

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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.

Appeal No. 01-2175

**Cir. Ct. Nos. 98-CV-49
98-CV-519
98-CV-906**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

ZOIS DERTIS,

PLAINTIFF-APPELLANT,

V.

DIMITRIOS PANAGIOTARAS,

DEFENDANT-RESPONDENT.

ZOIS DERTIS,

PLAINTIFF-APPELLANT,

V.

DIMITRIOS PANAGIOTARAS,

DEFENDANT-RESPONDENT.

DEMETRIOS JAN PANAGOULIAS AND Z.D.D.P. TRUST,

PLAINTIFFS,

V.

ZOIS DERTIS,

**DEFENDANT-THIRD-
PARTY PLAINTIFF-APPELLANT,**

V.

DEMETRIOS PANAGOULIAS,

THIRD-PARTY DEFENDANT,

DIMITRIOS PANAGIOTARAS,

**THIRD-PARTY DEFENDANT-
RESPONDENT.**

APPEAL from orders of the circuit court for Kenosha County:
BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Zois Dertis appeals from orders dismissing his claim against Dimitrios Panagiotaras and granting damages to Panagiotaras on his counterclaim against Dertis. We affirm.

¶2 Dertis and Demetrios Panagoulias founded Stars ‘n Stripes Restaurant, Inc., a Wisconsin corporation, which owns and operates a restaurant in Kenosha. In anticipation of his return to his native Greece, Dertis entered into a contract with Dimitrios Panagiotaras to sell Panagiotaras fifty shares of stock in the corporation. Dertis left for Greece in April 1994 and when he returned to Wisconsin in October 1996, he discovered that the corporation’s bills had not been

paid, the corporation had paid sums to Panagoulas and Panagiotaras, and corporate debt had been incurred. Dertis sued Panagoulas and Panagiotaras, alleging that their conduct had jeopardized the value of his stock. Dertis also sued Panagiotaras for breach of contract for the latter's failure to make all payments due under his contract to purchase Dertis's stock. Panagiotaras filed a counterclaim against Dertis seeking rescission of the stock purchase contract because Dertis fraudulently represented the extent of his stock ownership.

¶3 On summary judgment, the circuit court dismissed Dertis's claim against Panagoulas and Panagiotaras because that claim related to the alleged conversion of corporate assets and should have been brought as a shareholder's derivative action rather than a direct action by Dertis. The court also granted summary judgment to Panagiotaras on his rescission claim but on a different theory than that which was pled by Panagiotaras. Panagiotaras pled fraud, but the circuit court concluded that the elements of strict responsibility misrepresentation were satisfied on the summary judgment record before it. The court rescinded the stock purchase contract and ordered Dertis to repay Panagiotaras the sums he paid under the contract. Dertis appeals.¹

¶4 Dertis first challenges the circuit court's dismissal of his claim against Panagiotaras because the claim should have been brought as a shareholder's derivative action, not as a direct action. In his complaint, Dertis alleged that Panagiotaras was not a corporate officer or director, failed to pay the corporation's bills, paid himself without authority and incurred corporate debt. All of these actions allegedly jeopardized the value of Dertis's stock. In a third-

¹ Panagoulas is not a party to this appeal.

party complaint in a related lawsuit, Dertis alleged that Panagoulas and Panagiotaras, who were to run the corporation while Dertis was in Greece, failed to pay rent, bills and payroll taxes, thereby breaching their fiduciary duty to the corporation and making them liable to Dertis for any sums he was required to pay as a result of their breach.

¶5 We review decisions on summary judgment by applying the same methodology as the circuit court. *M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 496-97.

¶6 We decide de novo whether Dertis's claim should have been brought as a shareholder's derivative action. *Einhorn v. Culea*, 224 Wis. 2d 856, 865, 591 N.W.2d 908 (Ct. App. 1999), *rev'd on other grounds*, 2000 WI 65, 235 Wis. 2d 646, 612 N.W.2d 78. We focus on the essence of the claim asserted by Dertis. Dertis alleged that Panagiotaras failed to pay the corporation's debts, paid himself without authority and incurred corporate debt. We conclude that Dertis alleged direct harm to the corporation because it is the corporation's assets that were primarily jeopardized by Panagiotaras's actions. A claim of this nature belongs to the corporation and must be brought on the corporation's behalf. *Rose v. Schantz*, 56 Wis. 2d 222, 229, 201 N.W.2d 593 (1972). "That such primary and direct injury to a corporation may have a subsequent impact on the value of the stockholders' shares is clear, but that is not enough to create a right to bring a direct, rather than derivative, action." *Id.* (footnote omitted). Dertis's arguments that Panagiotaras's

mismanagement of the corporation harmed him are an insufficient basis for filing a direct action when a derivative action is warranted.² *Id.*

¶7 Dertis argues that Panagiotaras lacked standing to seek dismissal of his claim on the grounds that the claim should have been brought as a shareholder's derivative action. Panagiotaras responds that Dertis did not make this argument in the circuit court. Dertis does not dispute this assertion. We do not address arguments raised for the first time on appeal. *Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

¶8 Dertis also argues that his position is supported by *Jorgensen v. Water Works, Inc.*, 218 Wis. 2d 761, 582 N.W.2d 98 (Ct. App. 1998). We disagree. In *Jorgensen*, the Jorgensens, minority shareholders, alleged a breach of fiduciary duty by the directors and majority shareholders when the latter paid themselves fees and bonuses and removed the Jorgensens from the board of directors. *Id.* at 773, 776. The court concluded that these allegations did not primarily allege an injury to the corporation. *Id.* at 774. *Jorgensen* is distinguishable because Dertis specifically alleged that Panagiotaras was not an officer or director or a majority shareholder, and Panagiotaras's conduct primarily injured the corporation, not Dertis as a shareholder.

¶9 Dertis next protests the circuit court's grant of summary judgment to Panagiotaras on his counterclaim seeking rescission of the stock purchase agreement due to Dertis's fraud. Dertis complains that the circuit court granted summary

² Dertis argues that he need not have filed a derivative action because he was really alleging that by acting in a manner which depreciated the value of his stock, Panagiotaras breached a good faith duty to fulfill the stock purchase contract. We are not convinced. The allegations in Dertis's complaint focus on the harm to the corporation.

judgment on the grounds of strict responsibility misrepresentation, a theory not pled by the parties.

¶10 After reviewing the summary judgment record, the circuit court concluded that the undisputed facts satisfied the elements of strict responsibility misrepresentation. The court gave the parties a chance to respond to the court's conclusion. Even if it were error for the circuit court to decide the case on a different legal theory, which we do not decide, our review on summary judgment is *de novo*, and we may affirm the circuit court for other reasons. *Cf. State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985) (we can affirm even if the circuit court reached right result for wrong reason).

¶11 We turn to the merits of the circuit court's conclusion that there were no genuine factual disputes on the question of Dertis's liability for strict responsibility misrepresentation. The elements of strict responsibility misrepresentation are: (1) Dertis made a representation of fact relating to his stock ownership; (2) the representation of fact was untrue; (3) Dertis made the representation of fact based on his personal knowledge; (4) Dertis had an economic interest in the transaction; and (5) Panagiotaras believed the representation to be true and relied on it. *See* WIS JI 2402—CIVIL.

¶12 The Dertis-Panagiotaras stock purchase contract stated that there were 100 outstanding shares of the corporation of which Dertis held eighty shares and had pledged twenty shares as collateral. The contract provided that Dertis would sell fifty shares to Panagiotaras. At summary judgment, Dertis contended that he owned 100 shares of stock and had pledged twenty as collateral.

¶13 Elements (4) and (5) are satisfied. It is undisputed that Dertis had an economic interest in the stock purchase transaction, and Panagiotaras believed

Dertis's representation regarding his stock ownership and relied on the representation.

¶14 Proof of the remaining elements—the truth of Dertis's representation regarding his stock ownership and whether it was based on Dertis's personal knowledge—is found in a ruling in an earlier case determining the extent of Dertis's stock ownership. In *Panagoulis v. Dertis*, Kenosha county circuit court case no. 96-CV-1004, the circuit court found in 1997 that from the inception of the restaurant corporation, Panagoulis owned fifty shares and Dertis owned the other fifty shares. In light of this previous determination, it was no longer a jury question in this case whether Dertis believed he owned eighty or 100 shares at the time he entered into the Dertis-Panagiotaras stock purchase contract.³

¶15 The circuit court in the pending appeal concluded that there were no genuine factual disputes as to whether Dertis knew he owned only fifty shares and could not sell all fifty because twenty were pledged as collateral.⁴ Additionally, Dertis represented in the stock purchase contract that he owned eighty shares, which was not true. Elements (1) through (3) of strict responsibility misrepresentation elements are satisfied.

³ Dertis argues that he entered into the stock purchase agreement with Panagiotaras in 1994, three years before the circuit court's findings. We do not think this renders the circuit court's finding in case no. 96-CV-1004 irrelevant to this case. The court found that Dertis's ownership interest was limited to fifty shares from the inception of the corporation. Dertis does not argue that the 1997 case did not actually litigate the question of his stock ownership. Issue preclusion applies. See *N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 550-51, 525 N.W.2d 723 (1995).

⁴ The loan for which the stock had been pledged had not been repaid at the time of the summary judgment hearing in this case.

¶16 An action for rescission may be grounded on misrepresentation. *Whipp v. Iverson*, 43 Wis. 2d 166, 171, 168 N.W.2d 201 (1969). The circuit court properly granted summary judgment to Panagiotaras and properly awarded him the remedy of rescission of the stock purchase contract and return of all payments made by him under the contract.

By the Court.—Orders affirmed.

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

