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STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Docket No.: HAN-99-187

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

v.

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

APPELLANTS' REPLY BRIEF
ON APPEAL FROM THE HANCOCK COUNTY SUPERIOR COURT

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Sandra Hylander Collier
Attorney at Law, Bar#: 1828
P.O. Box 1391, 121 Main Street
Ellsworth, Maine 04605
(207) 667-6417

William S. Silsby, Jr. Esq.
Attorney at Law, Bar#: 794
P.O. Box 449, 4 Union St.
Ellsworth, Maine 04605
(207) 667-5511

Attorneys for the Appellants,
Lou Ann Francis, et als.

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Attorney at Law, Bar#: 794
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Ellsworth, Maine 04605
(207) 667-5511

Attorneys for the Appellants,
Lou Ann Francis, et als.

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I. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS WITH RESPECT TO THE FRANCIS FAMILY'S "FAIR SHARE" CLAIMS IN COUNTS I, V, VII and VIII OF THE AMENDED COMPLAINT.

The critical factual significance of the so-called "fair share" promise is two-fold. First, the fact that such a promise was made, with no intent to fulfill the promise, in order to induce the Francises to sell their stock at a pittance of its actual value, with all of the attendant circumstances, is evidence of fraud and generates questions of fact for the jury. Second, but for the "fair share" promise, it is questionable whether the Francises or the Wights would ever have questioned their brothers and begun to uncover the concealed facts which now prove that they were the victims of fraud.

The Superior Court erroneously adopted the Defendants' characterization of this suit as a contract action, zeroing on the so-called "promise to pay" and putting legal blinders on a full and fair consideration of the heart of the case, which is the fraud, breach of fiduciary duty, tort and equitable causes of action.

Plaintiffs have little quarrel with the Defendants' summary of contract law. The issue is, however, is that it is irrelevant to the heart of the analysis.

Defendants claim that the Plaintiffs cannot maintain a cause of action for breach of fiduciary duty because in 1990 when the company was finally sold the Plaintiffs no longer were shareholders of the company. Defendants' counter-intuitive argument would necessarily prevent shareholders who have divested themselves of their stock from bringing suit for damages even one day after the stock transfer. Moreover, Defendants' argument also fixates upon only one facet of the Defendants' multiple breaches of duty.

Examples of other breaches contained within the pleadings and the record include misrepresentations of fact including claims that the company was in dire straits financially and that unless the sisters sold out their families would be exposed to significant estate tax liability upon their deaths. Another example of breach of fiduciary duty was the withholding of material information concerning the value of stock thereby inducing the Francises in particular to relinquish their stock for a fraction of its actual value.

The fraud counts discussed below involve the very essence of fiduciary duty and insofar as the actions for fraud are timely because filed within 6 years from the date of the discovery of the fraud, the actions for breach of fiduciary duty are also timely.

II. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS WITH RESPECT TO THE MISREPRESENTATION CLAIMS FOR FRAUD AND FRAUD IN THE INDUCEMENT IN COUNTS VII and VIII OF THE AMENDED COMPLAINT.

The Superior Court based its summary judgment Order virtually exclusively upon certain disclaimer language contained within the Francis Stock Purchase Agreements. The Court failed to distinguish the significant difference in the language of the Francis agreements as contrasted with the language of the Wight agreements. The Francis agreements do in fact clearly state that "future stock values might be higher than the values accorded to the plaintiffs." However, the Wight agreements contain *no such language or disclaimer*. See Joint Appendix, pp. E164-E166.

Therefore, to the extent that the Superior Court's decision on Counts VI and VII against the Wights was based upon an erroneous assumption that the Wight agreements contained the same disclaimer language as the Francis agreements, the decision is clearly erroneous, and must be remanded.

As set forth in the Plaintiff's Brief, and will not be repeated here, Plaintiffs in any event have shown that the Court's reasoning on the entire issue is completely flawed, in that the Court's analysis leaves no room for the well-recognized causes of action which are grounded in equity and equitable theories.

III. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS WITH RESPECT TO THE CLAIM FOR WRONGFUL INTERFERENCE WITH A LEGACY IN COUNT IV OF THE AMENDED COMPLAINT.

The cause of action for wrongful interference with a legacy is not barred by the six-year statute of limitations. The Plaintiffs filed their initial Superior Court complaint on September 28, 1995. The first of the deeds under attack by the Plaintiff was dated October 12, 1989. Thus, all four of the deeds in question were executed within six years from the date this action was commenced.

Plaintiffs' initial complaint did not contain a count for wrongful interference with a legacy. However, the initial complaint asserted such causes of action as breach of fiduciary duty and misrepresentation and trust. Shortly after the lawsuit was commenced, and well before expiration of the discovery period, Plaintiffs moved to amend and were allowed to amend to add the count for wrongful interference with a legacy on August 26, 1996.

Rule 15(C), M.R.CIV.P. governs the relation back of amendments to pleadings. Relation back is permitted when the "claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

Plaintiffs' Motion to Amend simultaneously added counts for fraud arising out of the entire course of dealings between the Defendants and the Plaintiffs, which took place over a period of years, beginning in 1980 and continuing through the date of suit. The questioned deeds constitutes a part of the conduct, transaction or occurrence which form the backbone of this suit. The Court erred in ruling that summary judgment should be granted to the Defendants on a theory that this count was barred by the statute of limitations.

IV. THE SUPERIOR COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS COUNTS I THROUGH V OF THE COMPLAINT, BECAUSE T. 14 M.R. S. A. §859 APPLIED.

The case of Akins v. Firstbank, N.A., 415 A.2d 567 (Me. 1980) cited by the Defendants as authority for not applying the so-called "discovery rule" embodied in T.14 M.R.S.A. §859, actually stands directly as support for the application of the rule to the facts of this case. Here, as with Ms. Akins, at the time of the acts complained of whereby the Defendant brothers acquired the company's stock from their sisters and their families, the Defendants possessed superior knowledge of the financial health of the company, the value of the stock and various other material considerations, which knowledge was knowingly withheld from the Plaintiffs. Active misrepresentations were made, all of which have been set forth at length in the Plaintiffs' brief. Defendants also knew that once they had acquired the plaintiffs' stock, the value of their own stock would necessarily increase.

The Plaintiffs did not learn of the facts supporting their cause of action for fraud and breach of fiduciary duty until after the sale of the company in 1990. It so happened that the reason the sisters began to ask questions and learn of the facts as alleged in the Complaint grew out of Plaintiff Lou Ann Francis' concern, after the sale of the company, about the fact that the brothers were not living up to their so-called "fair share promise." Plaintiffs had no reason to suspect any of the facts creating the cause of action for fraud, until the brothers breached their promise to pay. Then, in the course of her investigation, including the discovery conducted in this case, Plaintiffs learned of the facts supporting the present cause of action for fraud and breach of fiduciary duty. Plaintiffs promptly amended their complaint and proceeded on the newly discovered grounds.

This is exactly the kind of case contemplated by Title 14 M.R.S.A. §859, and the Superior Court erroneously granted the Motion to Dismiss and for Summary Judgment.

V. THE SUPERIOR COURT DID NOT ERR IN DENYING DEFENDANTS' MOTION TO DISMISS COUNTS I AND V.

Defendants repeatedly sought an order from the Superior Court dismissing various counts in the complaint on two procedural grounds: first, they assert that the Plaintiff's claim against them is actually a claim against the corporation, Stinson Canning Company, and not a claim against them individually. Second, they assert that the Plaintiffs cannot maintain their action without joining all of the shareholders of the Stinson Canning Company.

The Defendants' assertions, which were correctly denied by the Superior Court below, reveal a fundamental misunderstanding of the nature of an action for breach of fiduciary duties. The proper party Defendants to this action are precisely those which have been named, and none other. Charles and Calvin Stinson, Jr., are being sued individually because they personally breached their duties towards the Plaintiffs as a matter of tort law. As in Rosenthal v. Rosenthal, 543 A.2d 348 (Me.1988) the proper remedy for the tort of breach of fiduciary duty is a personal tort action by the injured party against the individual(s) in their individual capacity, not a lawsuit against the corporation itself.

Thus, Title 13-A M.R.S.A. § 1122 is simply inapposite to this action or this case.

Similarly, Defendants' Rule 19 argument misses the mark because it is premised on the erroneous precept that the thrust of Plaintiffs' action is a suit against Stinson Canning Company, a dissolved corporation. Plaintiffs agree that in such event, the proper party defendants would be "the transferees of the corporation's assets." Lone Star Industries v. Redwine, 757 F.2d 1544 (5th Cir.1985). Because this action is not aimed at a dissolved corporation, there is no issue requiring joinder of any other shareholders. (Even if there were, Defendants' argument falls short of explaining exactly how complete relief could not be accorded to the Plaintiffs by action against the present Defendants only).

Finally, Plaintiffs note that Camp Hills, Inc., is named as a corporate defendant solely because the Registry records reveal it to be the present owner of substantial real estate, including the two parcels referenced to above (the Calvin Stinson, Sr., personal residence and the 4,000 acre "camp" property in Township #7). Plaintiffs claim that Camp Hills, Inc., holds these tracts in constructive trust for their benefit (As well as their siblings' benefit), based upon the circumstances otherwise alleged at length in their complaint.

Dated: September 20, 1999

Respectfully Submitted,

Sandra Hylander Collier

Sandra Hylander Collier
Attorney at Law, Bar#: 1828
P.O. Box 1391, 121 Main Street
Ellsworth, Maine 04605
(207) 667-6417
Attorney for the Appellants

William S. Silsby

William S. Silsby, Esq. Bar#: 794
Silsby & Silsby
P.O. Box 449, 4 Union Street
Ellsworth, Maine 04605
(207) 667-5511
Attorney for the Appellants

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 Reply Brief first class, postage paid, address to attorneys for the Defendant/Appellees, as follows:

Kate S. Debevoise, Esq.
Bernstein, Shur, Sawyer & Nelson
100 Middle St., 6th Floor
P. O. Box 9729
Portland, Maine 04104-5029

Peter Rubin, Esq.
Bernstein, Shur, Sawyer & Nelson
100 Middle St., 6th Floor
P.O. Box 9729
Portland, Maine 04104-5029

Dated at Ellsworth, Maine this 20th day of September, 1999.

William S. Silsby

William S. Silsby, Jr.
Attorney at Law, Bar #: 794
P.O. Box 449, 4 Union St.
Ellsworth, Maine 04605
(207) 667-6417

Sandra H. Collier

Sandra Hylander Collier
Attorney at Law, Bar #: 1828
P.O. Box 1391, 121 Main Street
Ellsworth, Maine 04605
(207) 667-6417