COURT OF APPEALS
DECISION
DATED AND FILED

November 2, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0129 **Cir. Ct. No. 02CV001226**

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

PERRY M. ANKERSON, INDIVIDUALLY AND IN THE RIGHT OF EPIK CORPORATION,

PLAINTIFF-APPELLANT,

V.

EPIK CORPORATION,

DEFENDANT-RESPONDENT,

CEDAR CREEK PARTNERS, LLC AND CCP LIMITED PARTNERSHIP,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 WEDEMEYER, P.J. Perry M. Ankerson appeals from an order dismissing a corporate derivative claim action commenced under the calls of WIS. STAT. § 180.0744 (2001-02).[1] The issue raised on appeal is whether the trial court properly determined that the Special Litigation Committee was independent. Ankerson claims that the trial court's findings of fact were improperly made and therefore provide no basis for its conclusion of law that the Special Litigation Committee acted independently. Because the trial court's findings of fact are not clearly erroneous and under the totality of the circumstances the trial court's conclusions of law are reasonably based, we affirm.

I. BACKGROUND

¶2 For the purposes of context and clarity, we briefly outline the business setting that precipitated this lawsuit and subsequent appeal. Ankerson established EPIK Corporation in 1996. The purpose of the corporation was to acquire and operate companies engaged in the manufacture and sale of point-of-purchase advertising and promotional products. The scope of its activities was intended to be worldwide. Ankerson was the first president and a member of the Board of Directors. He is one of its three stockholders, the other two being William D. Kolb and CCP Limited Partnership. At the commencement of this suit, Ankerson and Kolb each owned 2.83% of EPIK's shares, while CCP Limited Partnership owned 94.38%.

¶3 Cedar Creek Partners, LLC (CCP) is a limited liability corporation engaged in activities suited to buying, recapitalizing, and managing privately held

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

manufacturing, distribution, and service companies. It is owned by H. Wayne Foreman, Donald J. Jagla and Robert L. Cook, Jr. CCP's management team was comprised of three individuals—Steven D. Peterson, Michael H. Gandrud and Elvira L. Berg. CCP was the general partner of CCP Limited Partnership. From this description, it is self-evident that CCP, through CCP Limited Partnership, controls EPIK Corporation.

¶4 During the course of conducting EPIK's business, a disagreement arose between Ankerson and CCP Limited Partnership about the partnership's commitment to EPIK's business plan. On May 14, 2001, Ankerson's operational responsibilities and job titles with EPIK were removed. Then, on July 31, 2001, Ankerson's employment with EPIK was terminated.

¶5 On June 29, 2001, Ankerson made a written demand upon EPIK, pursuant to WIS. STAT. § 180.0742, to take legal action against the defendants based upon certain acts and omissions. The required 90-day notice expired without the appropriate response from EPIK.[2]

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[2] WISCONSIN STAT. § 180.0742 provides:

> **Demand**. No shareholder or beneficial owner may commence a derivative proceeding until all of the following occur:
>
> **(1)** A written demand is made upon the corporation to take suitable action.
>
> **(2)** Ninety days expire from the date on which the demand was made, unless the shareholder or beneficial owner is notified before the expiration of 90 days that the corporation has rejected the demand or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

¶6 On February 1, 2002, Ankerson—founder, minority shareholder and former president of defendant EPIK Corporation—filed a corporate derivative claim on behalf of EPIK and personal claims against CCP and CCP Limited Partnership. The derivative and personal claims essentially were based upon breach of fiduciary duties, breach of contract, promissory estoppel, and fraudulent misrepresentation. EPIK had not requested that it be included in the derivative claims as a party plaintiff and moved to intervene as a defendant. Its motion was granted on May 13, 2002. EPIK remained in the case as a nominal, but necessary, party. Ankerson has not appealed from that order.

¶7 On January 22, 2003, the majority stockholder, CCP Limited Partnership, which owned 94.38% of the outstanding common stock, elected the following individuals to EPIK's Board of Directors: Jagla, Cook, Foreman, Jack Riopelle and David Drury. Riopelle and Drury were newly added directors.

¶8 On January 23, 2003, a special meeting of the Board of Directors of EPIK was held to discuss the shareholder derivative claims filed by Ankerson. Only Cook did not participate in the meeting. At that meeting, a motion was made by Riopelle, and seconded by Drury to: (1) form a Special Litigation Committee pursuant to WIS. STAT. § 180.0744 to review the derivative proceeding and determine whether or not maintenance of the derivative proceeding is in the best interests of the corporation; (2) authorize the Special Litigation Committee to make all decisions and take all actions that it deems necessary or appropriate with respect to the derivative proceedings, at the corporation's expense; and (3) authorize the Special Litigation Committee to consult with attorneys and such other professionals as it deems necessary or appropriate, at the corporation's expense. The motion passed. A motion was then made by Riopelle and seconded by Drury to appoint Riopelle and Drury as the members of the Special Litigation

Committee. A vote on the motion was taken. Only the independent directors, Riopelle and Drury, voted. Jagla and Foreman abstained. The motion passed.

¶9 On April 28, 2003, in response to a motion, the trial court stayed all claims, both personal and derivative, pending a determination by the Special Litigation Committee as to whether maintaining the derivative claims was in the company's best interest.[3] On September 25, 2003, the Special Litigation Committee determined that prosecution of the derivative claims was not in the best interest of EPIK. As a result, EPIK filed a motion to dismiss the derivative claims. Ankerson opposed the motion on the basis that the Special Litigation Committee was not independent and therefore the dismissal was not proper. After a hearing, the trial court made findings of fact and conclusions of law determining that the Special Litigation Committee was independently constituted and, thus, dismissed the derivative claims. Ankerson now appeals.

II. ANALYSIS

¶10 Ankerson claims that Riopelle and Drury, the two independent directors, did not qualify under WIS. STAT. § 180.0744, as "independents" for the purposes of the Special Litigation Committee's actions.

¶11 Whether the trial court properly found that the members of the Special Litigation Committee were independent within the meaning of WIS. STAT. § 180.0744, presents a mixed question of fact and law. We shall not reverse the trial court's findings of fact as to the independence of the committee members unless they are clearly erroneous. We do, however, review independently the trial

[3] As a result of the stay order, the personal claims are not a part of this appeal.

court's application of § 180.0744 to the facts as found. ***Einhorn v. Culea***, 224 Wis. 2d 856, 870, 591 N.W.2d 908 (Ct. App. 1999), *rev'd on other grounds*, 2000 WI 65, 235 Wis. 2d 646, 612 N.W.2d 78. We use an objective test in independently reviewing the trial court application of the statute to the facts.

> Whether members are independent is tested on an objective basis as of the time they are appointed to the special litigation committee. Considering the totality of the circumstances, a court shall determine whether a reasonable person in the position of a member of a special litigation committee can base his or her decision on the merits of the issue rather than on extraneous considerations or influences. In other words, the test is whether a member of a committee has a relationship with an individual defendant or the corporation that would reasonably be expected to affect the member's judgment with respect to the litigation in issue.

Einhorn v. Culea, 2000 WI 65, ¶41, 235 Wis. 2d 646, 612 N.W.2d 78 (footnotes omitted).

¶12 In implementing this objective standard, our supreme court set forth a series of non-exclusive factors that a trial court should examine to determine "independence":

> (1) A committee member's status as a defendant and potential liability.…
>
> (2) A committee member's participation in or approval of the alleged wrongdoing or financial benefits from the challenged transaction.…
>
> (3) A committee member's past or present business or economic dealings with an individual defendant.…
>
> (4) A committee member's past or present personal, family, or social relations with individual defendants.…
>
> (5) A committee member's past or present business or economic relations with the corporation.…

> (6) The number of members on a special litigation committee.…
>
> (7) The roles of corporate counsel and independent counsel.…

Id. (italics omitted).

¶13 The court went on to add:

> A circuit court is to look at the totality of the circumstances. A finding that a member of the special litigation committee is independent does not require the complete absence of any facts that might point to non-objectivity. A director may be independent even if he or she has had some personal or business relation with an individual director accused of wrongdoing.[4]

Id., ¶45 (footnote added).

¶14 Ankerson contends that of these specific factors, Drury and Riopelle failed four of the five tests: they both had significant past business relationships with the principals of the defendants; they both had substantial past business relationships with the principals of EPIK, who are the same persons as the principals of the defendants; the Special Litigation Committee was comprised of

[4] For this explication, the supreme court relied on ***In re Oracle Securities Litigation***, 852 F.Supp. 1437, 1442 (N.D. Cal. 1994), which declared:

> A "totality of circumstances" test does not, however, necessitate the complete absence of any facts which might point to non-objectivity. In any business setting, associations and contacts of the type which [the committee member] has had with some of the individual defendants and [the corporation] are certainly neither inappropriate nor such as to suggest that [the committee member] would not faithfully discharge his obligations to [the corporation's] shareholders. Business dealings seldom take place between complete strangers and it would be a strained and artificial rule which required a director to be unacquainted or uninvolved with fellow directors in order to be regarded as independent.

only these two persons; and the roles of corporate counsel and counsel for the Special Litigation Committee were merged in the person of Attorney Thad W. Jelinske.

¶15 Before we address Ankerson's claims with specificity, we briefly examine uncontested matters in the context of the factors suggested by our supreme court and determinations that are not in dispute. At the outset, there is no disagreement that Drury and Riopelle were not named defendants in the derivative action and faced no exposure to personal liability as a result of the action. Nor were they members of the Board of Directors when the transactions in question took place. This case only concerns activities that occurred between 1998 and 2001. Neither Drury nor Riopelle joined the Board of Directors of EPIK as non-stockholders until January 22, 2003. Next, the trial court found that neither Drury nor Riopelle had any social relationships with Foreman or Jagla. There is no dispute over these findings of fact.

¶16 This dispute centers upon Drury's and Riopelle's financial relationship with Foreman and Jagla in the years preceding their joining the EPIK Board of Directors. We first review Drury's qualifications and activities. The record reflects that Drury, a CPA by profession, worked for PricewaterhouseCoopers from 1971-1989, finishing his tenure with the firm as the managing partner of the Milwaukee office from 1986-1989. He subsequently became the executive vice president, chief financial officer, and shareholder of The Oldenberg Group. Since 1999, he has been president and owner of Poblocki & Sons, LLC, an upscale specialty sign designer and manufacturer. At the time of the hearing, October 28, 2003, he served as a director on six boards of directors, including EPIK, for which he was paid for his services. The only EPIK Board member he has not met is Mike Gandrud. The last time he met Cook was eighteen

to twenty years ago and he never conducted any business with him. He has known Jagla for fifteen years, but never transacted any business with him. Two or three years ago he, together with Jagla, individually investigated the possibility of acquiring a Dallas, Texas sign company, but the process went no further than an initial investigation. As for Foreman, Drury met him in the 1970's in an auditing context, but never involved himself in any sort of business transaction with him.

¶17 Ankerson argues that Drury cannot be independent because he admitted in his deposition taken on March 6, 2003, that he did not expect to be directly compensated for his service on EPIK's Board or on the Special Litigation Committee and that if he helps CCP out in the matter relating to one of its portfolio companies, future business may come his way. The record reflects that Jagla called Drury during the fall of 2002 and explained that one of his portfolio companies i.e., EPIK, was facing a lawsuit. He explained Wisconsin law provided that a committee of the Board of Directors was empowered to take some sort of responsive action and asked him if he would be willing to serve as a director. Drury told him he would think about it. During this conversation nothing was said about compensation for serving on the Board or any committee. Drury stated that he had not even thought about compensation until Ankerson's counsel questioned him about the matter on March 6, 2003. When questioned further, it was then that Drury made the statement above cited. At the March 23, 2003 hearing before the trial court, Drury testified on direct examination that he was elected to the Board of EPIK on January 22, 2003, and that he had been compensated for his service on the Board. On cross-examination, he affirmed that statement, added that his compensation was the same as Riopelle, and that Jagla told him this before he and Riopelle had rendered their committee decision on September 25, 2003. On redirect, Drury stated that he was paid for his service as a director and not as a

Special Litigation Committee member at the rate of $1000 a day or $500 for a half day. When asked if the compensation he received from EPIK for service as a Board member would ever impact his work as a Special Litigation Committee member, he responded negatively, saying: "I built a reputation in this business [going] over 30 odd years. That being thought of in the community as having a very high level of integrity. $1,000 one way or the other isn't going to have an impact on doing the right thing."

¶18 Ankerson concedes that Drury's business relationships may not disqualify him in and of themselves, but argues they may explain why Drury expects bigger and better things from the defendants in the future in return for gratuitously helping them out in this case. The problem with this reasoning is that the services performed by Drury were not gratuitous.

¶19 With respect to Drury's status of independence, the trial court made the following findings of fact. Drury, as the owner of Poblocki & Sons, LLC, is responsible for all management and operations decisions for that company. His prior history of eighteen years as a CPA with the accounting firm of PricewaterhouseCoopers establishes him as an appropriate candidate for a position on the Board of Directors of EPIK Corporation and as a member of the Special Litigation Committee. He has gained a business reputation with more than thirty years of experience in the business community in southeastern Wisconsin and has established a reputation for business integrity within the business community. Drury met Jagla fifteen years ago when reviewing a business opportunity in which Jagla was interested. Neither party, however, pursued the opportunity after the initial review. Drury does not have a social relationship with either Jagla or Foreman, nor has he conducted any business with Jagla or Forman. Finally, the court found that the limited contacts Drury has had with Jagla and Foreman do not

appear to have affected or impaired his ability to sit impartially as a special committee member for EPIK Corporation.

¶20 Wisconsin's special litigation law and the requirement of independence does not require "'the complete absence of any facts which might point to non-objectivity.'" ***Einhorn***, 235 Wis. 2d 646, ¶45 n.39 (citation omitted).

¶21 Ankerson challenges Riopelle's status of independence because in 1992, he told Jagla and Foreman he wanted to run his own company and the following year they offered Riopelle the opportunity to purchase Wisconsin Film & Bag, Inc. in a leveraged buyout purchase. The transaction was financed by the venture capital company with which Jagla and Foreman were then affiliated. Riopelle became president of the company and remains its president today. Ankerson claims Riopelle agreed to serve on the Board of EPIK for no money as a favor to old friends. He claims error on the part of the trial court for failing to explain Riopelle's fundamentally disqualifying background.

¶22 The trial court found that since 1969, Riopelle has been an executive or manager of several business enterprises. He is currently the Chief Operating Officer of Wisconsin Film & Bag, Inc. He sits on the boards of directors of ten different corporations throughout the State of Wisconsin and has served as an outside director of numerous entities for many years. He has demonstrated the responsibilities and knowledge as a member of the boards of directors that include corporate governance, fiscal responsibility for the well being of the corporation, and fiduciary responsibility for the decisions made by members of each of these boards of directors. He understands the oversight obligations of management of each of these corporations and recognizes the natural tension existing between management and a board of directors relating to the progression of corporate

governance. He has had no social relationship with either Foreman or Jagla. He has had no direct business dealings with either Foreman or Jagla since 1998. Riopelle's only business relationship with Foreman and Jagla was that of fellow board members of Wisconsin Film & Bag, Inc. and Medalcraft Mint, Inc. It further found that the limited contacts he had with Foreman and Jagla did not appear to have affected or impaired his ability to sit impartially as a Special Litigation Committee member for EPIK Corporation. Last, Riopelle's thirty years of experience in corporate governance makes him a suitable candidate to sit on the Board of Directors of EPIK Corporation and act as an independent member of EPIK's Special Litigation Committee.

¶23 Our review of the record also shows the following. In 1992, Riopelle served as an outside director of Medalcraft Mint. Foreman and Jagla also served on Medalcraft's Board as representatives of the majority stockholder, Bank One Venture Corporation. Bank One Venture financed the purchase of Wisconsin Film & Bag, Inc. Riopelle became a minority shareholder and chief operation officer of the company.

¶24 Foreman and Jagla were board members from 1993 to the fall of 1998, when Bank One Venture ceased having a financial ownership in the company. We found nothing in the record to clearly demonstrate that Riopelle did not expect compensation for his service on the Board of EPIK. To the contrary, when he was deposed on March 11 in response to questions of Ankerson's counsel, he stated he did not have an agreement for compensation for service on the EPIK Board. He further testified that although he did not expect to be paid for the Special Litigation Committee work, he did expect to be paid for Board work. As of the date of his deposition, there had only been one meeting and that was

telephonic. In June of 2003, he was notified that he would be paid $1000 for a full day's face-to-face service and $500 for a half-day's service.

¶25 On redirect examination, special counsel asked Riopelle why he was requested to sit on companies' boards of directors and Riopelle replied:

> I think that throughout the 35 years that I've lived and worked primarily in Wisconsin, I have gotten to know an awful lot of people who have come to respect my business acumen and my personal integrity. And they've felt for a variety of reasons that I could bring value to their board. I think that's primarily why.

¶26 Lastly, Ankerson contends the Special Litigation Committee could not function independently because it was represented throughout by EPIK's own attorneys who were selected and paid by the defendants.

¶27 After hearing all of the evidence presented on this issue, the trial court found as a matter of fact that counsel for the Special Litigation Committee and his law firm had never previously represented either the members of the Special Litigation Committee or EPIK Corporation. It further found that counsel for the committee acted impartially and in the best interest of the corporation and the committee in counseling the members of the committee throughout the procedure.

¶28 The basis for Ankerson's claim that counsel for the Special Litigation Committee was not independent is that he was paid by the defendants and he dominated and controlled the work of the committee. This claim centers on the seventh factor that our supreme court urged trial courts to consider when issues of the independence of a Special Litigation Committee arise. Specifically, the court stated: "Courts should be more likely to find a special litigation committee independent if the committee retains counsel who has not represented

individual defendants or the corporation in the past." ***Einhorn***, 235 Wis. 2d 646, ¶41.

¶29 In explaining this factor, the court noted that: "Several courts have stated that retention of objectively independent counsel is highly recommended, although failure to do so does not necessarily prevent a special litigation committee from being independent." ***Id.***, ¶57 (footnote omitted).[5]

¶30 The record before us reveals that this derivative action was commenced by the filing of the summons and complaint on February 1, 2002. Initially, EPIK was represented by David J. Sisson, who had represented EPIK in the past. On August 28, 2002, however, Thad W. Jelinske was court-approved as substituted counsel for the purposes of this litigation. He was paid by EPIK, and advised the committee. He drafted the memorandum decision, which recommended dismissal of the action, which was approved by the committee members.

¶31 The cross-examination of Riopelle reveals that Jelinske provided all the advice on the legal issues that was required of the committee members during the course of their work. Jelinske advised them how to evaluate the evidence and the legal arguments submitted by counsel of the contesting parties. The committee members did not view their efforts as investigative because they only reviewed information provided to them by counsel of the respective parties in the form of

[5] In a footnote, the court refers to two cases to support this contention: ***In re Par Pharmaceutical, Inc. Derivative Litigation***, 750 F. Supp. 641, 647 (S.D.N.Y. 1990) ("Both New York and Delaware law contemplate that a special litigation committee be represented by independent counsel."); and ***Kaplan v. Wyatt***, 499 A.2d 1184, 1190 (Del. 1985) (although use of in-house counsel is not recommended, it is not fatal to the special litigation committee's investigation).

legal documents, answers to question they posed to counsel, and counsel's oral argument. Riopelle testified that he was not aware of anything that Jelinske did to assist them in their work. Only counsel for the respective parties provided the committee with any information. Then the committee reviewed all the information and reached a decision. Counsel then drafted the memorandum decision.

¶32 Drury's testimony essentially corroborated Riopelle's as to the methodology of the process and counsel's role. He stated that counsel did not engage in an independent investigation because the parties had agreed to do their own investigation and then rely upon the results. He believed that the committee had acted independently, impartially and in good faith. He further testified that neither he nor Riopelle felt the need to consult with another attorney or other professionals, which they had the authority to do. He felt very comfortable with the advice he had received. There was nothing that developed that suggested that he needed further legal advice. Finally, there was nothing in the process that caused him to believe that counsel was anything other than independent.

¶33 Ankerson's claim of the absence of independence is essentially a disagreement with the trial court's findings of fact and thereby the basis for its conclusions of law. "When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and of the weight to be given to each witness's testimony." ***Lessor v. Wangelin***, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998). In this capacity, the trial court is in a far better position than an appellate court to make this determination because it has the opportunity to observe the witnesses and their demeanor on the witness stand. ***Id.*** In ***State v. Owens***, 148 Wis. 2d 922, 436 N.W.2d 869 (1989), our supreme court illuminated these principles by explaining:

> Different witnesses' testimony may be contradictory and at times one witness's testimony may be inherently inconsistent. The trial judge not only hears the testimony, but also sees the demeanor of the witness and the body language. As a result, the trial judge hears the emphasis, volume alterations and intonations. The trial judge also has a superior view of the total circumstances of the witnesses' testimony. Consequently, the trial court's findings of fact are only upset when clearly erroneous.

Id. at 929.

¶34 Confronted with the conflicting testimony, it was the trial court's obligation to resolve it. The fact finder does not only resolve questions of credibility when two witnesses have conflicting testimony, but also resolves contradictions in a single witness's testimony. In ***Thomas v. State***, 92 Wis. 2d 372, 381, 284 N.W.2d 917 (1979), the court stated: "Where there is conflict in a witness' testimony it is the province of the trier of fact, the court in this case, to determine the weight and credibility to be given her testimony."

¶35 We find these rubrics of review helpful in resolving the question of the "independence" of the members of the Special Litigation Committee and its work product. We have thoroughly reviewed the record, painstakingly tracking the stated sources that form the basis for Ankerson's claim of the lack of independence on the part of Drury, Riopelle and the committee's counsel, Jelinske. Doubtless, the minds of reasonable fact finders can differ given the same evidence to evaluate, and from which reasonable inferences may be induced. Notwithstanding the many instances of contrary and controverted evidence submitted and the dauntless task of sifting and winnowing that faced the fact finder, we cannot conclude that any of the trial court's findings are clearly erroneous.

¶36 Based upon these findings for which there is reasonable support in the record, Ankerson has failed to demonstrate that any of the alleged negative circumstances or outside influences raised by him impacted upon Drury's and Riopelle's ability to objectively assess the merits of the statutory issue before them.

¶37 Jelinske did not represent individual defendants and had not represented EPIK in the past. Regardless of how counsel may have worked with the committee and participated with the committee members in preparing the memorandum recommending dismissal, it was the committee members who made the ultimate decision for dismissal. They then signed off on a document that was presented to them reflecting their decision. The fact that Jelinske was paid by EPIK is irrelevant. The Board of Directors of EPIK, pursuant to the statutory authority given it, authorized the establishment of the Special Litigation Committee. It was only natural that the corporation would pay for Jelinske's services. Succinctly expressed, there is an absence of evidence showing that counsel's activity altered the outcome of the committee's work or impaired the independence of the committee in making its recommendation for dismissal.

¶38 The trial court "in reviewing the totality of the circumstances and assessing the credibility of the witness," concluded as a matter of law that Riopelle and Drury were independent members of the Special Litigation Committee of EPIK Corporation, acted in good faith, and conducted a reasonable inquiry into the derivative claims of EPIK Corporation. Its conclusions have more than adequate

support in the evidence. Therefore, the trial court did not err by dismissing the derivative claims.[6]

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[6] CCP filed a motion seeking to dismiss the appeal, arguing that Ankerson waived his right to appeal. Because we have disposed of this case by addressing the merits of the appeal, we deny the motion to dismiss the appeal.