

Appeal No. 2005AP995

Cir. Ct. No. 2003CV488

**WISCONSIN COURT OF APPEALS
DISTRICT II**

MARIE L. KASTEN,

PLAINTIFF-APPELLANT,

V.

DORAL DENTAL USA, LLC,

DEFENDANT-RESPONDENT.

FILED

APR 05, 2006

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

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

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUES

1. Whether WIS. STAT. § 183.0405 (2003-04),¹ part of the Wisconsin Limited Liability Company Law (WLLCL), grants a broad right of member access to limited liability company records that, absent contrary language in the LLC operating agreement, embraces informal and nonfinancial records.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

2. If the court determines that the statute grants members a broad inspection right, whether e-mails can be classified as “records” under WIS. STAT. § 183.0405(2) such that they are subject to a member’s inspection.

FACTS

Doral Dental USA, LLC, is a Wisconsin LLC that was organized in August 1996. As part of a divorce settlement in 2001, Marie L. Kasten received a 23.1% membership interest in Doral Dental.

In late 2002 and 2003, Doral Dental began negotiating with potential buyers. In February 2003, Kasten started requesting certain documents from Doral Dental. She requested, inter alia, “various business records, financial and tax records and ledgers, invoices, agreements, contracts, employment records, letters of intent” and the “most current status of negotiations with suitors for Doral.” Kasten apparently requested these documents because she was concerned that the transactions that were in negotiations would adversely impact her interest in the company. Kasten has requested numerous other documents since that time.

Doral Dental complied with some, but not all, of Kasten’s requests. In November 2003, Kasten filed a lawsuit to enforce her rights, pursuant to WIS. STAT. § 183.0405 and Doral Dental’s operating agreement, to inspect and copy the remaining Doral Dental records and documents. In July 2004, Kasten filed a motion to compel, claiming that Doral Dental had not provided several of the documents she had requested. Her requests included “drafts of the sales documents and exhibits” and e-mail correspondence “by/to/from” various LLC members and their counsel and “between officers or directors” of Doral Dental.

The court held that Kasten was not entitled to inspect the e-mails or drafts of documents she requested. The court concluded that e-mails are not “documents or records,” but “communications.” The court, however, ruled that Kasten had the right to inspect other written correspondence.

DISCUSSION

This case presents a classic books-and-records dispute, but in an emerging context. Kasten maintains that the WLLCL and the operating agreement for Doral Dental grant her, in her capacity as a member of the LLC, the right to inspect and copy LLC e-mails and document drafts.² A careful and considered canvas of LLC jurisprudence reveals that the scope of a member’s right to inspect an LLC’s records and the question of whether an e-mail is a company record subject to a member’s inspection have not been touched upon in Wisconsin.

Parties’ arguments. Kasten maintains that the WLLCL and the operating agreement grant her the right to inspect and copy e-mails and “drafts of documents.” She urges a broad interpretation of a member’s inspection rights based upon the language in WIS. STAT. § 183.0405(2) granting members the right to inspect “any other limited liability company record” and the language in the operating agreement granting members the right to inspect “all other Company records” and “Company documents.”

Doral Dental, on the other hand, reads WIS. STAT. § 183.0405(2) and the operating agreement as granting only a narrow right to inspect the documents

² Because her appeal requires the court to engage in statutory and contract construction, it presents questions of law subject to the court’s independent review. See *Gottsacker v. Monnier*, 2005 WI 69, ¶13, 281 Wis. 2d 361, 697 N.W.2d 436.

and records specifically enumerated in § 183.0405(1). Doral Dental further asserts that, at most, the statutory term “record” and the agreement’s term “documents” refer to finalized records maintained to “reflect significant company transactions or events or its financial condition.” Doral Dental posits that the e-mails and drafts do not qualify as such.

The WLLCL and the operating agreement. The WLLCL’s provisions concerning a member’s inspection rights are found in WIS. STAT. § 183.0405. Section 183.0405(1) sets forth a list of records that an LLC is required to keep at its principal place of business.³ Section 183.0405(2) provides

³ WISCONSIN STAT. § 183.0405 states, in part:

(1) A limited liability company shall keep at its principal place of business all of the following:

(a) A list, kept in alphabetical order, of each past and present member and, if applicable, manager. The list shall include the full name and last-known mailing address of each member or manager, the date on which the person became a member or manager and the date, if applicable, on which the person ceased to be a member or manager.

(b) A copy of the articles of organization and all amendments to the articles.

(c) Copies of the limited liability company’s federal, state and local income or franchise tax returns and financial statements, if any, for the 4 most recent years or, if such returns and statements are not prepared for any reason, copies of the information and statements provided to, or which should have been provided to, the members to enable them to prepare their federal, state and local income tax returns for the 4 most recent years.

(d) Copies of all operating agreements, all amendments to operating agreements and any operating agreements no longer in effect.

(continued)

that any member may, upon reasonable request, inspect and copy any required LLC record under subsec. (1) at that member's own expense during ordinary business hours and "unless otherwise provided in an operating agreement, any other limited liability company record, wherever the record is located."

The operating agreement references member rights to inspection in two places and seems to grant similar inspection rights as the WLLCL. The agreement states in pertinent part:

Books of Account. The Manager shall maintain full and accurate books of account for the Company at the principal Company office. Each Member shall have access to and the right to inspect and copy such books and all other Company records at all reasonable times.

....

Company Books. Upon reasonable request, each Member shall have the right, during ordinary business hours, to inspect and copy Company documents at the requesting Member's expense.

Scope of inspection rights. Doral Dental's argument that WIS. STAT. § 183.0405(2) limits member inspection to the records enumerated in

(e) Unless already set forth in an operating agreement, written records containing all of the following information:

1. The value of each member's contribution made to the limited liability company as determined under s. 183.0501(2).

2. Records of the times at which or the events upon which any additional contributions are agreed to be made by each member.

3. Any events upon which the limited liability company is to be dissolved and its business wound up.

4. Other writings as required by an operating agreement.

§ 183.0405(1) does not seem consistent with the language of the statute itself. As Doral Dental points out, the WLLCL clearly provides that any member may, upon reasonable request, inspect and copy any LLC record required under subsec. (1). Sec. 183.0405(2). However, the statute seems to go one step further. It also provides that, unless otherwise stated in an operating agreement, the member's right to inspect and copy records extends to "any other" records of the LLC, regardless of whether they are required to be kept by the statute. *See* § 183.0405(2); J. WILLIAM CALLISON AND MAUREEN A. SULLIVAN, LIMITED LIABILITY COMPANIES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 15.59 (2005).

Should the court choose to reject Doral Dental's argument that only the records required under WIS. STAT. § 183.0405(1) are subject to member inspection under § 183.0405(2), the question for the supreme court becomes whether the phrase "any other limited liability company record" is to be read as broadly encompassing nonfinal or informal documents such as drafts of documents or correspondence containing financial and nonfinancial information. The WLLCL does not define the term "record" and its legislative history is of little assistance. Therefore, the legislature's intent in granting a member access to any existing company "record" is not clear. *See* § 183.0405(2).

On the one hand, Doral Dental cites to other corporate inspection statutes that it claims confirm its narrow understanding of the term "records." The Wisconsin Uniform Limited Partnership Act, WIS. STAT. ch. 179, permits limited partner inspection of only the records required to be maintained by the statute. WIS. STAT. § 179.05(2). These records include the partnership's tax returns and records, financial statements of the partnership and other formal documents pertaining to the finances of the partnership. Sec. 179.05(1). In a similar vein, the

Wisconsin Business Corporation Law, WIS. STAT. ch. 180, limits shareholder inspection to formal company documents such as minutes of meetings, bylaws and accounting records. *See* WIS. STAT. §§ 180.1602 and 180.1601. The WLLCL does borrow liberally from these two statutes and a member of an LLC, depending on the structure of the LLC as set forth in the operating agreement, does share certain characteristics with partners and shareholders. *See* JOSEPH W. BOUCHER ET AL., LLCs AND LLPs: A WISCONSIN HANDBOOK § 1.10 (rev. ed. 1999). Doral Dental further rejects a broad reading of the statute on the basis that it would impose a hefty burden on LLCs in that it would require them to make nearly all company files and documents available to its members.

On the other hand, as Kasten points out, the WLLCL, unlike the other statutes, explicitly refers to “any other limited liability company record.” WIS. STAT. § 183.0405(2). It is difficult to infer an implicit limitation on the availability of company documents in the face of this broad language. Furthermore, as Kasten observes, the statute also states that the member may inspect the other records “unless otherwise provided in an operating agreement.” *See* § 183.0405(2). The statute therefore can be read as granting a broad right of inspection and leaving it up to the LLCs to narrowly tailor their inspection rights to suit their own purposes and management structure.⁴ This understanding is consistent with the WLLCL drafter’s intention to create a business entity

⁴ Doral Dental maintains that its operating agreement is more restrictive than the statute because a member’s inspection rights fall under the headings “Books of Account” and “Company Books.” However, the operating agreement does not simply speak to “Company Books” or “Books of Account”; like the statute, it also provides member inspection of “*all other Company records*.” (Emphasis added.) It further contains a reference to company “documents,” a term that potentially could be construed even more broadly than the term “records.”

characterized by flexibility and freedom of contract. *Gottsacker v. Monnier*, 2005 WI 69, ¶19, 281 Wis. 2d 361, 697 N.W.2d 436.

Generally speaking, it seems that in the context of corporate inspection cases, courts have tended to define the scope of the inspection right broadly. *See, e.g., Wortham & Van Liew v. Superior Court*, 188 Cal. App.3d 927, 932 (Cal. Ct. App. 1987) (noting that the inspection rights of limited and general partners are broad); *McCain v. Phoenix Resources, Inc.*, 185 Cal. App.3d 575, 580 (Cal. Ct. App. 1986) (noting that limited partners have a liberal right of inspection). While the cases have not necessarily included requests to inspect informal documents such as e-mails or drafts of documents or nonfinancial records, they are instructive on the breadth of the term “record.” For example, in *Meyer v. Ford Industries, Inc.*, 538 P.2d 353, 358 (Ore. 1975), the court extensively analyzed the scope of the phrase “books and records of account,” and concluded that it was not “limited to ‘books and records of account’ in any ‘ordinary,’ literal or otherwise limited sense,” but should be broadly constructed “so as to extend to all records, contracts, papers and correspondence to which the common law right of inspection of a stockholder may properly apply.” *See also Riser v. Genuine Parts Co.*, 258 S.E.2d 184, 186 (Ga. Ct. App. 1979).

E-mails as records. If the court determines that the WLLCL contemplates a broad grant of access to company records, the more interesting question of whether an e-mail is a company “record” comes into play. The trial court drew a distinction between e-mails and written correspondence and concluded that Kasten was only entitled to inspect written correspondence.

We are not aware of any Wisconsin case that grapples with the important question of whether e-mails should be treated as company records

subject to inspection in a corporate setting. The above-cited cases, which suggest a broad right of inspection that includes “correspondences,” were written before e-mail became a primary source of business communication and the courts could not have even envisioned that such would be the case. See *Meyer*, 538 P.2d 353 (1975 case); *Riser*, 258 S.E.2d 184 (1979 case).

On the one hand, e-mail correspondence may be of a different character than most company files and documents and, as a result, may not be properly characterized as a company record. E-mail, unlike like other written correspondence, most often takes on a frank, conversational tone and involves messages that, like work product to attorneys, reflect unguarded thoughts in progress or comments. E-mail messages frequently contain statements that never would have been made in a formal memorandum or company record or that are not related to company finances.

On the other hand, if the court adopts a broad interpretation of the statute that includes more informal company records such as correspondence, this may be a distinction without a difference. The same information can be sent as a letter or memo by hard copy or as an e-mail transmission. Furthermore, in other contexts, courts have admitted substantive e-mail communications into evidence either as “records” or “documents.” See, e.g., *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1283-84, 1287 (D.C. Cir. 1993) (holding that federal government e-mail is a record as defined by the Federal Records Act). Finally, although the WLLCL was based in part upon the Prototype Limited Liability Company Act, see *Gottsacker*, 281 Wis. 2d 361, ¶18, it is worth noting that the Uniform Limited Liability Company Act defines the term “records broadly to include all recorded information.” See J. William Callison & Allan W. Vestal, “They’ve Created A Lamb With Mandibles of Death”: *Secrecy, Disclosure, and*

Fiduciary Duties in Limited Liability Firms, 76 IND. L.J. 271, 278 & n. 34 (2001) (citing the ULLCA as defining “record” as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form”).

CONCLUSION

This books-and-records dispute presents issues concerning the breadth of an LLC member’s inspection rights and the treatment of e-mails in the context of those rights that are of first impression in Wisconsin and, perhaps, the country. The resolution of these issues will have a significant impact on the volume of information that an LLC must make available to its members and the manner in which LLCs choose to structure their operating agreements. The supreme court is the law-declaring and law-defining court and as such is the proper judicial authority to resolve the issues. Accordingly, we respectfully ask the supreme court to impart definitive guidance, which will be of great assistance to the bench, bar and business community as they continue to navigate uncharted LLC territory.

