

**IN THE COURT OF APPEALS OF IOWA**

No. 1-758 / 11-0092  
Filed November 23, 2011

**EUGENE MCWHIRTER, MATT MCWHIRTER,  
LAURIE DAVIS, PHYLLIS BALLARD, RANDY  
ANKENEY and SHARON DEWITT, as  
Shareholders of Chariton Farm Machinery,  
Inc., McWhirter Implement Co., Inc., and  
EUGENE MCWHIRTER, Individually,**  
Plaintiffs-Appellants,

**vs.**

**BRIAN MCWHIRTER, Individually, SANDRA  
MCWHIRTER, Individually, B & M AUCTION  
COMPANY and JOHN BOOTH,**  
Defendants-Appellees.

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Appeal from the Iowa District Court for Jasper County, Sherman W.  
Phipps, Judge.

Plaintiffs appeal from the district court's ruling dismissing their petition  
seeking compensation for damages. **AFFIRMED.**

Ron D. Danks and Philip H. Myers of Myers, Myers, Danks & Smith,  
Pleasantville, for appellants.

Lee M. Walker and Jane K. Odland of Walker, Billingsley & Bair, Newton,  
for appellees.

Heard by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

**POTTERFIELD, J.**

The individual plaintiffs in this case are siblings—Sharon DeWitt, Eugene McWhirter (Gene), and Laurie Davis—or the heirs of siblings—Matthew McWhirter and Randy Ankeney—of Robert Dean McWhirter (RD), who died in 2007. The corporate plaintiffs are entities started by Robert W. McWhirter, the father of RD. The defendants are RD's estate; RD's wife Sandra, individually and as the personal representative of RD's estate; RD's son Brian; and B & M Auction Co. (B&M), a company run primarily by RD, though its ownership is disputed.

This case involves claims by plaintiffs, individually and as shareholders of Chariton Farm Machinery Auction, Inc. (CFMA) and McWhirter Implement Co., Inc. against defendants for fraud, conversion, misappropriation, and breach of fiduciary duty.<sup>1</sup> RD was involved in several business interests throughout his life. Many of the entities were owned at different times by various members of the McWhirter family as well as individuals that were not family members. These entities often lacked corporate formalities such as corporate records, regular board meetings, and the proper issuance of stock certificates. Two of these entities, CFMA and B&M, were auction companies in the business of buying and selling farm equipment.

The individual plaintiffs claimed to be shareholders of CFMA, though this fact was disputed by defendants. The record shows that for several years RD was the only family member with significant involvement in the operation of

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<sup>1</sup> There was little testimony or evidence introduced at trial concerning McWhirter Implement Co., Inc. The plaintiffs' case focused on CFMA and B&M.

CFMA. Both Gene and Sharon testified they trusted RD to run the family business. They also testified that when they asked RD about the status of CFMA, he always said it was viable. Gene and Sharon testified the plaintiffs relied upon the representations of RD, Sandra, and Brian as to the financial condition of CFMA.

RD also owned and operated B&M, along with a partner who was not a member of the McWhirter family. Gene claimed to be a shareholder in B&M, though this fact was disputed at trial. RD started B&M after the parties' father had been working in the same business under the CFMA entity.

The plaintiffs claim that when the estate inventory was filed after RD's death in 2007, they found they had reason to question RD's trustworthiness in managing the family business over the years. They claim that, upon further investigation, they discovered RD, along with his wife and son, had been siphoning cash and assets from the family business, CFMA, into his own business, B&M. Plaintiffs' claim for damages was based in part on their assertion that CFMA issued several loans to Brian, B&M, and B-M (a company independent from B&M) that were never repaid.

In 2009, the plaintiffs hired a forensic accountant to look for potential misappropriations in CFMA's accounting records. The accountant wrote a report identifying transactions in seven different areas that he concluded were "non business and non authorized by [CFMA] . . . [that] appear to have created economic benefits to RD . . . and related individuals and entities, while at the same time, causing detriment to [CFMA]."

In their amended petition, plaintiffs asserted a claim against all defendants for fraud against CFMA and McWhirter Implement; a claim against Brian McWhirter, Sandra McWhirter, and B&M Auction Co. for conspiracy to defraud all plaintiffs; a claim against the estate of Robert Dean McWhirter for breach of fiduciary duty to CFMA and to Gene as a shareholder of B&M; a claim against RD's estate for conversion and misappropriation from Gene as a shareholder of B&M; and a claim against Brian, Sandra, and RD's estate for fraud against Gene as a shareholder of B&M.

The district court dismissed plaintiffs' petition after a bench trial, concluding, among other things: (1) plaintiffs Randy Ankeney, Sharon DeWitt, and Matthew McWhirter could only have standing to act as petitioners if they were shareholders of the two corporate plaintiffs, which they failed to prove; (2) the claims raised by the corporate plaintiffs were time barred as plaintiffs were aware of these claims as early as 2001; (3) Gene offered no evidence to support a claim that he was a shareholder of B&M; and (4) even if the plaintiffs had standing, they had failed to carry their burden of proof as to damages.

Plaintiffs appeal, asserting the district court erred in ruling: (1) the corporate plaintiffs' claims were time barred; (2) plaintiffs did not have standing to bring suit on behalf of CMFA; (3) RD did not breach his fiduciary duty to CFMA by favoring B&M; and (4) Gene had no ownership interest in B&M.

On appeal, plaintiffs do not challenge the portion of the trial court's ruling that found they had failed to carry their burden of proof as to damages.<sup>2</sup>

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<sup>2</sup> To the extent the plaintiffs' third argument on appeal—that the district court erred in finding RD did not breach his fiduciary duty to CFMA by favoring B&M—challenges the

Accordingly, this judgment became final, and, regardless of whether plaintiffs could succeed on their arguments on appeal, they cannot succeed on the claims in their petition due to their failure to prove damages. See *Estate of Countryman v. Farmers Coop. Ass'n*, 679 N.W.2d 598, 605 (Iowa 2004) (stating plaintiffs' failure to appeal from the portion of a summary judgment ruling dismissing their claim for liability based on a particular theory rendered that theory not viable on remand); *Wright Cnty. v. Hagan*, 231 N.W. 298, 301 (Iowa 1930) (finding a defendant failing to appeal from part of a judgment is bound thereby). Because plaintiffs failed to challenge the portion of the district court's ruling concluding plaintiffs did not prove damages, we find plaintiffs' arguments on appeal are moot and affirm the district court.

**AFFIRMED.**

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district court's finding regarding failure to prove damages, we find this issue was not preserved. Plaintiffs assert in their brief, "The District Court did not address the breach of fiduciary duty by RD . . . in operating a business in direct competition with [CFMA]." Plaintiffs further argue, "The District Court never addressed the money taken by B&M from [CFMA]." "[W]e have repeatedly said that a rule [1.904] motion is necessary to preserve error when the district court fails to resolve an issue, claim, or other legal theory properly submitted for adjudication." *Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002) (internal quotation omitted). Because plaintiffs failed to file a rule 1.904 motion, we deem this issue waived.