IN THE SUPREME COURT OF THE STATE OF NEVADA

G. STANMORE RASMUSSEN, AN INDIVIDUAL AND AS A DIRECTOR OF THE CARSTAN CORPORATION; AND G.S. RASMUSSEN & ASSOCIATES, INC., A CALIFORNIA CORPORATION,
Appellants/Cross-Respondents,
vs.
CARLOS LOPEZ, AN INDIVIDUAL AND AS A DIRECTOR OF THE CARSTAN CORPORATION; AND THE CARSTAN CORPORATION, A NEVADA CORPORATION,
Respondents/Cross-Appellants.

No. 36958

FILED

JUL 11 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a final judgment in favor of appellant/cross-respondent G.S. Rasmussen & Associates, Inc. (GSRA) and against respondent/cross-appellant Carstan Corporation (Carstan) for monies owed, for respondent/cross-appellant Carlos Lopez (Lopez) for breach of fiduciary duty by appellant/cross-respondent G. Stanmore Rasmussen (Rasmussen), and from orders denying motions for a new trial or alternatively, for additur. We affirm GSRA's award for monies owed. We reverse Lopez's award for breach of fiduciary duty and remand for a new trial on the issue of usurpation of Carstan's corporate opportunities.

In 1987, Rasmussen, an engineer with expertise in developing materials needed to secure Federal Aviation Administration (FAA) approval to convert passenger planes into cargo planes, and Lopez, an engineer with confidential information on certain Boeing aircraft as well as FAA contacts, formed respondent/cross-appellant Carstan as a private

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Nevada corporation. Pursuant to NRS 78.010 et seq., Rasmussen and Lopez were fifty/fifty shareholders and Carstan's only corporate directors and officers. Carstan's primary business was to secure and license "Supplemental Type Certificates" (STCs), issued by the FAA, authorizing an increase of the design weight limitations for Boeing aircraft. Carstan contracted with GSRA, of which Rasmussen was the president and sole shareholder, for aeronautical engineering services necessary for the issuance of STCs. Under the non-compete clause in Carstan's pre-incorporation agreement, Rasmussen and Lopez were required to present certain Boeing aircraft-related opportunities to Carstan first. If Carstan rejected or abandoned the opportunity, the person who first learned of it was free to develop it separately.

In the early 1990s, Rasmussen's and Lopez's relationship began to deteriorate. Rasmussen filed a complaint against Carstan, alleging, among other things, breach of contract for monies owed to GSRA for services provided to Carstan. Lopez agreed that GSRA rendered the services to Carstan but challenged the amounts owed. Lopez filed counterclaims against Rasmussen, alleging, among other things, that Rasmussen usurped two particular corporate opportunities, Omni and Pegasus, from Carstan and, consequently, his profits as a fifty percent shareholder. Lopez claimed that Rasmussen did not obtain his consent to pursue these opportunities for himself rather than Carstan.

At the conclusion of the trial, the district court instructed the jury that Carstan was a partnership, and Rasmussen and Lopez owed each other a fiduciary duty based upon their relationship as partners. A jury awarded Rasmussen $175,000.00 for his breach of contract claim against Carstan and awarded Lopez $400,000.00 for his breach of

fiduciary duty counterclaim against Rasmussen. The district court denied all post-trial motions. On appeal, Rasmussen argues, in part, that the jury erred in its prejudgment calculation on his award. Rasmussen also argues that the jury's finding that he breached a fiduciary duty to Lopez was inconsistent with its finding that he did not breach a fiduciary duty to Carstan. Lopez argues that he is entitled to additur or a new trial on his $400,000.00 judgment.

Pre-judgment interest on Rasmussen's/GSRA's $175,000.00 award

The district court ordered Carstan to pay pre-judgment interest on the jury's award to Rasmussen for Carstan's breach of contract from March 16, 1994, the date Rasmussen served the complaint in this case. If payment on a contract is not made when due, a party is entitled to interest from the date payment was due.[1] A district court may not, however, speculate as to the date payment was due.[2] The record before the district court, and now before this court, does not establish that Rasmussen and GSRA are entitled to interest prior to March 16, 1994. Because Rasmussen failed to establish when Carstan's payments were due, the district court did not err by using the service of complaint date to calculate the pre-judgment interest. Accordingly, we affirm Rasmussen's

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[1]NRS 99.040(1)(a) ("interest must be allowed . . . upon all money from the time it becomes due . . . (a) Upon contracts"); First Interstate Bank v. Green, 101 Nev. 113, 115, 694 P.2d 496, 498 (1985) ("Where a party is entitled to repayment on a certain date, and payment is not made, interest is recoverable from the date due.").

[2]James Hardie Gypsum, Inc. v. Inquipco, 112 Nev. 1397, 1407-08, 929 P.2d 903, 909-10 (1996), disapproved of on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates, 117 Nev. ___, ___, 35 P.3d 964, 968 n.6 (2001).

award in the amount of $175,000.00, which includes prejudgment interest only from the date of service of the complaint.

Jury instruction on partnership

The district court instructed the jury, in part, that Carstan was a partnership and Rasmussen and Lopez owed each other partnership fiduciary duties. As a result, the jury awarded Lopez $400,000.00 for his breach of fiduciary duty claim against Rasmussen. Carstan, however, was a private corporation, not a partnership or a close corporation, which would give rise to partnership-type duties. We, therefore, conclude that the district court erred as a matter of law by instructing the jury that Carstan was a partnership. Accordingly, we reverse Lopez's $400,000.00 award and remand the issue of usurpation of Carstan's corporate opportunities for a new trial.[3]

Partnership

The district court relied on this court's precedent in Clark v. Lubritz to support its decision to instruct the jury on a theory of partnership.[4] In Clark, five doctors agreed to partner and join their practices to form a preferred provider organization, Nevada Preferred Professionals (NPP).[5] Despite the subsequent incorporation of NPP, this court imposed fiduciary duties between the shareholders akin to that of a

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[3]See Wynn v. Smith, 117 Nev. 6, ___, 16 P.3d 424, 430 (2001) (reversing and remanding in part because erroneous jury instruction was not harmless).

[4]113 Nev. 1089, 944 P.2d 861 (1997).

[5]Id. at 1091, 944 P.2d at 862.

partnership.[6] This court concluded that the subsequent incorporation of a partnership did not preclude recovery by one of the partners for breach of contract of an oral partnership agreement entered into prior to incorporation.[7]

The evidence in Clark, however, revealed that the doctors agreed orally that each would contribute $15,000.00, and they would share profits and losses equally.[8] The evidence further revealed that, even after their decision to incorporate NPP, the doctors continued to treat each other as partners. No actual stock was issued, no annual shareholder meetings were held, officers and directors were not actually elected, and the bylaws were not used in operating NPP.[9] Therefore, in Clark, the district court did not err when it "allowed the jury to determine whether the parties breached the oral [partnership] agreement."[10]

In the instant case, however, there never was a partnership agreement. In 1987, Carstan incorporated as a Nevada corporation under NRS 78.010 et seq., Nevada's statutory scheme for private corporations. Carstan's pre-incorporation agreement is not analogous to a partnership agreement. Carstan filed articles of incorporation, elected Rasmussen and Lopez as officers, adopted bylaws, issued stock, maintained a Nevada bank account, maintained a registered agent in the state, and filed a corporate

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[6]Id. at 1093, 944 P.2d at 863-64.

[7]Id. at 1095, 944 P.2d at 864.

[8]Id. at 1091, 944 P.2d at 862.

[9]Id. at 1093, 944 P.2d at 863.

[10]Id. at 1095, 944 P.2d at 864.

tax return. These practices are corporate, not partnership, practices. Therefore, Clark does not apply here.

Close corporation

In 1989, two years after Carstan was formed, the legislature passed a "close corporation" statute, NRS 78A.010 et seq. A close corporation statute allows joint venturers the choice to create a corporate-like entity that operates in many ways like a partnership. In a close corporation, " a shareholder . . . stands in a fiduciary relationship to other shareholders."[11] NRS 78A.030 states that a corporation that organized under NRS Chapter 78, which Carstan did, can become a close corporation by filing a certificate of amendment to the certificate of incorporation. Carstan never filed such certificate of amendment, and, therefore, it never became a "close corporation." Accordingly, Rasmussen and Lopez did not owe each other any fiduciary duties applicable in a "close corporation."

Private corporations

In a private corporation, which Carstan was, the general rule is that shareholders have no fiduciary duty to their fellow shareholders.[12] The recognized exceptions to this general rule, when a shareholder can be considered a fiduciary, are where the shareholder "owns a majority

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[11]18A Am. Jur. 2d Corporations § 732 (1985).

[12]Nevada's statutory scheme is modeled after Delaware's. See In re Hechinger Inv. Co. of Delaware, 274 B.R. 71, 93 (D. Del. 2002) ("Under Delaware law, fiduciary duties are owed only by directors, officers, or controlling shareholders."); cf. Ivanhoe Partners v. Newmont Min. Corp., 535 A.2d 1334, 1344 (Del. 1987) (shareholders only owe each other fiduciary duties in limited circumstances); see also Freese v. Smith, 428 S.E.2d 841, 847 (N.C. Ct. App. 1993) ("As a general rule, shareholders do not owe a fiduciary duty to each other or to the corporation.").

interest in or exercises control over the business affairs of the corporation."[13] "Controlling shareholders" have a fiduciary duty to minority shareholders,[14] which is breached when the controlling shareholder acts to his own benefit to the detriment of the minority shareholders.[15]

By definition, Rasmussen owed no fiduciary duty to Lopez.[16] Rasmussen was not a majority shareholder in Carstan. Additionally, although Lopez asserts that Rasmussen "actually ran Carstan's business,"

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[13]Ivanhoe Partners, 535 A.2d at 1344.

[14]See, e.g., Paramount Communications v. QVC Network, 637 A.2d 34, 42-43 (Del. 1994) (discussing the significance of a sale or change of control). The Delaware Supreme Court explained that "[a]bsent effective protective provisions, minority stockholders must rely for protection solely on the fiduciary duties owed to them by the directors and the majority stockholder, since the minority stockholders have lost the power to influence corporate direction through the ballot." Id. at 43.

[15]See, e.g., CLT Telecommunications Corp. v. Colonial Data Technologies Corp., No. 3:96CV2490 (AHN), 1999 WL 200700, at *9 (D. Conn. Mar. 21, 1999) (majority shareholder may breach fiduciary duty where it transfers control that it knows or has reason to know will result in injury to the minority shareholder); Summa Corp. v. Trans World Airlines, Inc., 540 A.2d 403, 406 (Del. 1988) (determining that majority shareholder of airline breached fiduciary duty to minority shareholders by failing to place earlier orders for jets and forcing airline to enter into leases for aircraft, but stating "[majority shareholder] acted for its sole benefit at the expense of its fiduciary duties to TWA's minority shareholders"); Harris v. Carter, 582 A.2d 222, 235-36 (Del. Ch. 1990) (finding that a duty of care may be imposed on majority shareholders in the context of a sale of corporate control by the majority shareholders).

[16]Cf. Ivanhoe Partners, 535 A.2d at 1340, 1344 (by definition, shareholder did not owe a fiduciary duty to other shareholders where it owned 49.7% of stock and its control was limited).

the record does not contain any evidence that Rasmussen dominated Lopez "through actual control of corporation conduct."[17] Accordingly, the record does not establish that Rasmussen was a controlling shareholder of Carstan, and, therefore, owed Lopez a fiduciary duty.[18]

The question in this case is whether Rasmussen usurped the Omni and Pegasus corporate opportunities. Any damages resulting from an alleged usurpation of corporate opportunities belong to Carstan, not Lopez. In order for a shareholder, such as Lopez, to bring an individual rather than a derivative claim, he "must allege more than an injury resulting from a wrong to the corporation."[19] "[H]e must be injured directly or independently of the corporation."[20] Lopez did not make any such allegations. Because the type of claim Lopez brought is derivative and belongs to Carstan, and because Rasmussen does not owe Lopez a fiduciary duty, the district court's jury instructions allowing the jury to award damages to Lopez individually, based on a non-existent duty, were reversible error.[21]

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[17]Citron v. Fairchild Camera & Instrument, 569 A.2d 53, 70 (Del. 1989) (explaining that if there is no controlling stock ownership, a plaintiff must allege that the non-controlling stockholder dominated "through actual control of corporation conduct").

[18]Cf. Gilbert v. El Paso Co., 490 A.2d 1050, 1055-56 (Del. Ch. 1984) (claims of breach of fiduciary duties "must subsist on the actuality of a specific legal relationship, not in its potential").

[19]Kramer v. Western Pacific Industries, 546 A.2d 348, 351 (Del. 1988).

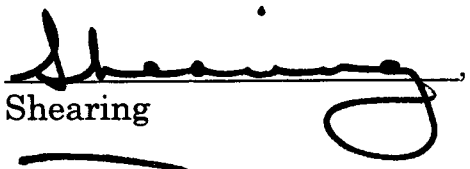
[20]Id.

[21]See Wynn, 117 Nev. at ___, 16 P.3d at 430 (holding that this court reviews erroneous jury instructions for harmless error). The specific jury

continued on next page . . .

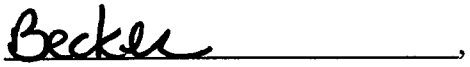
Accordingly, we affirm the $175,000.00 award to Rasmussen, reverse the $400,000.00 award to Lopez, and remand this case to the district court for further proceedings consistent with this order.[22]

It is so ORDERED.



_____, J.
Shearing

_____, J.
Rose



_____, J.
Becker

cc: Hon. Connie J. Steinheimer, District Judge
Schnader Harrison Segal & Lewis LLP
John A. Snow
Hale Lane Peek Dennison Howard & Anderson
Washoe District Court Clerk

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instructions that resulted in reversible error are numbers thirty-one to thirty-five, inclusive.

[22]Because the district court erroneously instructed the jury on a theory of partnership, we need not reach the merits of the additional issues the parties raised on appeal.