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NORTH CAROLINA COURT OF APPEALS

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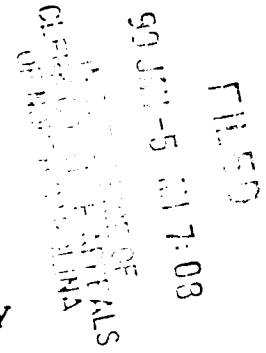

O. BRUTON SMITH,
Plaintiff,

v.

Mecklenburg County
No. 97 CVS 9961

NORTH CAROLINA MOTOR SPEEDWAY, INC.; PENSKE MOTORSPORTS, INC., PENSKE ACQUISITION, INC., PSH CORP. WALTER CZARNECKI, RICHARD J. PETERS, ROBERT H. KURNICK, JR., CARRIE B. DEWITT, NANCY DEWITT DAUGHERTY, and JO DEWITT WILSON,
Defendants.

Appeal by plaintiff from order filed 18 November 1997 by Judge Ben F. Tennille in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 September 1998.

Parker, Poe, Adams & Bernstein, L.L.P., by Fred T. Lowrance and Michael S. Malloy, and James, McElroy & Diehl, P.A., by William K. Diehl, Jr., for plaintiff-appellant.

Moore & Van Allen, PLLC, by Jeffrey J. Davis, for defendant-appellee North Carolina Motor Speedway, Inc.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester, R. Steven DeGeorge and Douglas M. Jarrell, for remaining defendant-appellees.

MARTIN, Mark D., Judge.

Plaintiff appeals from the trial court's order denying plaintiff's motion for a preliminary injunction and granting defendants' motion to dismiss.

Defendant North Carolina Motor Speedway, Inc. (NCMS) is a privately held North Carolina corporation with approximately 100

shareholders. The company's principal business is the operation of a one-mile racetrack located ten miles north of Rockingham, North Carolina. NCMS presently hosts two annual NASCAR Winston Cup Series races along with other motor sports events throughout the year.

Lindsay G. DeWitt, co-founder of NCMS in 1965, was the company's majority shareholder until his death in October 1990. Upon his death, his widow, defendant Carrie B. DeWitt (DeWitt), became NCMS's majority stockholder. DeWitt is the chairperson of NCMS's Board of Directors (Board) and, as of 31 March 1997, held 65.3% of the issued common stock (1,461,378 shares of the 2,236,830 shares outstanding).

Plaintiff O. Bruton Smith is a director on NCMS's Board and owns approximately 25% of NCMS's stock. In addition, plaintiff is the majority owner, Chairman, and Chief Executive Officer of Speedway Motorsports, Inc. (SMI). SMI currently owns five racetracks which host eight NASCAR Winston Cup Series races throughout the year. From 1995 to 1997, SMI, along with plaintiff, made numerous unsuccessful attempts to become the controlling shareholders of NCMS by purchasing DeWitt's majority interest. DeWitt refused these repeated offers apparently out of concern SMI would cease capital improvements to the Rockingham Speedway and move one of the NASCAR Winston Cup Series races to another racetrack.

Rather than sell to SMI, DeWitt, on 1 April 1997, granted defendant Penske Motorsports, Inc. (PMI) an irrevocable proxy to

vote all her shares on any NCMS matter, including a possible merger between PMI and NCMS. On 9 April 1997 DeWitt granted PMI an option to purchase all of her shares in NCMS, which PMI exercised on 15 May 1997.

In electing to sell to PMI rather than SMI, DeWitt considered factors in addition to price. Jo Wilson, DeWitt's daughter and president of NCMS, testified "[o]ur primary objectives in selling my mother's shares were to obtain a satisfactory price for my mother's ownership interest and to sell to a buyer who we believed to be the best business partner for us and the best caretaker of NCMS." PMI agreed to continue the company's capital expenditure plan and represented it had no intention to move any NASCAR sanctioned race from the Rockingham Speedway.

On 1 April 1997 PMI proposed a merger between NCMS and PMI. The offer provided that PMI would pay $18.61 per NCMS share or exchange PMI stock worth a like amount for each share of NCMS stock. On 2 April 1997 SMI also proposed a merger with NCMS, offering $23 per NCMS share or SMI stock worth a like amount for each share of NCMS stock. On 9 April 1997, after PMI entered into an option agreement with DeWitt, SMI increased its initial proposal to $32 per share.

After SMI increased its offer, NCMS's Board established a special committee to negotiate and evaluate the two proposed mergers. The special committee hired independent counsel and a financial advisor to assist in their findings.

The special committee's negotiations with PMI resulted in two

improvements which benefitted minority shareholders: (1) PMI increased its offer price to $19.61 per share; and (2) in the event any minority shareholder holding more than 5% of NCMS's shares secured a higher price for their shares in a dissent and appraisal proceeding, or if PMI sold NCMS for a higher price within one year of the merger, PMI agreed to pay any price differential to all minority shareholders. In their report the special committee determined these price protection agreements were significant enhancements in PMI's merger proposal.

On 2 July 1997 the special committee concluded their final report and found: (1) both mergers to be "fair" to shareholders; (2) PMI's proposal was above the range of values the financial advisor concluded was appropriate; and (3) PMI could incur an enormous tax liability if it did not conclude its merger with NCMS prior to the end of 1997.

Prior to the NCMS Board's vote on the proposed mergers, Roger Penske, PMI's Chairman of the Board, sent a letter stating PMI's intention to vote all of its majority shares (1,461,378 shares purchased from DeWitt) against any SMI proposal to acquire NCMS. As a result, any merger proposal submitted to the shareholders by SMI would be futile without PMI's newly acquired 65.3% vote.

On 5 August 1998 the NCMS directors, by a vote of seven to three, decided to submit only the PMI merger to the NCMS shareholders. The Board concluded the merger transaction was "fair to the Company and its shareholders, and that proceeding with such merger transaction [was] in the best interests of the Company and

its shareholders."

The same day the Board approved the merger with PMI, plaintiff filed a complaint against defendants seeking a preliminary injunction to enjoin the proposed merger and to have any agreements concerning the merger declared void and unenforceable. On 14 August 1997 defendants filed a motion to dismiss plaintiff's complaint for failure to state a claim pursuant to N.C.R. Civ. P. 12(b)(6).

On 12 November 1997, after conducting a hearing on all pending motions, the trial court denied plaintiff's motion for a preliminary injunction and granted defendants' motion to dismiss. On 18 November 1997 plaintiff filed a motion for temporary stay pending appeal, which the trial court denied on 20 November 1997. On 24 November 1997 plaintiff filed a motion for temporary stay and petition for writ of supersedeas with the North Carolina Court of Appeals, which this Court denied 26 November 1997.

On 2 December 1997 NCMS stockholders voted to approve the proposed merger and, later that day, NCMS and PMI successfully merged.

On appeal, plaintiff contends, among other things, that the trial court erred because: (1) plaintiff showed irreparable harm was likely to occur if an injunction prohibiting any further action to carry out the merger was not issued; (2) dissent and appraisal is not plaintiff's exclusive remedy for objecting to the merger; and (3) DeWitt, as majority shareholder, violated her fiduciary duty to the minority shareholders.

I.

Plaintiff first contends the trial court erred in denying his motion for a preliminary injunction to set aside the merger between NCMS and PMI, as well as the proxy and option contracts between NCMS and DeWitt.

The decision to grant or deny a preliminary injunction is ordinarily within the sound discretion of the trial court and the burden is upon the appellant to show error. *Stout v. City of Durham*, 121 N.C. App. 716, 717, 468 S.E.2d 254, 256 (1996). Nevertheless, "[o]n an appeal from an order . . . granting or refusing a preliminary injunction, [this Court] is not bound by the findings of fact of the hearing judge, but may review and weigh the evidence and find the facts for itself." *Pruitt v. Williams*, 288 N.C. 368, 372-373, 218 S.E.2d 348, 351 (1975).

Generally, a preliminary injunction will be issued only where: (1) the plaintiff is able to show a likelihood of success on the merits of the case and (2) the plaintiff is likely to sustain irreparable harm, or, in the opinion of the court, the injunction is necessary to protect the plaintiff's rights during the course of the litigation. *A.E.P. Industries v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-760 (1983). "Issuance of an injunction is a matter of discretion which the trial court exercises after weighing the equities and the advantages and disadvantages to the parties." *Adams v. Beard Development Corp.*, 116 N.C. App 105, 109, 446 S.E.2d 862, 865 (1994).

An injunction is an equitable remedy and will be granted only

when irreparable injury is both real and immediate. *Light and Water Comrs. v. Sanitary District*, 49 N.C. App. 421, 423, 271 S.E.2d 402, 404 (1980), *disc. review denied*, 301 N.C. 721, 276 S.E.2d 282 (1981). Where there is a full, complete and adequate remedy at law, the equitable remedy of injunction will not lie. *Id.*

In the present case, plaintiff seeks equitable relief as opposed to monetary damages based on the NCMS Board's refusal to consider any other bids for a proposed merger. Plaintiff claims the Board's refusal effectively made it impossible to calculate monetary damages. However, in plaintiff's deposition, he stated his monetary loss could be calculated as the difference between the actual merger price and SMI's proposed merger price, multiplied by the number of shares plaintiff owns in NCMS. Thus, a monetary award of damages would provide plaintiff full relief and avoid any irreparable injury.

Furthermore, issuance of a preliminary injunction could have the effect of actually placing PMI and NCMS shareholders in a less advantageous situation. PMI's tax counsel concluded an injunction setting back the merger date until after 31 December 1997 would create the risk of a potentially disastrous income tax liability. Thus, there is a risk that PMI could decide to completely withdraw its merger proposal if delay threatens the tax-free status of the transaction. If this occurred, an injunction could be injurious to the best economic interests of minority shareholders. Therefore, the equities weighed strongly against issuance of a preliminary

injunction.

Plaintiff therefore has failed to demonstrate irreparable injury was likely to occur if an injunction was not issued. In addition, as this Court will discuss further, plaintiff did not demonstrate any likelihood of success on the merits of his claim. Accordingly, the trial court did not err in denying plaintiff's motion for a preliminary injunction and allowing the merger between PMI and NCMS to proceed.

II.

Plaintiff further contends he was entitled to injunctive relief because the trial court erred in holding his exclusive remedy for objecting to the merger was the right to dissent and appraisal pursuant to N.C. Gen. Stat. section 55-13-02 (Supp. 1997).

Section 55-13-02 allows "a shareholder [to] dissent from a plan of merger proposed by the corporation or the majority shareholders and obtain the fair value of his shares." *Werner v. Alexander*, __ N.C. App. __, __, 502 S.E.2d 897, 900 (1998). Specifically, section 55-13-02(b) provides in pertinent part:

> [a] shareholder entitled to dissent and obtain payment for his shares . . . may not challenge the corporate action creating his entitlement, including without limitation a merger solely or partly in exchange for cash or other property, *unless the action is unlawful or fraudulent* with respect to the shareholder or the corporation.

N.C. Gen. Stat. § 55-13-02(b) (Supp. 1997) (emphasis added). Therefore, in the absence of fraudulent or unlawful conduct, the

statute textually prescribes the right to dissent and appraisal as the exclusive remedy.

Plaintiff, in his deposition, stated the present suit was founded on the merger price PMI offered NCMS shareholders. Moreover, when asked in deposition if the alleged breach of fiduciary duty was "a matter of price," plaintiff responded "[o]f course . . . the director and the majority shareholder had the obligation and the fiduciary duty to get the highest price for the stock."

It is well settled, however, that "'inadequate price alone will not support a claim for fraud.'" *Werner*, __ N.C. App. at __, 502 S.E.2d at 901 (*quoting Ira ex rel. Oppenheimer v. Brenner Companies, Inc.*, 107 N.C. App. 16, 24, 419 S.E.2d 354, 359 (1992)). Furthermore, any "'remedy beyond the statutory procedure is not available where the shareholder's objection is essentially a complaint regarding the price . . . .'" *Id.* at __, 502 S.E.2d 901 (*quoting IRA ex rel. Oppenheimer*, 107 N.C. App. at 21, 419 S.E.2d at 358).

Plaintiff nevertheless argues this Court should measure defendants' actions according to the "entire fairness" test established in *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983), *aff'd*, 497 A.2d 792 (Del. 1985). In *Weinberger* the Delaware Supreme Court held an appraisal remedy may not be adequate where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross palpable overreaching is involved. *Id.* at 714. In determining whether defendants' actions are equitable,

Weinberger applies a two-part fairness test whenever "directors of a Delaware corporation are on both sides of a transaction." *Id.* at 710.

North Carolina's recent amendment to section 55-13-02(b) specifically provides that, absent fraud or unlawfulness, the right to dissent and appraisal is a minority shareholder's exclusive remedy. Even applying the *Weinberger* test, we discern no specific acts of fraud, misrepresentation, or other misconduct to demonstrate the unfairness of the merger terms to the minority.[1] *Weinberger*, 457 A.2d at 703. Additionally, DeWitt's sale of her stock was a personal transaction, therefore none of the corporate defendants stood on both sides of the transaction. Accordingly, even under *Weinberger*, plaintiff's exclusive remedy is limited to the right to dissent and appraisal pursuant to section 55-13-02.

III.

Plaintiff next contends the trial court erred in granting defendants' motion to dismiss because DeWitt violated her fiduciary duty to the minority shareholders.

The trial court granted defendants' motion to dismiss

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[1]Applying *Weinberger* to the facts at hand, defendants' actions conform to both the "fair process" prong and the "fair price" prong of the entire fairness test. We note: (1) NCMS's Board created a special committee to evaluate both of the merger proposals; (2) the special committee hired both independent counsel and a financial advisor to assess the proposals; (3) the special committee negotiated with both PMI and SMI; (4) the special committee's report deemed PMI's bid fair and above the range of values the financial advisor had deemed appropriate; and (5) both NCMS's directors and shareholders voted to proceed with PMI's proposal.

pursuant to N.C. Gen. Stat. section 1A-1, Rule 12(b)(6) (1990). A Rule 12(b)(6) motion "tests the legal sufficiency of the complaint." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987).

> In order to withstand such a motion, the complaint must provide sufficient notice of the events and circumstances from which the claim arises, and must state allegations sufficient to satisfy the substantive elements of at least some recognized claim. The question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. In general, "a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*"

Id. at 670-671, 355 S.E.2d at 840 (*quoting Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979)) (citations omitted) (emphasis in original). With our standard of review established, we move to the substance of plaintiff's claim.

The question for this Court is whether North Carolina majority shareholders, who sell their personal stock in a privately held corporation, owe a fiduciary duty to minority shareholders to auction off the company or otherwise obtain the highest possible price when selling their controlling interest or engaging in a cash-out merger.[2]

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[2]"A [cash-out] merger, also known as a 'freeze-out' or 'squeeze-out' merger, occurs when the majority shareholders of a corporation attempt to gain control of the corporation by 'cashing out' the shares of the minority shareholders." *Werner v. Alexander*, ___ N.C. App. ___, ___, 502 S.E.2d 897, 900 (1998).

As a general rule, shareholders in a corporation do not owe a fiduciary duty to each other or to the corporation. *Freese v. Smith*, 110 N.C. App. 28, 37, 428 S.E.2d 841, 847 (1993). In cases involving the use of corporate assets or actions taken by a corporation as a whole, however, North Carolina courts have recognized a controlling shareholder's fiduciary duty to minority shareholders to exercise "'good faith, care, and diligence to make *the property of the corporation* produce the largest possible amount[] [and] to protect the interests of the holders of the minority of the stock.'" *Loy v. Lorm Corp.*, 52 N.C. App. 428, 432, 278 S.E.2d 897, 901 (1981) (*quoting Gaines v. Manufacturing Co.*, 234 N.C. 331, 338, 67 S.E.2d 355, 361 (1951)) (emphasis added).

Nevertheless, North Carolina courts have never imposed a duty upon majority shareholders to obtain the highest possible price when selling their personal stock. As the trial court noted, the concept of a fiduciary duty owed to minority shareholders due to the sale of personal stock does not find support in any legal precedent relied upon by plaintiff or otherwise found by the Court.[3] To the contrary, established legal precedent is plainly

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[3] The trial court order reflects: "[i]f the theory the plaintiff's complaint depends upon were adopted in this state, North Carolina would stand alone in imposing such restrictions upon a majority shareholder seeking to sell her shares. Such a rule would create, at a minimum, significant uncertainty for businesses and shareholders in this state and would infringe upon a shareholder's time-honored right to make decisions with respect to her own property. Such a rule would create enormous uncertainty between potential buyers and sellers and limit their ability to contract. It would, in effect, transfer 'control' to minority shareholders anytime a majority shareholder wanted to sell her interests."

arrayed against plaintiff's premise.

> [T]he owner of corporate stock may dispose of his shares as he sees fit. *Alderman v. Alderman*, 178 S.C. 9, 43, 181 S.E.2d 897, 911 (1935). A dominant or majority shareholder does not become a fiduciary for other stockholders merely by owning stock. [*McDaniel v. Painter,* 418 F.2d 545, 547 (10th Cir. 1969)]. In selling their stock, the stockholders necessarily act for themselves, and not as trustees for the other stockholders. *Gerdes v. Reynolds*, 28 N.Y.S.2d [622], 650 [(N.Y. App. Div. 1941)].

Swinney v. Keebler Co., 480 F.2d 573, 577 (4th Cir. 1973).

> "With only infrequent and relatively minor exceptions, the courts still adhere to the traditional view that a shareholder, irrespective of whether he is also a director, officer, or both, may sell his shares, just as he may sell other kinds of personal property, for whatever price he can obtain, even if his shares constitute a controlling block and the price per share is enhanced by that fact. Further, the courts generally hold that neither the selling shareholder nor his purchaser is under an obligation to see that other shareholders are provided opportunities to sell their shares on the same favorable terms as the controlling shareholder or even to inform minority shareholders of the price and other terms of the sale of the controlling interest." O'Neal, *Symposium: Sale of Control-Introduction*, 4 J. Corp. L. 239, 239 (1979).

Martin v. Marlin, 529 So.2d 1174, 1177 (Fla. Dist. Ct. App. 1988), *rev. denied*, 539 So.2d 475 (Fla. 1988).

The Delaware Supreme Court, in a factually similar case, previously rejected the same theory of law asserted by plaintiff. *See Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840 (Del. 1987). In *Bershad*, a minority shareholder of Dorr-Oliver Inc. filed suit against Curtiss-Wright Corp., a 65% majority shareholder, and Dorr-

Oliver challenging a cash-out merger between the two defendants. *Id.* at 841, 844. Plaintiff's argument was two-fold. First, the majority shareholder breached his fiduciary duty by maintaining a policy against selling his majority shares, thus preventing minority shareholders from obtaining the best available price. *Id.* at 844. Second, plaintiff argued that defendants had an affirmative duty to auction the corporation for the highest possible price once the decision to cash-out the minority was made. *Id.* at 844-845.

The *Bershad* court rejected plaintiff's contention and held majority shareholders have a right to sell their personal stock without having to obtain the highest possible price for minority shareholders. *Id.* at 845.

> Stockholders in Delaware corporations have a right to control and vote their shares in their own interest. They are limited only by any fiduciary duty owed to other stockholders. It is not objectionable that their motives may be for personal profit, or determined by whim or caprice, so long as they violate no duty owed other shareholders. Clearly, a stockholder is under no duty to sell its holdings in a corporation, even if it is a majority shareholder, merely because the sale would profit the minority.

Id. (citations omitted).

When DeWitt sold her NCMS shares to PMI, she was acting solely as a shareholder, making a discretionary decision a shareholder should be free to make in the open market. DeWitt was neither taking action on behalf of NCMS and the other shareholders, nor acting with corporate property in selling her own stock to PMI. She was independently selling her stocks in a reasonable manner for

a fair price to a seller whom she chose. Accordingly, her actions must be reviewed in her capacity as a NCMS shareholder.

As the majority shareholder, DeWitt had no fiduciary duty to obtain the highest possible price when selling her shares. A minority shareholder's attempt to "impose an affirmative duty on majority shareholders to auction the corporation when seeking to cash-out the minority" is "unsupported by any accepted principle of law." *Bershad*, 535 A.2d at 845. *See also Kleinhandler v. Borgia*, 1989 WL 76299 (Del. Ch. 1989) (Del. J. Corp. L. 681) (holding majority stockholders who decide to acquire the entire company have no duty to auction-off the company).

Even assuming DeWitt was acting in her capacity as director, the *Bershad* court, likewise, rejected plaintiff's claim that directors violated their fiduciary duty to minority shareholders by not auctioning the company. 535 A.2d at 845. The *Bershad* court held any attempt by directors to auction the company would be futile after the merger decision because Curtiss-Wright owned 65% of the stock and could thwart any effort to auction-off the company. *Id.* Similarly, NCMS's directors had no fiduciary duty to auction the company for the highest possible price after receiving notice of Roger Penske's intention to vote his 65% of the shares against such a merger. Such an attempt by NCMS's directors would have been futile. Consequently, NCMS's directors did not violate any legally recognized fiduciary duty.

We hold that, under North Carolina law, a majority shareholder selling his or her personal stock does not have a fiduciary duty to

minority shareholders to auction the company or otherwise obtain the highest possible price when selling their controlling interest or engaging in a cash-out merger. Accordingly, the trial court did not err in granting defendant's Rule 12(b)(6) motion to dismiss and denying plaintiff's motion for a preliminary injunction.

We have carefully reviewed defendant's remaining assignments of error and find them to be without merit.

Affirmed.

Judges JOHN and MCGEE concur.

Report per Rule 30(e).

This opinion was authored and delivered to the Clerk of the North Carolina Court of Appeals by Judge Mark D. Martin prior to 4 January 1999.