COURT OF APPEALS
DECISION
DATED AND FILED

April 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 98-2559

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

MICHAEL C. MCVEIGH, M.D.,

PLAINTIFF-APPELLANT,

V.

JOHN T. GRUM, M.D., WILLIAM A. SMULLEN, M.D., DOUGLAS W. OLEN, M.D., JEFFREY M. HARTWICK, M.D., DALE J. LYE, M.D., RADIOLOGY ASSOCIATES OF MILWAUKEE, S.C., AND BERNARD KAMPSCHROER, M.D.,

DEFENDANTS-RESPONDENTS,

ST. JOSEPH'S HOSPITAL, INC.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Michael C. McVeigh, M.D., appeals the judgment dismissing his breach of fiduciary duty claim against Radiology Associates of Milwaukee, its current shareholders and one retired shareholder (collectively, RAM). McVeigh brought suit after the majority of shareholders voted both to terminate McVeigh's employment as a radiologist and to remove him as a director, officer and shareholder in the closely held corporation. The trial court granted summary judgment to RAM, finding that McVeigh failed to support his claim that RAM breached a fiduciary duty to him. We affirm.

I. BACKGROUND.

¶2 RAM, a non-statutory, closely held corporation, had an exclusive contract with St. Joseph's Hospital to do the hospital's radiology work. McVeigh, a radiologist, first became employed by RAM in 1989, pursuant to a two-year written employment contract. McVeigh's contract was renewed for one additional year and, at the end of that period, RAM offered McVeigh an opportunity to become a shareholder. Because RAM's shareholder agreement and shareholder employment contracts were in the process of being revised, RAM offered to make McVeigh a shareholder under the same terms and conditions as the other shareholders. He was told that he would be subject to the identical terms of the last written shareholder agreement signed by all the shareholders, with some amendments.[1] McVeigh agreed and, as a result, he was required to pay $200 immediately for stock in the service corporation. He was also obligated to pay

[1] In both McVeigh's original and amended complaints, he alleged that he received a copy of the shareholder agreement. Later, in his affidavit in opposition to the summary judgment motion, he asserted that he was never given a copy of the shareholder agreement and he declared he was not subject to any shareholder or employment agreement. He argued that his agreement as a shareholder and an employee was regulated solely by statute. These claims will be addressed more fully later.

approximately $94,000 over the next four years for the purchase of RAM's accounts receivables and for the purchase of an interest in two entities owned by RAM—Overview Partnership and Mayfair Radiology, Inc. This sum was to be paid out of McVeigh's share of the profits over a four-year period.

¶3 Early in January 1996, the RAM shareholders approved a new shareholder employment contract that provided that a shareholder's employment "may be terminated during its term by either party hereto on not less than thirty(30) days notice in writing." After a series of problems erupted concerning McVeigh's conduct and his ability to work with others, McVeigh was offered an opportunity to resign, and was warned that, if he did not resign, there were sufficient votes to terminate him. McVeigh did not resign, and, on March 18, 1996, a resolution was passed removing McVeigh as an officer and director of RAM.[2] McVeigh was also given written notice of his employment termination. Following the dictates of the January 1996 revised shareholder's agreement of compensation due a shareholder, McVeigh was sent a check representing the repurchase of his stock, and advised he was due an additional $119,000 for his purchase of RAM's accounts receivables and RAM's interest in two other medical practices.

¶4 McVeigh refused to accept payment and, instead, he commenced legal action against RAM and RAM's shareholders on October 15, 1996. Later, St. Joseph's Hospital was added as a defendant, as was Dr. Bernard Kampschroer, a retired RAM shareholder. Originally the complaint, and later, the amended complaint, alleged a variety of causes of action. Eventually, McVeigh agreed to

[2] Later, RAM passed a resolution removing McVeigh as a shareholder.

dismiss all causes of action against St. Joseph's Hospital except defamation, and all causes of action against RAM, except his claim of breach of a fiduciary duty. St. Joseph's Hospital and RAM brought summary judgment motions. At the hearing on the motions, the trial court dismissed McVeigh's defamation suit against St. Joseph's Hospital, as well as his claim of breach of fiduciary duty against RAM. McVeigh appeals the trial court's dismissal of his claim for breach of fiduciary duty.[3]

II. ANALYSIS.

¶5 McVeigh argues that the trial court erred in granting RAM's summary judgment motion. In an appeal from the entry of summary judgment, this court reviews the record *de novo*, applying the same standard and following the same methodology required of the trial court under WIS. STAT. § 802.08 (1997-98). *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-16, 401 N.W.2d 816 (1987).

¶6 McVeigh submits that RAM breached its fiduciary duty to him by unlawfully removing him as a practitioner and a shareholder. Despite McVeigh's earlier assertions found in the original complaint, and later, in the amended complaint, that he received a written copy of the shareholder's agreement, McVeigh now contends that he was not subject to any shareholder agreement whatsoever, and that his rights as an employee and a shareholder are to be determined solely by statute. Like the trial court, we find this argument to be meritless and we adopt the trial court's decision regarding this issue. As the trial

[3] McVeigh is not appealing the dismissal of the defamation suit against St Joseph's Hospital.

court aptly noted, if this supposition were true, McVeigh would be reduced to having no shareholder status with RAM and RAM would owe him no fiduciary duty. Without an agreement making him a shareholder, McVeigh would only be entitled to be reimbursed money he paid to RAM in anticipation of becoming a shareholder. As the trial court noted:

> Either he had the same agreement that all of the shareholders had and he was as [sic] an educated adult in business [and] at this point was able to figure that out that he was bound by the same rules and had essentially accepted the same terms and conditions as each of the other shareholders had and was not going to be treated differently from the other shareholders.
>
> Either he was smart enough to figure that out, or there was no meeting of the mind and nothing at all.

Thus, we agree with the trial court's conclusion that McVeigh was subject to the terms and conditions of the shareholder agreement ratified by the shareholders at the January 1996 shareholder meeting.[4]

¶7 This contract permitted a shareholder to be terminated upon thirty days notice in writing. McVeigh was given a written thirty-day notice. Notwithstanding that this notice comported with the provision found in the shareholder's agreement, McVeigh argues that his termination as a shareholder

[4] McVeigh has also claimed during the pendency of this litigation that he was subject to an oral contract, and that a provision of the oral contract was that he could only be dismissed "for cause." McVeigh relies on a conversation he had during the negotiations of his shareholder interest for this assertion. McVeigh claims he was advised that no one had previously been terminated as a shareholder. McVeigh interprets this comment to mean that one of the oral shareholder agreement's provisions was that he could not be terminated except for cause. Whether or not McVeigh's recollections are correct, the fact that no other shareholder had ever been terminated does not mean that they could not have been terminated for cause, nor does it eliminate the clause in the written shareholder's agreement that permitted a majority of shareholders, for no reason whatsoever, to vote to repurchase the shares of another shareholder. We also agree with the trial court's assessment that McVeigh's recollections do not create a genuine factual dispute, thereby making summary judgment unavailable.

and as an employee of the professional services corporation was unlawful. McVeigh relies on the holdings in ***Jorgensen v. Water Works, Inc.***, 218 Wis. 2d 761, 582 N.W.2d 98 (Ct. App. 1998), and ***Jensen v. Christensen & Lee Insurance, Inc.***, 157 Wis. 2d 758, 460 N.W.2d 441 (Ct. App. 1990), and argues that he could only be removed if a "legitimate business purpose supported his removal." We disagree.

¶8 ***Jensen*** contradicts McVeigh's contention that his termination from his employment as a radiologist at RAM was wrongful. Jensen, a former employee and minority stockholder of a closely held corporation, brought suit against the majority stockholders alleging both a wrongful discharge and a breach of fiduciary duty by the majority stockholders. Jensen argued that by terminating his employment and "squeezing him out," the majority shareholders acted in a manner contrary to public policy and, thus, that he had a cause of action for wrongful discharge. 157 Wis. 2d at 760-62. This court disagreed with Jensen's contention:

> Jensen cites *Brockmeyer v. Dun & Bradstreet*, which says that "an employee has a cause of action for wrongful discharge when the discharge is contrary to a … well-defined public policy as evidenced by existing law." Jensen apparently argues that this holding of the supreme court could apply to cases where an employer violated public policy in the act of discharge without ever requesting the employee to violate public policy.

Id. at 765 (citation omitted). And, we concluded:

> However meritorious Jensen's reading of *Brockmeyer* and [its early progeny] may be, we are constrained to rule that the law is otherwise. In *Bushko* [*v. Miller Brewing Co.*], the supreme court expressly limited a wrongful discharge cause of action to those situations in which an employee is discharged for refusing to comply with an employer's request to violate public policy. We hold that

> the facts alleged in Jensen's complaint do not come under *Bushko* and therefore fail to state a claim for which relief can be granted.

Id. at 766 (citation omitted).[5]

¶9 Here, McVeigh has no written employment contract that permitted RAM to discharge him only for cause, nor does McVeigh allege that he was terminated from his employment as a result of his refusal to violate public policy or his compliance with a well-defined legal duty. He only contends that his termination as an employee, given his status as a shareholder, is against public policy. Relying on the reasoning in ***Jensen***, we conclude that McVeigh has no claim for a breach of fiduciary duty or for wrongful discharge because of his termination.

¶10 Next, McVeigh submits that both ***Jorgensen*** and ***Jensen*** support his position that he could only be removed as a director, officer or shareholder of RAM if there was a legitimate business purpose. McVeigh reads the holdings in these cases too broadly.

¶11 In ***Jorgensen***, this court merely established that, under common law, a cause of action for breach of fiduciary duty existed. *See* ***Jorgensen***, 218 Wis. 2d at 777. It did not hold that a minority shareholder can never be removed as a shareholder unless there is a legitimate business purpose. In ***Jorgensen***, there were allegations that majority shareholders were "diverting corporate assets or using them for their own personal use and also breached their fiduciary duty by

[5] We note that the supreme court, in ***Hausman v. St. Croix Care Ctr.***, 214 Wis. 2d 665, 669, 571 N.W.2d 393 (1997), broadened the wrongful discharge cause of action to include cases where an at-will employee is terminated for complying with a fundamental and well-defined legal duty.

paying fees to themselves which are in fact dividends." 218 Wis. 2d at 767. In ***Jorgensen***, this court summarized this situation as one "'where some individual right of a stockholder is being impaired by the improper acts of a director,'" thus allowing for "'the stockholder [to] bring a direct suit on his own behalf because it is his individual right that is being violated.'" ***Jorgensen***, 218 Wis. 2d at 778-79 (citation omitted). No such allegations of improper acts are raised here.

¶12 While breach of fiduciary duty is a viable cause of action in Wisconsin, the underpinnings for such an action are not present here. McVeigh does not allege that the majority stockholders diverted corporate assets or used them for their personal use, nor is there any evidence that the majority stockholders were granting to themselves dividends or monies not available to McVeigh. McVeigh's claim that RAM shareholders acted improperly is based on his belief that they were "proportionately enriched" by buying him out and, thus, that they had a conflict of interest. However, McVeigh fails to note the factual distinctions between ***Jorgensen*** and his situation, and he ignores the fact that he was treated in accordance with the shareholder agreement.

¶13 Here, the written agreement permitted the repurchase of McVeigh's stock and contained a formula to repay him the amount he invested in RAM's accounts receivables and assets. As a general rule, shareholders in a close corporation do not breach a fiduciary duty when they act within their contractual rights when terminating a minority shareholder. *See* ***Blank v. Chelmsford OB/GYN, P.C.***, 649 N.E.2d 1102, 1105-06 (Mass. 1995). Were we to adopt McVeigh's argument, shareholders would never be able to remove another shareholder in a close corporation without a legitimate business purpose. As noted in RAM's brief: "All closely held corporations whose members comprised its

board of directors would be paralyzed with respect to ever voting to add or remove members if Dr. McVeigh's argument were accepted."

¶14 McVeigh contends that because ***Jorgensen*** cites a Massachusetts case that holds that the board of directors may not vote to add or remove members absent a legitimate business purpose, the court in ***Jorgensen*** adopted such a rule in Wisconsin. McVeigh is wrong. The case, ***Wilkes v. Springside Nursing Home, Inc.***, 353 N.E.2d 657 (Mass. 1976), was only cited as one that was "factually similar" to the facts present in ***Jorgensen***. ***Jorgensen***, 218 Wis. 2d at 779. The holding in ***Wilkes*** was not adopted by this court. Moreover, the Massachusetts Supreme Judicial Court has limited this holding. *See* ***Merola v. Exergen Corp.***, 668 N.E.2d 351, 355 (Mass. 1996) (although termination was not for a legitimate business purpose, it was also not for financial gain or against public policy).

¶15 ***Jensen*** also does not support McVeigh's theory. In ***Jensen***, this court determined that Jensen's complaint had "sufficient allegations to plead a claim that the defendants breached their fiduciary duty to Jensen as a minority shareholder of the close corporation." 157 Wis. 2d at 764. In other words, Jensen's complaint was sufficient to survive a motion to dismiss. In ***Jensen***, there were allegations that the majority stockholders had violated the agreements of the parties. *See* ***id.*** Here, no allegations exist that the RAM stockholders violated the written stockholder agreement. Indeed, the court in ***Jensen*** predicted that while the complaint survived a motion to dismiss, it was quite possible that the defendants would prevail in later proceedings. This court remarked that "the defendant's argument that the agreements provide for discharge as a legitimate triggering mechanism for the company's purchase of stock may be a proper issue in later proceedings" ***Id.*** Here, McVeigh's complaint was subjected to summary judgment scrutiny. The written shareholder contract provided that the

shareholders could vote to repurchase the stock of another shareholder. Thus, discharge was a legitimate triggering mechanism for the corporation to repurchase McVeigh's stock.

¶16 Unlike the situation presented in ***Jensen*** and ***Jorgensen***, no improper acts have been alleged against RAM shareholders. It is uncontroverted that the RAM directors and shareholders ratified an agreement. The agreement permits a vote of the majority of RAM shareholders to remove a shareholder, authorizes the buy back of all the shares held by the removed shareholder, and contains a reimbursement formula to give the removed shareholder the money paid in for the purchase of the accounts receivables and the other holdings of RAM.[6] All the shareholders except McVeigh, who abstained, and another doctor, who gave McVeigh his proxy, voted to remove McVeigh as a director, officer, and later, as a shareholder. Given the authority in the agreement to so act, the actions taken by the directors did not constitute "an improper act." Consequently, we are satisfied that McVeigh failed to submit sufficient proof to validate his claim of a breach of fiduciary duty by RAM shareholders, and we affirm the trial court's determination that summary judgment was appropriate.[7]

[6] The earlier shareholder contract in place at the time McVeigh became a shareholder was substantially the same as the new one. It, too, included a thirty-day notice of termination by either party. However, the buyout formula was modified slightly in the newer version.

[7] We decline to address whether the RAM shareholders acted upon a legitimate business purpose. Because of our decision on the dispositive issue, it is not necessary for us to address this argument. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

By the Court.—Judgment affirmed.

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