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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-464 / 90-53

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JOLLIFFE & CO., An Iowa Corporation,
Plaintiff-Appellant,

vs.

EUGENE F. GRAVES,
Defendant-Appellee.

EUGENE F. GRAVES,
Counterclaimant-Appellee,

vs.

JOLLIFFE & CO., An Iowa Corporation; **HELEN L. JOLLIFFE; ROBERT J. JOLLIFFE; TJERAN A. JOLLIFFE;** and **DUANE A. THOMPSON;**
Defendants-Appellants.

Appeal from the Iowa District Court for Pocahontas County, Newt Draheim, Judge.

Jolliffe & Co., an accounting firm, brought this action against its former employee, Eugene Graves, when he quit his employment and became the internal comptroller for one of Jolliffe's clients. Jolliffe claimed that Graves improperly interfered with its business opportunities. Graves counterclaimed alleging breach of a shareholders' agreement. The district court dismissed all of Jolliffe's claims and awarded Graves $91,853 on his counterclaim. Jolliffe now appeals. **AFFIRMED.**

Gary A. Robinson and William B. Serangeli of Smith, Schneider, Stiles, Mumford, Schrage, Zurek, Wimer & Hudson, P.C., Des Moines, for appellant.

Redge O. Berg, Spencer, and Donald M. Winkler, Laurens, for appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

DONIELSON, P.J.

Jolliffe & Co. (Jolliffe) is a corporation established by Helen and Robert Jolliffe. The corporation provides accounting and tax preparation services to its individual, partnership, and corporate clients. Helen and Robert each own approximately 35 percent of the corporate stock, and their son, Tjeran Jolliffe, Duane Thompson, and Eugene Graves (the defendant and counterclaimant), each own 10 percent of the corporate stock. Graves began working for Jolliffe in 1974 and became a shareholder in 1977. At Jolliffe, he provided services to the corporation's clients including the preparation of financial statements, monthly profit and loss schedules, payroll deposits, tax returns, and tax plans.

In 1982, Graves and the other shareholders entered into a shareholders' agreement. The agreement required either a corporate or employee-shareholder repurchase of shares when a shareholder terminated employment with the company. The agreement also contained an automatic adjusted value formula: if the shareholders did not meet and set a value for the stock each year, the formula provided an automatic adjusted stock value for that year. At that time, the shareholders valued the stock at $216.91 per share. The shareholders did not meet and set a value for the stock between 1983 and 1985.

Graves sustained a head injury in 1981 and was unable to work for several months but did return to work that same

year. Subsequently, Jolliffe received some complaints from clients because of errors in Graves' work. Graves resigned in May 1985. He accepted a job with Ration Maker Products, Inc. in June 1985 as an internal comptroller. His duties for Ration Maker include assisting in the preparation of formula on a premix livestock feed; preparing a balance on rations; dealing with purchase inventory problems, personnel, OSHA, and DNR; supervising pension, fringe benefits on products, and costing; determining market prices; operating the computer; and substituting for employees who are on vacation. Ration Maker had been a client of Jolliffe but after hiring Graves it no longer used the company.

Jolliffe filed this suit against Graves alleging breach of contract, loss of corporate opportunity, interference with prospective contractual relations, and breach of fiduciary duty. Graves filed a counterclaim asking the court to value his shares in Jolliffe. The district court dismissed Jolliffe's claims and granted Graves relief on his counterclaim. The court valued the stock at $265.47 per share, a figure corresponding to the value established by the automatic adjusted value formula of the 1982 shareholders' agreement. Judgment was entered against Jolliffe for $91,853 plus interest.

Jolliffe appeals. Jolliffe claims the court erred in: (1) finding there was no breach of fiduciary duty by Graves; (2) failing to find there was mutual mistake in the

shareholders' agreement; (3) failing to set a fair market value on the Jolliffe stock; (4) permitting Graves to amend his answer after the close of evidence; (5) allowing Graves to defend on the basis of laches, acquiescence, and estoppel; (6) finding that Graves' accounting errors resulted from his head injury; and (7) failing to order Graves to pay court and deposition costs. We now affirm.

I. **Breach of Fiduciary Duty.** Jolliffe contends Graves, as a corporate officer of the company, breached his fiduciary duty by misappropriating a corporate opportunity. Jolliffe states Ration Maker offered a business opportunity to Graves that Jolliffe was able to undertake but instead of promoting Jolliffe's interests Graves seized the business opportunity for himself. We disagree.

The leading Iowa case on corporate opportunity is Ontjes v. MacNider, 232 Iowa 562, 5 N.W.2d 860 (1942). There, our supreme court set forth the following standard for determining whether there is a corporate opportunity:

> It is true that when a business opportunity comes to a corporate officer or director in his individual capacity rather than in his official capacity, and the opportunity is one which, because of the nature of the enterprise, is not essential to his corporation, and is one in which it has no interest or expectancy, the officer or director is entitled to treat the opportunity as his own, and the corporation has no interest.
>
> On the other hand, it is equally true that, if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable

> expectancy, and by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself. And, if, in such circumstances, the interests of the corporation are betrayed, the corporation may elect to claim all of the benefits of the transaction for itself, and the law will impress a trust in favor of the corporation upon the property, interests and profits so acquired.

Id. at 578-79, 5 N.W.2d at 869 (citing Guth v. Loft, Inc., 23 Del. Ch. 255, 271-72, 5 A.2d 503, 510-11 (1939)) (citations omitted).

The supreme court also quoted favorably the following statement by the New Jersey Supreme Court:

> It is clear from an analysis of the two opinions in the Loft case, as well as of the numerous authorities cited therein, that a finding of "corporate opportunity" will be denied (a) wherever the fundamental fact of good faith is determined in favor of the director or officer charged with usurping the corporate opportunity, or (b) where the company is unable to avail itself of the opportunity, or (c) where availing itself of the opportunity is not essential to the company's business, or (d) where the accused fiduciary does not exploit the opportunity by the employment of his company's resources, or (e) where by embracing the opportunity personally the director or officer is not brought into direct competition with his company and its business. It will be observed that all of the foregoing elements are stated disjunctively and it would therefore seem that the absence of any one of them is sufficient to defeat such claim of corporate opportunity as is made in this case.

Ontjes, 232 Iowa at 579-80, 5 N.W.2d at 869-70 (citing Solimine v. Hollander, 128 N.J. Eq. 228, 246-47, 16 A.2d 203, 215 (1940)).

Like the trial court, we find Graves did not breach a fiduciary duty. Jolliffe was in no position to avail

itself of the position offered to Graves. While the position offered may have included some of the functions previously provided to Ration Maker by Jolliffe, it also included many functions Jolliffe did not, and could not, provide. Nor was the opportunity offered to Graves essential to Jolliffe's business. We also note Graves did not solicit the job offer from Ration Maker and Ration Maker did not offer the position to Graves until after he had resigned from Jolliffe. We point out these circumstances because we believe they are indicative of Graves' good faith and the absence of exploitation of Jolliffe's resources. Under these circumstances, the trial court did not err in concluding Graves had not breached a fiduciary duty.

II. **Reformation of Shareholder Agreement Based on Mutual Mistake.** Jolliffe contends there was a mutual mistake in the shareholders' agreement which would justify reforming the contract.

Our supreme court has recently reviewed when mistake may be grounds for setting aside or reforming a contract in Pathology Consultants v. Gratton, 343 N.W.2d 428 (Iowa 1984). The Pathology Consultants court noted,

> Avoidance is possible where the party seeking to avoid the contract establishes that both parties are mistaken about an essential fact that was a material consideration for the contract. . . . Not all mistakes, however, are sufficient to avoid contract. Mistake is a broad term. A mistake in the legal sense, as used here, is limited to an erroneous belief as to a then existing or past fact. A party's failure to anticipate future events or contingencies is not a

> mistake as to a then existing or past fact that would normally entitle him to relief.

Id. at 437 (citations omitted).

Jolliffe asserts that all the parties believed the purpose of the automatic adjusted value formula was to establish a fair market value for the stock. It claims it was never the intent of the parties that a departing shareholder would ever receive greater than the fair market value of the shares, which Jolliffe alleges is the effect of applying the automatic adjusted value formula at this time. Jolliffe argues the district court erred by not setting a fair market value for the shares as of December 31, 1984. Jolliffe presented expert testimony that the fair market value of the shares was $153 per share. The court did not look beyond the shareholders' agreement in valuing the stock at $265.47 per share.

Valuation of a closely-held corporation is difficult, and the market value of stock in a closely-held corporation can rarely be ascertained. In re Marriage of Moffatt, 279 N.W.2d 15, 19 (Iowa 1979). Here, the parties to the shareholders' agreement, in effect, defined the "market value" of Jolliffe stock. The language of the shareholders' agreement clearly and unambiguously set the "market value" of Jolliffe stock at $216.91 per share in 1982. The agreement then provided:

> B. Automatic Adjusted Value Formula. If the Stockholders to this agreement do not mutually agree to a new value within one hundred eighty (180) days after the close of each fiscal year of the corporation on December 31, . . . then there

> will be an automatic adjustment made to the value per share calculated as follows . . .[method described].

Jolliffe now seeks to be relieved of its agreed upon value. This court rejects Jolliffe's invitation to rewrite the contract. "Courts should not rewrite a shareholder agreement under the guise of relieving one of the parties from the apparent hardship of an improvident bargain." Maschmeier v. Southside Press, Ltd., 435 N.W.2d 377, 383 (Iowa App. 1988). If there is a failure of understanding here, and we are not at all sure there is, it is a failure to anticipate future events and not a mistake as to a then existing or past fact. We believe Jolliffe simply seeks to escape the results of what it now finds to be an "improvident bargain." This court will not aid Jolliffe in its attempt.

III. **Amendment of Answer.** Jolliffe asserts the district court erred in permitting Graves to amend his answer after the close of evidence in this case. Graves amended his answer to bar Jolliffe from claiming any damages as a result of breach of contract by reason of laches, acquiescence, and estoppel. Jolliffe asserts that it could not adequately prepare any response to these new theories of defense. Furthermore, Jolliffe argues the district court should not have allowed Graves to assert the defenses of laches, acquiescence, and estoppel because the facts do not support any of these defenses.

Iowa R. Civ. P. 88 provides, in part, that "a party may amend a pleading [after time for responsive pleading has passed] only by leave of court . . . Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires." (Emphasis added.) Allowance of an amendment to a pleading is the rule and denial the exception. See Atlantic Veneer Corp. v. Sears, 232 N.W.2d 499, 503 (Iowa 1975). A trial court has considerable discretion in this matter and we will reverse only where a clear abuse of discretion is shown. Id.

We find no clear abuse of discretion in the district court's allowance of the amendment. We do not find that the amendment substantially changed the issues before the court or unfairly surprised Jolliffe. Furthermore, we believe the amendment simply conformed the pleadings to the evidence introduced at trial without objection by Jolliffe.

We have reviewed the remainder of Jolliffe's contentions of error and find them without merit. For all the reasons stated, we affirm the district court.

AFFIRMED.