STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0423

Mark Keogh,
Appellant,

vs.

John Henry Foster Minnesota, Inc.,
Respondent,

John D. Hawkins,
Respondent.

Filed April 15, 2008
Affirmed
Wright, Judge

Dakota County District Court
File No. CX-06-6334

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Considered and decided by Willis, Presiding Judge; Wright, Judge; and Poritsky, Judge.[*]

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

WRIGHT, Judge

Appellant challenges the district court's entry of summary judgment on claims arising out of the termination of his employment with a closely held corporation. Appellant argues that there are genuine issues of material fact regarding whether (1) his employment contract was breached, (2) respondent-shareholder violated common-law fiduciary duties owed to him, (3) respondent-shareholder's conduct was "unfairly prejudicial" to appellant as a fellow shareholder, (4) his discharge was wrongful, and (5) respondent-shareholder tortiously interfered with his contractual employment relationship with respondent-corporation. We affirm.

FACTS

Respondent John Hawkins is the president, majority shareholder, and sole director of respondent John Henry Foster Minnesota, Inc. (JHF), a closely held corporation with a history of employee ownership and management. Hawkins purchased JHF on January 1, 1999, and began planning for his own succession before the sale was complete.

Because Hawkins "wanted to continue the employee owner-operator structure," he identified appellant Mark Keogh and Ronald Nordby, who were "[t]wo of [his] key and long-time employees," to succeed him as co-owners. Keogh had been an employee of JHF since 1984, when he was hired as an accountant. He was subsequently promoted to controller in 1985, became a shareholder in 1990, and became vice president of finance in 1999. Keogh owns 145 of JHF's 855 outstanding shares. Nordby was employed by JHF since 1974, became a shareholder in 1992, and was subsequently promoted to vice president of sales and marketing.

Formal negotiations for succession began in early 1999. All parties acknowledge that the succession-agreement negotiations were conducted in good faith. Although the negotiations were difficult, Keogh and Nordby were jointly represented by counsel, whose fees were paid by JHF. The parties eventually reached a succession agreement, which was executed on May 12, 2000.

The succession agreement incorporated a number of interlocking documents, including an employment agreement and an option agreement. The option agreement gave Keogh an option to purchase 255 of Hawkins's 510 shares between July 1, 2007, and July 1, 2009. But the option would "automatically terminate, without notice, upon the occurrence of . . . [Keogh's] termination . . . of employment with [JHF]." Nordby was given an option with identical terms.

Under the employment agreement, JHF would "retain [Keogh] for an unspecified period of time . . . subject, however, to termination of this Agreement as set forth in Section 13." Section 13 enumerates the following six grounds on which Keogh's employment with JHF may be terminated: (1) mutual written agreement; (2) Keogh's death or resignation; (3) a "joint decision" by Hawkins and Nordby, if Nordby is still employed by JHF; (4) "for cause," such as misconduct or material breach of the employment agreement; (5) JHF's dissolution, liquidation, or bankruptcy; or (6) Keogh's incapacitation. Before executing the employment agreement in May 2000, Keogh did not have a formal employment agreement with JHF. Thus, the employment agreement provided Keogh greater protection than most other JHF employees, who were at will. According to the employment agreement, if Keogh did not exercise his stock option, he would resume his status as an at-will employee.

In 2003, Hawkins told Nordby that JHF wanted to purchase his shares. When Nordby asked whether he was being terminated, Hawkins said no and reiterated that the company wanted to buy back Nordby's shares. Nordby sold his JHF stock for $5,000 per share, and, by March 2004, he was neither a shareholder nor a participant in the succession agreement. But he retained his position as vice president of sales and marketing.

At approximately 4:30 p.m. on a day in early June 2005, Hawkins and Nordby met in Nordby's office. Although the record does not disclose the reason for the meeting, it was unrelated to Keogh. During their discussion, Nordby stated, in effect, "I hope you retain control of the company, if . . . you know what I mean." Although Nordby does not recall the rest of the discussion, Hawkins described the 20-minute conversation as "quite profound." According to Hawkins, Nordby advised him that he and several other employees were considering leaving JHF because they were "very nervous about their positions and about the future of [JHF] should . . . Keogh take control of the company."

At some point during the next few weeks, Hawkins noticed that another JHF shareholder, whom Nordby had identified among those considering leaving, was exhibiting an out-of-character demeanor. When Hawkins asked this shareholder to share his thoughts regarding Keogh, the shareholder complimented Keogh's mathematical acumen but stated that Keogh was not a good manager and not the right person to succeed Hawkins and lead JHF.

Hawkins did not speak to any other employees about Keogh's leadership until late June 2005, when he told Nordby that he planned to terminate Keogh. This was the first conversation between Nordby and Hawkins regarding termination.

On July 1, 2005, Hawkins asked Nordby to join him in a meeting with corporate counsel. Although the substance of the meeting's discussion was objected to on grounds of attorney-client privilege, the record reflects that the discussion was mostly between Hawkins and Nordby. The record also reflects that Nordby recalled that, under the employment agreement, "the only way that either [Keogh] or [he] could be let go for basically no reason would be if one or the other consented to it," and he volunteered to consent. Corporate counsel drafted a letter, addressed to Hawkins and signed by Nordby, stating:

> Pursuant to Section 13(c) of that certain Employment Agreement dated May 12, 2000, by and between Mark Keogh and John Henry Foster Minnesota, Inc., I hereby consent to and fully support the decision by you to terminate the employment of Mark Keogh with John Henry Foster Minnesota, Inc.

Hawkins terminated Keogh's employment on July 6, 2005. As a result, Keogh brought an action against JHF and Hawkins. JHF and Hawkins moved for summary judgment, which the district court granted on all claims. This appeal followed.

D E C I S I O N

On appeal from summary judgment, we determine whether genuine issues of material fact exist and whether the district court erred as a matter of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). In doing so, we view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Summary judgment is appropriate when the nonmoving party bears the burden of proof and fails to establish the existence of an element essential to its case, *Bersch v. Rgnonti & Assocs., Inc.*, 584 N.W.2d 783, 786 (Minn. App. 1998), *review denied* (Minn. Dec. 15, 1998), or when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)). Although the district court may not weigh the evidence and must draw all reasonable inferences in favor of the nonmoving party, the record must create more than a "metaphysical doubt as to a factual issue" to warrant reversal of summary judgment. *Id.* at 71.

I.

Keogh argues that the district court erred in entering summary judgment on his breach-of-contract claim against JHF because genuine issues of material fact exist as to whether the decision to terminate Keogh was a joint decision. The parties agree that the employment contract requires JHF's decision to terminate Keogh to be the "joint decision" of Hawkins and Nordby. But Keogh argues that the district court erred in its interpretation of the definition of "joint decision" within the meaning of the contract and in its determination that the record does not support a reasonable inference that the termination decision was not a "joint decision."

Contract interpretation presents a question of law, which we review de novo. *Paradigm Enters., Inc. v. Westfield Nat'l Ins. Co.*, 738 N.W.2d 416, 419 (Minn. App. 2007). The primary goal of contract interpretation is to determine and enforce the intent of the contracting parties. *Motorsports Racing Plus, Inc., v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003). When interpreting a written instrument, "the intent of the parties is determined from the plain language of the instrument itself." *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). When the contractual provision is clear and unambiguous, we will not rewrite, modify, or limit the effect of a contract provision by a strained construction. *Id.*

Keogh's challenge is founded on the requisite manner and extent of Nordby's participation in the decision-making process contemplated by the phrase "joint decision." Keogh argues that the phrase "joint decision" requires Nordby "to meaningfully participate in the decision-making process." He contends that, although Nordby acquiesced in Hawkins's decision, Hawkins effectively excluded Nordby from this process. Thus, according to Keogh, the decision to terminate him was not a "joint decision." JHF counters that Nordby's consent to the termination is sufficient because the contract does not require Hawkins and Nordby to make the decision at the same time or for the same reasons.

The word "joint" means something "common to or shared by two or more persons or entities." *Black's Law Dictionary* 841 (7th ed. 1999); *see also The American Heritage Dictionary* 971 (3d ed. 1992) (defining "joint" as "[s]hared by or common to two or more"). Thus, although the parties differ as to their interpretation of the phrase, the plain meaning of "joint decision" does not include a particular process for reaching the joint decision, a common rationale for that decision, or a particular temporal relationship, such as simultaneity, as to when each party must make the decision. There is no evidence from which a fact-finder reasonably could conclude that Nordby's level of participation in the decision-making process was insufficient to constitute a joint decision.

In support of his argument, Keogh relies primarily on Nordby's letter to Hawkins, which states that he "consent[s] to and fully support[s] the decision *by you* to terminate the employment of . . . Keogh." (Emphasis added.) In doing so, he suggests that a fact-finder reasonably could conclude that a "decision by you" implies a "decision by you and not me." *Cf. Maher v. All Nation Ins. Co.*, 340 N.W.2d 675, 680 (Minn. App. 1983) (applying maxim of *expressio unius est exclusio alterius* to contract language). Keogh also cites portions of Nordby's deposition testimony that superficially appear to support his position. But a thorough review of the record makes evident that this testimony is taken out of context. For example, Keogh points to the following exchange:

> Q. Whose idea was it to terminate Mark Keogh?
> A. John Hawkins.
> Q. How did you find out about the idea?
> . . . .
> A. I believe he just came up and told me.
> Q. What did he tell you?
> A. That he would be terminating Mark Keogh.

> Q. Is that the first conversation you had with him about that subject . . . ?
> A. As far as I can recall, yes.
> . . . .
> Q. And did he tell you why?
> . . . .
> A. Not really. He didn't go into details about it or anything, no.
> Q. Did you ask him why he was telling you this?
> A. Didn't cross my mind to ask him that, no.

This testimony may appear to suggest that the termination decision was unilaterally made by Hawkins. But as Keogh himself argues, a simultaneous decision by Nordby and Hawkins was not required. The record reflects that when Hawkins and Nordby met with corporate counsel to discuss Keogh, Nordby incontrovertibly decided to terminate Keogh:

> Q. Do you recall if the [consent letter] was ready for you when you arrived there at the lawyer's office . . . ?
> A. No, it was not.
> Q. Do you recall how it got prepared?
> . . . .
> A. . . . It's my best recollection that during . . . that meeting . . . at the lawyer's office between [Hawkins] and I, [Hawkins] and I were doing most of the talking, and I volunteered to consent, if they wanted me to. . . . I just said I was willing to consent to it. I knew that I would have to, I mean, so I said, yeah. I mean, I kind of volunteered to do it, yes.
> Q. Well, who brought up the idea of your consent?
> A. Me.
> Q. You?
> A. Yeah.
> Q. And how did you know that you would have to consent?
> A. About the only thing I remember about [the succession agreement] was the fact that . . . the only way that either [Keogh] or I could be let go for basically no reason would be if one or the other consented to it. That's about the only thing I really remember about all those papers I signed. *But it was*

> *my idea to do it.* In fact, I was kind of surprised that it was not brought up. . . . I let them know that I knew that in order for anything to happen, I would have to consent to something, and I just said I would consent to it. And I think—my impression was they were kind of surprised.

(Emphasis added.) When all inferences are drawn in favor of Keogh, there is no genuine issue of material fact as to whether the termination decision was a joint decision. The record establishes joint participation by Nordby and Hawkins and a common understanding between them, thereby satisfying the joint-decision requirement to terminate Keogh under the employment agreement.

II.

Keogh next argues that there are disputed material facts as to whether Hawkins breached a common-law fiduciary duty that he owed Keogh as a fellow JHF shareholder. Shareholders in a closely held corporation, such as JHF, owe a common-law fiduciary duty to one another. *Berreman v. West Publ'g Co.*, 615 N.W.2d 362, 370 (Minn. App. 2000), *review denied* (Minn. Sept. 26, 2000). Whether a fiduciary duty has been breached ordinarily is a question of fact. *Id*. at 367. Therefore, summary judgment is appropriate only if a rational fact-finder could not conclude that Hawkins breached a fiduciary duty owed to Keogh. *Id*.

The scope of the common-law fiduciary duty among shareholders in a closely held corporation is defined as a requirement to deal "openly, honestly, and fairly" with each other. *Id.* at 371 (quotation omitted). This duty encompasses both substantive and procedural obligations. *Gunderson v. Alliance of Computer Prof'ls, Inc.*, 628 N.W.2d 173, 185 (Minn. App. 2001), *review granted* (Minn. July 24, 2001) *and appeal dismissed*

(Minn. Aug. 17, 2001). Here, Keogh advances two theories regarding how Hawkins breached the common-law fiduciary duty by terminating him. First, Keogh suggests that a rational fact-finder could conclude that Hawkins terminated Keogh for the improper motive of personal financial gain. He points to several facts from which he argues this inference can be drawn: Hawkins has a large amount of personal debt, including a sizeable financial obligation to his former wife; as president of JHF, Hawkins's annual salary is $1 million; if Keogh exercised his stock option, Hawkins would lose his position as majority shareholder in exchange for a one-time payment of approximately $1.3 million; and if Keogh cannot exercise his option because he is no longer employed by JHF, Hawkins will retain his position as majority shareholder. Thus, Keogh argues, a rational fact-finder could conclude that Hawkins terminated Keogh in order to retain his position as majority shareholder of JHF, thereby ensuring his continued employment as president and the $1 million annual salary Hawkins needed to meet his financial obligations.

There is, however, a significant gap in Keogh's reasoning. Although Keogh's deposition testimony supports the proposition that Hawkins had substantial financial obligations, it does not necessarily follow that he required a $1 million annual salary to meet them. There is nothing in the record about Hawkins's net worth—for example, any income independent of JHF, savings, or real-property holdings. Moreover, the succession agreement, which was executed over a year after Hawkins's divorce, contemplates Hawkins ceding control of JHF to someone else. In short, there is nothing to establish that Hawkins's debt is beyond his means apart from Keogh's own speculation. Without a factual context in which to evaluate Hawkins's financial situation, a fact-finder cannot rationally infer the bad motive that Keogh suggests.

Second, Keogh argues that Hawkins breached a fiduciary duty by misleading Keogh about his job security, which he contends was "material information" Hawkins was required to disclose. We have held that the common-law fiduciary duties of a shareholder in a closely held corporation "include the duty to disclose material information about the corporation." *Berreman*, 615 N.W.2d at 371. Whether information is "material" depends on its probable effect on the shareholder's decision-making rights with respect to that shareholder's investment. *See id.* at 371-72 (approving of "probability-magnitude approach" for materiality). This balancing necessarily depends on the specific facts of each case. *Id.* at 371.

If Keogh's investment is, as he suggests, tied to the succession agreement—and particularly, his stock option—whether he was being considered for termination theoretically could be material because his continued employment is a condition precedent to exercising the option. But nothing in the record suggests that, as a shareholder, Keogh had any decision-making rights, including the right to notice, with respect to his status as an employee. Rather, under the employment contract, the termination decision rests exclusively with Hawkins and Nordby. Thus, no rational fact-finder could conclude that Keogh's lack of job security could have affected any of his decision-making rights as a shareholder.

III.

Keogh also argues that there is a factual dispute as to whether Hawkins acted in an "unfairly prejudicial" manner towards him in his capacity as a shareholder. Under the Minnesota Business Corporation Act (MBCA), a court may grant reasonable equitable relief to a shareholder in a closely held corporation if those in control of the corporation have acted in an "unfairly prejudicial" manner toward a shareholder in his or her capacity as a shareholder. Minn. Stat. § 302A.751, subd. 1(b)(3) (2006). The MBCA does not define the term "unfairly prejudicial." But we have interpreted it to mean "conduct that frustrates the reasonable expectations of all shareholders in their capacity as shareholders." *Gunderson*, 628 N.W.2d at 184. Because whether a shareholder's reasonable expectations have been frustrated ordinarily is a question of fact, summary judgment is improper unless we conclude that a rational fact-finder could not find Hawkins's conduct frustrated a reasonable expectation held by Keogh in his capacity as a shareholder. *Id.* at 186.

Keogh argues that he had a reasonable expectation of continued employment notwithstanding the provision in his employment contract that permitted Hawkins and Nordby to jointly terminate him "for any reason." A shareholder in a closely held corporation typically expects to continue employment with the corporation. *Id.* at 189. Indeed, "because of the unique characteristics of close corporations, employment is often a vital component of a close-corporation shareholder's return on investment and a principal source of income." *Id.* A shareholder-employee's expectation of continued employment is reasonable if it "can fairly be characterized as part of the shareholder's investment." *Id.* at 191 (quotation omitted).

But not all shareholder expectations of continued employment are reasonable. *Id.* at 186. Indeed, the legislature directs us to presume that "written agreements, including employment agreements[,] . . . reflect the [shareholder's] reasonable expectations concerning matters dealt with in the agreements." Minn. Stat. § 302A.751, subd. 3a (2006). Thus, written employment agreements must "be honored to the extent they specifically state the terms of the parties' bargain." *Gunderson*, 628 N.W.2d at 186.

Here, the succession-agreement documents, including Keogh's employment agreement, were the product of one-and-one-half years of negotiations. Keogh was represented by counsel and heavily involved in the negotiations. The final agreement reached through these negotiations specifically permits Hawkins and Nordby to terminate Keogh "for any reason" pursuant to their joint decision. And as a product of these same negotiations, the final stock-option agreement inherently contemplates the possibility that Hawkins and Nordby may jointly decide to exercise that power. Because the termination decision was made "jointly," Keogh received the protection he bargained for. *Cf. id.* at 190 (hypothesizing that "shareholders who sign buyout agreements permitting termination of employment for any reason and obligating shareholders to sell their shares to the corporation upon termination of employment would not likely have a reasonable expectation of continuing employment"). Because Keogh's employment was subject to that risk, a rational fact-finder could not find that Keogh possessed a reasonable expectation of continued employment.

IV.

Keogh also argues that there is a genuine issue of material fact regarding his wrongful-termination claim. Generally, employment in Minnesota is at will, "meaning that the relationship can be terminated for any reason or for no reason at all." *Nelson v. Productive Alternatives, Inc*., 715 N.W.2d 452, 454 (Minn. 2006). Nevertheless, our supreme court has recognized a common-law wrongful-termination cause of action when a termination violates public policy. *Id*. at 455-56. The scope of this action, however, is extremely limited because only the clearest, most fundamental, and important of policies will justify a judicially created exception to the at-will doctrine. *Id.* at 456.

Keogh argues that the MBCA provides such a policy. He maintains that Minn. Stat. § 302A.751, subd. 1(b)(3), which proscribes acting with "unfair prejudice" in terminating a minority-shareholder employee, can support a common-law wrongful-termination claim. And arguably, the legislative history of the MBCA provides some support for this proposition: "Abuse of non-controlling shareholders is not to be tolerated under [the Minnesota Business Corporation Act]; . . . this section stand[s] *as evidence of that policy*." Minn. Stat. Ann. § 302A.751 reporter's notes (West 1981) (emphasis added). While Minnesota courts have not considered whether Minn. Stat. § 302A.751, subd. 1(b)(3), expresses the requisite clear public policy that can support a common-law wrongful-termination action, we need not decide the issue here because the record does not support an inference that Keogh was unfairly prejudiced within the meaning of that statute.

V.

Finally, Keogh argues that there is a genuine issue of material fact as to whether Hawkins tortiously interfered with his contractual relations with JHF. To establish a claim for tortious interference with a contract, Keogh must prove (1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) that the alleged wrongdoer intentionally procured its breach; (4) that the alleged wrongdoer acted without justification; and (5) damages. *Furlev Sales & Assocs., Inc. v. N. Am. Auto. Warehouse, Inc.*, 325 N.W.2d 20, 25 (Minn. 1982).

Tortious interference extends to at-will employment agreements. *Nordling v. N. States Power Co.*, 478 N.W.2d 498, 505 (Minn. 1991). This is because "at-will employment subsists at the will of the employer and employee, not at the will of a third party meddler who wrongfully interferes with the contractual relations of others." *Id.* But when a corporate officer terminates an at-will employee of the corporation pursuant to the officer's corporate duties, it is the corporation-employer who allegedly "interferes," not the individual officer. *Id.* Moreover, a party cannot "interfere" with its own contract. *Id.* In such circumstances, the employee's dispute is with the corporation-employer for breach of contract, not the individual officer for a tort. *Id.*

Nevertheless, a corporate officer may be individually liable for tortious interference with a contract if the officer acted outside the scope of his or her corporate duties. *Id.* at 506. This occurs when the officer "improperly" interferes with the employee's contract by terminating the employee based on the officer's bad motive. *Id.* (noting "difficulty of describing in any inclusive fashion what [interference] might be tortious”). Thus, for Keogh’s tortious-interference claim to survive summary judgment, he must establish that Hawkins was acting outside the scope of his duties as president of JHF when Keogh was terminated.

Keogh’s argument that there is a genuine issue of material fact as to Hawkins’s bad motive is unavailing. As discussed in section II, the record is insufficient to permit a rational fact-finder to infer a bad motive on Hawkins’s part. And because JHF cannot tortiously interfere with its own contract, summary judgment was properly granted on this claim.

Affirmed.