

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 16, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-0339-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

RONALD RIXMANN,

PLAINTIFF-APPELLANT,

V.

**BEVERLY DEHMER, KEVIN BERG, DEAN DEHMER,
GARY OLSON AND KROOKED CREEK, LTD.,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Polk County:
ROBERT H. RASMUSSEN, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

MYSE, J. Ronald Rixmann appeals¹ a summary judgment dismissing his declaratory action under § 806.04, STATS. Rixmann's complaint

¹ This is an expedited appeal under RULE 809.17, STATS.

sought to enforce a shareholder agreement that he alleged required valuation of his shares by an outside appraiser. Rixmann contends on appeal that the trial court erred by construing the valuation provision of the shareholder agreement in a way that violates public policy and by concluding that there were no material factual disputes. Because Rixmann's arguments on appeal allege causes of action that are not pled in his complaint, the judgment is affirmed.

This dispute centers on a shareholder agreement among Rixmann and four other shareholders. Each shareholder had an equal number of shares in a corporation that operated a golf course, and each shareholder accepted the shareholder agreement. Under the agreement, the value of each share was to be set annually by a three-fourths vote. The agreement also provided that a shareholder could be expelled by the same vote. The relevant provisions of the shareholder agreement are as follows:

4. Compulsory Sale of Corporate Shares

In the event any shareholder is unable or unwilling to contribute to the operation or success of the corporation, the shareholders may, by a vote of $\frac{3}{4}$ of the issued shares of said corporation, at a meeting called for the repress [sic] purpose of expulsion of said shareholder, vote to expell [sic] said shareholder and the corporation may purchase the shares of said shareholder pursuant to the terms of paragraphs 6, 7, and 8 of this Agreement. Notice of said intended action by the corporation shall be in writing to each shareholder not less than ten (10) days before consideration of said expulsion.

....

6. Purchase Price.

Except as provided in paragraph 2, the price shall be determined as follows:

a) Unless and until changed under this paragraph, the price of each share shall be determined each December, by a meeting of the shareholders of said corporation, for the purpose of establishing the value of each corporate share for the following year. If the shareholders are unable to

reach an agreement by a vote of not less than three-fourths (3/4ths) of the shares of said corporation, then the parties shall hire an outside appraiser, by a majority vote, for the purpose of determining the value of each share of stock.

b) For the year 1990, the value of each share of stock shall be \$150.00/ share.

Rixmann was expelled at a shareholder meeting, and pursuant to the shareholder agreement had to sell his shares at the price of the last valuation of the shares. In order to prevent this, Rixmann sought a declaratory judgment affirming his right to have the shares valued by an appraiser. Rixmann's complaint stated the following:

8. The purpose of this action is to ascertain the validity of the Shareholder Agreement which is attached hereto, marked as Exhibit A, and incorporated herein by reference, and to determine the parties' rights thereunder, specifically set forth in the subsequent paragraphs.

9. On or about June 26, 1990, the plaintiff and defendants entered into a Shareholder Agreement concerning the operation and interaction of shareholders of Krooked Kreek, Ltd.

10. That said Shareholder Agreement requires that in the event of involuntary transfer of shares in Krooked Kreek, Ltd., and the parties are unable to agree upon the value of the shares to be transferred, then the parties shall hire an outside appraiser by a majority vote for the purpose of determining the value of each share of stock.

11. That the defendants have voted to oust the plaintiff from their corporation and have set the value of his 100 shares of stock arbitrarily and without the assistance of an outside arbitrator.

12. That pursuant to the terms of the Shareholder Agreement, the value of the plaintiff's shares of stock must be valued by an outside appraiser.

WHEREFORE, plaintiff demands judgment against defendant [sic]:

- A) Ordering that the defendants abide by the Shareholder Agreement;
- B) That defendants cannot arbitrarily set the value of plaintiff's 100 shares of stock in said corporation;

- C) That said shares be valued by an outside appraiser;
- D) That the plaintiff be provided fair compensation for his 100 shares of stock in said corporation;
- E) Such further relief as may be appropriate.

The defendants moved for summary judgment, contending that they complied with the shareholder agreement's provisions for both Rixmann's expulsion and the valuation of the shares. The defendants further contended that there was no issue of material fact because the agreement was clear on its face.

In his summary judgment response brief and at the motion hearing, Rixmann for the first time contended both that the shareholder agreement was contrary to law because it unreasonably restricted the alienation of his shares and that the defendants acted in bad faith with the purpose of denying him the fair value of his shares. Rixmann did not amend his pleadings to conform with these new allegations. Accompanying his motion, Rixmann submitted an affidavit in which he alleged the defendants acted wrongfully in valuing the shares.

The trial court granted summary judgment for the defendants. The court concluded that Rixmann's cause of action sought enforcement of the shareholder agreement that he believed required valuation by an appraiser, and did not allege the tort claims argued on summary judgment. The court reasoned that on its face the agreement was not contrary to law or public policy, and that it permitted an outside appraiser only if three-fourths of the shareholders were unable to agree on the value of the shares.

In reviewing the granting of summary judgment, the appellate court adopts the same methodology as the trial court. *State v. Town of Linn*, 205 Wis.2d 426, 434, 556 N.W.2d 394, 398 (Ct. App. 1996). Summary judgment is a question of law, *id.* at 434, 556 N.W.2d at 399, which we review de novo, *State v.*

Irish, 210 Wis.2d 107, 110, 565 N.W.2d 161, 162 (Ct. App. 1997). After examining the pleadings to determine that a claim and defense are asserted, we examine the proof submitted by the moving party to determine whether that party has made a prima facie case for summary judgment. *In re Cherokee Park Plat*, 113 Wis.2d 112, 116, 334 N.W.2d 580, 582-83 (Ct. App. 1983). Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Section 802.08(2), STATS.

Rixmann raises several arguments on appeal that, similar to his claims on summary judgment, are not a part of his cause of action. First, Rixmann argues that the shareholder agreement provision providing for a three-fourths majority to establish share price is contrary to public policy and thus invalid. Second, Rixmann argues that there are material facts in dispute concerning his allegations that the defendants set an unfair price for his stock. Third, Rixmann argues that he has a statutory right to fair compensation for his stock. Rixmann does not challenge the trial court’s interpretation of the contract that an appraiser is not required because there was a three-fourths majority in favor of the valuation.

The trial court properly rejected the first two arguments after concluding that they went beyond the scope of Rixmann’s complaint.² Rixmann’s complaint alleged only that the shareholder agreement required a neutral appraiser

² The trial court never considered the third argument because it is raised for the first time in Rixmann’s reply brief. We will not consider arguments not raised to the trial court, *see Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980), nor will we consider issues first discussed in the reply brief, *see Estate of Bilsie*, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 n.2 (Ct. App. 1981).

because he disagreed with the other shareholders' valuation. Rixmann did not allege that the shareholder agreement was invalid, nor did his pleadings allege a tort action against the other shareholders. Further, Rixmann did not avail himself of his rights under § 802.09, STATS., to amend his complaint and allege these new causes of action. We will not consider on appeal issues not properly raised before the trial court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

