IN THE COURT OF APPEALS OF IOWA

No. 1-106 / 00-0639
Filed May 23, 2001

FILED
MAY 23 2001
CLERK SUPREME COURT

GERALD DAVIES,
Plaintiff-Appellant/Cross-Appellee,

vs.

JOHN B. DOOLEY, Individually and ANESTHESIA & PAIN CONSULTANTS, P.C., a Professional Corporation,
Defendants-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve, Judge.

The parties appeal and cross-appeal following a jury trial awarding damages to plaintiff Gerald Davies and from a court ruling denying Davies's declaratory relief. Davies contends the trial court erred in (1) failing to grant the declaratory relief of reinstating his position as a stockholder and director of defendant Anesthesia & Pain Consultants, P.C, (2) limiting his damages for lost income and (3) refusing to allow evidence he contended went to the value of Anesthesia & Pain Consultants. **AFFIRMED.**

Peter C. Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellant.

Ralph W. Heninger of Heninger and Heninger, P.C., Davenport, for appellee-Dooley.

Heard by Sackett, C.J., and Huitink and Zimmer, JJ.

SACKETT, C.J.

Plaintiff Gerald Davies and defendant John Dooley are medical doctors specializing in anesthesiology. Starting in 1991 they both began working for defendant Anesthesia & Pain Consultants, P.C. (A&P), a professional corporation. Originally four or five doctors worked for A&P but by the time the problems forming the basis for this litigation arose only Davies and Dooley remained employees. Both men served as directors of the corporation, Dooley holding the office of president and Davies the office of secretary. Davies and Dooley owned stock in equal shares and were employed under the same year-to-year employment agreement that ran from October 1 to September 30. The agreement by its terms automatically renewed unless A&P gave written notice it would not be renewed.

On June 30, 1998, Dooley as president of A&P and without board action advised Davies by letter that he was terminated for cause as of July 1, although the agreement under which A&P employed Davies did not expire until September 30, 1998. Dooley contended Davies violated the employment agreement in failing to maintain hospital privileges at Mississippi Medical Plaza (MMP). Dooley also removed Davies as a director and took him off the corporation's malpractice insurance. Dooley tendered to Davies a check drawn on A&P for the sum of $1000 for Davies's stock in A&P. Dooley contended this price set by the corporation's CPA was determined according to the corporation by-laws as the price for buying out Davies's stock at such time as he was no longer an employee of the corporation. Subsequently Davies was to receive from A&P a salary of $24,000 and a bonus of $31,105.41 for the third quarter of 1998

covering the months of July, August and September, and no salary but a bonus of $16,844.65 for the fourth quarter of 1998.

In August of 1998 Davies brought this action against Dooley and A&P on a number of theories asking for a jury trial on all issues. Davies's original petition was amended several times. The second amendment included a request for a declaratory judgment and second jury demand.

Prior to trial Dooley filed a motion in limine asking that Davies's proof of damages be limited to damages incurred during the period prior to September 30, 1998, that being the time remaining on Davies's employment agreement at the time Dooley fired him. The district court granted the motion finding Davies was an at-will employee and any losses of future profits after September 30, 1998 were speculative.

The case was submitted to a jury on Davies's claims that (1) Dooley breached a fiduciary duty; (2) Dooley tortiously interfered with Davies's contract; and (3) the professional corporation breached Davies's contract. Five questions were given the jury. In answering the questions the jury found (1) Dooley was not liable to Davies for a breach of fiduciary duty; (2) Dooley was liable to Davies for tortious interference with existing contractual relations; (3) A&P was liable to Davies for breach of an express contract; (4) Davies's damages for loss of earning and time from business through September 30, 1998 were $18,700, and damages for loss of benefits through the same date were $18,191; and (5) Davies had failed to prove by clear and convincing evidence that Dooley's conduct constituted a willful and wanton disregard for the rights or safety of another.

Based on the jury's finding the district court entered judgment in favor of Davies and against Dooley and A&P for $36,941 plus costs and any legal interest.

Following the verdict Dooley filed a motion for a judgment notwithstanding the verdict contending there was not substantial evidence Davies sustained an economic loss prior to September 30, 1998, and Dooley was entitled to qualified immunity. A&P filed a similar motion contending there was not substantial evidence to support a finding it breached Davies's employment contract.

Davies filed a post trial motion contending he was entitled to declaratory relief and to be reinstated as a shareholder and director of A&P. Davies contended if declaratory relief was not granted he should be given a new trial on the issue of damages based on the value of the exclusive contract.[1] He further requested a new trial on the issue of damages for the period following September 30, 1998.

In ruling on post trial motion the district court denied the motions filed by Dooley and A&P and denied Davies's claim for declaratory relief and his request for a new trial. This appeal and cross appeal followed.

Davies first contends the district court erred in not granting declaratory relief and reinstating his position as a stockholder and director of A&P. Davies argues that the jury verdict finding tortious interference with his contract by Dooley and breach of his contract by A&P justifies his being reinstated as stockholder and director. Davies further argues that the sole reason for Dooley's

[1] No further information as to the contract is presented in the motion.

terminating him as a director and stockholder was because his employment was terminated. Consequently, to reinstate him would be a just result.

Davies contends he preserved error on this issue by asking for declaratory relief in his petition, as amended, and by requesting declaratory relief after the jury returned its findings. Dooley and A&P contend Davies failed to preserve error. While conceding Davies sought declaratory relief in amended petitions, they claim the case went to the jury without Davies submitting a claim for declaratory relief to the jury. Consequently it was too late for him to do so after the jury made its findings.

In his petition and amended petitions Davies pled a number of theories for recovery. At the close of Davies's case the court sought to focus on the theories of recovery that Davies still sought to advance. The court questioned Davies's attorney about his earlier indication that he only intended to proceed on some of the theories pled. Davies's attorney answered, "At this point in time we intend to submit the claims of breach of contract, breach of fiduciary duty, . . . breach of express contract, . . . and interference with existing contract." Davies's attorney said the breach of contract would be against the professional corporation and the interference with contract and breach of fiduciary claims would be against Dooley. Further discussion ensued concerning the withdrawal of other claims before Davies's attorney said, "There is also a claim for declaratory relief." Then the following exchange occurred:

> Davies' attorney: Yes, and we intend to ask for declaratory relief, because if the jury finds a breach of contract or breach of fiduciary duty, then I believe it's incumbent upon the Court to make appropriate declaratory rulings consistent with the jury's findings.

> **The Court:** . . . I haven't looked at your request for declaratory relief in any great detail in light of—really the whittling down of Plaintiff's theories, if you will, but I take it that to the extent you are asking for declaratory relief, it will be based only upon any finding of the jury that come out of these three theories that are being submitted.
>
> Davies' attorney: This is correct
>
> The Court: And that's understood by the Plaintiff. Okay.

A review of the subsequent record does not reveal any objection to Davies's proceeding in this manner.[2]

Davies reserved the right to have the declaratory judgment action decided by the court after the jury had decided certain specific factual issues. Neither Dooley nor A&P have shown where they objected to the case proceeding in this manner. The issue of whether Davies was entitled to a declaratory judgment was preserved for our review.

Dooley and A&P also contend that even if error was preserved, this is no basis for the declaratory relief that Davies seeks. In denying Davies's request for declaratory relief the district court found:

> [P]laintiff's requested declaratory relief would necessarily require executory or coercive relief. More precisely, it would require court intervention every step of the way. The Court refuses to promote further litigation between these parties.

A declaratory judgment is an action in which a court declares the rights, duties, status or other legal relationships of the parties. Iowa R. Civ. P. 261; *Fox v. Polk County Bd. of Sup'rs, Polk County, Iowa*, 569 N.W.2d 503, 507 (Iowa 1997); *Dubuque Policemen's Protective Ass'n v. City of Dubuque*, 553 N.W.2d 603, 606 (Iowa 1996). In general, "the purpose of the declaratory judgment is to

[2]. It was also noted that Davies would be requesting punitive damages. They were denied and are not at issue here.

resolve uncertainties and controversies before obligations are repudiated, rights are invaded, or wrongs are committed." *Dubuque*, 553 N.W.2d at 607. Courts have discretion to not render a declaratory judgment "where it would not, if rendered, terminate the uncertainty or controversy giving rise to the proceeding." Iowa R. Civ. P. 265; *Fox*, 569 N.W. 2d at 507-08. The discretion to grant or refuse declaratory relief is broad in nature, and should be liberally exercised to effectuate the purpose of the statute. *Id.* at 508, citing *Wright v. Thompson*, 254 Iowa 342, 350, 117 N.W.2d 520, 525 (1962).

We cannot say the district court abused its discretion in refusing to grant the declaratory judgment. Granting declaratory relief would not have resolved the problems between Davies and Dooley and would only result in future litigation. We affirm on this issue.

Davies next contends the district court erred in limiting evidence of damages to the period from June 30, 1998, the date of Davies's termination, and the end of the employment agreement year contract, that being September 30, 1998. Davies contends he preserved error on this issue by arguing the submission of this damage evidence, making an offer of proof, and challenging the issue in a motion for new trial. Dooley does not argue that error was not preserved. Davies contends our review is for errors at law. Dooley contends it is for an abuse of discretion.

By way of an offer of proof it was stated Davies would testify that in the calendar year 1999 he would have income of $158,000 and $28,000 from A&P, and he would have a number of itemized business expenses and business-related expenses that in past years would have been paid by A&P.

To support an award of compensatory damages for loss of past and future wages and benefits, the plaintiff must show such award is reasonable. *Jones v. Lake Park Care Center, Inc.*, 569 N.W.2d 369, 375 (Iowa 1997). The award of future damages must be based on the likely duration of the terminated employment. *Id.; Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 687 (Iowa 1990). If there is a reasonable basis in the record from which the amount of damages can be inferred or approximated, recovery of damages for breach of contract or tortious interference with the contract will be allowed. *Id.* The determination of future losses is for the jury or the court if tried to the court. *Id.*

Defendants contend the damage evidence plaintiff sought to introduce was more speculative than certain. Courts have recognized a distinction between proof of the fact that damages have been sustained and proof of the amount of those damages. *Orkin Exterminating Co., Inc. v. Burnett,* 160 N.W.2d 427, 430 (Iowa 1968). If it is speculative and uncertain whether damages have been sustained, recovery is denied. *Id.* Future income, being speculative in nature, requires that the trial court be given considerable discretion as to whether to submit an item of profits to the jury. *Tredrea v. Anesthesia & Analgesia, P.C.,* 584 N.W.2d 276, 288 (Iowa 1998), *citing* 4 Arthur Linton Corbin, *A Comprehensive Treatise on the Working Rules of Contract Law* § 1022, at 142-3.

We agree with Dooley that we review for abuse of discretion. *See Tredrea,* 584 N.W.2d at 288.

The district court did not abuse its discretion in determining testimony of Davies's claimed losses after September 30, 1998 was too speculative to admit into evidence. Even though the employment contract has a provision for

automatic renewal, it is too speculative for us to conclude that the contract in this case would have been renewed had A&P not breached the contract and Dooley not tortiously interfered with it. *See Tredrea,* 584 N.W.2d at 288.

Davies claims the *Tredrea* standard is not applicable in this case because in *Tredrea* the party upon whose consent renewal of the contract depended was an uninterested third party. We do not agree with Davies that automatic renewal is the only possible scenario in this case, even if Davies was the only other member of the board. Under *Tredrea* the employment contract Davies had with A&P expired on September 30, 1998.

Furthermore, Davies does not argue that the district court incorrectly determined that he was employed at will and would have no claim for wages beyond September 30. Consequently we find no merit to his claim he should have been allowed to introduce evidence of damages he allegedly sustained in the period following that date. We affirm on this issue.

Davies next contends the district court erred in refusing to allow evidence that another professional corporation of anesthesiologists, A & A, was willing to offer one million dollars for an exclusive contract A&P had with MMP surgery center. Davies contends we review this issue for an abuse of discretion.

Davies contends this evidence would establish the value of A&P and the value of his shares in that corporation. Davies made an offer of proof through the testimony of anesthesiologist Kevin Wilson, a medical doctor and anesthesiologist, who was president of A & A. Wilson testified A & A was possibly interested in buying A&P's exclusive contract with MMP, and that in late 1999 A & A had valued A&P's contract with MMP at $1 million.

Wilson further testified his group did an informal valuation considering a number of factors and considered offering A&P $1 million for its contract with MMP. However, the offer would be contingent on a number of factors including (1) the consent of the MMP board; (2) an exclusive restrictive covenant on other practitioners in the Quad Cities area working at MMP; and (3) Dooley stepping down from the board of MMP.

Dooley filed a motion in limine asserting the testimony was not admissible for a number of reasons including that (1) it was not relevant because the value of A&P stock was established by the bylaws; (2) the evidence of value at time of trial was not evidence of the value of Davies's shares at the time his employment was terminated; (3) Wilson was not qualified to testify as an expert on the value of a business asset; (4) Wilson was not disclosed to them until seventeen days before trial; and (5) there was no evidence the CPA who valued the stock did not determine the value in good faith as required by the bylaws.

Davies contends he was prejudiced by the ruling on the evidence for it showed a breach of fiduciary duty on the part of Dooley. The trial court has wide discretion in ruling on the admissibility of evidence. *Gamerdinger v. Schaefer,* 603 N.W.2d 590, 594 (Iowa 1999). The trial court's decisions will not be disturbed unless there is a clear and prejudicial abuse of discretion. *Id.* The trial court did not abuse its discretion in excluding Wilson's testimony.

Wilson's testimony did not establish a definite value. But most importantly, the amount of A & A's considered offer was contingent upon certain factors including (1) the consent of the board of MMP; (2) a restrictive covenant; and (3) Dooley's stepping down from the board at MMP. There being no

evidence that (1) MMP would approve the transfer; (2) the restrictive covenant could be negotiated; and (3) that Dooley would or could be required to step down from the MMP board, the appraisal was based on factors not in evidence. On this basis we affirm on this issue.

Dooley has cross appealed contending the damage award against him is contrary to law because Davies did not sustain any economic loss for the period the district court instructed damages could be awarded. His argument is that Davies recovered his damages twice, once before he filed suit when the corporation paid him income through September 30, 1998 and the second time in obtaining a judgment for the same amount paid during the same time period.

Dooley testified that Davies drew roughly the salary he had been drawing for three months, less expenses attributed to him. Dooley contends that Davies received more in salary in the three months after his employment ended than he did in the three months before. Consequently Davies was in a better position not being an employee of the professional corporation on September 30, 1998 than if he had been. Dooley contends error was preserved by a motion for a judgment notwithstanding the verdict.

Our review of the trial court's refusal to grant a judgment notwithstanding the verdict is for error. *Johnson v. Dodgen*, 451 N.W.2d 168, 171 (Iowa 1990). If there is substantial evidence to support the claim or defense, the judgment notwithstanding the verdict should be denied. *Id.* Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Id.* When considering a motion for JNOV, the district court must view the evidence in the light most favorable to the party against whom the motion is directed. *Id.* In

reviewing the district court's ruling on defendants' motion, we look at the evidence in the light most favorable to Davies.

We conclude there was substantial evidence to support the jury's findings that Davies was not reimbursed for all of his damages resulting from the June 30, 1998 employment termination. Although Davies did receive money from A&P after his termination, we cannot conclude that the jury had not already accounted for these funds in determining damages. Evidence at trial showed that Davies would not receive some of his accounts receivable funds until at least six months after the termination. Furthermore, having been wrongfully terminated in June, Davies was unable to generate further accounts receivable for the three remaining months of his employment contract. There was substantial evidence to support the submission of this claim. We affirm on this issue.

Dooley next contends that the verdict against him for interference with Davies's contract is not supported by substantial evidence and is contrary to law because as an officer of the professional corporation he is entitled to a statutory and common law qualified immunity. Dooley has failed to state in his brief how and where error was preserved on these issues. However, we did find where he raised the issue in both a motion for directed verdict at the conclusion of Davies's case and again at the close of all the evidence.

Dooley contends he followed the advice of the corporation's attorney and its accountant in terminating Davies's employment. Dooley contends this entitled him to the statutory immunities found in Iowa Code sections 490.830(2)(b) and 490.842(2)(b) because his actions were taken pursuant to the lawyer's and accountant's advice.

The business judgment rule, the standard by which the actions of directors are measured, has been codified as Iowa Code section 490.830.4 (1997). The purpose of the rule is to limit second-guessing of business decisions made by those the corporation has chosen to make them. *See Cramer v. General Tel. & Elec. Corp.*, 582 F.2d 259, 274 (3d Cir.), *cert. denied*, 439 U.S. 1129, 99 S. Ct. 1048, 59 L. Ed. 2d 90 (1978). Iowa Code section 490.830 sets metes and bounds for judicial interference. Good faith is required (Iowa Code section 490.830(1)(a)) in weighing the appropriateness of challenged business decisions. The test is both objective (Iowa Code section 490.830(1)(b)) and subjective (Iowa Code section 490.830(1)(c)). If directors act in good faith in making a business decision, and the decision is reasonably prudent, and the directors believe it to be in the corporate interest, there can be no liability. *See Hanrahan v. Kruidenier*, 473 N.W.2d 184, 186 (Iowa 1991).

Dooley correctly argues that if he is a party to a contract he cannot be liable for tortious interference with that contract. See *Jones v. Lake Park Care Center, Inc.*, 569 N.W.2d 369, 377 (Iowa 1997). Only a third-party, separate from the contracting parties, can be liable for such a tort. *Id.* Dooley contends in firing Davies he was acting for the corporation and that his actions are protected by the statutory business judgment rule. A director or officer acts as an agent of the corporation when acting in good faith to protect the interests of the corporation. *Id.* When acting as an agent within the scope of the qualified privilege, there can be no tortious interference because only two parties exist: the corporation and the contracting party. *Id.* However, when officers or directors act beyond the scope of their qualified privilege, they are no longer acting as agents of the

corporation and can be personally liable for their acts. *Id. See Hunter v. Board of Trustees of Broadlawns Medical Center*, 481 N.W.2d 510, 518 (Iowa 1992).

Before a plaintiff can recover damages against an officer or director of a corporation for the tort of intentional interference with a contract, the plaintiff must prove the officer or director exceeded the qualified privilege and then prove the intentional interference claim. *Id.* at 376. Both issues are submissible to the trier of the facts. *Id.*; *Wolfe v. Graether*, 389 N.W.2d 643, 660 (Iowa 1986)

However, the business judgment rule only applies to challenges which do not allege self-dealing on the part of Dooley. Where directors are engaged in self-dealing the burden rests upon them to establish that the transaction was fair to the corporation. *See Cookies Food Prods. v. Lakes Warehouse*, 430 N.W.2d 447, 452 (Iowa 1988).

Dooley did not act as a director in firing Davies. Rather Dooley, acting as president of the corporation, fired Davies claiming he alone as president of the corporation had that authority under the corporate bylaws. We therefore do not find that statutory part of the act which sets grounds for judicial interference in the decisions of corporate directors to be applicable here. However, Dooley argues the common law has extended the same protection to an officer.

Majority shareholders have the right "to control the affairs of a corporation, if done so lawfully and equitably, and not to the detriment of minority stockholders." *Cookies*, 430 N.W.2d at 454; *Connolly v. Bain*, 484 N.W.2d 207, 211 (Iowa Ct. App. 1992). Courts are disinclined to interfere in internal corporate operations involving management decisions, subject to the principle of majority control. *See Wolf v. Lutheran Mut. Life Ins. Co.*, 236 Iowa 334, 341-42, 18

N.W.2d 804, 809 (1945). The selection and retention or dismissal of officers, directors, and employees are examples of such internal corporate operations. *See Connelly,* 484 N.W. 2d at 211.

We do not find the district court erred in denying defendant's motion for a judgment notwithstanding the verdict on the ground he was protected by the business judgment rule. Dooley acted only as president in firing Davies. He was neither supported by board action nor by a majority vote of the shareholders. While Dooley argues he was operating in the corporation's interest, the result of his actions affected only Davies and himself. At the close of this transaction Dooley became the sole shareholder. We do not believe the district court erred here in finding this was not a transaction that the business judgment rule was meant to insulate from liability. We affirm on this issue.

Lastly Dooley contends the verdict against the professional corporation is not supported by substantial evidence and is contrary to the law because Davies did not prove his employment contract with the professional corporation was modified. Davies's employment contract required him to have privilege at St. Luke's and/or Mercy Hospitals as the corporation deemed necessary. We find no merit to this issue. We affirm the district court on all issues.

AFFIRMED.