COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP529 **Cir. Ct. No. 2008CV931**

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

IN THE MATTER OF THE GERHARD G. POEHLING FAMILY TRUST U/A DATED DECEMBER 29, 1975:

JOHN POEHLING, SR. AND JOHN POEHLING, JR.,

OBJECTORS-APPELLANTS,

V.

TRUST POINT, INC.,

TRUSTEE-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County: SCOTT L. HORNE, Judge. *Affirmed*.

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. This case involves a dispute between Trust Point, Inc., trustee of the Gerhard G. Poehling Family Trust, and two trust beneficiaries,

John Poehling, Sr., and John Poehling, Jr. The Poehlings appeal the circuit court's order approving Trust Point's administration of the trust for a three-year period ending in April 2013. The Poehlings seek reversal on two grounds. The first ground relates to Trust Point's decision not to sell the trust's primary asset, a company called First Supply, without obtaining an independent appraisal of the company's value. The second ground relates to Trust Point's tax reporting of the trust's distributed income. We affirm.

Background

¶2 Trust Point petitioned the circuit court, requesting court approval of Trust Point's administration of the trust from May 4, 2010, through April 30, 2013. The Poehlings objected. Trust Point moved for summary judgment on the Poehlings' objections. In briefing, Trust Point argued that the Poehlings had the burden to prove a breach of fiduciary duty claim and that the Poehlings failed to point to evidence to support such a claim. The circuit court granted Trust Point's motion, and approved Trust Point's administration of the trust for the pertinent time period.

Discussion

¶3 We review summary judgment de novo, construing the facts and reasonable inferences from those facts in the nonmoving party's favor. ***Strozinsky v. School Dist. of Brown Deer***, 2000 WI 97, ¶32, 237 Wis. 2d 19, 614 N.W.2d 443. Summary judgment is granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2013-14).

¶4 Here, we perceive no material factual disputes. Rather, the question is whether the undisputed facts require granting Trust Point's petition for approval of its administration of the trust for the time period specified. Although Trust Point is the petitioner and the party that moved for summary judgment, Trust Point argues that the Poehlings, as objectors, have the burden of proof. The Poehlings do not dispute that the burden is theirs. And, we have determined, in prior litigation between the Poehlings and Trust Point, that in these circumstances the Poehlings, as the objectors, carry the burden. *See* ***Poehling v. Trust Point, Inc.***, No. 2012AP1817, unpublished slip op. ¶44 (WI App May 16, 2013), *review denied*, 2014 WI 3, 352 Wis. 2d 354, 842 N.W.2d 362.

¶5 As to what the Poehlings must prove, the parties seem to agree that it is the elements of a claim for breach of fiduciary duty. Those elements are: "(1) the [trustee] owed the [objectors] a fiduciary duty; (2) the [trustee] breached that duty; and (3) the breach of duty caused the [objectors'] damage." *See* ***Berner Cheese Corp. v. Krug***, 2008 WI 95, ¶40, 312 Wis. 2d 251, 752 N.W.2d 800.

¶6 Before proceeding to the Poehlings' arguments, we summarize some additional undisputed facts. We also summarize some of the Poehlings' evidence, as well as the reasonable inferences from that evidence, as presented by the Poehlings in their briefing.

¶7 In 1975, Gerhard Poehling established the trust, naming his children as income beneficiaries and his grandchildren as remainder beneficiaries. There are currently six income beneficiaries and a much larger number of remainder beneficiaries. Objector John Poehling, Sr., is an income beneficiary, and objector John Poehling, Jr., is a remainder beneficiary.

¶8 Gerhard Poehling created the trust for three express purposes, as stated in the trust:

> 1. To provide financial security for [his] children and grandchildren, and a secure source of income.
>
> 2. To avoid constant acquisitions and reacquisitions of common stock of various plumbing supply companies owned by members of the family caused by deaths.
>
> 3. To assure continuous and smooth management and operation of the various plumbing supply companies.

¶9 It is undisputed that the phrase "various plumbing supply companies" refers to what is now First Supply. It is also undisputed that, at all times relevant here, the trust has been the sole owner of First Supply's stock, and that First Supply's stock has been the trust's primary asset.

¶10 Thus, the purposes of the trust seem to contemplate that First Supply will remain in the trust. However, the trust also contains terms providing that the trustee has discretion to sell assets and discontinue business enterprises. We will thus assume, as the Poehlings assert, that Trust Point is not required to retain First Supply in the trust no matter the impact on the trust beneficiaries. Rather, we will assume, as the Poehlings argue, that Trust Point has a fiduciary duty to act prudently and impartially in deciding whether to retain First Supply in the trust, and this includes the duty to *invest* prudently and impartially. Still, there can be no dispute that Trust Point's task is a difficult one, that is, Trust Point must balance the potentially conflicting interests of two classes of beneficiaries, while pursuing Gerhard Poehling's desire that First Supply remain a trust asset.

¶11 The Poehlings point to evidence that each income beneficiary's after-tax trust income peaked at $72,000 in 2009, dropped to $48,000 in 2010, and

remained at $48,000 through at least 2013. This represents a rate of return that has declined, based on some estimates of First Supply's value, from 1.51% to 1.25%. At the same time, the value of First Supply has increased to the apparent benefit of the remainder beneficiaries.

¶12 The Poehlings spend considerable briefing space referencing evidence, such as that immediately above, in an effort to persuade us that Trust Point's failure to sell First Supply is patently unfair to the income beneficiaries and, therefore, a breach of Trust Point's fiduciary duties. However, as we understand this part of the Poehlings' argument, it is not simply that Trust Point breached its duty by failing to sell First Supply. Rather, as we will now see, the Poehlings argue that the problem was Trust Point's failure to make a more informed decision.[1]

A. Retention Of First Supply In The Trust Without An Independent Appraisal

¶13 The Poehlings' first argument relates to Trust Point's decision not to sell First Supply without obtaining an independent appraisal of First Supply's value. Trust Point instead used appraisals obtained by First Supply, and also relied on Trust Point's own review of First Supply's financial records.

¶14 More specifically, the Poehlings argue that a reasonable fact finder could infer that Trust Point breached its duties of prudence and impartiality by retaining First Supply in the trust without obtaining an independent appraisal. The

[1] To the extent that the Poehlings' underlying concern is that Trust Point is administering the trust in a way that is unfair to the income beneficiaries, we are uncertain how this concern matches up with John Poehling, Jr.'s interests as a remainder beneficiary. Regardless, we do not dwell on the potentially different interests of John Poehling, Sr., and John Poehling Jr., both because the Poehlings have not made any individual arguments in their combined brief and because Trust Point does not dispute John Poehling, Jr.'s right to object.

Poehlings assert that, without an independent appraisal, Trust Point had no way, or at least no *reliable* way, of knowing the fair market value of First Supply and therefore no way of knowing whether a sale would better serve the beneficiaries' interests. According to the Poehlings, Trust Point "administered the Trust in the dark."

¶15 We are not persuaded by the Poehlings' independent-appraisal argument. As the circuit court recognized, the Poehlings point to no authority that imposes a duty on Trust Point to obtain and have the trust pay for an independent appraisal when other means of estimating fair market value were available.

¶16 The Poehlings *do* point to a paragraph in an expert's affidavit suggesting that the available appraisals estimated the value of individual company shares and that the sale price of an entire company "can be as high as 60%" above the appraised share price. However, we conclude that this evidence is not enough to support a finding that Trust Point unreasonably relied on existing appraisals. At most, this evidence supports a speculative possibility that the existing appraisals *might* have undervalued the sale price of First Supply, as a whole, by some unknown percentage between 0% and 60%.

¶17 Moreover, the Poehlings fail to make clear the underlying problem that exists if it is true that Trust Point was relying on an inaccurate appraisal. It is one thing to allege that Trust Point should have had better valuation information and another to explain why knowledge of a significantly higher value would have required Trust Point to sell First Supply. Without the latter, the Poehlings fail to demonstrate causal damage.

¶18 Expanding on the topic of damage, we pause to observe that the parties' briefing, at least as to the appraisal issue, lacks any discussion of the

damage element of the Poehlings' breach-of-fiduciary-duty claims. We are left wondering why the Poehlings believe that the evidence supports an inference that *damages or harm* resulted from the alleged failure to obtain and consider additional appraisal information. Perhaps there is an answer to this question, but the answer is not apparent to us from the parties' briefing. We do not address this resulting harm topic further, but mention it here because it seems like a topic that could arise in the future.[2]

¶19 The Poehlings also seem to be arguing that Trust Point wrongly believed that Trust Point lacked the authority to sell First Supply without the consent of third-party stock voters. If this is one of the Poehlings' arguments, it similarly leads nowhere because the Poehlings fail to demonstrate that a correct understanding of selling authority would have required a sale of First Supply to avoid a breach of fiduciary duty. For that matter, the Poehlings identify no evidence showing a causal connection between the alleged mistaken belief and Trust Point's decision not to sell First Supply. The Poehlings point to testimony by Trust Point's corporate designee indicating that Trust Point held this belief. However, this testimony does not support an inference that Trust Point's belief was the *reason* for Trust Point's decision not to sell First Supply. Rather the designee's testimony indicated that Trust Point never bothered approaching the other voters about a sale because Trust Point thought that retaining First Supply was in the beneficiaries' overall best interests.

[2] The parties' briefing suggests that the Poehlings and Trust Point dispute Trust Point's administration of the trust for periods of time after the period at issue here that ended in April 2013.

¶20 Before turning to the Poehlings' tax-related argument, we acknowledge that the Poehlings also seem to be making a broader argument that Trust Point simply failed to consider *at all* whether Trust Point should have sold First Supply during 2010-2013 and whether such a sale would have better balanced the beneficiaries' interests. For example, the Poehlings assert: "A reasonable fact finder could conclude that Trust Point … abused its discretion by failing to exercise it." However, to the extent that that is the Poehlings' argument, we fail to see what it adds to the arguments we have already addressed.

B. Tax Reporting Of Distributed Income

¶21 The Poehlings' next breach of fiduciary duty argument concerns Trust Point's reporting of lease income on tax returns and how that compares with the income Trust Point distributes to income beneficiaries. We summarize and discuss this argument below, but first address Trust Point's contention that issue preclusion applies to bar consideration of the topic.

¶22 Trust Point draws our attention to the circuit court's earlier decision to deny a request by John Poehling, Sr., to "distribute all trust income." Trust Point argues that the Poehlings' lease-income/tax-treatment argument is barred by issue preclusion because that earlier decision covers the same ground. The Poehlings, in one paragraph in their reply brief, assert that the "issue" is not the same. They do not otherwise address the issue preclusion factors. The Poehlings' response is inadequate. Thus, we could rely on Trust Point's facially valid issue preclusion argument to reject the Poehlings' lease-income/tax-treatment argument.

However, we follow the circuit court's lead and address the merits.[3] Before proceeding to the merits, we first add a few more background facts, again construing reasonable inferences in the Poehlings' favor.

¶23 First Supply does not pay stock dividends and, thus, the trust does not pass along stock dividends to the income beneficiaries. And, so far as the parties explain the situation to us, the profits of First Supply are not otherwise trust income and, therefore, are not distributed to the income beneficiaries as trust income. Instead, Trust Point has generated income for the income beneficiaries in recent years by creating a trust-owned real estate holding company that purchased real estate from First Supply and then leased that real estate back to First Supply. Lease income is distributed to the income beneficiaries. As the years have gone by, the holding company has had less mortgage interest to deduct on the real estate and, thus, the holding company's net income available for distribution to the income beneficiaries has decreased.

¶24 Turning to the Poehlings' more specific arguments, we acknowledge at the outset that we have difficulty understanding precisely what the Poehlings mean to argue. Accordingly, in summarizing their arguments we quote liberally from their briefing.

[3] Although the circuit court did not rely on issue preclusion, Trust Point prominently raised this topic in that court, and it is well established that we may affirm on alternative grounds. *See, e.g.*, ***Correa v. Farmers Ins. Exch.***, 2010 WI App 171, ¶4, 330 Wis. 2d 682, 794 N.W.2d 259. We acknowledge that this is a factually complicated case that justified the Poehlings' use of significant briefing space to explain the factual background, and that the Poehlings may have understandably needed to make strategic decisions about what arguments to develop. However, in order to reject Trust Point's issue preclusion argument, we would have needed more from the Poehlings.

¶25 The Poehlings argue, in the pertinent heading of their principal brief, that "the circuit court erred in approving Trust Point's accounts when Trust Point's representations to the IRS about how much trust income it was required to distribute cannot be reconciled with how much trust income it actually distributed." According to the Poehlings, the circuit court should not have approved Trust Point's administration of the trust "in the face of this inconsistency."

¶26 More specifically, the Poehlings explain the "inconsistency" as follows:

> Trust Point either (1) incorrectly prepared the Trust's tax returns by telling the IRS that under the trust agreement and state law, all the Trust's "distributable net income" is "required to be distributed" each year; or (2) correctly prepared the Trust's tax returns but then unlawfully failed to distribute all the Trust's "distributable net income" each year, as it told the IRS it was "required" to do. The circuit court had no need to decide which of these two mistakes Trust Point made, but it erred in approving Trust Point's accounts when it is clear that Trust Point mis-administered the Trust in one way or the other. Regardless of which error Trust Point made, its Trust accounts cannot possibly be right.

¶27 It is reasonably clear that the Poehlings mean to argue that Trust Point breached one or more fiduciary duties because, when it comes to trust income, there was a mismatch between what Trust Point reported to the IRS and what Trust Point actually distributed. What is less clear is the Poehlings' argument with respect to the Poehlings' burden of showing resulting harm. As to resulting harm, as best we can tell, the Poehlings make two harm arguments, but neither harm argument pans out.

1. First Harm Argument: Risk Of Adverse Tax Consequences

¶28 The Poehlings argue, as we understand it, that one harm caused by Trust Point's "inconsistent" approach is the risk that the IRS may take adverse action against the trust. The Poehlings argue: "[I]f it turns out that Trust Point's error lay in how it prepared the Trust's tax returns, its imprudent decision to provide the IRS with inaccurate information will have harmed all the Trust beneficiaries by exposing the Trust to the risk of back taxes, interest, and penalties." Indeed, as we read the Poehlings' summary judgment briefing in the circuit court, the Poehlings essentially took the position that Trust Point's tax reporting *was in fact incorrect*, thus exposing the trust to negative tax consequences.

¶29 In response, Trust Point contends that there was no inconsistency in its actions. Trust Point also contends that, under ***Logemann Bros. Co. v. Redlin Browne, S.C.***, 205 Wis. 2d 356, 556 N.W.2d 388 (Ct. App. 1996), the Poehlings' asserted risk of tax consequences based on tax reporting is not yet a cognizable injury.

¶30 The circuit court agreed with Trust Point's ***Logemann*** argument. As we explain below, the Poehlings fail to persuade us that the circuit court erred in relying on ***Logemann***. We therefore reject the Poehlings' tax-consequences-as-harm argument.

¶31 ***Logemann*** involved a malpractice claim against an accountant for filing allegedly faulty tax returns. *See* ***id.*** at 357-58. The court concluded that the claim could not proceed without some indication from the IRS that the tax return was faulty. ***Id.*** at 359-60, 363. More specifically, the court said that a "tax-related malpractice claim does not accrue until the IRS files a deficiency notice, enters

into a compromise agreement with the [trust], *or* accepts an amended return, which definitively reveals the amount of tax liability that was actually misstated on the allegedly erroneous return." *See* ***id.*** at 363. The court in ***Logemann*** reasoned that, until such IRS action, there is no injury to the taxpayer and the claim is premature. *See* ***id.***; *see also* ***id.*** at 361-62.

¶32 Here, it is undisputed that the IRS has not taken any of the actions described in ***Logemann*** or otherwise made an adverse determination against the trust. Based on these undisputed facts, the circuit court concluded that the Poehlings' tax-consequences-based objections were premature under ***Logemann***. In other words, the circuit court reasoned that, under ***Logemann***, any tax-related injury the Poehlings might suffer from tax reporting that was inconsistent with income distributions has not yet accrued. The circuit court determined that, if the IRS takes action in the future, nothing in the court's decision precludes the Poehlings from seeking relief then.

¶33 As we understand it, the Poehlings make two alternative arguments relating to ***Logemann***. First, they argue that ***Logemann*** actually *supports* their position that their objections were not premature. Second, they argue that ***Logemann*** is distinguishable. Neither argument persuades us.

¶34 As to ***Logemann*** supporting their position, the Poehlings argue that here, it is Trust Point, rather than the Poehlings, that is the party prematurely seeking relief under ***Logemann***'s reasoning. The Poehlings point out that Trust Point is the party that initiated this action seeking judicial approval of its administration of the trust. In other words, the Poehlings argue that the circuit court should have sustained their objections and should not have approved Trust Point's actions because Trust Point is the party here that is most like the plaintiff

in ***Logemann***. We disagree. Here, the Poehlings, as objectors, have the burden to prove the elements of a claim for breach of fiduciary duty. *See* ***Poehling***, No. 2012AP1817, ¶44. The Poehlings allege a tax-related tort claim and, therefore, they are in the same position as the plaintiff in ***Logemann***.

¶35 As to the Poehlings' argument that ***Logemann*** is distinguishable, the Poehlings assert that their case, unlike ***Logemann***, involves "more than a potentially faulty tax return that may invite penalties from the IRS." Rather, the Poehlings assert, the "fundamental problem is that Trust Point has administered the Trust inconsistently" in a way that "harms the Trust's income beneficiaries—independently of any action the IRS may take." This brings us to the Poehlings' second harm argument.

2. Second Harm Argument: Delaying The Inevitable

¶36 Alternatively, the Poehlings seem to be arguing that, *regardless* whether Trust Point's tax reporting was correct or incorrect, Trust Point's alleged inconsistency caused a different harm. As we understand it, the Poehlings argue that this other harm is that Trust Point's inconsistency allowed Trust Point to perpetuate the status quo and put off the inevitable day when Trust Point will need to sell First Supply or otherwise change the composition of assets in the trust in order to provide a reasonable income to the income beneficiaries.[4] Taking this as

[4] To quote the Poehlings' argument:

> The harm of putting a judicial imprimatur on Trust Point's contradictory manner of administering the Trust is that it perpetuates a situation in which the income beneficiaries are receiving less income than they were five years ago, are getting no more than a 1.25% rate of return on the Trust's assets, and have no prospect of seeing more income in the future.

(continued)

the Poehlings' second harm argument, we fail to see how delaying this inevitable need is, in and of itself, a cause of harm to the Poehlings. If there is merit to this theory, the Poehlings do not adequately explain it.

¶37 We observe that the Poehlings do *not*, as far as we can tell, make a third harm argument that we might have expected, namely, an argument that, if Trust Point *correctly* reported to the IRS, then Trust Point distributed too little income to John Poehling, Sr., and other income beneficiaries in some knowable, specified amount. Rather, at most, some of the Poehlings' assertions seem to imply this theory of harm. We are uncertain why the Poehlings do not make the argument, but it appears the reason may relate to Trust Point's issue preclusion argument. Regardless the reason, we need not address an argument the Poehlings do not make.

> If Trust Point distributed the same amount it tells the IRS is "required to be distributed" each year, it would be forced to do one of two things. First, it could manage the Trust's investments differently, so as to yield cash flow allowing Trust Point to distribute all of Trust's "distributable net income" each year, as it has been telling the IRS it is "required" to do. Second, Trust Point could tell the IRS the truth about how much income Trust Point retains in the Trust.
>
> Yet even if it chose that second option, Trust Point again would have to consider managing the Trust's investments differently in order to support larger cash distributions, and to justify the corresponding "income distribution deductions" that Trust Point has determined are the best tax strategy for the Trust and its beneficiaries. *See* Wis. Stat. § 881.01(3)(c)3. (2011-12) (stating that a fiduciary must consider "[t]he expected tax consequences of investment decisions or strategies"). Either way, Trust Point would need to confront the cash flow problem that resulted from Trust Point's investment decisions and that now prevents Trust Point from distributing everything it tells the IRS it is "required" to distribute each year.

(Paragraph breaks added.)

¶38 Before concluding, we acknowledge the broader undercurrent of the Poehlings' argument, namely, that it is unfair that the income beneficiaries' low rate of return and net income decreased while the value of First Supply apparently increased during the three years in question. However, like the circuit court, we fail to see how the evidence so far supports a finding that Trust Point breached fiduciary duties that caused harm. As the circuit court aptly summarized:

> I can't find that the facts in this case demonstrate that the trustee has been unreasonable in the way that they've handled the trust over [the] 2010 to 2013 years. As I say, if the pattern continues, and it appears over a longer period of time that the income beneficiaries have been disadvantaged vis-à-vis the remainder beneficiaries, then I think a stronger case could be made on the part of the objectors. And I'm making [my] determination only for the 2010 to 2013 tax years.

To repeat, Trust Point has the difficult task of balancing the potentially conflicting interests of two classes of beneficiaries, while pursuing Gerhard Poehling's desire that First Supply remain a trust asset. We agree with the circuit court that the evidence the Poehlings point to does not support a finding that Trust Point, during the time period that matters here, failed to strike a reasonable balance. We agree with the circuit court that no reasonable jury could find otherwise. We express no opinion on Trust Point's administration of the trust after April 2013.

Conclusion

¶39 For the reasons above, we affirm the circuit court's order approving Trust Point's administration of the trust from May 4, 2010, through April 30, 2013.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).