unger then refused to sell her outstanding shares to Bauer at the price found by the appraiser, insisting instead on the valuation formula contained in the buy-sell agreement. The trial court granted Bauer's motion to compel Unger to sell her shares at the price given by the appraiser and rejected her claims that Bauer misrepresented material facts to the appraiser.

Unger has not established that the trial court improperly exercised its discretion by refusing to reform the appraisal. Reformation of an instrument is an equitable action, the main objective of which is to effectuate the parties' intention. *Krause v. Hartwig*, 14 Wis.2d 281, 284, 111 N.W.2d 138, 140 (1961). Unger has not established that the parties intended a result other than that expressed in the settlement agreement. The settlement agreement instructed the appraiser to find the fair market value of the corporation, assuming that neither the buyer nor seller were under any compulsion to buy or sell the stock and that the buyer is and would not be a director, employee or officer of the involved companies. The appraiser was free to choose the method of appraisal. The formula set out in the buy-sell agreement was not adopted by the parties to

the settlement agreement. The stipulated settlement was executed for the purpose of resolving the dissolution action without regard to the Fond du Lac County case and the validity of the buy-sell agreement. The formula contained in the buy-sell agreement is irrelevant under these circumstances.

Unger has not established that the settlement agreement or the appraisal was the product of a mutual mistake of fact. A mutual mistake is one reciprocal and common to both parties, where each alike labors under a misconception in respect to the terms of the written instrument. *Willett v. Stewart*, 227 Wis. 303, 310, 277 N.W. 665, 668 (1938). A mutual mistake must be based on a past or present fact, not a future fact. Both parties are assumed responsible for considering the possible future facts that may occur. *Continental Casualty Co. v. Wisconsin Patients Compensation Fund*, 164 Wis.2d 110, 118, 473 N.W.2d 584, 587 (1991). The stipulated settlement agreement created its own definition of fair market value and instructed the appraiser to find the value of the corporation on that basis. The validity of the stock purchase agreement and the formula contained in that agreement became irrelevant upon execution of the settlement agreement. Both parties knew that the validity of the buy-sell agreement had not yet been conclusively determined. They agreed to settle this lawsuit regardless of the outcome of the Fond du Lac County case. Under these circumstances, the ultimate resolution of the Fond du Lac County case cannot be described as a mutual mistake of fact.

Unger has also failed to establish a unilateral mistake by her and fraud by Bauer. Unger contends that Bauer misrepresented material facts to the appraiser when it stated that there were no stockholder agreements which restricted or facilitated the transfer of the company's common stock. At the time the statement was made, it was true. In addition, the stipulated settlement made the existence of the buy-sell agreement and all of its terms and formulas irrelevant. The appraiser was specifically instructed to assume facts contrary to the buy-sell agreement. Bauer's misrepresentation, if any, was of a fact rendered immaterial by the definition of fair market value set out in the settlement agreement.

We decline to order a new trial pursuant to § 752.35, STATS. The record does not support Unger's claim that the real controversy was not tried. Rather, it appears that she seeks to be relieved from the settlement agreement

because she now believes that the formula contained in the buy-sell agreement would be more advantageous. The trial court fully litigated the meaning of the settlement agreement and correctly concluded that it superseded the valuation formula set out in the buy-sell agreement and reflected the parties' intention to do so.

Bauer asks for additional costs on the ground that this appeal is frivolous. While we reject Unger's arguments, we do not find them so frivolous as to warrant the imposition of additional costs.

By the Court. – Judgment affirmed.

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