COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2693 **Cir. Ct. No. 98-CV-398**

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

ROGER WHITCOMB,

PLAINTIFF-APPELLANT,

V.

ALICE BLUE, SURINDER NARULA, J & B HEATING & AIR CONDITIONING, INC. AND WP, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County: DONALD J. HASSIN, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Roger Whitcomb appeals from a judgment dismissing claims for additional compensation and punitive damages against Alice Blue, Surinder Narula, J & B Heating & Air Conditioning, Inc. and WP, Inc.

(collectively "the defendants"). He argues that summary judgment was inappropriate because issues of material fact exist. We conclude that issues of fact exist as to all but one of the four claims remaining after the circuit court adopted a referee's accounting. We affirm the circuit court's dismissal of the claim for compensation for plumbing work done on buildings owned individually by Blue and Narula. We reverse that portion of the judgment dismissing Whitcomb's claims for additional salary, profits, and punitive damages, and remand the action to the circuit court for further proceedings on those claims.

¶2 Blue and Narula, husband and wife, and Whitcomb formed WP for the purpose of conducting a plumbing business.[1] Whitcomb is a master plumber and he worked for the corporation. The business operated out of the same building as J & B Heating, a corporation in which Narula held an ownership interest. The businesses were complementary to one another and there was a sharing of some portion of HVAC installations or services, operating costs and employment of a receptionist.

¶3 WP was formed in August 1995. Narula was issued 51% of the shares and Whitcomb 49%.[2] Whitcomb, his wife, Blue, and Narula were made officers of the corporation. Blue was in charge of all corporate records and books, and served as the bookkeeper. WP ceased doing business in February 1997 and was formerly dissolved on April 25, 1997.

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[1] Barbara Whitcomb, Whitcomb's wife, was originally a plaintiff to this action because of her marital property interest. A motion for summary judgment dismissing her as a party was granted.

[2] Whitcomb claimed that Blue and Narula fraudulently altered the stock certificates. On appeal he makes no claim with respect to the allocation of the shares.

¶4 Believing that requests for corporate information and an accounting were not satisfied, Whitcomb commenced this action February 23, 1998. He alleged four causes of action: (1) breach of contract for breach of alleged written and oral shareholder agreements regarding compensation, profits, and ownership; (2) conversion against Blue and Narula for failing to properly account for sales and costs between WP and J & B Heating and for selling WP assets at less than fair market value; (3) fraud against Blue and Narula personally and as officers of WP for false representations to induce Whitcomb to form the corporation and become an employee, for altering stock certificates, and for converting funds and assets of WP; and (4) breach of fiduciary duties Blue and Narula had as officers and directors of WP. Whitcomb also sought an award of punitive damages against Blue and Narula in their individual and corporate capacities, and J & B Heating as a co-conspirator, for willful, wanton, and malicious fraud in the handling of WP affairs. The defendants counterclaimed for compensation for expenses, liabilities, goods and services provided to WP and benefiting Whitcomb.

¶5 The in-court status of this case was stagnant as the parties engaged in discovery and attempted to reconstruct many of the transactions affecting WP. This proved difficult because of the intermingling of sales and expenses between WP and J & B Heating, unrecorded cash sales, and the posting of WP credit card sales through J & B Heating's credit card terminal. Whitcomb and the defendants each had an accountant prepare an accounting of the income and expenses and calculate figures each would pay into WP before the combined remaining sum would be divided. Whitcomb claimed that he had been promised at least a $50,000 per year salary which had not been paid and that he was to take 75% of the first year's profits, 70% of the next, and thereafter his profits share would be reduced by 5% until he and Narula would split profits 50/50.

¶6 On June 7, 2001, the defendants moved for the appointment of a referee, specialized in accounting, to determine what monies, if any, were owed to WP.[3] The parties agreed to the appointment of a referee to conduct an independent accounting. The circuit court ordered the referee to file a report regarding what might be owed to WP by the parties. The report was filed on January 16, 2002, and, as later amended, determined that the Blue/Narula/J & B Heating group owed WP $39,283, and Whitcomb owed WP $2,718.

¶7 An order of February 12, 2002, found that both parties waived the right to challenge the referee's report and the court adopted the referee's finding. The order further set forth Whitcomb's remaining claims, that is, claims not resolved by the referee's findings:

> (i) Whether the corporation owes [Whitcomb] $28,200 in unpaid salary for the years 1995 through 1997.
>
> (ii) Whether the corporation owes [Whitcomb] from the first year of W.P., Inc.'s existence for unpaid profits based on the allegation that 75% of the profits would go to [Whitcomb].
>
> (iii) Whether the individual defendants, Alice Blue and Surinder Narula, owe the corporation $7,600 for plumbing work done by [Whitcomb] between 1995 and 1997 in a building they own.[4]

¶8 The order also recognized that Whitcomb's claim for punitive damages had not been dismissed and that an issue remained of whether the defendants acted intentionally and maliciously in utter disregard of Whitcomb's

[3] The defendants' motion for partial summary judgment dismissing the punitive damages claim filed on September 15, 2000, was still pending.

[4] The scope of the issues as defined by this order is not challenged on appeal.

rights.[5] The defendants moved for summary judgment dismissing all remaining claims. The circuit court granted the motion and Whitcomb appeals.

¶9 Whether summary judgment was appropriate presents a question of law we review independently of the circuit court. ***Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.***, 229 Wis. 2d 751, 755, 601 N.W.2d 318 (Ct. App. 1999). When reviewing a circuit court's grant of summary judgment, we apply the standards set forth in WIS. STAT. § 802.08 (2001-02),[6] in the same manner as the circuit court. ***Williams v. State Farm Fire and Cas. Co.***, 180 Wis. 2d 221, 226, 509 N.W.2d 294 (Ct. App. 1993). The first step requires us to examine the pleadings to determine whether a claim for relief has been stated. ***Crowbridge v. Village of Egg Harbor***, 179 Wis. 2d 565, 568, 508 N.W.2d 15 (Ct. App. 1993). Whitcomb's complaint adequately states the claims for relief. The denials in the defendants' answer raise factual issues. Thus, the next step in the summary judgment methodology is to examine the moving party's affidavits to determine whether a prima facie case for summary judgment has been made and whether the opposing affidavits or other proof demonstrate any disputed material facts which

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[5] The order further directed the referee to examine WP records to determine what, if any, monies might be owed to the IRS and whether any income was purposely not disclosed in corporate tax returns. The referee found that there should be no adjustment to tax returns, that the underreporting of income was not substantial, and that there was no attempt to fraudulently avoid taxes.

The order also defined the defendants' counterclaim as whether WP owed any monies to J & B Heating for labor and services provided to WP, and whether Whitcomb's action was frivolous. Although there is no formal order dismissing these claims, it appears that the defendants abandoned them since they were scheduled to be heard at the June 4, 2002 hearing and were not raised by the defendants at that hearing.

[6] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

entitles the nonmoving party to a trial. ***Clay v. Horton Mfg. Co.***, 172 Wis. 2d 349, 353, 493 N.W.2d 379 (Ct. App. 1992).

> If there are disputed issues of material fact, a grant of summary judgment is inappropriate and must be reversed so that the disputes can be resolved by a factfinder after trial. The alleged factual dispute, however, must concern a fact that affects the resolution of the controversy, and the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. Any reasonable doubt as to the existence of disputed material fact is resolved against the moving party.

Id. at 353-54 (citations omitted).

¶10 We first observe that except with respect to the punitive damages claim, the defendants offered no affidavits in support of the motion to dismiss Whitcomb's claims.[7] They offered no defense but instead sought to force Whitcomb to demonstrate that he could satisfy his burden of proof on all elements of his claims. ***Transp. Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 291-92, 507 N.W.2d 136 (Ct. App. 1993) (citing ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322 (1986)), recognizes that at times "a party moving for summary judgment can only demonstrate that there are no facts of record that support an element on which the opposing party has the burden of proof" and that it then becomes the "burden of the party asserting a claim on which it bears the burden of proof at trial 'to make a showing sufficient to establish the existence of an element essential to that party's case.'" However, this shifting of the burden does not permit the defendants to merely assert that Whitcomb has no proof or to demand only an examination of Whitcomb's materials to determine whether he produced evidence in support of his claims. *See* ***Leske v. Leske***, 197 Wis. 2d 92, 97-98, 539 N.W.2d

[7] Documents and portions of Whitcomb's depositions were attached as exhibits to the defendants' brief in support of the motion for summary judgment.

719 (Ct. App. 1995) ("A statement that the plaintiff lacks evidence is insufficient. The burden is on the moving party to demonstrate a basis *in the record* that this is so.").

¶11 In support of summary judgment the defendants argued that Whitcomb had no proof of his claim other than his own testimony and that of his wife. On appeal they argue that Whitcomb's affidavits in opposition to summary judgment—his and his wife's sworn statements that certain promises were made for compensation—are merely "circular, self-serving, and conclusory allegations" inadequate to create any genuine dispute.[8] This is but a slippery slide into that pool of cases properly disposed of by summary judgment.

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[8] With respect to Whitcomb's salary and profits claims, the circuit court adopted this approach in granting summary judgment. It stated:

> Firstly, with respect to the salary issue, the only evidence on this record at this stage in the proceeding are the self serving statements of Mr. and Mrs. Whitcomb. That's not sufficient to overcome summary judgment.
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> ….
>
> As concerns the profit claim of 75 percent and a reduced step amount thereafter again the sole record before this court is Mr. Whitcomb's self serving statement. There is not a single piece of evidence on this record at this stage other than those statements that such an entitlement would occur.
>
> It's not sufficient to defeat summary judgment. You can't come back in[,] as I've said repeatedly on this record, to say it ain't so is not [] sufficient to put the matter of issue before the trier of fact or jury. There must be evidence. Something independent of a simply self serving statement.
>
> It's incredible that all of this occurs prior to or at the inception of the creation of the corporation but yet nothing is ever done to document what apparently Mr. and Mrs. Whitcomb believed was to have occurred.

¶12 We recognize that "[a] party opposing a summary judgment motion must set forth 'specific facts,' evidentiary in nature and admissible in form, showing that a genuine issue exists for trial. It is not enough to rely upon unsubstantiated conclusory remarks, speculation, or testimony which is not based upon personal knowledge." ***Helland***, 229 Wis. 2d at 756. Thus, it is important to adhere to the distinction between a conclusory affidavit and one which sets forth evidentiary facts about an occurrence or transaction.

¶13 Whitcomb's affidavit in opposition to the motion to dismiss his claims for a larger salary and greater profits stated, in part:

> 14. Affiant was promised $50,000 annual salary plus a percentage of the net profit for his participation in WP, Inc. which induced affiant to leave his profitable business known as "Whitcomb Plumbing and Pump Service" to form WP, Inc. Affiant agreed to take a weekly salary which was reduced from the $50,000 annual amount in the early formation of this company so that the company known as WP, Inc. would have more cash flow for its start up with the promise and understanding that affiant would be paid his back salary annually before any profits were distributed to the shareholders.
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> 15. … Affiant asked on numerous occasions when he would be paid his back salary and he was always told by the defendant, Alice Blue, that there was no money and that she was unable to pay him his back salary.
>
> 16. … In addition, affiant had numerous discussions at corporate stockholder meetings concerning how the net profit of WP, Inc. was going to be split. That is was agreed between the shareholders and the officers of the corporation at several meetings that the split of any net profit after the full payment of affiant's wages and all other legitimate bills of the corporation would be split as follows: 75% to Roger Whitcomb for the year 1995 and 25% to Surinder Narula; for 1996, the agreement was that 70% of the net profit would go to Roger Whitcomb and 30% would go to Surinder Narula; and that there would be a five percent reduction per year in affiant's share of the net profit and a five percent increase in Surinder Narula's share until the

> parties reached a 50/50 split of the net profit, which would be in the fifth year of the corporation's existence.

¶14 Barbara Whitcomb's affidavit explained that the minutes of the initial corporate meeting of WP on August 5, 1995, conflict with her own notes and her own recollection of the agreements made. She indicated that she heard the discussions regarding formation of the corporation and that Narula suggested a $50,000 salary for Whitcomb and a greater percentage share of the profits. She heard the yearly stepped down profits percentage starting at 75% in favor of Whitcomb discussed.

¶15 These affidavits present evidentiary facts based on personal knowledge and are not mere legal conclusions. To reject these affidavits as self-serving is to make a credibility determination. While plausibility may be determined on summary judgment, credibility may not. ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 665, 476 N.W.2d 593 (Ct. App. 1991) (under Wisconsin summary judgment methodology, the court does not decide issues of credibility, weigh the evidence, or choose between differing but reasonable inferences from the undisputed facts but is not precluded from deciding whether a rational trier of fact could find that the nonmoving party's claim is plausible). The distinction is particularly important here where at issue is the parties' contractual intent upon inception of the corporation. It has often been stated that the issue of intent is not easily determined by summary judgment since the credibility of a person with respect to his or her subjective intent does not lend itself to be determined by affidavit. ***Lecus v. Am. Mut. Ins. Co. of Boston***, 81 Wis. 2d 183, 190, 260 N.W.2d 241 (1977); *see also* ***Walter Kassuba, Inc. v. Bauch***, 38 Wis. 2d 648, 654, 158 N.W.2d 387 (1968).

¶16 After examining Whitcomb's affidavits, we conclude that a rational trier of fact could find an agreement to pay Whitcomb a $50,000 salary and higher profits if it accepts his testimony as credible. Not only does Whitcomb's affidavit set forth the necessary elements of an oral contract, but he offers an explanation as to why the agreement was not honored from the start. Whitcomb's affidavit also explained that the salary he was paid amounted to $15 per hour, a wage no master plumber with his experience would agree to work for. Reasons for the higher percentage of profits and yearly reduction were also given, lending plausibility rather than fabrication to that agreement.

¶17 A complete failure of proof has not been made and summary judgment was improper. *See* ***Fortier***, 164 Wis. 2d at 666. This is not to say that Whitcomb should ultimately prevail or that there are no other untested grounds for summary judgment.[9] But summary judgment was not proper when the only basis for granting such judgment was to reject the credibility of an affiant. We reverse the circuit court's summary judgment dismissing Whitcomb's claim for additional salary and a higher percentage of the profits from WP.[10]

¶18 Whitcomb's claim for unpaid plumbing services also relied extensively on his affidavit and that of his wife explaining how services were

[9] We observe that the circuit court correctly concluded that Whitcomb's claims for salary and profits were not determined by the referee. The referee's accounting was based only on the sums actually paid and made no factual determination about whether an agreement for greater sums was made and is enforceable.

[10] This is not to be construed as allowing Whitcomb to litigate a claim that stock certificates were fraudulently altered. An affidavit from the attorney who helped the parties with WP's incorporation explained how the stock certificates were issued and the mathematical certainty in which Whitcomb's less than 50% ownership was reflected. Whitcomb's claim for a higher share of profits is independent of his ownership interest.

provided and not paid for. This claim does not, however, stand on equal footing with those for salary and profits. The claim was narrowed to whether WP was entitled to additional sums from Blue and Narula as a result of plumbing services provided by WP employees.[11] It is a claim that can be pursued only by WP and not Whitcomb simply by virtue of his status as an officer or employee of WP. Moreover, the referee's accounting was intended as a final wrap up of the affairs of WP. The sums adopted by the parties were admittedly a compromise of certain claims that additional monies were owed to WP. The claim that WP was not compensated for certain services to Blue and Narula was extinguished by that compromise. Finally, even if Whitcomb could assert a personal claim for compensation for plumbing work on Blue and Narula's property, his affidavit indicating that he did not receive payment for such work contradicts his deposition testimony that he was paid and may be disregarded under the sham affidavit rule. *See* ***Yahnke v. Carson***, 2000 WI 74, ¶21, 236 Wis. 2d 257, 613 N.W.2d 102 ("an affidavit that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of fact for trial, unless the contradiction is adequately explained").[12] We affirm dismissal of the claim that Blue and Narula failed to compensate WP for all plumbing services performed on their property.

¶19 Finally, we reach the question of whether summary judgment was proper to dismiss Whitcomb's claim for punitive damages. Whitcomb offered

[11] Whitcomb does not adhere to the issue as defined in the circuit court's February 12, 2002 order. On appeal he argues that he submitted adequate evidence that "*he* personally performed plumbing work for the defendants for which *he* did not receive payment." Appellant's Brief at 10 (emphasis added).

[12] The circuit court implicitly rejected Whitcomb's explanation for the contradiction when it noted that the claim was based on accounting variations.

affidavits detailing the conduct of Blue and Narula that he believes to be fraudulent and exhibiting a pattern of deceptive and self-interested practices.

¶20 The circuit court granted summary judgment concluding that there was no evidence that the defendants acted with intentional disregard of Whitcomb's rights. "The factors necessary for an award of punitive damages, require a showing of: (1) evil intent deserving of punishment or of something in the nature of special ill-will; *or* (2) wanton disregard of duty; *or* (3) gross or outrageous conduct." ***Trinity Evangelical Lutheran Church and School-Freistadt v. Tower Ins. Co.***, 2003 WI 46, ¶45, ___ Wis. 2d ___, 661 N.W.2d 789 (emphasis added). Blue and Narula, as officers of WP, had a fiduciary duty to the corporation and its shareholders of loyalty, good faith and fair dealing in the conduct of corporate business. ***Modern Materials, Inc. v. Advanced Tooling Specialists, Inc.***, 206 Wis. 2d 435, 442, 557 N.W.2d 835 (Ct. App. 1996). "An officer or director is precluded from exploiting his or her position for personal gain when the benefit or gain properly belongs to the corporation." ***Id.*** In a closely-held corporation, a cause of action for breach of fiduciary duty is akin to corporate oppression and includes "a lack of probity and fair dealing in the affairs of the company to the prejudice of some of its members; or a visual departure from the standards of fair dealing, [] a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely," and frustration of the reasonable expectation of the shareholders. ***Jorgensen v. Water Works, Inc.***, 218 Wis. 2d 761, 783, 783 n.10, 582 N.W.2d 98 (Ct. App. 1998).

¶21 While "a mere breach of fiduciary duty does not justify a punitive damage award," ***Loehrke v. Wanta Builders, Inc.***, 151 Wis. 2d 695, 703, 445 N.W.2d 717 (Ct. App. 1989), a certain level of acting in self-interest may. ***Jeffers v. Nysse***, 98 Wis. 2d 543, 552-53, 297 N.W.2d 495 (1980), recognizes that when

the motive of self-interest rises to the level of wanton, willful or reckless disregard of the rights of others punitive damages may be awarded. A finding of an intentional and ruthless desire to injure, vex or annoy is not required. ***Id.*** at 548. Conscious action in deliberate disregard of the rights of others may provide the necessary state of mind to justify punitive damages. ***Id.*** at 548-49. In such cases, "'putting the cookies back in the jar' when caught is not enough." ***Id.*** at 553.

¶22 The circuit court conceded that there was evidence of the use of WP money for purposes inconsistent with the corporate entity.[13] In addition to evidence that cash and credit card transactions were not properly credited to WP by Blue, specific instances of potential self-dealing recited in Whitcomb's affidavits include: Blue running her individual cabinet business out WP's office and utilizing its resources (secretary, phone, and bank account); Blue closing out a WP savings account right after the parties agreed to cease business and opening a new account on which Whitcomb was not a signatory; Blue's production of financial statements throughout 1996 reflecting that the savings account only had $1,000 when in fact over $12,000 in sale proceeds had been deposited into the account during 1996; Blue's filing of tax forms showing herself with $11,000 equity in WP when she was not a shareholder; Blue filing a tax return for every year of WP's existence which showed a loan from J & B Heating even after the loan had been paid off; and Blue's filing of a "Disposition of Asset Report" on October 28, 1997, indicating no remaining inventory when, in fact, Blue was still

[13] We acknowledge that to bring individual claims for breach of a fiduciary duty, the shareholder must allege facts sufficient, if proved, to show an injury that is personal to him or her, rather than an injury primarily to the corporation. ***Reget v. Paige***, 2001 WI App 73, ¶12, 242 Wis. 2d 278, 626 N.W.2d 302, *review denied*, 2001 WI 114, 246 Wis. 2d 171, 634 N.W.2d 318 (Wis. July 18, 2001) (No. 99-0838). Whitcomb does this.

in possession of WP displays. Whitcomb also suggests that as WP's secretary Blue failed to keep accurate records and minutes, i.e., the incorporation papers reflect that Waukesha State Bank would be the corporate bank but the minutes Blue wrote said it would be M&I Bank. Blue also refused to permit Whitcomb to see the corporate "notebook" when requested at every corporate meeting.

¶23 While the defendants attribute all the shortcomings in the books and accounts of WP to simply poor bookkeeping practice, one has to ask why Blue offered to be the bookkeeper in light of her apparent inability to do an accurate job. In short, a rational trier of fact may reject the defendants' characterization that it was just poor bookkeeping. *See* ***State v. Davidson***, 242 Wis. 406, 414-15, 8 N.W.2d 275 (1943) ("while the claim is made that examination of the whole period discloses nothing but a poor system of bookkeeping, plus a poor bookkeeper, a jury was entitled to reject this explanation in favor of a more serious one" or conclude "that the difficulty was not the result of carelessness or unskillfulness"). Further, a rational trier of fact may conclude that the pattern of conduct was in deliberate disregard of Whitcomb's rights so as to justify punitive damages. Summary judgment dismissing the punitive damages claim was improper.[14]

¶24 Whitcomb's claims for additional salary, a greater share of profits, and for punitive damages are remanded for further proceedings. While Whitcomb may offer proof of the circumstances surrounding the keeping of accounts and records of WP, he may not relitigate the final accounting of WP affairs. The

[14] The referee's conclusion that there was no purposeful underreporting of income to tax authorities does not address whether the defendants acted in conscious disregard of Whitcomb's rights and the fiduciary duties owed to him.

amount of money distributable from WP has been determined but how the sum is distributed may be altered upon final disposition of the remaining claims.[15]

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

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

[15] Except for the punitive damages claim, Whitcomb's claims are defined as against WP and thus payable out of that sum of money which the referee determined to exist after a full accounting. Blue and Narula may only have liability on those claims to the extent that recovery reduces the amount of money to be distributed to Narula as a shareholder. Because the defendants have been treated as a single unit throughout this litigation and on appeal, our reversal does not determine whether the liability of any one defendant, if any, is different from that of any other defendant.