

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 31, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0723

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MARSHFIELD MACHINE CORPORATION,

**PLAINTIFF-APPELLANT-CROSS-
RESPONDENT,**

DAVID EGGER,

PLAINTIFF,

V.

**BERNARD MARTIN, BRIAN SCHMOLL, AND INNOVATIVE
MACHINE SPECIALISTS, INC.,**

**DEFENDANTS-RESPONDENTS-CROSS-
APPELLANTS.**

APPEAL from a judgment of the circuit court for Wood County:
FREDERIC W. FLEISHAUER, Judge. *Affirmed.*

Before Vergeront, Roggensack and Lundsten, JJ.

¶1 ROGGENSACK, J. David Egger and Marshfield Machine, Inc. appeal the circuit court's dismissal of their suit against Bernard Martin, Brian Schmoll and Innovative Machine Specialists, Inc. (IMS) at the close of the plaintiffs' evidence. They contend that they introduced sufficient evidence to establish the elements of the claim of breach of fiduciary duty against Martin and Schmoll.¹ The defendants cross-appeal, arguing that the circuit court should have granted summary judgment to them. Because we conclude that the plaintiffs failed to introduce any competent evidence that Martin's or Schmoll's alleged breach of fiduciary duty was a substantial cause of the diminution in Marshfield Machine's value, we affirm the judgment of the circuit court.

BACKGROUND

¶2 Thomas and David Egger each owned half of Marshfield Machine, a machine shop located in Marshfield, Wisconsin, that manufactured and repaired parts for dairies and other local businesses. Martin managed the shop's day-to-day activities. He was paid a salary and a bonus of thirty percent of the shop's profits, but he was never required to complete a non-compete agreement. While still employed by Marshfield Machine, Martin decided to open a competing machine shop, IMS, with Schmoll, another Marshfield Machine employee. While still employees, Martin and Schmoll incorporated IMS, began to construct a building for their business and purchased some machinery, but they did not attempt to contact potential clients or begin doing any work for IMS. On November 11,

¹ The plaintiffs also sued Martin, Schmoll and IMS on the theory that they conspired to destroy Marshfield Machine's business. However, on appeal they developed arguments for reversal based only on the breach of fiduciary duty theory. Therefore, we deem any contentions of error based on the dismissal of the conspiracy claims as abandoned, and we do not address them. *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285, 292 (Ct. App. 1998).

1996, David Egger learned of Martin's plans and fired him immediately. Martin then began contacting potential clients on behalf of IMS; Schmoll remained at Marshfield Machine for another week before Thomas Egger fired him, whereupon he also began to work for IMS.

¶3 Marshfield Machine's business declined after Martin and Schmoll left. On January 27, 1997, Thomas Egger sold his half of the business to his brother, David Egger, for \$62,000. In April of 1997, Thomas Egger, together with two other former Marshfield Machine employees, opened another competing machine shop in Marshfield. At approximately the same time, Staab Manufacturing, also a machine shop, moved from Dorchester to Marshfield. Therefore, by the spring of 1997 there were three new machine shops in Marshfield competing with Marshfield Machine.

¶4 David Egger and Marshfield Machine sued Martin, Schmoll and IMS, alleging that Martin and Schmoll had breached their fiduciary duties of loyalty to Marshfield Machine and that they had conspired to destroy Marshfield Machine's business.² At trial, Marshfield Machine's expert witness, Kevin Janke, testified about the reduction in value of Marshfield Machine. Janke, a certified business valuation expert, testified that Marshfield Machine's common stock had a fair market value of \$425,000 on September 30, 1996. Janke opined that Marshfield Machine's value had been diminished by \$223,000 during the year that followed. However, he admitted on cross-examination that he could not give an opinion on whether the defendants' activities were a cause in the decline in value.

² They also sued Thomas Egger and several others on various theories. However, those claims were settled before trial and therefore are not relevant to this appeal.

¶5 Following the close of the plaintiffs' case, the defendants moved to dismiss on a failure of proof pursuant to WIS. STAT. § 805.14(3) (1999-2000).³ The circuit court granted the motion, concluding that the plaintiffs had failed to present sufficient evidence to allow the jury to find whether any of the diminution in Marshfield Machine's value was caused by the defendants. David Egger and Marshfield Machine appeal. The defendants cross-appeal, arguing that the circuit court should have granted them summary judgment because no issues of material fact existed to establish that Martin and Schmoll had a fiduciary duty to Marshfield Machine.

DISCUSSION

Standard of Review.

¶6 We review a circuit court's decision to grant a defendant's motion to dismiss for insufficient evidence at the close of plaintiff's case, *de novo*. *American Family Mut. Ins. v. Dobrzynski*, 88 Wis. 2d 617, 624, 277 N.W.2d 749, 752 (1979).

³ WISCONSIN STAT. § 805.14(3) provides:

MOTION AT CLOSE OF PLAINTIFF'S EVIDENCE. At the close of plaintiff's evidence in trials to the jury, any defendant may move for dismissal on the ground of insufficiency of evidence. If the court determines that the defendant is entitled to dismissal, the court shall state with particularity on the record or in its order of dismissal the grounds upon which the dismissal was granted and shall render judgment against the plaintiff.

Additionally, all citations to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Causation.

¶7 The circuit court may grant a motion to dismiss for insufficient evidence at the close of plaintiff's case only if "the court is satisfied that, considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such a party." *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 388, 541 N.W.2d 753, 761 (1995) (citation omitted). When ruling on a motion to dismiss, the circuit court should consider only the proof that the plaintiff has offered before resting its case. *Beacon Bowl, Inc. v. Wisconsin Elec. Power Co.*, 176 Wis. 2d 740, 788, 501 N.W.2d 788, 807 (1993). Our review on appeal is the same as that conducted by the circuit court. *Weiss*, 197 Wis. 2d at 389-90, 541 N.W.2d at 761-62.

¶8 A claim for breach of fiduciary duty may be made when a key employee fails to exercise good faith and loyalty in regard to his employer's interests. *Modern Materials, Inc. v. Advanced Tooling Specialists, Inc.*, 206 Wis. 2d 435, 442, 557 N.W.2d 835, 838 (Ct. App. 1996); *General Auto. Mfg. Co. v. Singer*, 19 Wis. 2d 528, 533, 120 N.W.2d 659, 662 (1963). To prove a claim for breach of fiduciary duty, the plaintiff must prove that: (1) the defendant had a fiduciary duty to the plaintiff, *Modern Materials*, 206 Wis. 2d at 443, 557 N.W.2d at 838; (2) the defendant breached the duty, *General Auto.*, 19 Wis. 2d at 533, 120 N.W.2d at 662; and (3) the breach of duty caused injury to the plaintiff. *Burg v. Miniature Precision Components, Inc.*, 111 Wis. 2d 1, 7, 330 N.W.2d 192, 195 (1983); *Saga Enters., Inc. v. Coldwell, Banker & Co.*, 598 P.2d 285, 293 (Ore. 1979); *Graphic Directions, Inc. v. Bush*, 862 P.2d 1020, 1022 (Col. Ct. App. 1993).

¶9 In Wisconsin, causation is determined using the “substantial factor” test; in other words, Martin’s or Schmoll’s alleged breach of fiduciary duty must have been a substantial factor in causing the damage to Egger and Marshfield Machine. *Bruss v. Milwaukee Sporting Goods Co.*, 34 Wis. 2d 688, 695, 150 N.W.2d 337, 340 (1967). Therefore, to meet the burden of production with respect to causation, plaintiffs must produce some credible evidence that Martin’s or Schmoll’s alleged breach of fiduciary duty was more probably than not a substantial factor in causing their claimed damages. See *Beacon Bowl*, 176 Wis. 2d at 783, 501 N.W.2d at 805. In circumstances where the issue of causation is complex, a plaintiff may present expert testimony to establish causation. See *Wal-Mart Stores, Inc. v. LIRC*, 2000 WI App 272 ¶16, 240 Wis. 2d 209, 222, 621 N.W.2d 633, 638, *cert. denied* 2001 WI 15, 241 Wis. 2d 210, ___ N.W.2d ___ (citing *Cramer v. Theda Clark Mem’l Hosp.*, 45 Wis. 2d 147, 150, 172 N.W.2d 427, 428-29 (1969)).

¶10 Marshfield Machine and Egger contend that the circuit court erred in granting the defendants’ motion to dismiss because they proved all the elements of a claim for breach of fiduciary duty. The theory of their case was that the value of Marshfield Machine was diminished because Martin and Schmoll planned and began to develop a competing business while still employees of the company and because, after they left employment at Marshfield Machine, they used knowledge acquired during the course of employment to assist IMS to Marshfield Machine’s detriment. Assuming, *arguendo*, that Martin or Schmoll had a fiduciary duty to Marshfield Machine and breached it, we nonetheless conclude that the plaintiffs failed to prove that such breach was a substantial factor in causing the damage that plaintiffs contend they sustained.

¶11 Janke, a duly qualified expert in business valuation, testified for the plaintiffs about the diminution in value of Marshfield Machine. He provided competent evidence that Marshfield Machine suffered a diminution in value of \$223,000⁴ between September 30, 1996 and October of 1997, when it was liquidated. However, neither Janke nor any other witness testified that the activities of any defendant were a cause of Marshfield Machine's reduction in value. The transcript of the trial shows that Janke repeatedly denied he had any opinion relative to whether the defendants' actions affected the diminution in Marshfield Machine's value. He testified:

Q. Is there a way for you to ascertain which competitive business affected the value of Marshfield Machine Corp. after September 30, 1996?

A. No, there is not.

Q. So it could have been Central Manufacturing Corporation?

A. It could have been anything.

Q. It could have been Staab Manufacturing coming into Marshfield?

A. It's possible.

....

Q. Did you assess any damage to the setting up of a competitive enterprise without competing directly by Bernard Martin and Brian Schmoll?

A. I did not.

Q. You don't have any opinion as to what the damage could have been because of them setting up a competing enterprise without competing?

⁴ This number was adjusted slightly during cross-examination, but that adjustment is not relevant to this appeal.

A. Just setting up, no.

....

Q. Did you look at any diminution in value between September of 1996 and November 11, 1996?

A. No.

....

Q. In doing your valuation did you consider at all the sale by Tom Egger of his half of the business to Dave Egger?

A. I did not.

¶12 Given Janke's testimony, if the circuit court had allowed the question of causation to go to the jury, it would have been required to speculate whether any of the reduction in value was caused by the alleged breach of fiduciary duty or whether it was attributable solely to other potential causes.⁵ As a result, we conclude that the plaintiffs failed to provide sufficient proof that the alleged breach of fiduciary duty was a substantial cause of the damage they sustained. Therefore, we affirm the circuit court's judgment of dismissal.

CONCLUSION

¶13 Because we conclude that the plaintiffs failed to introduce any credible evidence that Martin's or Schmoll's alleged breach of fiduciary duty was

⁵ Other potential causes of the reduction in value of Marshfield Machine include: (1) Thomas and David Egger's dislike of one another was so intense they were unable to operate the business together; (2) three other competing machine shops had opened in Marshfield, a city of about 20,000 people; (3) Marshfield Machine had difficulty retaining qualified machinists and was therefore unable to keep up with the orders it was receiving.

a substantial cause of the damages that Egger and Marshfield Machine claim to have sustained, we affirm the judgment of the circuit court.⁶

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

⁶ Because we have decided this appeal in the defendants' favor, we do not reach the cross-appeal.

