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STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

HAN-99-187

Law Docket No.: HAN-99-187

LOU ANN FRANCIS, et als., - Plaintiffs, Appellants

v.

CHARLES B. STINSON, et als., - Defendants Appellees

APPELLANTS' BRIEF
ON APPEAL FROM THE HANCOCK COUNTY SUPERIOR COURT

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Lou Ann Francis, et als.

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PROCEDURAL HISTORY

Plaintiffs commenced this action by a five-count Complaint dated September 28, 1995. In Counts I and II, the Francis and Wight families separately alleged that the Defendants had breached their fiduciary relationship with the Plaintiffs in connection with the Defendants' acquisition of their stock in the Stinson Canning Company in 1980 and 1982. Count III alleged breach of contract. Count IV alleged negligent misrepresentation. Count V alleged that co-defendant Camp Hills, Inc. held assets of the former Stinson Canning Company in constructive trust for the benefit of the Plaintiffs.

The Superior Court granted Defendants' initial Motion to Dismiss Count I, except insofar as the Francis Plaintiffs alleged that the Defendants had breached their fiduciary duty to them by obtaining their stock with the promise to pay them the difference in value should the company sell for a greater price in the future. The Court also dismissed Counts II, III and IV.

The Plaintiffs subsequently amended their Complaint to add several new counts: Count V renewed the constructive trust theory; Count VI alleged wrongful interference with a legacy (arising from deeds executed by the late Mr. Stinson to the company in the late 1980's) and Counts VII and VIII alleged fraud.

On cross-motions for Summary Judgment, the Superior Court granted Defendants' motion and ordered Summary Judgment on Counts I, V, VI, VII and VIII against the Plaintiffs.

The Plaintiffs filed the present appeal in a timely manner, bringing review of the earlier dismissal order and the order granting Summary Judgment to the Law Court.

STATEMENT OF FACTS

The parties to this lawsuit are two sisters and their families, and their brothers. The Plaintiffs Lou Ann Stinson Francis and Eva Wight, and their families, once owned stock in the Stinson Canning Company, a successful business established many years ago by their father, the late Calvin L. Stinson. The Plaintiffs' brothers, Charles B. Stinson and Calvin L. Stinson, Jr., always worked in the company alongside their father, and ultimately became President and Treasurer, respectively, as well as being directors of the company. Calvin L. Stinson, Jr., was with the company his entire career, working for the company since 1952. (SMF para.37).[1] Charles Stinson worked his way up from assistant bookkeeper or payroll clerk to president and treasurer, and was familiar with the financial condition of the company during that time. (SMF para.38). By contrast, Lou Ann Francis and Eva Wight never worked for the company and were never involved in its management. (SMF para.43).

Calvin L. Stinson, Jr. and Charles Stinson first became interested in obtaining control of the company around 1960. (SMF para.42). In the 1970's, Calvin Stinson did not want to relinquish control of the company, but in 1975 there was a major reorganization of the company. (SMF para.44, 45 and 48). In 1975, Calvin L. Stinson, Jr. participated in a meeting voting to approve the merger of Stinson Canning Company, Addison Packing and Bath Canning Company, which resulted in Charles and Calvin, Jr., acquiring joint control of the companies. (SMF para.48). As a result of the reorganization, the brothers acquired the Class A voting common stock. (SMF para.57).

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[1] All references to "SMF" in this Statement of Facts are to the Plaintiffs' Statement of Material Facts in Support of Plaintiffs' Motion for Summary Judgment and in opposition to Defendants' Motion for Summary Judgment. See Appendix at 108.

The two brothers also benefited from profit-sharing plans, bonuses, salary increases, and health insurance and life insurance plans put into place after the reorganization in 1975. (SMF para.49).

According to Charles Stinson, President, the company was growing in value and profits between 1975 and 1980. (SMF para.83). During the period from 1978 to 1980, the Stinson Canning Company received several inquiries into the possibility of acquiring the company. (SMF para.64). Calvin L. Stinson, Jr., recalls that there were inquiries from Connors Brothers and Zapata Corporation during the time frame before the Francis family sold their stock, including: "Connors quoted something like 14 million plus interest over, I don't know, five years or something. It comes up to 16.1 million with the interest. Four million cash, ten million over five years, seven percent interest; came up with the interest to 16.1 million." (SMF para.66).

Lou Ann Francis and her husband were not told of the offers and inquiries by Charles Stinson or Calvin L. Stinson, Jr., Charles Stinson stating that he saw "no reason why' he should advise the Francis family. (SMF, para.79-80).

In late 1977 or early 1978, the attorney (Thomas Van Meer) for the corporation and the brothers first brought up the subject of personal estate tax issues for Stinson family members with Calvin L. Stinson, Jr. (SMF para.51). The company was not paying any dividends, and the value of the stock was increasing. These issues and the rising value of the company were not discussed with the Francises or the Wights. (SMF para.52). Alleged estate tax problems concerned "all the major stockholders" including Lou Ann Francis and Eva Wight. (SMF para.53). A discussion was had at a meeting of the Board of Directors of the Stinson Canning Company in December 1977 (per recorded minutes of the meeting) "as to the possibility of contacting (the Wight and Francis families) through Mr. Van Meer and explaining the implication in continuing to hold Class B and preferred stock and to vindicate the possibility, if anyone was interested, to redeem Class B and preferred stock to the corporation for a lump sum, one-time settlement. It was voted and agreed that Mr. Van Meer was to contact first the Wight and then the Francis family and explain to them in detail the implication of holding onto the stock in connection with the estate problems." (SMF para.55). The Wights and the Francises had no representation on the Board and were unaware of the Board discussions. (SMF para.56).

By a vote of the Board of Directors of Stinson Canning Company taken on April 25, 1978, the Board adopted a stock redemption agreement for all stockholders of the company, effectively doing away with any estate tax problems for the minority stockholders. (SMF para.68; 85). At a meeting of the Board and the shareholders on June 9, 1978, however, the stated purpose was to "make the family aware of possible estate tax problems" ; the minutes of the meeting confirm that there is no mention of the Directors' vote taken six weeks earlier ostensibly having resolved the issue. (SMF para.86).

In late 1979, Calvin L. Stinson, Jr., called Lou Ann Francis and initiated a discussion about her family selling their stock. (SMF para.1). Lou Ann was amazed that her brother called about selling the stock. (SMF para.2). Charles Stinson told the Francises that the company was having a "financial problem" and that "they" felt that "maybe now was the time to sell because if they got a good buyer they would probably sell the company." (SMF para.4). Charles also told the Francises that "if something should happen to me being the major stock holder, that chances are the inheritance tax would wipe out my husband's business. He also said that if the company got in financial bankruptcy or bad trouble, I would be responsible or my family would be responsible for the 1/6 --- our 1/6 of the debts." (SMF para.5).

Lou Ann and Arnie Francis were very confused by Charlie's representations and decided to stop and visit their brother, Cal, Jr. (SMF para.6). Cal, Jr., told them, that same night, that he and Charlie were not getting along and "the company was rocky financially. And he said that Charlie and – and the rest of them wanted to sell the company. And I asked him if he wanted to, and he said he didn't believe he would, but he was outvoted." (SMF para.7). Arnie Francis was pretty upset about the idea that he had no control and didn't know anything about the financials of the company. Lou Ann's brothers ran the company and had control of the company and Arnie Francis felt that "they were very honorable people and if they advised selling, especially Charles, then that's the thing we should do." (SMF para.8). Lou Ann believed her brothers and that they would only tell her what was "right and good." (SMF para. 9). Lou Ann believed very much in Charles: "Charlie, he was my little god, you know; and I would never believe him to tell me a falsehood." (SMF para. 10). Lou Ann's general understanding of her brothers' roles in the family business was that "they were the company ..they ran Stinson Canning Company. They called all the shots." (SMF para.23).

As an added incentive to sell, Charles Stinson told Lou Ann that if they sold the company later and made a good profit from it, then they would make up the difference to the Francises. (SMF para.11).

During the time of these negotiations with Lou Ann Francis and her family, Charles Stinson believed it was possible to sell the company for $18,000,000. (SMF para.88). Calvin L. Stinson, Jr., stated that the balance sheet of the company as of December 29, 1979 showed that the assets of the company were worth $20,555,130.00 (SMF para. 69). The value per share of the common stock was at least $5000.00, which Charles Stinson never told the Francis family because he "had no reason to." (SMF para. 82). In fact, Charles Stinson does not "recall" any discussions between Lou Ann and Arnie Francis and himself between June of 1978 and the stock transfers in 1980, relating to the stock sale. (SMF para. 70).

However, in late 1979, Charles Stinson called and offered Lou Ann Francis and her family $300,000.00 for their stock which was all said it was "worth." (SMF para. 14). Charles then called her again with another offer, this time for $600,000.00 (SMF para.15). Lou Ann Francis then attempted to comply with the bylaw of the company regarding giving the company first refusal to purchase any stockholder's stock prior to an outside sale by notifying the brothers of an alleged outside offer. (SMF para.17). Charles then called Lou Ann again and increased the offer by $100,000.00, and stated that her letter was a "joke." (SMF para.18). Charles said "you know, I don't have to pay you a goddam thing." (SMF para.18).

Calvin L. Stinson, Jr. testified that he did not know how to determine the value of a minority interest in a non-dividend paying private business. The only thing he ever heard of was "whatever a willing buyer and a willing seller are willing to agree on." (SMF para.58). He felt that family members were being pressured "into selling their stock at a cheap price, and …felt that there should be other options other than solve (sic) an inheritance tax problem by selling their stock back to the company." (SMF para.59). He agreed that it would be "obvious" that there was a conflict of interest in buying out family members at a "cheap price" at the same time as the company was negotiating to sell the company for more money. (SMF para.60). Neither brother attempted to get an opinion of the fair market value of their sisters' families' stock. (SMF para.62).

However, despite his position as a director and officer of the company, Calvin Stinson, Jr. denied that he owed a duty to the Francis family to pay them fair market value for their stock. (SMF para.71). He believed instead that the value of the Francises' stock was "what a willing buyer and a willing seller will agree upon, and (he) had no other idea of how to determine the value." (SMF para.72). He admits that he had a duty to treat all stockholders "fairly." (SMF para.73). Moreover, he admits that the Francis family did not, in fact, receive fair market value for their stock. (SMF para.74). Calvin L. Stinson, Jr., also understood by his own admission that he owed Lou Ann Francis the utmost duty of good faith and fair dealing and that it was his responsibility to look out for them and to be sure that the Francises received the full value of their shares. (SMF para.76). Calvin testified to his belief that the Francises should have gotten more for their stock. (SMF para.91).

For his part, Charles Stinson agreed with everything Calvin said. (SMF para.78). He agrees that he owed his sisters and their families a duty "to be used fairly and treat everybody fairly." (SMF para.81). However, yet he claims that he had "no reason to" tell the Francis family that the value of their stock per share was at least $5000.00 when it came time for them to sell their stock. (SMF para.84). Charles Stinson never told the Francises what his opinion of the value of the company and the stock was: "She agreed to sell it for $700,000.00 and the board of directors agreed to accept her offer; and that's the value of the stock as far as I'm concerned is what the buyer and seller can agree to." (SMF para.89). Charles made no effort, as President of the company, to determine the value of the Francises' stock. (SMF para.100). Charles Stinson never told the Francis family because he "had no reason to." (SMF para. 82). In fact, Charles Stinson does not "recall" any discussions between Lou Ann and Arnie Francis and himself between June of 1978 and the stock transfers in 1980, relating to the stock sale. (SMF para. 70).

Dennis Norton, CPA, testified in his deposition in 1998 that the fair market value of the Francis family stock, at the time they entered into the stock redemption agreements, was actually $2,254,591.00, far from the $700,000.00 paid by the company. (SMF para.35).

The Francis family closed on the sale of their stock at the company offices on February 4, 1980. They were there for about five minutes, there was no real discussion, they went into the conference room where the stock purchase agreements were placed. (SMF para.19). Lou Ann only glanced at the agreement and did not read it, as "(m)y brothers and I had discussed this sale, and they're honorable people, so we just believed what they said. They wouldn't have me sign something I shouldn't be signing." (SMF para.20). The attachments to the agreements, which are labeled "exhibits" were actually in separate manila envelopes and the Francises did not even look at them before they signed the agreements. (SMF para.21). The subject of the promise by the brothers to make up the difference if the company sold for more later was discussed at the time the agreements were signed. (SMF para.22).

With respect to the brothers' promise to make up the difference if the company sold for more per share than the Francises were being paid in 1980, another sister, Ida

Trenholm, had a conversation with Calvin Stinson, Jr., during the time between the Francis and Wight families' stock sales in which Calvin Stinson, Jr., confirmed that if the company was sold, they "would make the difference up to my sister Lou Ann." (SMF para.24). Ida also confirmed that she had been told there was trouble and that she should sell her stock, too, prior to Lou Ann's stock sale. (SMF para.25).

Calvin Stinson, Jr., admits in his deposition that he "possibly" told his sister Ida "that if the company was sold for more at the time that we were negotiating with Lou Ann for a sale that we would – our legal representative told us that we would have to make up that difference. It would be a sale in anticipation of our already being negotiating for more money." (SMF para.75).

Plaintiff Eva Wight, Lou Ann's sister, remembers that at the special meeting of the shareholders in 1978 they were told that if they should die the estate taxes would be so great that they would wipe out their families and, therefore, they should seriously consider selling their family stock back to the company for a minimal amount. (SMF para.27). She became suspicious because of that meeting that her brothers were trying to "grab" her stock in Stinson Canning Company. (SMF para.28). Calvin Stinson, Jr., actually expressed dismay at the use of such "pressure tactics" on them. (SMF para.29).

In 1980, Eva became financially distressed and she began to reconsider the possible sale of her stock, especially since she derived no income from her stock. (SMF para.30). Charles Stinson at first wanted to pay Eva what they had paid Lou Ann ($700,000.00). (SMF para.31). Eva received no financial information concerning the company between 1979-1980 and 1983, when she finally did sell her stock. (SMF para.33). Eva eventually told her brothers that she wanted $2,000,000.00 for the stock, her lawyer having told her that they were "holding all the cards, the Wights were at their mercy and the Wights had to do whatever they said." (SMF para.32). Eva arrived at the price of $2,000,000.00 through prayer. (SMF para.34).

According to Dennis Norton, CPA, in his deposition testimony in 1998, the fair market value of the Wight family stock at the time they entered into their stock purchase agreements was between $2,500,000.00 and $3,333,000.00. (SMF para.36).

In his declining years, the late Calvin Stinson, Sr., was presented various deeds to sign, which Ida Trenholm observed and it appeared to her that he did not know what he was signing. (SMF para.26). Calvin L. Stinson, Jr., also signed certain deeds as power of attorney for his father. (SMF para.40).

In 1990 the Stinson Canning Company was successfully sold at last for $24,000,000.00. Its assets remained substantially similar to the assets of the company in 1980. (SMF para.103). When Lou Ann Francis, Eva Wight and the Stinson brothers met prior to Plaintiffs' filing of this lawsuit, and Lou Ann mentioned about the poor financial condition the company had been in when she had sold her stock, "Charles laughed" back at her and "says there wasn't a year that we didn't make money and a hell of a lot of it!" (SMF para.13). The brothers did not deny having made the promise to Lou Ann and her family that they would make up the difference on a later sale at a higher price per share of stock, but claimed as their reason why they were not going to live up to their promise to make up the difference in value to Lou Ann and her family, that "it has been too long a period of time, they didn't have to. .." (SMF para.22).

I. THE SUPERIOR COURT ERRED GRANTING SUMMARY JUDGMENT TO DEFENDANTS ON COUNTS I AND V OF THE AMENDED COMPLAINT.

The Francis Plaintiffs seek damages for breach of fiduciary duty under Count I of the amended Complaint. Specifically, Defendants promised the Francises that if they sold their stock for $700,000.00, and the company later sold for more, they would "make up the difference." The Francises relied upon the promise, and sold their stock. Upon sale of the company in 1992, the Francises learned that their interest in the company had had considerably greater value than they had been paid. In fact, as Dennis Norton, the CPA who reviewed the financial condition of the company in 1980 and 1983, testified that the Francis stock was worth $2,254,591.00 in 1980. Thus, by selling early based upon a combination of the promise made by the Defendants to protect their interests upon a future sale of the company, and multiple misrepresentations made by the Defendants as to the allegedly poor financial condition of the company and non-existent "estate tax problems" (which had been cured by a Board of Directors' vote which was never communicated with them) the Francises were cheated out of more than two-thirds of the value of their stock by their brothers – the President and Treasurer of the Stinson Canning Company.

The Superior Court granted the Defendants' Motion for Summary Judgment, on Counts I and V of the Amended Complaint based upon the reason that "(t)he contract (for the sale of the stock) is, upon its face, unambiguous. It is clear. It is comprehensive. It requires no outside interpretation." (Order, page two). In so ruling, the Court completely refused to consider the equities and equitable theories of the case. The Court refused to consider the statements of the Defendants which misrepresented several critical facts, the breach of fiduciary duties and the relationship among the parties, including the plaintiffs' trust in the defendants. The Court erred in refusing to assess the importance of these equitable factors, and the Court erred in insisting upon analyzing this case as purely one of law, and not of equity which is the entire thrust of plaintiffs' case.

Upon Defendants' motion for summary judgment, they bear the burden of establishing that there is no genuine issue as to any material fact, and that they are entitled to judgment as a matter of law. M.R.Civ.P., Rule 56(c). E.g. Bailey v. Gulliver, 583 A.2d 699 (Me. 1990). Facts which have been admitted or conceded by the opposing party must be taken as true. Steeves v. Irwin, 233 A.2d 126 (Me. 1967).

In Rosenthal v. Rosenthal, 543 A.2d 348 (Me.1988), the Maine Supreme Court discussed at length the fiduciary duties which corporate directors and officers owe to their shareholders. These duties originate under the common law and by statute. Directors owe a duty of care and a duty of loyalty. The duty of loyalty requires directors to act honestly with a view to protecting the interests of not only the corporation, but also its shareholders. Rosenthal, supra; 13-A M.R.S.A. §716.

Rosenthal describes these fiduciary duties further as follows:

"(1) to act with that degree of diligence, care and skill which ordinarily prudent persons would exercise under similar circumstances in like positions;

(2) To discharge the duties affecting their relationships in good faith with a view to furthering the interests of one another as to the matters within the scope of the relationship;

(3) To disclose and not withhold from one another relevant information affecting the status and affairs of the relationship; and

(4) To not use their position, influence or knowledge respecting the affairs and organization that are subject to the relationship to gain any special privilege or advantage over the other person or persons involved in the relationship."

Id. At 352.

The Law Court observed in Atlantic Acoustical & Insulation Co. vs. Moreira, 348 A.2d 263 (Me.1975) that the true scope of a corporate director's fiduciary duties "takes on meaning and significance only in a particularized factual context." Id. at 267. Thus, where, as in Rosenthal and in the case at bar, there is also a special family relationship involved, the fiduciary duties owed by the directors are only enhanced.

In Ruebsamen vs.Maddocks, 340 A.2d 31, 35 (Me.1975), the Law Court held that a plaintiff claiming breach of fiduciary relationship must prove "the actual placing of trust and confidence in fact . . . and a great disparity of position and influence between the parties to the relation." Once the plaintiff establishes the existence of that relationship by trust and reliance by one party and dominance by the other, "equity then 'raises a presumption of undue influence and casts upon (the dominant) party the burden . . to show affirmatively (in the particular transaction) . . . entire fairness on his part and freedom of the other from undue influence.'" Rosenthal vs. Rosenthal, at 36 (quoting from Ruebsamen at 36).

The underlying facts giving rise to the presumption of undue influence need only be proven by a preponderance of the evidence. Avery vs. Whatley, 670 A.2d 922 (Me.1996).

The overwhelming weight of undisputed evidence shows that the Francis family actually placed trust and confidence in Charles and Calvin Stinson, Jr. There was in fact a great disparity of position and influence between the parties to the relation pertaining to the control and management, and knowledge of the affairs of, the Stinson Canning Company and its subsidiaries. The brothers were officers and directors, and the Francises relied completely upon the brothers to look out for their interests. Thus, the Francis Family benefits from the presumption of undue influence insofar as they sold out their stock at an unfairly low price, for a total of $700,000.00.

At the time of the Francis Family buyout by the company, dominated by the brothers, their stock had a fair market value of $2,254,541.00, according to the testimony of Dennis Norton, C.P.A. Mr. Norton's opinion was based upon a number of bona fide inquiries and offers the company was receiving during the period of the Francis "negotiations," inquiries and offers which the brothers received in their capacities as President and Treasurer of the company, but with regard to which they felt no duty to inform the Francises prior to the closing.

The most critical facts establishing beyond genuine dispute the brothers' violations of their fiduciary duty toward the Francis Family are the defendants' own admissions during their depositions. Both brothers testified that they owed *no duty* to Lou Ann and her family to ensure that they received the true value of their stock. Each of them testified that the appropriate price to pay for the Francises' stock was whatever a "willing buyer" and a "willing seller" would agree upon. The Defendants made no effort whatsoever to obtain an appraisal of the stock, or a professional opinion of its value. The figure of $700,000.00 was arrived at without any effort (or desire) on the part of the

Defendants to fulfill their fiduciary duty to the Francises, and later the Wights, to protect the Francises interests, as required by law.

The defendants' own attorney told them that they owed plaintiffs duties, which the defendants' testimony shows that they failed to fulfill.

The Superior Court's Order granting summary judgment on Count I is based upon a fundamental misunderstanding as to the tort of breach of fiduciary duty. The Court erroneously concentrated upon the parol evidence rule and the language of the contracts, which relate to *contract* theory causes of action. The essence of the tort is the actual placing of trust and confidence by the sisters in their brothers, as discussed above and which is established factually in the Statement of Material Facts.

In fact, in the case of the Francis family, none of them even read the stock purchase agreements, which were not given to them ahead of time in any event. The crucial "disclosures" about inquiries and offers to purchase the company were contained in manila envelopes and no one explained them to the Francises. Whether the agreements actually "integrated" any prior discussions becomes irrelevant when considering evidence of misrepresentations external to the document which give rise to the tort of breach of fiduciary duty and fraud.

With respect to breach of promise, the Defendants made numerous false representations of facts, including that the company was in poor financial condition and that there were and continued to be inheritance tax problems. The defendants now concede that the company was actually in excellent financial condition throughout the relevant time period, and that a vote taken by the directors in April of 1978 had alleviated any inheritance tax issues. No one informed the Plaintiffs any differently, either as to financial viability of the company nor that the April 1978 vote had even been taken. In other words, the brothers put out false and misleading information and a fair inference from their behavior is that, as suspected by Eva Wight and her husband, Carl, the brothers were engaged in an intentional course of conduct to attempt to obtain their stock at the lowest price possible, in direct contravention of their over-riding fiduciary duties.

In the case of Jenson vs. Snow, 131 Me. 415, 163 A. 784 (1933), the Law Court held that fraud is a fundamental ground of equitable jurisdiction, regardless of whether the injured parte has an adequate remedy at law. In Letellier v. Small, 400 A.2d 371 (Me.1979), the Court further held that a Defendant is liable for fraud or deceit if he makes a false representation of a material fact with knowledge of its falsity or in reckless disregard of whether it is true or false for the purpose of inducing another to act, and a Plaintiff justifiably relies upon the representation as true and acts upon it to his damage.

Title 14 M.R.S.A. § 6051(4) grants jurisdiction to the Superior Court to grant equitable relief in cases of "fraud, trust, accident or mistake ..."

The Restatement of Contracts (Second) provides further guidance to the Court as to the appropriate law to apply to the facts of this case. First, in § 90, the Restatement states:

> "Promise Reasonably Inducing Action or Forbearance.
> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
> ...."

This Section is often referred to in terms of "promissory estoppel," according to the Comment to Section 90.

Of great importance in relation to the issues before the Court in this case, is Section 91 of the Restatement: *"If a promise within the terms of Section 82-90 is in terms conditional or performable at a future time the promisor is bound thereby, but performance becomes due only upon the occurrence of the condition or upon the arrival of the specified time."*

Furthermore, Restatement Section 139 addresses the issue of enforcement of a promise, which otherwise is barred by the Statute of Frauds, in the following circumstances:

> "(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of promisee or a third party person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires."

As the Comment clarifies, "Like Section 90, this Section overlaps in some cases with rules based on estoppel or fraud; it states a basic principle which sometimes renders inquiry unnecessary as to the precise scope of the other policies." Restatement (Second) of Contracts, p. 354. Moreover, when a promise is made without intention to perform, remedies under this section may be used as an alternative to remedies for fraud. Id. At 355.

It appears from the Order of this Court dated January 19, 1999, that the Court found that the terms of the stock purchase agreement were clear and unambiguous. The Court deemed that finding determinative of the issues presented in this case. However, that finding is far from determinative. The Court has disregarded the entire context of events and has refused to consider the Defendants' multiple misrepresentations of fact (i.e., that the company was in poor financial condition; that the sisters and their families had dire "estate tax problems" ; that the Defendants failed to inform the sisters of the adoption by the Board of a stock redemption policy that would have eliminated any "estate tax problems" ; that the Defendants expressly promised the Francises that if they sold out for $700,000.00 at that time (a price the Court elsewhere found to be a fraction of the real value of the stock), and the company later sold for a greater price per share, that the Defendants "would make up the difference" which misrepresentations induced the Plaintiffs to sell their stock to their extreme financial detriment.

The Court's ruling is fundamentally wrong. The case of Ferrell v. Cox, 617 A.2d 1003 (Me. 1992) is directly on point. A signed agreement that contradicts prior oral statements does not bar an action for fraud as a matter of law, and parol evidence of fraudulent inducement may be introduced to show that a signed document does not reflect the intention of the parties. A Plaintiff's reliance on fraudulent misrepresentations is only "unjustified" if the Plaintiff knows the representation is false or its falsity is obvious to the Plaintiff, neither of which exceptions is applicable to the facts of this case. Moreover, the fraudulent misrepresentation does not have to be a sole or even a decisive factor in the Plaintiff's decision to proceed with a particular transaction, it need only have "substantially influenced his decision" in order for the Plaintiff's reliance to be justified in an action for fraudulent misrepresentation. Ferrell v. Cox, supra.

A cause of action for fraud "may be commenced at any time within 6 years after the person entitled thereto discovers that he has just cause of action." Title14 M.R.S.A.

§859. The Plaintiffs did not discover the fraud until 1992, when Stinson Canning Company was sold. Their cause of action is timely.

II. THE SUPERIOR COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS COUNTS I (EXCEPT THE FRANCISES' "FAIR SHARE CLAIM,") II, III AND IV OF THE COMPLAINT.

The Court expressly but erroneously ignored the existence of the fiduciary relationship that existed among the parties during the time of the negotiations and stock sales. The Court states on page 2 of its Summary Judgment Order notes that "The facts of Defendants' fiduciary duty to the Plaintiffs (during the period of their stock ownership) does not alter this result." The fiduciary relationship has a direct bearing upon the issue of whether or not certain representations and promises were made to the Plaintiffs to induce them into the specific act of agreeing to sell their stock and entering into the stock purchase agreements. The Defendants were advising the Plaintiffs as to what they should do while Defendants were acting in their capacities as officers and directors of the company in relationship to minority shareholders who were in a relative state of ignorance regarding corporate affairs. That relationship created a situation of trust between brother and sister and corporate officers and minority shareholders. That is further highlighted by the fact that both brothers told their sisters that if they were in their sisters' positions, they would sell, too. The relationship is at the core of the entire case.

It appears that the Court has considered this case throughout to be an action at law. There is, of course, do distinction under contemporary Maine law between actions at law and equity. See Rule 1, M.R.Civ.P. The basis for the Court's earlier dismissal of part of Courts I, and II, III and IV may have been based upon the Court's narrow view of this case as if it is solely brought as an "action at law." The Court's earlier rulings, likewise, therefore, were erroneous and the Plaintiffs request that the Court on its own motion reconsider its earlier rulings, amend the judgment and vacate the earlier rulings as having been erroneous.

The statute of limitations defense asserted by the Defendants is a legal defense. Due to the equitable nature of the Plaintiffs' claims for breach of fiduciary duty, fraud and misrepresentation, the appropriate question as to the timeliness of the action is whether the Plaintiffs have shown that Defendants are equitably estopped from raising the statute of limitations defense.

In Hanusek v. Southern Maine Medical Center, 584 A.2d 634 (Me.1990), the Law Court specifically recognized the application of estoppel to prevent the assertion of a statute of limitations defense to a civil action in general. The gist of an estoppel barring the defendant from invoking the defense of the statute of limitations is that the defendant has conducted himself in a manner which actually induced the plaintiff not to take timely action on a claim. "The plaintiff thus relies to his detriment on the conduct of the defendant by failing to seek legal redress while the doors of the courthouse remain open to him." Id. at 636, quoting Townsend v. Appel, 446 A.2d 1132, 1133 (Me.1982). The acts of the plaintiff in reliance upon the defendant's conduct must be "reasonable." Whether the plaintiff's reliance upon misrepresentations by the defendant is "reasonable" is a question of fact depending upon the factfinder's ultimate assessment of the totality of the circumstances in the particular case.

There is clear precedent for the application of the doctrine of equitable estoppel in the context of a suit for breach of fiduciary duty between a corporation and a director in the matter of Livermore Falls Trust & Banking Company v. Riley, 108 Me. 17, A.

(1911). In Livermore Falls, a bank director borrowed money from his bank, but never paid the promissory note back. The director never brought the fact of his non-payment to the attention of the board for over six years, and then, when sued by the bank for payment, the director asserted the statute of limitations as an affirmative defense. The Law Court held unequivocally that "the defendant Riley must be deemed to have waived his right to plead the statute of limitations in bar of this action and be held equitably estopped to invoke the relief which that statute, regarded as a statute of repose, was designed to afford under ordinary and more meritorious conditions than those in the case at bar." Id. at 21.

The Law Court notes that "*the relation existing between the directors of a corporation and the stockholders for whom they act is substantially that of trustees and beneficiaries*." Id. at 21. Moreover, "*(t)he treasurer and other trustees appear to have acted upon the confident assumption that he would discharge his duty as a trusted member of the board, and to have been lulled into inactivity by the appearance of his signature on the back of the note and his conduct in the premises.*" Id at 23. Given the fiduciary relationship, and the equities presented, the Court reasoned in the following manner:

> "Under the circumstances, the plaintiff's claim that the defendant Riley is now equitably estopped to set up the statute of limitations in his defense must be deemed a meritorious one. The principle upon which it is based is analogous to that frequently applied in bills for the specific performance of oral contracts which have been partly performed, and the stature of frauds is invoked in defenses. 'The ground of the remedy is equitable estoppel based on an equitable fraud. After having induced or knowingly permitted another to perform in part an agreement on the faith of its full performance by both parties, and for which he could not well be compensated except by specific performance, the other shall not insist that the agreement is void.' Woodbury v. Gardner, 77 Maine, 68. In such a case 'the defendants are estopped to set up the statute of frauds in defense.' Low v. Low, 173 Mass.

580. In 4 Pom. Eq. Jur. sect. 1409, the author says: 'The ground is equitable fraud, not an antecedent fraud in entering into the contract, but a fraud inhering in the consequence of setting up the statute as a defense.'" Id. at 24.

Cf. Northeast Harbor Golf Club v. Harris, 725 A.2d 1018, 1024 (Me.1999), in which the Law Court considered the applicability of equitable estoppel which was asserted by the Plaintiffs in an effort to overcome the statute of limitations defense.

The reasoning of the decisions in Riley and Hanusek is directly applicable and controlling upon the present case. As set forth in the Plaintiffs' Statement of Material Facts on the summary judgment motions, this case clearly involves a fiduciary relationship in which the Defendant brothers Charles and Calvin Stinson owed the plaintiffs absolute duties which they breached. The Defendants in their capacity as officers and directors of the corporation owed plaintiffs "the strict requirement of full disclosure prior to taking advantage of any corporate opportunity." Northeast Harbor Golf Club v. Harris, Id. at 1022. The corporate opportunity here is that the corporation was going to buy back the stock, and the defendants were going to gain by the increase in value of their own stock. The defendant brothers knew that upon the purchase of their sisters' (and their families) stock at a value, in the Francis case in particular, much lower than its actual value (a point noted by the Superior Court), that they stood directly to gain substantially by the correlative increase in value of their stock.

Here the plaintiffs were lulled into inaction over the years based upon various misrepresentations by the defendants, and the defendants' fraudulent conduct. Because of the very nature of the fiduciary relationship, and the close inter-family bonds among them, it was clearly reasonable for the plaintiffs to rely upon the defendants to be telling them the truth about the financial condition of the company (they said it was in bad condition, when in fact it was in excellent condition); about estate tax problems (they said there were severe estate tax problems, when any such issues had been erased by the vote of the defendants, as directors, months earlier to redeem a deceased shareholder's stock); and by promising the Francis family to "make up the difference" if the company sold for more in the future (a promise which Defendant Calvin Stinson, Jr., does not deny, but which he now claims was intended to last only a few years; a promise upon which the Francises relied to their detriment).

Unlike the plaintiff in Northeast Harbor Golf Club, supra, these plaintiffs never learned of the facts constituting the defendants' breach of fiduciary duty, until after the sale of the company, and in the case of the counts alleging fraud, until the plaintiffs engaged in discovery and obtained substantial documentation consisting of evidence of the fraud. It should be noted that after the discovery showing the evidence of fraud, the plaintiffs immediately amended their complaint to include counts of fraud.

Plaintiffs have alleged all of these facts, and more, in their Statement of Material Facts. Summary judgment was inappropriate.

For the foregoing reasons, the Court in its Orders erroneously granted the Defendants' Motion to Dismiss, and summary judgment to the Defendants on the grounds of the statute of limitations, as well as on the grounds otherwise asserted above.

III. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS ON COUNT IV ALLEGING WRONGFUL INTERFERENCE WITH A LEGACY.

Plaintiffs Lou Ann Francis and Eva Wight allege in Court IV of the Complaint that their brothers obtained their late father's signature to certain deeds of real estate in the years immediately before he died and during a time when their father was mentally incompetent. Complaint, para. 43. No consideration was paid for these deeds. Complaint, para. 44. Plaintiffs further allege that but for their brothers' wrongful interference, the real estate in question would have become part of their father's estate upon his death, and the sisters would have received one-sixth each under their father's will. Complaint, para. 45. Finally, Plaintiffs allege that Charles Stinson and Calvin Stinson, Jr., "wrongfully interfered with (their) expectation of a legacy from their father." Complaint, para. 46.

Four deeds are involved, dated October 12, 1989; January 3, 1990; and July 18, 1990 (two deeds were executed on the same date).

Plaintiffs did not learn until after their father's death in 1992, that real estate which had been in his individual name during the 1980's, at times when they had signed their stock purchase agreements, had been transferred by their father into the company's name in the years immediately before he died. This lack of knowledge and the obtaining of these deeds are part and parcel of the overall course of fraud allegedly perpetrated by the brothers upon their sisters, and their families, to deprive them of their fair share of their father's assets.

When fraud is proven, the statute of limitations does not begin to run until the fraudulent acts are discovered. The statute of limitations in this case did not begin to run until sometime after 1992, placing the present action well within the statute of limitations of six years.

In Cyr vs. Cote, 369 A.2d 1013 (Me. 1979), the Maine Supreme Court recognized an independent cause of action for wrongful interference with an expected legacy or gift under a will. The Court's opinion is predicated on the Restatement (Second) of Torts

§774B (1979) which provides: "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to the other for loss of the inheritance or gift." A Defendant is liable for unlawfully causing the testator to convey inter vivos that which would have passed under the will. Plimpton vs. Gerard, 668 A.2d 882 (Me. 1995).

Fraud, or undue influence, qualify as tortious means. Desmarais vs. DesJardins, 664 A.2d 840 (Me. 1995). Undue influence is the unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relationship between them is justified in assuming that that person will not act in a manner inconsistent with his. Russo vs. Miller, 559 A.2d 354, 358 (Me. 1989). Again, when a confidential relationship is shown to have existed between the parties, the burden of proof shifts, as the law imposes a presumption of undue influence on the part of a superior party to a confidential relationship if the superior party obtains a benefits from a transaction "between the parties." DesMarais, supra. _

The late Mr. Stinson's deeds in question resulted in the conveyance of valuable real estate into the corporation, Stinson Canning Company. Had these conveyances not been made, the Plaintiffs would have shared one-sixth of these properties along with their brothers under their father's will. Instead, the real estate became the property of the company, well after the Plaintiff sisters had relinquished their stock, thereby depriving them of their legitimate interests under the will.

IV. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS ON COUNTS VII AND VIII ALLEGING FRAUDULENT MISREPRESENTATION AND FRAUD IN THE INDUCEMENT.

As the Statement of Material Facts show, the Defendants Charles Stinson and Calvin Stinson, Jr., engaged in an intentional course of conduct designed to deprive the Francises and the Wights of their stock, for the ultimate benefit of themselves and their families. The evidence is certainly sufficient to allow a factfinder to find that it is "highly probable" that Defendants defrauded the Francises and the Wights.

At the heart of this case is the confidential, fiduciary relationship that existed between the sisters, their families and the brothers. A factfinder can certainly conclude that the Defendants defrauded the Francises and the Wights out of their stock by failing to fulfill their fiduciary obligations, as admitted by them during their own depositions, in order to benefit themselves and their families.

To withstand a motion for summary judgment on a fraud claim, the Plaintiff must demonstrate specific facts creating a dispute as to whether the Defendants made a misrepresentation of a material fact with knowledge of its falsity or in reckless disregard of whether it was true or false, and that the Plaintiff reasonably relied upon it to his or her detriment. Barnes v. Zappia, 658 A.2d 1086 (Me. 1995). Evidence of such fraud must be "highly probable" rather than "merely likely." Id.

The Plaintiffs' Statement of Material Facts establishes beyond question the high probability that Defendants defrauded them and their families. Certainly, the disputed facts render a summary judgment against them inappropriate. Beginning in at least December 1977, the Board of Directors voted to explore an opportunity to buy out the Francis and Wight families. The brothers used the existence of so-called "estate tax problems" as a scare tactic and an excuse to approach the sisters about selling their stock back to the company. Although by April 1978 the Board had adopted a stock redemption agreement that effectively eliminated any estate tax problems for the minority shareholders, that was never communicated to the Francises or the Wights.

The brothers also intentionally misrepresented the financial condition of the company to their sisters. They said the company was in poor financial condition, whereas, as Charles Stinson boasted at his deposition, "There wasn't a year we didn't make money, and a hell of a lot of it!" Combined with the brothers' withholding of material information from their sisters, such as the many offers and inquires they were receiving about buying the company for as much as $16.1 million in 1978 and 1979, the brothers' numerous breaches of fiduciary duty in the form of active misrepresentations and failure to disclose reveal an intentional course of fraudulent conduct deliberately designed to obtain their sisters' families valuable stock for as little as they possibly could get away with.

The Court clearly erred in granting summary judgment to the Defendants on the fraud claims.

CONCLUSION

For the reasons argued herein, Plaintiffs respectfully ask the Law Court to reverse the Order of the Court dismissing Counts, I, II, III and IV, and the Summary Judgment Order in favor of the Defendants' and to remand to the Superior Court for further proceedings.

Dated: 7/6/99

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CERTIFICATE OF SERVICE

We, William S. Silsby, Jr. and Sandra Hylander Collier, attorneys for the Plaintiff/Appellant, Lou Ann Francis, et als., hereby certify that we have this day sent out two copies of the foregoing Brief first class, postage paid, address to attorneys for the Defendant/Appellees, as follows:

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