

FLORIDA'S FRIVOLOUS FLIRTATION WITH SHAREHOLDER FIDUCIARY DUTY IN CLOSELY HELD CORPORATIONS

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INTRODUCTION

Peter, Paul, and Mary are three seasoned Certified Public Accountants. Last April, after a strenuous tax season at a large accounting firm in Florida, Peter, Paul, and Mary decide to open their own venture. This venture is a small accounting firm that will have the purpose of providing capital for Peter, Paul, and Mary. Peter, Paul, and Mary will be paid via salaries. Their lawyers advised them to pursue incorporation for limited liability, low set-up costs, tax effects, and the transferability of ownership. Peter, Paul, and Mary follow their lawyer's advice and form a corporation under Florida law. Merely a few months into the venture, Mary and Paul become unhappy with Peter's performance. Peter is not bringing in enough clients nor putting in the work and effort Mary and Paul are. So, Mary and Paul decide to oust Peter and vote to fire him from the accounting firm.

During the same time period that Peter, Paul, and Mary were opening their accounting firm, Janet and Dino were also starting a business venture. Janet was an acclaimed scientist working on a new drug to cure Cystic Fibrosis, and Dino saw her value and invested in her project. The two, much like Peter, Paul, and Mary, form a corporation in the state of Florida. Dino provides funds for Janet's research and provides the sole backing for her work. After months of no progress, Dino begins to think Janet lacks the necessary skills to complete the research and produce the drug. He tells her to step down from her position.

Janet and Peter find themselves in very similar situations, ousted members of a corporation. If the respective groups had chosen a partnership, then per Florida Statute section 620.8404 the partners would owe a fiduciary duty or

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duty of loyalty to each other.¹ A fiduciary relationship exists among partners.² “The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care.”³ Under this statute, Janet and Peter could possibly sue alleging a breach of a fiduciary duty.⁴ If the groups had chosen a limited liability company, then again, a fiduciary relationship would exist.⁵ Florida Statute Section 605.04091 provides, “each manager of a manager-managed limited liability company and member of a member-managed limited liability company owes fiduciary duties of loyalty and care to the limited liability company and members of the limited liability company.”⁶ Accordingly, under a limited liability company, Janet and Peter again could possibly claim a breach of fiduciary duty because the other members in the organization ousted them.

However, both groups chose a corporation over all other business organization options. These decisions raise several questions. Under Florida law, how does a corporation provide relief to the ousted party? Should the choice of the corporate entity affect the duties of Paul and Mary when they decide to oust Peter? Should the choice of the corporate entity affect the duty of Dino when he forces Janet to surrender her position?

While imposing a fiduciary duty and preventing the majority shareholders from ousting the minority shareholder(s) might seem like the best solution, this Note will demonstrate that courts cannot create a fiduciary duty between shareholders of a closed corporation if the shareholders did not choose a business organization that imposes a fiduciary duty among shareholders. Part I of this Note will describe closed corporations and the conundrum that led to a fiduciary duty being forced on majority shareholders. Part II of this Note will discuss the Florida conventional corporate model, how Florida statutes govern closed corporations, and the lack of a shareholder fiduciary duty in closed corporations. Part III of this Note will hone in on the history of the judicially created shareholder-to-shareholder fiduciary duty, showing how the state of Florida has approached the issue. Lastly, Part IV will conclude that Florida should not judicially create the fiduciary duty among shareholders; however, the duty should be allowed based on a different legal principle or private ordering.

1. FLA. STAT. § 620.8404 (2018).

2. *Id.*

3. FLA. STAT. § 620.8404(1) (2018).

4. FLA. STAT. § 620.8404 (2018).

5. FLA. STAT. § 605.04091(1) (2018).

6. FLA. STAT. § 605.04091.

PART I: CONVENIENT CLASSIFICATION OF MODERN AMERICAN
CORPORATIONS

Corporations have been a very favorable business organization because of the limited liability associated with them.⁷ While there are different types of corporations, the common theme is that shareholders choose this type of business organization to protect themselves from being sued when the corporation causes harm.⁸ There are three types of corporations: (1) publicly held corporations, (2) private corporations, and (3) closed corporations.⁹ Closed corporations are a type of private corporation and can be characterized similarly.¹⁰

Under a publicly held corporation, there is complete separation between managerial control from the ownership of the company.¹¹ Generally, the ownership of the company takes the form of shareholders that are comprised of hundreds or thousands of individuals or institutions.¹² All of whom are investors who do not have control of the company.¹³ These investors tend to not have a relationship with each other nor are they associated with the managers of the company.¹⁴ The board of directors has all the power and managerial control of the publicly held corporation.¹⁵ They operate separately from the shareholders.¹⁶

Privately held corporations can vastly differ in size and internal characteristics than that of a publicly held corporation.¹⁷ First, the private company's ownership is stable and not tradeable as that of a public company.¹⁸ Also, the separation between ownership and managerial control does not always exist as in a public corporation.¹⁹ Private corporations tend to involve family or contractual relationships.²⁰

7. JONATHAN R. MACEY, *THE ICONIC CASES IN CORPORATE LAW* 114 (2008).

8. *See generally* MELVIN EISENBERG & JAMES COX, *CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS* 452 (10th ed. 2011).

9. *Id.*

10. *Id.*

11. *Id.* at 191.

12. *See generally id.*

13. *Id.*

14. *Id.* at 192.

15. *See generally id.*

16. *Id.*

17. *Id.* at 452.

18. *See generally id.*

19. *Id.*

20. *Id.*

Specifically, a closely held corporation is a subset of the privately owned corporation.²¹ The closely held corporation typically has active shareholders who manage the company.²² In a closely held corporation, known as a closed corporation, there is substantial overlap between ownership and managerial control.²³ The substantial overlap often means shareholders who are family members also make up the board of directors of that same corporation.²⁴ “With substantial shareholding interests abiding in each member of the board of directors, it is often quite impossible to secure, as in the large public-issue corporation, independent board judgment free from personal motivations concerning corporate policy.”²⁵

In closely held corporations, stock of the company is generally “held in a few hands, or in a few families.”²⁶ Since closed corporations generally involve a small number of shareholders who work to run the business, closed corporations tend to resemble partnerships.²⁷ Like partnerships, closed corporations often have owners who participate in the management of the company.²⁸ Also, in both types of business organizations, there is no active market for the owners to sell their shares.²⁹ Lastly, there tend to be restrictions on the transferability of ownership in both types of organizations.³⁰ However, unlike partnerships, the closed corporation owners do not have the option to dissolve the business organization at their will.³¹

While the structure of a partnership and a closed corporation do indeed have their similarities, there is a certain vulnerability that exists for shareholders of a closed corporation that does not necessarily exist in a partnership.³² The structure of a closely held corporation naturally induces conflicts between minority and majority shareholders because of the high stakes involved.³³ In a publicly held corporation, shareholders always have

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Galler v. Galler*, 203 N.E.2d 577, 584 (Ill. 1964).

26. *Id.*

27. EISENBERG & COX, *supra* note 8, at 452.

28. MACEY, *supra* note 7, at 114.

29. *Id.*

30. *Id.*

31. *Id.*

32. DOUGLAS K. MOLL & ROBERT A. RAGAZZO, CLOSELY HELD CORPORATIONS § 7.01, 1, 26 (LexisNexis 2017).

33. *Id.*

the option to sell their stock to get out.³⁴ While in a partnership, the shareholders have the highest degree of trust and loyalty between the owners.³⁵ However, here in a closed corporation, the shareholders have more on the line, and in order to get paid, the shareholders need the board's approval.³⁶ Thus, the majority shareholders hold the power to pay the shareholders either via dividends or their salaries.³⁷ This leads to the possibility of a freeze-out.³⁸ Freeze-outs occur when the majority shareholders deprive the minority shareholder of his salary or other benefit of his position.³⁹

PART II: FLORIDA'S CONVENTIONAL CORPORATE MODEL

In Florida, Statute section 607.0302 confers general powers to corporate entities.⁴⁰ Much like the traditional corporate structure, Florida provides that every corporation "has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs."⁴¹ Florida Statute section 607.0801 states, "All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors."⁴²

The board of directors is elected by the shareholders; however, the board has the power and authority to make decisions for the corporation.⁴³ With power comes responsibility; the board of directors must also act in good faith and in the best interests of the corporation.⁴⁴ Nevertheless, shareholders are not necessarily bound to this same standard and are not imposed with a duty to act in the best interests of the corporation.⁴⁵

In terms of a closed corporation, Florida Statute section 607.0732 recognizes closed corporations as constitute an organization with fewer than 100 shareholders, so as long as the provisions of the statute are complied

34. *Id.*

35. MACEY, *supra* note 7, at 114.

36. MOLL & RAGAZZO, *supra* note 32, at 27.

37. *Id.*

38. KEITH H. BERK, SCOTT A. JOSEPHSON & MIRIAM VOLCHENBOUM, FIDUCIARY DUTIES OF SHAREHOLDERS OF CLOSELY HELD CORPORATIONS, ILL. B. J. 1, 3 (2010) http://www.hmblaw.com/media/10638/isba_20-_20shareholder_20fid.pdf.

39. *Id.*

40. FLA. STAT. § 607.0302 (2018).

41. *Id.*

42. FLA. STAT. § 607.0801(2) (2018).

43. *See* FLA. STAT. §§ 607.0801, 607.0808 (2018).

44. FLA. STAT. § 607.0830(1) (2018).

45. *See generally* FLA. STAT. § 607.0731 (2018).

with.⁴⁶ Specifically, this statute “validates written, unanimous agreements,” that “establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer, or employee of the corporation.”⁴⁷ Further, the written agreement “set[s] forth . . . the bylaws” which indicate “who shall be directors or officers,” “restricts the discretion or powers of the board of directors,” and governs voting and distributions.⁴⁸ Accordingly, it is evident that Mary, Peter, and Paul are operating in Florida as a closed corporation. Likewise, Dino and Janet have also formed a closed corporation.

Also, Florida Statute section 607.0732(6) provides, “even if the agreement or its performance treats the corporation as if it were a partnership,” the state will still uphold traditional corporate legal principles and preserve the limited liability of the shareholders.⁴⁹ Particularly, common law does not impose a special shareholder-to-shareholder fiduciary duty in a closed corporation setting.⁵⁰ Furthermore, Florida legislatures have not tampered with that common law tradition.⁵¹

PART III: FLORIDA’S FLIRTATION WITH SHAREHOLDER-TO-SHAREHOLDER FIDUCIARY DUTY

A. *Origin of the Concept*

An important attribute of corporate law is that the shareholders generally do not owe a fiduciary duty to each other.⁵² “Shareholders who own less than a controlling interest in the corporation owe no legal duties to the corporation or to fellow shareholders.”⁵³ Usually, a shareholder is free to act for himself

46. FLA. STAT. § 607.0732 (2018).

47. FLA. STAT. § 607.0732(1)(e).

48. FLA. STAT. § 607.0732(1)–(2) (2018).

49. FLA. STAT. § 607.0732(6).

50. Francesca Russo-Di Staulo & Jeff Cazeau, *Does A Florida Minority Shareholder In A Closely Held Corporation Owe A Fiduciary Duty To Fellow Shareholders?*, FLA. B.J., Oct. 2005, 55, 58. <https://www.floridabar.org/news/tfbjournal/?durl=/divcom%2fjn%2fjnjournal01%2ensf%2fAuthor%2f457DC4855EC602E485257088006F1C20>.

51. *See generally id.*

52. BERK, JOSEPHSON & VOLCHENBOUM, *supra* note 38, at 2.

53. *Report of the Task Force of the ABA Section of Business Law, Corporate Governance Committee on Delineation of Governance Roles and Responsibilities*, 65 BUS. LAW. 107, 120 (Nov. 2009)

(The Report acknowledges that controlling shareholders do owe “certain fiduciary obligations.” These certain obligations are founded in the long-standing principle that: “if the owners of a majority of the stock of a corporation take advantage of their position, and of their influence over the directors or other officers,

and does not have the duty of loyalty to the company nor its shareholders.⁵⁴ “Conventional analysis treats shareholder fiduciary duties as exceptional in nature, with shareholders generally presumed to be free to pursue their self-interest except when they exercise a degree of control over the firm equivalent to that of corporate directors.”⁵⁵

Shareholders do not have managerial powers within the corporation, so it does not make sense for the shareholders to owe a fiduciary duty when they do not have any authority.⁵⁶ The corporation has no vulnerability to the shareholders; thus, traditional common law has not imposed on the shareholder a duty to the corporation.⁵⁷

However, this rationale does not seem to automatically apply in a closed corporation setting where the shareholders would normally participate in the management and control of the business.⁵⁸ Courts have handled this issue in different ways.⁵⁹ Some courts have imposed a fiduciary duty among shareholders; while other courts have decided to follow traditional corporate law and not impose a fiduciary duty.⁶⁰

1. *Donahue Decision*

Up until 1975, closed corporations followed traditional corporate law and did not impose a fiduciary duty among shareholders.⁶¹ Then, *Donahue v. Rodd Electrottype Co.* came along and completely turned this concept around.⁶² This seminal case involved the majority shareholders of a closed corporation selling their shares to the corporation.⁶³ Harry Rodd founded Rodd Electrottype Company, and he held a majority of the shares.⁶⁴ His employee, Joseph

to obtain an inequitable contract . . . , they perpetrate a fraud upon the minority, and the contract . . . will be set aside in equity” Ballantine, *Corporations* at p. 596. The objective is to prevent the controlling shareholder from reaping disproportionate benefits at the expense of the corporation or non-controlling shareholders, not to bar him from acting in his self-interest. Cox & Hazen, *Corporations* (2d ed. 2003) at p. 253).

54. *Id.*

55. Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1295 (2008).

56. MACEY, *supra* note 7, at 114.

57. *Id.*

58. MACEY, *supra* note 7, at 114–15.

59. *See generally* BERK, JOSEPHSON, & VOLCHENBOUM, *supra* note 38, at 4.

60. *Id.*

61. MACEY, *supra* note 7, at 105.

62. *Id.*

63. *Id.*

64. *Donahue v. Rodd Electrottype Co.*, 328 N.E.2d 505, 509 (Mass. 1975).

Donahue, owned a small percentage of the shares.⁶⁵ Mr. Donahue was an employee of Rodd Electrotpe Company.⁶⁶ He passed away leaving his share of the company to his wife, the minority shareholder.⁶⁷

The majority shareholder, Mr. Rodd, had passed down his shares to his sons who controlled the Rodd Electrotpe Company's board.⁶⁸ In order for Mr. Rodd to retire, his children, acting as both the board and shareholders, caused the corporation to purchase their father's shares at \$800 per share.⁶⁹

The minority shareholder, the widow of Mr. Donahue, demanded the corporation purchase her shares at the same price.⁷⁰ However, the corporation, whose board was run by the majority shareholder, refused to purchase the minority's shares.⁷¹ The minority shareholder sued claiming the majority breached a duty to her because the majority failed to give the minority shareholder an equal opportunity to sell her shares to the corporation.⁷²

In response, the Massachusetts Supreme Court crafted the judicial doctrine of a shareholder-to-shareholder fiduciary duty.⁷³ The court reasoned that a closed corporation is a unique organization, and traditional corporate norms do not necessarily always apply.⁷⁴ The closed corporation has this heightened vulnerability, particularly the minority shareholders, and the court wanted to protect the minority shareholder from the possibility of a freeze-out.⁷⁵

The term "freeze-out" covers several problems the minority shareholders face in a closed corporation.⁷⁶ Specifically, the minority shareholders are vulnerable to the majority shareholders or directors who are deciding dividends and employment policies.⁷⁷ These issues traditionally are covered under the business judgment rule and are difficult for the minority shareholder to challenge.⁷⁸ The business judgment rule provides that courts "will not second guess the decisions of a director as long as they are made (1) in good faith, (2) with the care that a reasonably prudent person would use, and (3)

65. *Id.* at 509.

66. *Id.*

67. *Id.* at 510 n.8.

68. *Id.* at 510.

69. *Id.*

70. *Id.* at 511.

71. *Id.*

72. *Id.*

73. MACEY, *supra* note 7, at 106.

74. *Donahue*, 328 N.E.2d at 511-12.

75. *Id.* at 513.

76. MACEY, *supra* note 7, at 108.

77. *Id.*

78. *Id.*

with the reasonable belief that they are acting in the best interests of the corporation.”⁷⁹ However, *Donahue* was not governed by the business judgment rule because this transaction dealt with a conflict of interest.⁸⁰

The court based its decisions on the idea that there needs to be more legal protections for the minority shareholder of a closed corporation; in doing this, the court neglected to grant the statutory relief that was available.⁸¹ Specifically, 8 Delaware Code section 144 governs conflict of interest transactions in Delaware and states that the transaction could be allowed if, “the material facts . . . [were] disclosed or [were] known to the board (or shareholders). . . and the board . . . authorize[d] [the transaction],” or “the transaction [was] fair as to the corporation” if they proved that the board members making this decision were independent and disinterested.⁸² Though, this was not the case because the sons were not neutral and were having the corporation buy the stocks for their father’s benefit and not the corporation’s interest.⁸³ Thus, the safe harbor statute could have provided relief for the minority shareholder in *Donahue*.⁸⁴

However, the court focused on protecting the minority shareholder, and it grounded its reasoning on the fact that a closed corporation is analogous to a partnership.⁸⁵ Based on the similarities between the two business organizations, the court imposed a shareholder-to-shareholder fiduciary duty in the closed corporation setting since the same duty exists within partnerships.⁸⁶ However, the court did not impose other partnership principles in *Donahue*.⁸⁷ The court did not make a broad generalization that all closed corporations should be treated as partnerships.⁸⁸ If the sole basis for the fiduciary duty is the similarity of a closed corporation to a partnership, then surely the closed corporation should just have chosen a partnership as their business organization if they desired to have the same treatment as partnerships.⁸⁹ Consequently, the court should not solely rely on the

79. *Business Judgment Rule*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/business_judgment_rule (last visited Mar. 16, 2018).

80. *Donahue*, 328 N.E.2d at 511.

81. *Id.* at 513.

82. DEL. CODE ANN. tit. 8, § 144 (2016).

83. *Donahue*, 328 N.E.2d at 510.

84. *See* tit. 8, § 144.

85. *Donahue*, 328 N.E.2d at 515.

86. *Id.*

87. *Id.*

88. *See id.* at 515.

89. *Id.*

partnership analogy for the imposition of a shareholder-to-shareholder fiduciary duty in closed corporations.⁹⁰

Overall, *Donahue* is an influential decision in Massachusetts that created the fiduciary duty among shareholders in a closed corporation.⁹¹ Since *Donahue*, Massachusetts has continued to apply a shareholder-to-shareholder fiduciary duty in subsequent decisions.⁹² However, other states have chosen to not impose the shareholder-to-shareholder fiduciary duty in closed corporations.⁹³ While certainly *Donahue* transformed the legal implications of a closed corporation, the concept of a shareholder-to-shareholder fiduciary duty has not been explicitly decided nor adopted by all courts.⁹⁴

2. *Wilkes Adaptation*

In 1976, the Massachusetts Supreme Court applied the *Donahue* doctrine to another famous case: *Wilkes v. Springside Nursing Home, Inc.*⁹⁵ The Massachusetts Supreme Court granted certiorari for the *Wilkes* case in hopes of further defining and fleshing out the *Donahue* doctrine.⁹⁶ Despite *Wilkes* making it to the Massachusetts Supreme Court a year after *Donahue*, the *Wilkes* case actually commenced earlier and took almost a decade to reach the Massachusetts Supreme Court.⁹⁷ *Wilkes*'s attorney was able to capitalize on the *Donahue* decision and use it in his brief.⁹⁸ His attorney pointed out that the issue in *Wilkes* is the same issue from *Donahue*.⁹⁹ Unsurprisingly, the court applied a similar analysis and applied the *Donahue* doctrine to the *Wilkes* case; however, the court did put a restraint on this doctrine.¹⁰⁰

In *Wilkes*, four men decided to invest in real estate.¹⁰¹ The men purchased a building and turned it into a nursing home.¹⁰² Their attorney suggested

90. *Id.*

91. MACEY, *supra* note 7, at 119.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657 (1976).

96. Eric J. Gouvin, *Symposium: Fiduciary Duties in the Closely Held Firm 35 Years After Wilkes v. Springside Nursing Home: Wilkes v. Springside Nursing Home Inc.: The Backstory*, 33 W. NEW ENG. L. REV. 269, 308 (2011).

97. *Id.*

98. *Id.* at 307.

99. *Id.*

100. *Wilkes*, 353 N.E.2d at 663.

101. *Id.* at 659.

102. *Id.*

creating a corporation to prevent the men from being liable to one another.¹⁰³ Each of the men contributed equally to the investment, and each person was a shareholder and a board member.¹⁰⁴ The work was divided equally along with the pay.¹⁰⁵ One of the original men sold his share to Quinn.¹⁰⁶ Quinn and Wilkes did not get along, and their “bad blood” resulted in Wilkes being fired.¹⁰⁷

Usually the board’s decision would be protected under the business judgment rule; however, the court did not apply this and, instead, the court applied a fiduciary duty among shareholders which offered a protection for the minority shareholder.¹⁰⁸ The court followed the trend to not give deference under the business judgment rule.¹⁰⁹ If the court allowed the business judgment rule to reign, then it is possible that the court still could have reached the same outcome.¹¹⁰ The majority shareholders would have the burden to show compliance with their fiduciary duties such as that the decisions were made in good faith.¹¹¹

Another option for *Wilkes* is that he could have simply brought a derivative suit¹¹² against the board of directors, and his claim would have been actionable without the shareholder-to-shareholder fiduciary duty.¹¹³ While *Wilkes* seems to have the correct outcome, the court did not need to apply the *Donahue* doctrine to reach that outcome.¹¹⁴

The Massachusetts Supreme Court decided to apply *Donahue* to *Wilkes* case and further provide a legal basis for the shareholder-to-shareholder

103. *Id.*

104. *Id.* at 659–60.

105. *Id.* at 660.

106. *Id.*

107. *Id.* at 660–61.

108. *Id.* at 661.

109. *Id.*

110. Larry Ribstein, *Wilkes v. Springside and the Rise of the Uncorporation*, TRUTH ON THE MARKET (October 16, 2010), <https://truthonthemarket.com/2010/10/16/wilkes-v-springside-and-the-rise-of-the-uncorporation/>.

111. *Id.*

112. “A shareholder derivative suit is a lawsuit brought by a shareholder on behalf of a corporation. Generally, a shareholder can only sue on behalf of a corporation when the corporation has a valid cause of action, but has refused to use it. This often happens when the defendant in the suit is someone close to the company, like a director or a corporate officer. If the suit is successful, the proceeds go to the corporation, not to the shareholder who brought the suit.” Cornell Law Sch., *Shareholder Derivative Suit*, https://www.law.cornell.edu/wex/shareholder_derivative_suit (last visited September 1, 2018).

113. *Id.*

114. *Id.*

fiduciary duty.¹¹⁵ However, *Wilkes* was steadfast in imposing a limitation on the *Donahue* doctrine. As the court states:

Nevertheless, we are concerned that untempered application of the strict good faith standard enunciated in *Donahue* to cases such as the one before us will result in the imposition of limitations on legitimate action by the controlling group in a close corporation which will unduly hamper its effectiveness in managing the corporation in the best interests of all concerned. The majority, concededly, have certain rights to what has been termed “selfish ownership” in the corporation which should be balanced against the concept of their fiduciary obligation to the minority.¹¹⁶

This new legal doctrine remained under a microscope, and other courts have had to decide whether to follow this legal principle or deny the shareholder-to-shareholder fiduciary duty.¹¹⁷

3. *Nixon Decision*

While the Massachusetts Supreme Court decided to recognize the shareholder-to-shareholder fiduciary duty in closed corporations, some states do not impose such judicially created duty.¹¹⁸ While those states are considered the minority at this time, the leading opinion against having a shareholder-to-shareholder fiduciary duty comes from *Nixon v. Blackwell*.¹¹⁹ The Delaware Supreme Court in *Nixon* declined to adopt the duty that the Massachusetts Supreme Court crafted in *Donahue* and *Wilkes*.¹²⁰

In *Nixon*, the minority shareholder claimed that the majority shareholders had an unfair advantage at the corporation’s stock ownership plan because employee stockholders had the option to choose cash or stocks while non-employees only had a stock option.¹²¹ The corporation’s founder, Mr. Barton, had passed away and left Class A voting stock to the employees and Class B

115. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663; (1976); *see generally* *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 509 (1975).

116. *Wilkes*, 353 N.E.2d at 661.

117. *Id.* at 663.

118. David E. Lieberman, *Shareholder Oppression and Enhanced Fiduciary Duties*, A.B.A., <http://apps.americanbar.org/litigation/committees/businessstorts/articles/winter2012-shareholder-oppression-enhanced-fiduciary-duties.html> (Feb. 29, 2012).

119. *Id.*

120. *See generally* *Nixon v. Blackwell*, 626 A.2d 1366 (Del. 1993).

121. *Nixon*, 626 A.2d at 1374.

non-voting stock to Barton's family.¹²² The employees owned Class A voting stock and were able to cash it out or transfer it to Class B voting stock through the Employee Stock Ownership Plan.¹²³ Fourteen of the Class B stockholders sued the corporation alleging that the stock ownership plan was unfair and a breach of fiduciary duty because they did not have the same options as Class B stock under the Employee Stock Ownership Plan.¹²⁴

According to the court, the majority shareholders established that the stock ownership plan was entirely fair to the shareholders at large, and furthermore, the court dismissed the principle of shareholder-to-shareholder fiduciary duty created by *Donahue*.¹²⁵ The *Nixon* court stated, "[i]t would do violence to normal corporate practice and our corporation law to fashion an ad hoc ruling."¹²⁶ Essentially, the Delaware Supreme Court did not even consider this type of duty, and the court gave two reasons for refusing to adopt the shareholder-to-shareholder duty.¹²⁷

First, the parties can use private ordering and contract what legal principles they would like in their business organization.¹²⁸ If the organization desires a fiduciary duty between shareholders, then the parties can use the contracting mechanisms that state statutes allow.¹²⁹ Besides imposing a duty among shareholders, the corporation could provide elaborate remedies or provisions for voting, earnings, and other matters that could rise to a breach of fiduciary duty.¹³⁰ Thus, the Court will just follow the principles from the corporation's documents in deciding how to handle the minority's claim of oppression.¹³¹

However, the private ordering does not necessarily provide the protection that *Donahue* provides for the minority shareholder.¹³² If the majority shareholders are already in control, then certainly they will have control over the contract.¹³³ Closed corporations have often been comprised of family and friends, so the close ties might prevent the parties from putting certain

122. *Id.* at 1370.

123. *Id.* at 1374.

124. *Id.* at 1370, 1374.

125. *Id.* at 1380–81.

126. *Id.* at 1380.

127. MACEY, *supra* note 7, at 117.

128. *Id.*; *Nixon*, 626 A.2d at 1380.

129. MACEY, *supra* note 7, at 117.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

principles in their corporation documents.¹³⁴ Also, minority shareholders are not fortune-tellers, and the potential oppressive behavior might not be a thought during the contracting.¹³⁵ This position also puts a lot of control in the lawyer's hands for effective contracting and requires a level of expense associated with that.¹³⁶ Admittedly, contracting might not always be the ideal answer for the minority shareholder.¹³⁷

Secondly, the court rejected the fiduciary duty because Delaware General Corporation Law has special provisions to protect the shareholders of closed corporations.¹³⁸ Instead of judicially creating legal concepts, the Delaware Supreme Court deferred to the state statutes and reasoned that the state statutes provide the necessary legal latitude for shareholders of a closed corporation.¹³⁹ Thus, the Delaware Supreme Court did not adopt *Donahue* because the court found there were other options available to implement protections for the minority shareholder such as special statute provisions.¹⁴⁰ However, at times Delaware's state statutes provide "little aid in the event of oppressive conduct."¹⁴¹ In order for state statutes to be an effective solution, the corporate provisions would still need to provide protection.¹⁴²

While the *Nixon* decision involved the courts relying on statutes and private ordering, the *Donahue* decision involved drastically changing a foundational element of corporate law.¹⁴³ Neither providing an ideal solution. Despite the potential drawbacks, Delaware's position was sufficient for other states to follow.¹⁴⁴ While Maine and Maryland are among the states to follow Delaware's lead, many states have yet to decide their position on this topic.¹⁴⁵

134. *Id.*

135. *Id.*

136. *Id.* at 117–18.

137. *Id.* at 118.

138. *Id.* at 117.

139. *Id.*

140. *Id.*

141. *Id.* at 118.

142. *Id.* at 119.

143. *Id.*

144. See Lieberman, *supra* note 118.

145. *Id.*

B. *Florida's Reliance on Donahue*

Traditionally, Florida has looked to Delaware for guidance in corporate law.¹⁴⁶ Florida's Southern District Court has stated, "[w]e rely with confidence upon Delaware law to construe Florida corporate law. The Florida Courts have relied upon Delaware corporate law to establish their own corporate doctrines."¹⁴⁷ Undeniably, Delaware is the "principal judicial forum in this country on matters of corporate law."¹⁴⁸ While Florida has a large number of corporations, Florida does not have a large number of corporate legal scholars.¹⁴⁹ Thus, Florida judges have looked to Delaware for guidance in the field of corporate law.¹⁵⁰ However, Florida vastly differs from Delaware in their corporations.¹⁵¹ Florida tends to have smaller corporations, while Delaware has larger, publicly held corporations.¹⁵² Additionally, Florida has a Model Business Corporation Act which Delaware does not have.¹⁵³ Now, despite Delaware's guidance to Florida on corporate law, Florida does not explicitly follow Delaware's decision for shareholder-to-shareholder duty in closed corporations.¹⁵⁴

1. *Biltmore Decision*

Around the same time *Donahue* was being decided, Florida courts faced one of their first cases dealing with a shareholder-to-shareholder fiduciary duty.¹⁵⁵ In *Biltmore*, the minority shareholder was fired by the majority, a classic example of ousting in a closed corporation setting.¹⁵⁶ Besides the firing, the majority also caused the corporation to issue more stock shares in order to dilute the minority's percentage of ownership.¹⁵⁷ In response, the minority issued suit against the majority shareholders.¹⁵⁸ Rightfully, the

146. Stuart R. Cohn, *Dover Judicata: How Much Should Florida Courts Be Influenced by Delaware Corporate Law Decisions?*, FLA. B.J., Apr. 2009, at 20.

147. *Int'l Ins. Co. v. Johns*, 874 F.2d 1447, 1459 n.22 (11th Cir. 1989).

148. Cohn, *supra* note 146, at 20.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *See Biltmore Motor Corp. v. Roque*, 291 So. 2d 114 (Fla. Dist. Ct. App. 1974).

156. *Id.* at 115.

157. *Id.*

158. *Id.*

majority stockholders were required to return the issued shares that had the purpose of dilution.¹⁵⁹ The business judgment rule could not protect the majority shareholders here because it does not apply when there is a conflict of interest.¹⁶⁰ The board was acting in its own personal interest as shareholders and not in the best interests of the corporation at large.¹⁶¹ In response, the court concluded that the majority shareholders had breached their fiduciary duty to the minority shareholders.¹⁶² The court sparsely reasoned that a fiduciary duty existed among shareholders and it was indeed breached without any statutory support.¹⁶³

In making this conclusion, the court completely ignored the fact that authorizing more shares of the corporation's stock without a corporate purpose was a conflict of interest governed by state statute.¹⁶⁴ There was no need to discuss the fiduciary duty owed when the correct result could be obtained via state statute, specifically Florida Statute section 607.0832.¹⁶⁵

Florida Statute section 607.0832 provides that when a conflict of interest exists, the transaction can be authorized or approved if "[t]he fact of such relationship or interest is disclosed or known to the board . . . or . . . shareholders," or "[t]he contract or transaction is fair and reasonable as to the corporation at the time it is authorized."¹⁶⁶ This safe harbor statute provides the necessary relief in conflict of interest cases.¹⁶⁷

2. *Tills Decision*

In *Tills*, the minority shareholders filed suit, complaining that the majority shareholders had the corporation purchase their shares of their capital stock at a price above the market value.¹⁶⁸ The majority shareholders depleted corporate assets in making the purchase and caused the corporation to borrow money back from the majority shareholders.¹⁶⁹ The trial court dismissed the complaint for failure to state a cause of action.¹⁷⁰ However, Florida's Fifth

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. FLA. STAT. § 607.0832 (2012).

167. *Id.*

168. *Tills v. United Parts*, 395 So. 2d 618, 618 (Fla. Dist. Ct. App. 1981).

169. *Id.* at 618.

170. *Id.*

District Court of Appeals (DCA) found there was a sufficient basis for the cause of action, and specifically, the Fifth DCA found there was enough basis for a breach of the shareholder-to-shareholder duty.¹⁷¹

The Fifth DCA explicitly cited the *Donahue* decision and applied the same principles to *Tills*.¹⁷² The *Tills* court loosely credited its decision to the analogy between partnerships and closed corporations.¹⁷³ However, *Tills* should not have used the argument that Florida recognizes partnerships and closed corporations to be similar entities, so a fiduciary relationship exists in both.¹⁷⁴ Florida courts have already made the distinction between partnerships and closed corporations, so this analogy is inadequate reasoning to find a shareholder-to-shareholder duty exists.¹⁷⁵ Consequently, Florida is not prepared to recognize closed corporations are analogous to partnerships as the Florida Supreme Court has already decided to the contrary.¹⁷⁶

Further, another issue with *Tills* is that there was an alternate form of relief granted by state statute.¹⁷⁷ The minority shareholder had a cause of action for a related party's transaction known as the director's conflict of interest under Florida Statute section 607.0832.¹⁷⁸ Florida Statute section 607.0832 provides that a "transaction between a corporation and one or more of its directors . . . [that] are financially interested" is not allowed unless the transaction is approved by disinterested board members who do not have a financial interest in the transaction.¹⁷⁹ There is no indication in *Tills* that a disinterested board approved the majority's forcing the corporation to purchase their own shares of stock.¹⁸⁰ This stock repurchase transaction clearly seems unfair to the minority plaintiff who is not offered the same deal.¹⁸¹ It seems natural that the court would want to fix this situation; however, the *Tills* court created its own doctrine in imposing the fiduciary duty when valid recourse was available.¹⁸²

171. *Id.* at 619.

172. *Id.*

173. *Id.*

174. Russo-Di Staulo & Cazeau, *supra* note 50, at 58.

175. *Id.*

176. *Id.*

177. *See generally* FLA. STAT. §§ 607.07401, 607.0830, 607.0832 (2018).

178. *See* FLA. STAT. § 607.0832 (2012).

179. *Id.*

180. *See generally* *Tills v. United Parts*, 395 So. 2d 618, 618 (Fla. Dist. Ct. App. 1981).

181. *Id.* at 619.

182. *See generally id.* at 618.

Under Florida Statute section 607.0832, directors cannot make a decision that is a conflict of interest without approval from a disinterested party.¹⁸³ Since that did not occur in *Tills*, the majority's decision is prohibited under Florida Statutes.¹⁸⁴ Specifically, *Tills* was an example of board members breaching their fiduciary duty to the corporation by agreeing to a related party transaction.¹⁸⁵ The majority shareholders breached their fiduciary duty; however, this duty came from their roles as board members, not as shareholders.¹⁸⁶ As discussed, it is clear that board members owed a fiduciary duty to the corporation, and the board has the power to make decisions for the corporation.¹⁸⁷ Nonetheless, those powers are limited in a conflict of interest situation like in *Tills*.¹⁸⁸ According to the Florida Business Corporation Act, the majority shareholders have the burden of showing their transaction was fair to the corporation. Whether the transaction was fair to the corporation was never explored in *Tills* because of the court's judicial adventurism.¹⁸⁹

Bringing in the *Donahue* doctrine seemed completely irrelevant because *Tills* did not need to create a common law doctrine in order to achieve the court's desired result of granting relief to the plaintiff.¹⁹⁰ This is very similar to *Wilkes* where the court could have allowed the plaintiff relief based on statutory law instead of following the *Donahue* doctrine.¹⁹¹ Certainly, the court should have at least adopted this doctrine with caution as *Wilkes* did.¹⁹² Without exercising caution, Florida courts will be quick to adapt this unnecessary shareholder-to-shareholder fiduciary duty.

Thus, the shareholder-to-shareholder fiduciary duty is not needed because there are other safeguards in Florida Statutes that could grant the minority shareholders rightful relief.¹⁹³ Subsequent courts have not necessarily taken *Tills* to mean a fiduciary duty exists among shareholders in a closed corporation without analyzing if the facts of a case require that legal principle.¹⁹⁴

183. FLA. STAT. § 607.0832.

184. *Id.*; *Tills*, 395 So. 2d at 618.

185. *Tills*, 395 So. 2d at 619.

186. *Id.*

187. MACEY, *supra* note 7, at 105.

188. *See* § 607.0832.

189. *Id.*

190. *Tills*, 395 So. 2d at 619.

191. *See generally* *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657 (1976).

192. *See generally id.*

193. *See* FLA. STAT. §§ 607.07401, 607.0830, 607.0832 (2018).

194. *Hodges v. Buzzeo*, 193 F. Supp. 2d 1279, 1288 (M.D. Fla. 2002).

3. Courts' Reliance on *Tills*

Even more egregiously, courts have stated that Florida imposes a fiduciary duty among shareholders despite the insufficient analysis *Tills* provided.¹⁹⁵ In *Hodges v. Buzzeo*, the majority shareholders sued Buzzeo, the minority shareholder, claiming fraud.¹⁹⁶ Interestingly, Buzzeo counterclaimed that the majority shareholders owed him a fiduciary duty because they did not give him an employment contract.¹⁹⁷ Without much discussion, the court cites *Tills* stating, "Florida and Pennsylvania do recognize a claim by a minority shareholder against majority shareholders and/or directors for breach of fiduciary duty."¹⁹⁸ Ultimately, the case was a derivative action, so the shareholder fiduciary duty was not dispositive.¹⁹⁹ However, the court showed how loosely *Tills* has been interpreted to mean that Florida recognizes the shareholder fiduciary duty.²⁰⁰

Additionally, the Southern District Court of Florida cites that Florida law recognizes a shareholder-to-shareholder fiduciary duty simply because of the *Tills* decision.²⁰¹ In *Miller v. Hoste*, the court, without any analysis, just simply states, "Plaintiff correctly asserts that Florida does recognize an individual claim by a minority shareholder against a majority shareholder for breach of duty."²⁰² However, there is no reasoning provided on how this duty even applies.²⁰³ Once more, this seems to be an example of the courts creating law when there are adequate statutory solutions that could apply.

PART IV: FUTURE IN FLORIDA

Over thirty seven years have passed since the *Tills* decision, and the Florida Supreme Court and legislature have yet to adopt the shareholder fiduciary duty.²⁰⁴ Thus, Florida law is not completely clear on where it stands, and this lack of decision could further indicate that the shareholder duty is not necessary.

195. *Id.*

196. *Id.* at 1281.

197. *Id.* at 1287.

198. *Id.* at 1288.

199. *Id.* at 1289.

200. *Id.* at 1288.

201. *See Miller v. Hoste*, No. 11-61946-CIV, 2013 WL 12090314 at *1 (S.D. Fla. Mar. 6, 2013).

202. *Id.* at *10.

203. *Id.*

204. *See Tills v. United Parts*, 395 So. 2d 618, 618 (Fla. Dist. Ct. App. 1981).

Now, here are two closely held corporations in the state of Florida dealing with similar situations like *Wilkes* and *Donahue*. Peter, Paul, and Mary's corporation has voted out or ousted Peter by majority vote. What does Peter do?

Perhaps, they rightfully ousted Peter because he was not performing or perhaps they just wanted more money for themselves. Imposing a fiduciary duty will not provide justice or the best result here, but allowing relief based on state statutes and well-developed corporate principles will. If Paul and Mary can show a legitimate business purpose for the firing that was aimed at the best interests of their corporation, then they could possibly be successful. However, if Peter can show he was wrongfully fired and their decision was made in bad faith, without a corporate purpose, then Peter could rightfully win.

Now, what about Janet and Dino? Dino wants to stop funding Janet's research, but Janet does not want to lose her funds. Similarly, Janet could look to sue under the *Donahue* theory, but there is no need when there is another valid option. If Dino is contractually obligated to provide funding to Janet, then Janet could rightfully sue under a breach of contract theory. Overall, there are options for all parties that do not require creating an unnecessary fiduciary duty among shareholders in a closed corporation.

Therefore, Florida law has already shown there are various ways to solve the conundrum that closed corporations impose on their minority shareholders. In Florida, the Florida Business Corporation Act protects shareholders from many situations including ousting; thus, there is no need to create a new doctrine for minority shareholders when they already have multiple options to protect themselves.²⁰⁵ Imposing a shareholder-to-shareholder fiduciary duty is not only unnecessary but also outside the realm of corporate law and bad public policy. As demonstrated, the courts have other options to provide relief for the minority shareholder, which do not require judicial adventurism.

205. See generally FLA. STAT. §§ 607.07401, 607.0830, 607.0832 (2018).