COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1633 **Cir. Ct. No. 2009CV1928**

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

ESTATE OF JAMES F. SHEPPARD, BY MICHAEL E. MCMORROW, PERSONAL REPRESENTATIVE,

PLAINTIFF-APPELLANT,

V.

WILLIAM F. SPECHT,

DEFENDANT,

COUSINS SUBMARINES, INC. AND COUSINS SUBS SYSTEMS, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. This appeal by the Estate of James F. Sheppard represents another chapter in the litigation involving the Estate, Sheppard's cousin William F. Specht, and two closely held corporations that Sheppard and Specht co-founded in 1972, Cousins Submarines, Inc. and Cousins Subs Systems, Inc., (collectively, "Cousins"). To address a shareholder deadlock, the circuit court ordered the Estate to sell its Cousins stock to Specht at fair market value as determined by an appraiser. We accord great deference to the circuit court's equitable remedy, and thus affirm the order.

¶2 Sheppard and Specht were fifty-percent shareholders and the sole directors of Cousins. In 2006, they began seeking a third-party buyer. In early 2007, they were in serious negotiations with Crosslane, Ltd., a British firm. When Sheppard died a few months later, his estate became a fifty-percent shareholder. Soon after, Specht unilaterally ended negotiations with Crosslane. The Estate contended that Specht purposefully stymied the sale of Cousins with a plan to become a 100 percent shareholder, then sell the corporations to Crosslane himself.

¶3 The Estate sued Specht on grounds that he breached his fiduciary duty as a shareholder and a director, and sought judicial dissolution under WIS. STAT. § 180.1430(2)(c) (2011-12).[1] The circuit court granted summary judgment to Specht on the fiduciary duty issue and to the Estate on its claim for judicial dissolution. The Estate appealed only the grant of summary judgment to Specht; this court affirmed. *See* ***Estate of Sheppard v. Specht***, 2012 WI App 124, ¶1 and n.1, 344 Wis. 2d 696, 824 N.W.2d 907.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

¶4 After granting summary judgment to the Estate, the circuit court set about determining an appropriate remedy. The Estate intentionally had created a deadlock in voting for corporate directors for two consecutive annual shareholder meetings so as to have the court dissolve Cousins and sell the assets through a receiver. *See* WIS. STAT. §§ 180.1430(2)(c), 180.1432. Specht and Cousins urged either no action, the appointment of a provisional director, or a forced sale of the Estate's stock to Cousins or Specht at a value determined by an appraiser.

¶5 The court appointed a provisional director and, after briefing and a hearing comprising six witnesses' testimony and arguments by counsel, ordered the Estate to sell all of its Cousins stock either to Cousins or to Specht, at Specht's option, for an appraiser-determined fair market value. Finally, the court ruled that it would retain jurisdiction to enable it to review the appointment.

¶6 From the three "perfectly suitable" appraisers nominated, the court appointed Scott Wildman, whose qualifications it found most closely suited the task at hand. Wildman valued the Estate's fifty-percent interest in Cousins at approximately $2.6 million.[2] The amount reflected a twenty-five percent "lack of marketability discount" due to the "inability to offer the company for sale or to liquidate its assets."

¶7 Objecting that Wildman's appraisals were flawed and warranted further discovery, the Estate moved that they not be used to set the price for the forced sale of its stock to Specht. The court addressed each point of criticism and

[2] Cousins Submarines, Inc., owns and operates sixteen company-owned stores. Cousins Subs Systems, Inc., is a franchisor of, at the time, 155 independently owned stores. Wildman appraised them at $1.161 million and $1.429 million, respectively

explained why it disagreed. It denied the Estate's motion, affirmed the values in Wildman's reports, and ordered the Estate to tender its stocks for sale within ten days. Leaving the door open to the possibility that Specht self-servingly thwarted the Crosslane sale, the court stated that it would retain jurisdiction over the matter for eighteen months to review a sale of the corporations should one occur. The stock sale to Specht was accomplished; the Estate appeals.

¶8 The Estate first argues that the trial court erred by ordering a forced sale of its stock to Specht.[3] It contends that the appointment of a receiver and dissolution is the "single process" Wisconsin law provides in the face of shareholder deadlock. We disagree.

¶9 The standard of review drives our decision. WISCONSIN STAT. § 180.1430(2)(c) provides that a circuit court *may* dissolve a corporation if a shareholder makes the requisite showing. But the usual level of deference to a discretionary act is heightened here. Judicial dissolution actions are proceedings in equity. *See* ***Gull v. Van Epps***, 185 Wis. 2d 609, 626-27, 517 N.W.2d 531 (Ct. App. 1994). "The basis of all equitable rules is the principle of discretionary application." ***Mulder v. Mittelstadt***, 120 Wis. 2d 103, 115, 352 N.W.2d 223 (Ct. App. 1984) (citation omitted). When fashioning an equitable remedy appropriate to the needs of the particular case, the court's discretion is nearly unlimited. ***Id.***

¶10 The Estate gives a nod to the court's discretion but argues that, in ***Strong v. Fromm Laboratories, Inc.***, 273 Wis. 159, 77 N.W.2d 389 (1956), the

[3] Specht and Cousins contend that the Estate does not have standing to challenge the judicial dissolution ruling. Standing is not a question of jurisdiction, but of sound judicial policy. *See* ***Wisconsin Bankers Ass'n v. Mutual Sav. & Loan Ass'n***, 96 Wis. 2d 438, 444 n.1, 291 N.W.2d 869 (1980). We will address the issue on the merits.

supreme court "dictated" that in a director deadlock situation where the parties cannot reach agreement, "dissolution is the only proper remedy." The Estate overstates the holding. There, a deadlock developed after a director died and the corporate by-laws forbade the Board from transacting any business until the director vacancy was filled. The court underscored that there was no "alternative corrective remedy" "[i]n the instant case" because the board of directors was without power to manage the business of the corporation. ***Id.*** at 172-73. Cousins does not have a like by-law that hamstrings the board's ability to conduct business.

¶11 The circuit court's decision-making process here is beyond reproach. It examined the parties' proposals at length, weighing the pros and cons of each one. It observed that a do-nothing approach was untenable, as the status quo was a "recipe for disaster" and almost certain future litigation. It carefully considered whether to appoint a provisional director and who should be appointed, and retained jurisdiction to review the appointment as needed.

¶12 As to dissolution and appointment of a receiver, the court acknowledged that liquidation understandably was most financially beneficial to the Estate but also would allow the Estate to capitalize on its deadlock strategem. Further, the court noted that dissolution would be expensive, would have substantial negative tax consequences for Specht, would not obtain a fair value for Cousins' shareholders in that economic climate, and would interfere with Specht's interests to a "grossly unfair" degree. In short, dissolution "would be the most drastic possible remedy"—a "nuclear remedy" from Specht's vantage point. And it did not escape the court's notice that the Estate's complaint requested, as one form of relief, that the court "compel purchase by William F. Specht of the Estate's stock at their fair market value." Retaining jurisdiction over the matter to review a possible sale illustrates the court's fairness to both parties.

¶13 The Estate also contends that the circuit court "ignore[d] Wisconsin Supreme Court precedent" in allowing the appraiser to discount the value of the Estate's shares. Citing ***HMO-W Inc. v. SSM Health Care System***, 2000 WI 46, 234 Wis. 2d 707, 611 N.W.2d 250, and ***Northern Air Services, Inc. v. Link***, 2011 WI 75, 336 Wis. 2d 1, 804 N.W. 2d 458, it claims our supreme court has "rejected the application of discounts in analogous forced[-]sale situations." The Estate misreads the relevance of those cases to the facts here.

¶14 It is true, as the Estate points out, that the ***HMO-W Inc.*** court ruled that applying discounts to the forced sale of stock under dissenter's rights statutes "frustrates the equitable purpose of the statute to protect minority shareholders." ***HMO-W Inc.***, 234 Wis. 2d 707, ¶30. That case involved Wisconsin's dissenters rights statute, WIS. STAT. § 180.1301, *et seq*., statutorily defines "fair value," § 180.1301(4), called upon the court to undertake statutory interpretation to determine whether the circuit court properly permitted a discount, and expressly stated that it was dealing with a minority discount, not a lack-of-marketability discount. ***HMO-W Inc.***, 234 Wis. 2d 707, ¶¶10 n.3, 19. This case, by contrast, is not a dissenter's rights case, is not aided by a statutory definition, requires review of an equitable remedy, and involves a lack-of-marketability discount. ***HMO-W Inc.*** does not apply.

¶15 Similarly, the Estate asserts that the ***Link*** court "again pointed out that discounts are not applied in determining 'fair value' of stockholder's shares." That also is true, and also to no avail. ***Link*** made plain that "fair value" per share is the net worth of a closely held corporation divided by the number of shares, while "fair market value"—the concept at issue here—is determined by an appraiser and incorporates downward adjustments to reflect a lack of ready marketability. ***Link***, 336 Wis. 2d 1, ¶13 and n.6. ***Link*** does not assist the Estate.

¶16 The circuit court demonstrated beyond question that allowing the use of Wildman's appraisal reports as part of the equitable remedy was a proper exercise of discretion. Sheppard and Specht were equal shareholders with no buy-sell agreement or formal agreements about deadlocks, tie-breaking, or sale of shares. No statute directs the matter. It found that Wildman had access to company data and to all of the participants and parties and discussed matters with them. It also found that the fact that Wildman's appraisal was lower than an earlier one the Estate commissioned meant nothing by itself and is not uncommon. The court refused further discovery, as the parties had that opportunity along the way and Wildman's report was "transparent on its face." We see no error.

¶17 Finally, the Estate complains that the circuit court ordered it to bear the full cost of the appraisal. The court explained that, as the Estate requested this precise remedy in its complaint, it should bear the cost. That was reasonable.

By the Court.—Order affirmed.

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