STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

BENJAMIN A. TAUB, Defendant-Appellant,	:	Supreme Court Case No. 146289
v.	:	Court of Appeals Case No. 298425
RAMA MADUGULA, Plaintiff-Appellee.	:	Circuit Court Case No. 08-537-CK

BRIEF ON APPEAL – DEFENDANT-APPELLANT

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STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal pursuant to Article 6, Section 4 of the Michigan Constitution, as well as MCL 600.212, MCL 600.215(3), and MCR 7.301(A)(2), to review by appeal a case after a decision by the Court of Appeals. The Court of Appeals issued its opinion in this matter on October 25, 2012. This Court granted Defendant-Appellant Taub's Application for Leave to Appeal on June 5, 2013.

STATEMENT OF JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Benjamin A. Taub ("Taub") appeals from the unpublished *per curiam* decision of the Court of Appeals (Ronayne Krause, P.J., and Borrello and Riordan, JJ.) (App. 255a-259a),[1] filed on October 25, 2012. The Court of Appeals' decision upheld the judgment entered by the Circuit Court for the County of Washtenaw on March 31, 2010 (App. 195a-197a), following a 6-1 jury verdict returned on March 19, 2010 (App. 190a-191a) that awarded Plaintiff-Appellee Rama Madugula ("Madugula") $191,675 in economic damages and ordered Taub to purchase Madugula's shares in Dataspace, Inc. ("Dataspace") at a price of $1.2 million on the grounds that Taub violated Michigan's shareholder oppression statute, MCL 450.1489 (Add. 4).[2] Taub likewise appeals from the Court of Appeals' decision upholding the trial court's May 25, 2010 denial of his motion for judgment notwithstanding the verdict, or in the alternative, new trial or remittitur. (App. 241a).

Because the Court of Appeals clearly erred in holding that the alleged breach of a supermajority provision in a privately-negotiated Stockholders' Agreement constituted

[1] References to "App." are to the Appendix submitted with this brief.

[2] References to "Add." are to the Addendum appended to this brief.

shareholder oppression, and that Madugula's interests as a shareholder were interfered with disproportionately even where Madugula retained his corporate shares and his corporate directorship, Taub seeks entry of judgment in his favor. In the alternative, because the Court of Appeals erred in holding that Madugula's equitable claim for a forced buy-out of his stock under Michigan's shareholder oppression statute was properly submitted to the jury rather than decided by the bench, Taub seeks remand to the trial court for a bench trial.

STATEMENT OF QUESTIONS PRESENTED

(1) Did the Court of Appeals clearly err in ruling contrary to the precedent of this Court and other Court of Appeals decisions that the plaintiff-appellee had a right to a jury trial on his purely equitable claim for a forced buy-out of his stock under Michigan's shareholder oppression statute?

The trial court answered................No
Judge Riordan answered................No
Judge Borrello answered..............No
Judge Ronayne Krause answered......Yes
Appellant Taub answers................Yes

(2) Did the Court of Appeals clearly err in ruling that an alleged breach of a shareholder's private contractual rights constitutes a statutory violation giving rise to shareholder oppression and its broad equitable remedies?

The trial court answered................No
The appellate court answered..........No
Appellant Taub answers................Yes

(3) Did the Court of Appeals clearly err in ruling that plaintiff-appellee's interests as a shareholder were interfered with disproportionately by the actions of the defendant-appellant and thus Michigan's shareholder oppression statute was violated, where plaintiff-appellee retained his corporate shares and his corporate directorship?

The trial court answered................No
The appellate court answered..........No
Appellant Taub answers................Yes

INTRODUCTION

This case presents the Court with its first opportunity to interpret Michigan's shareholder oppression statute, MCL 450.1489 (Add. 4). Under the statute, a minority shareholder can bring a claim "to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder." MCL 450.1489(1). The statute then defines "willfully unfair and oppressive conduct" as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder *as a shareholder*." MCL 450.1489(3) (emphasis added). The statute provides that willfully unfair and oppressive conduct "may include the termination of employment or limitations on employment benefits," but only "to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder." *Id.*

The proper interpretation and use of Michigan's shareholder oppression statute has been the subject of much legislative and judicial debate in recent years, as both branches struggle to define the scope of the rights protected by the statute. In particular, lawmakers and judges have grappled with whether and how the statute should protect shareholders who become involved in contractual or employment disputes with their fellow shareholders in closely held corporations. The decision of the Court of Appeals reflects the confusion in the lower courts. The court below erred by ruling, contrary to the well established precedent of this Court, that a purely equitable claim under the shareholder oppression statute could proceed to a jury trial, despite the existence of a constitutionally protected right to a trial by equity. The court was also mistaken in interpreting the statute to protect private contractual rights, resulting in the application of remedies for which neither party bargained. Finally, the court erred by finding that the termination of a shareholder's consulting services disproportionately interfered with his interests as a shareholder, where the shareholder retained ownership of his shares, continued to receive dividends, and continued to sit on the board of directors. Taub respectfully urges this Court to correct these errors by entering judgment in his favor, or in the alternative, by reversing and remanding for a bench trial.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. Factual Background

The following sets forth the relevant facts of the case, as established at trial.

A. Taub Founds Dataspace and Madugula Becomes a Shareholder Error! Bookmark not defined.

Taub founded Dataspace, an information technology consulting firm, in 1994. (App. 133a). Dataspace focuses on providing advice to organizations that are constructing business intelligence and data warehouse systems, which are computerized tools for reporting on and analyzing an organization's electronic data. From 1994 to 2004, Taub was the sole shareholder of Dataspace.

In late 2002, Taub hired an independent contractor, Madugula, to provide sales consulting services to Dataspace. Taub gave Madugula the title of vice president of sales and business development, but Madugula was not an employee of Dataspace. (App. 145a, 161a, 167a). Approximately one year later, Taub invited Madugula and Andrew Flower ("Flower"), a Dataspace employee and executive, to become part owners of Dataspace. (App. 134a). Taub offered Madugula 29% of the shares of Dataspace and Flower 20% of the shares. *Id.*

At that time, neither Flower nor Madugula could afford to purchase shares of Dataspace at their fair market value. (App. 135a, 165a). In order to reduce the value of the company to make it possible for them to buy in, Dataspace paid Taub $321,000, thus lowering the liquidation value of Dataspace and allowing Madugula to buy 29% of the shares of Dataspace at a cost of

$87,000. *Id.*; (App. 178.1a). Taub then executed a promissory note, lending $321,000 to Dataspace to fund its ongoing operations. (App. 135a). Madugula did not pay cash for his shares of Dataspace. Rather, he entered into a promissory note with Taub in which he agreed to pay Taub $87,000, with an interest rate of 4% per annum. (App. 178.1a). To secure this promissory note, Madugula pledged his 17,400 shares of Dataspace common stock to Taub. *Id.* At the time Madugula filed suit, he had not paid the balance of this promissory note and still owed Taub nearly $108,000. (App. 73a).

When Madugula and Flower became partial owners of Dataspace, Taub, Madugula, and Flower executed two contracts, a Stockholders' Agreement (App. 179a) and a Buy-Sell Agreement (App. 183a), both of which were dated January 1, 2004. Under the terms of the Stockholders' Agreement, Madugula became entitled to nominate one director to Dataspace's five-person Board of Directors. (App. 180a). Madugula nominated himself and has served as a member of Dataspace's Board of Directors since 2004. (App. 153a, 156a). He continues to this day to serve in that capacity.

The Stockholders' Agreement further provided that certain actions required the approval of the holders of not less than 70% of the outstanding stock of Dataspace, including "[m]aterial changes in the nature of the business conducted by Dataspace"; "[m]aterial changes in compensation, or methods of determining compensation, of Taub, Madugula and Flower, or other managers employed by Dataspace"; "[e]stablishment of annual capital expense budgets, or actual capital expenses, exceeding in the aggregate $100,000 per year"; and "[a]ny other corporate action that would have a material adverse impact on Taub, Madugula or Flower, as opposed to the shareholders as a group in relation to their percentage ownership of the stock of Dataspace." (App. 181a). Under the terms of the Agreement, the parties contracted that "[i]n the event of any dispute between Taub, Madugula and Flower concerning the interpretation of this Stockholders' Agreement, or any matter which is related to or arises out of this Stockholders' Agreement," the Stockholders' Agreement would be enforceable only through binding arbitration conducted under the rules of the American Arbitration Association. (App. 182a).

Taub, Madugula, and Flower also signed a Buy-Sell Agreement, which provided that any one of them could withdraw from Dataspace at any time and the non-withdrawing party or parties agreed that either they or the company would purchase the withdrawing party's shares at a price equal to 75% of their fair market value. (App. 184a).

Taub and Flower were both employees of Dataspace and were each paid $150,000 per year. (App. 145a). At Madugula's request, Madugula never became an employee of Dataspace. Rather, beginning in 2004, Dataspace paid Midwest Business Associates, a consulting firm owned by Madugula's parents, $150,000 per year for Madugula's services. (App. 145a, 161a, 167a). The compensation of Taub, Flower, and Madugula was set by contract and approved by the Board of Directors (on which Taub, Flower, and Madugula all served), and at no time did Dataspace ever use the distribution of company dividends as a means of paying salaries or bonuses to its employees or consultants.

B. Taub Terminates Madugula's Consulting Services

In late 2006 and the first several months of 2007, Taub became concerned with Madugula's performance as head of sales for the corporation. Several large Dataspace projects were ending, and Taub was worried that there were no new projects to replace them. (App. 148a). Taub forecasted that Dataspace would begin losing money in late 2006. (App. 143a-144a). On March 25, 2007, Taub sent Madugula a memorandum detailing his assessment of the situation facing Dataspace and making requests and recommendations for improving Dataspace's sales and marketing in the upcoming months to bring in new business. (App. 151a). Taub believed that Madugula failed to implement several of these recommendations. *Id.*

Taub thus began looking for new sources of revenue for Dataspace on his own. In so doing, he considered expanding on the company's prior experience. Dataspace had previously worked as a consultant designing business intelligence systems to help Oakland County, and, later, Washtenaw County, manage their jail populations. (App. 139a, 157a, 160a). Taub believed this showed that there was a demand for data management solutions in other jail systems. (App. 139a). He therefore created a team, headed by a computer programmer who had worked on the Oakland County and Washtenaw County projects, to design generic business intelligence software for jails, called JPAS, which was derived from the firm's existing jail consulting work for Oakland and Washtenaw Counties and could be marketed to other counties. (App. 140a). Madugula was aware of the work that Taub was doing with JPAS and never voiced any objection to it. (App. 150a, 164a, 186a). At no time did Madugula indicate that he believed the development of the JPAS software constituted a material change in the nature of Dataspace's business requiring a vote of 70% of the outstanding stock of Dataspace. *Id.* Nor did Madugula ever call for such a vote pursuant to the terms of the Stockholders' Agreement.

By mid-2007, Taub believed that it was no longer in the best interest of Dataspace to continue to pay $150,000 per year for Madugula's consulting services and that Madugula should be replaced as head of sales. (App. 141a). Taub testified that by terminating Madugula, who had become divisive and whose performance "had gotten very bad," as Dataspace's vice president of sales and business development, Taub believed he was "protect[ing] [Madugula] as a shareholder." *Id.*

During the week of July 23, 2007, Taub informed Madugula that Dataspace was terminating the services that Madugula and Midwest Business Associates provided to Dataspace. (App. 189a). Dataspace agreed to continue to pay Madugula's monthly consulting fee of $12,500 through August 31, 2007. *Id.* Thereafter, all compensation and benefits for Madugula's work as head of sales would cease. *Id.*

C. Madugula Remains a Shareholder and Director of Dataspace

Following the termination of his consulting services, Madugula could have, but chose not to, exercise his right to withdraw as a shareholder from the company under the terms of the Buy-Sell Agreement. Nor did Madugula seek arbitration under Section 10 of the Stockholders' Agreement for any alleged breach of that Agreement.

Thus, from the time of his termination to today, Madugula continues to be the second-largest stockholder in Dataspace. He holds 36.25% of Dataspace's shares.[3] (App. 153a). As the second-largest shareholder of Dataspace, Madugula receives 36.25% of the dividends of Dataspace each year. *Id.* Madugula most recently received a dividend payment of more than $52,000 in 2012. If Dataspace is ever sold, Madugula will receive 36.25% of the net proceeds.

Under the terms of the Stockholders' Agreement, Madugula continues to be entitled to appoint one member of the Dataspace Board of Directors. (App. 153a, 156a, 180a). Because he has appointed himself, Madugula continues to serve on the Board of Directors. *Id.* Madugula has been invited to participate in and vote at all Dataspace shareholders' meetings, both before and after the termination of his consulting services. (App. 153a). Madugula has never been

[3] Madugula's percentage ownership in Dataspace increased from 29% to 36.25% when Dataspace bought back Flower's shares when Flower withdrew from the company in 2007. (App. 136a, 153a). Taub currently holds 63.75% of Dataspace's outstanding shares.

excluded from either a shareholders' meeting or a Board of Directors meeting. Since filing his complaint in this case more than five years ago, Madugula has attended, participated in, and voted at every shareholders' meeting and every Board of Directors meeting. Madugula also continues to receive dividend payments from Dataspace, having received more than $100,000 in dividends since filing his complaint in 2008.

The only impact of Taub's termination decision is that Madugula's employer, Midwest Business Associates, is no longer paid $150,000 per year for Madugula's services, and Madugula is no longer obligated to perform services for Dataspace as head of sales. Madugula remains to this day a shareholder of Dataspace and remains to this day entitled to all of his rights as a shareholder – receiving dividends, voting at shareholder meetings, and electing directors (including himself).

II. Procedural History

Madugula brought suit against Taub in May 2008. Madugula originally filed a six-count complaint against Taub and Dataspace, alleging shareholder oppression pursuant to MCL 450.1489, as well as breach of fiduciary duty, violation of the duty of good faith under MCL 450.1541a, and fraud and misrepresentation. (App. 4a-16a). Madugula sought compensatory and exemplary damages, a forced buy-out of his stock, and the removal of Taub from his position at Dataspace, among other remedies. *Id.*

A. Pretrial Proceedings and Rulings

Taub moved for summary disposition of the case against him (App. 25a), and on October 29, 2009, in a ruling from the bench, the Circuit Court dismissed all claims against Dataspace and granted summary disposition in Taub's favor on all claims except for the shareholder oppression claim. (App. 67a-68a, 84a). The court held that it would permit the shareholder oppression claim against Taub to be heard at trial because Madugula, a minority shareholder in

Dataspace, had alleged that Taub had terminated his employment. (App. 67a). The court held that because the shareholder oppression statute had been amended in 2006 to provide that termination of employment could constitute shareholder oppression in certain circumstances, the termination of Madugula's consulting services created an issue of fact. *See id.*

As to the case's sole remaining claim for shareholder oppression, Madugula requested a jury trial in his complaint (App. 15a), but Taub objected to the submission of that claim to a jury. As Taub argued to the court in a motion *in limine* filed prior to trial, there was no right to a jury trial under MCL 450.1489 for the equitable remedies Madugula sought under the shareholder oppression statute. (App. 99a-100a). In support of his argument, Taub cited the analysis of the Court of Appeals in *Forsberg v. Forsberg Flowers, Inc.*, No. 263762, 2006 WL 3500897 (Mich. Ct. App. Dec. 5, 2006) (Add. 16-26), which squarely held that there is no right to trial by jury for equitable claims under Michigan's shareholder oppression statute. (App. 100a). The court, however, denied the motion *in limine* and ordered that the case proceed to trial before a jury. The court's stated reason for denying Taub's motion was that the unpublished decision of *Forsberg* was not binding precedential authority on the court "[a]nd unless and until the Court has binding authority which would prohibit that . . . then [if] either party wants a jury, they're entitled to it." (App. 124a-125a). The court did not discuss the binding precedents cited in *Forsberg* – such as this Court's binding decision in *Anzaldua v. Band*, 457 Mich. 530, 578 N.W.2d 306 (1998) – nor the analysis set forth in the case. *Id.*

Prior to trial, the court also ruled on Taub's motion *in limine* to preclude Madugula from discussing, or introducing evidence at trial about, the Stockholders' Agreement. (App. 194a). Taub had sought to preclude evidence about the Stockholders' Agreement because, in a February 2009 filing, Madugula explicitly stated that he was *not* suing Taub on the basis of the

Stockholders' Agreement, the provisions of which required any such claims to be submitted to an arbitrator. As Madugula asserted: "Plaintiff does not make any claims based upon the Stockholders' Agreement in his Complaint. Any statements made concerning compensation or dividend payments are merely for the purpose of showing evidence of oppressive acts and/or fraud." (App. 23a). Over Taub's objection, the court held that evidence about the Stockholders' Agreement could be admitted at trial. (App. 119a-121a).

B. Evidence at Trial and Verdict

Because the court denied Taub's request for a bench trial, the case proceeded to trial before a jury on March 15–19, 2010. In order to prove a violation of the shareholder oppression statute at trial, Madugula was required to prove that Taub had engaged in "willfully unfair and oppressive conduct." MCL 450.1489(3) (Add. 4). The statute defines "willfully unfair and oppressive conduct" as "a continuing course of conduct or a significant action or series of actions *that substantially interferes with the interests of the shareholder* ***as a shareholder***." *Id.* (emphasis added). The statute further provides that such conduct "may include the termination of employment or limitations on employment benefits *to the extent that the actions interfere with* ***distributions or other shareholder interests*** *disproportionately as to the affected shareholder*." *Id.* (emphasis added).

In his post-trial briefing, Madugula summarized all of the evidence of "willfully unfair and oppressive conduct" that he presented at trial as follows:

> At trial, Plaintiff produced evidence that Defendant stopped paying Plaintiff his compensation and benefits and that Defendant did so without a 70% vote of the outstanding stock of Dataspace. Defendant himself, admitted this fact. Plaintiff also elicited testimony that Defendant changed Dataspace's primary business from data warehousing and business intelligence services to software development and that he did so without the required 70% vote. Plaintiff also presented evidence that Defendant cut him off entirely from Dataspace's operations.

(App. 236a).[4] Thus, despite the fact that he had disavowed any claim based on the Stockholders' Agreement, Madugula apparently believed that any evidence demonstrating that Taub had breached the supermajority provisions of the Stockholders' Agreement would be sufficient to show shareholder oppression, and Madugula admitted that this was all of the evidence he presented at trial.

On March 19, 2010, the jury returned its verdict. By a 6-1 vote, the jury found that shareholder oppression had occurred. (App. 177a-178a). The jury awarded Madugula $191,675 in economic damages for lost compensation and benefits. (App. 190a). The jury was also asked about the appropriate equitable remedy. Specifically, the jury was asked if Madugula was entitled to have his stock purchased by Taub, and if so, what was the fair value of Madugula's interest in Dataspace. *See id.* The jury determined that Taub must purchase all of Madugula's shares in Dataspace and arrived at a price of $1.2 million. *See id.* Madugula's expert had testified before the jury that Madugula's 29% ownership of Dataspace was worth $2.1 million as of August 2007, (App. 169a), while Taub's expert testified that Madugula's shares were worth only $303,065 at that time, (App. 174a). Given these expert valuations, it is unclear how the jury arrived at its valuation of $1.2 million and the jury was not asked to provide any explanation of how it arrived at that price. The court then entered judgment on March 31, 2010, ordering Taub to pay $191,675 in damages and to buy Madugula's shares in Dataspace at a price of $1.2 million pursuant to the jury's verdict. (App. 195a-197a).

[4] Evidence about the Stockholders' Agreement came in over Taub's opposition to its admission. (App. 96a).

C. Post-Trial Proceedings and Rulings

On April 20, 2010, Taub filed a motion for judgment notwithstanding the verdict. (App. 199a-227a). Taub argued that it was error for the court to allow the claim for a forced buy-out of stock to be tried to and decided by a jury because it was a purely equitable remedy sought under the Michigan shareholder oppression statute. (App. 220a-226a). Taub argued that under Michigan law, equitable claims under the shareholder oppression statute are not matters to be decided by juries, but rather are matters for the court exclusively to decide. *See id.* Taub also argued that none of the conduct that Madugula proved at trial constituted "willfully unfair and oppressive conduct" within the meaning of MCL 450.1489 as a matter of law because none of the conduct impacted Madugula's rights "as a shareholder." (App. 212a-220a). Rather, the only interests affected were Madugula's contractual interests and his interests in retaining his consulting position. *Id.*

The court denied that motion. (App. 241a-246a). As to Taub's argument that the claim for a forced buy-out of stock was an equitable claim for which Madugula was not entitled to trial by jury, the court disagreed. The court reasoned that the only authority on the subject was the unpublished opinion of *Forsberg v. Forsberg Flowers, Inc.*, which the court refused to follow on the grounds that it was an unpublished opinion, and therefore not binding. (App. 245a). The court did not discuss the authorities relied upon by the *Forsberg* court, such as this Court's binding decision in *Anzaldua v. Band,* nor the authorities relied upon by Taub in his briefs, all of which held that equitable claims must be tried to a court of equity absent the parties' consent to submit them to a jury. The court likewise refused to credit Taub's argument adopting the analysis of Chief Justice Murphy in his partial concurrence and dissent in *Forsberg,* which reasoned that even if there is a right to a jury trial for a claim of damages under the shareholder oppression statute, equitable claims should still be the subject of a bench trial.

The court also rejected Taub's argument that there was no violation of the Michigan shareholder oppression statute because Madugula's rights "as a shareholder" had not been affected. The Court explained its reasoning as follows:

> The Stockholders' Agreement for Dataspace Incorporated sets forth the responsibilities and obligations of the shareholders of Dataspace. The evidence at trial clearly provided that the Stockholders Agreement prohibits making a material change in Madugula's compensation or a material change in the nature and business of Dataspace without approval of 70% of the outstanding stock of Dataspace.
>
> At trial, Madugula presented evidence that Taub stopped paying Madugula his compensation and benefits, and did so without a 70% vote of the outstanding stock of Dataspace; that Taub changed Dataspace's primary business from data warehousing and business intelligence service to software development, and did so without a 70% vote of the outstanding stock of Dataspace; and that Taub cut off Madugula from Dataspace's operations.
>
> The jury, based upon the evidence presented, could have determined that Madugula's shareholder rights were disproportionately affected by Taub's actions, including but not limited to, Taub continuing to receive compensation while Madugula did not, development and marketing of the jail management software, and precluding Madugula from participating in decision making at Dataspace.
>
> . . .
>
> The Court finds that reasonable jurors could honestly have reached different conclusions as to whether or not Taub's actions oppressed Madugula's shareholder interest in Dataspace. It is clear from the facts and evidence presented at trial that Madugula established a claim as a matter of law.

(App. 243a-244a). Thus, the Court apparently accepted Madugula's theory that a violation of the Stockholders' Agreement supermajority provisions was sufficient to show shareholder oppression.

D. Court of Appeals' Proceedings and Ruling

On June 1, 2010, Taub moved to stay execution of the judgment pending appeal. (App. 247a-251a). The next day, Taub timely filed a Claim of Appeal in the Michigan Court of Appeals. (App. 252a). On June 14, 2010, the trial court granted Taub's motion to stay, contingent upon Taub's posting a $300,000 bond with the Court, which he did. (App. 253a-254a).

Oral argument was held before the Michigan Court of Appeals on October 2, 2012, and the court issued its opinion on October 25, 2012. All three members of the panel (Ronayne Krause, P.J., and Borrello and Riordan, JJ.) unanimously agreed that the trial court did not err in denying Taub's motion for a judgment notwithstanding the verdict with regard to a lack of evidence of minority shareholder oppression. In its *per curiam* unpublished opinion, the Court of Appeals found that "[t]here was significant evidence of willfully unfair and oppressive conduct," including "that Madugula was not afforded the opportunity to vote on material changes to Dataspace, such as the decision to alter the nature of Dataspace's business to software development" and that Taub reduced Madugula's compensation to zero, both of which were in violation of the supermajority provision of the Stockholders' Agreement. (App. 257a). The court rejected Taub's argument that the Stockholders' Agreement was a private agreement among the parties that gave rise to its own remedies for breach and that the Agreement could not be enforced by means of a lawsuit under the shareholder oppression statute. (App. 257a-258a). The court also held that the termination of Madugula's consulting services constituted shareholder oppression that "disproportionately affected Madugula's interest as a shareholder because Madugula's compensation was reduced to zero and he was no longer involved in decisions on material issues such as the development of JPAS." (App. 259a).

The panel split three ways, however, in deciding Taub's appeal with respect to whether Madugula's equitable claim for a forced buy-out of stock under the shareholder oppression statute should have been tried to a jury.

Judge Riordan held simply that the trial court judge had not abused his discretion by failing to follow the unpublished opinion *Forsberg v. Forsberg Flowers, Inc.*, No. 263762, 2006 WL 3500897 (Mich. Ct. App. Dec. 5, 2006), in submitting the case to a jury. (App. 259a). Judge Riordan did not consider Taub's argument that he had a constitutional right to have his equitable claims decided by a court sitting in equity. Rather, he applied only an abuse of discretion standard and found it was not an abuse of discretion not to follow a non-binding decision. *Id.*

Judge Borrello concurred that the case had been properly submitted to a jury, but he did so based on the reasoning of Chief Judge Murphy's partial concurrence and dissent in *Forsberg*. (App. 260a-261a). In that partial concurrence and dissent, Chief Judge Murphy stated that in his view, under the shareholder oppression statute, a plaintiff was entitled to have a jury render a verdict on a claim for money damages, despite the fact that the trial judge would also be examining the factual issues regarding whether there was illegal, fraudulent, or willfully unfair and oppressive conduct and that the trial judge would rule on the equitable claims. *Forsberg*, 2006 WL 3500897, at *11 (Murphy, J., concurring and dissenting) (Add. 24-25). Judge Borrello apparently did not realize that in his briefing, Taub had adopted the same position as Chief Judge Murphy. Taub had argued to the court that even if Madugula had a right to a jury trial as to his damages claim, the claim for a forced buy-out of stock should not have been submitted to the jury.

Judge Ronayne Krause dissented from her colleagues with respect to whether the case had been properly submitted to the jury, and would have remanded for a new bench trial solely for equitable remedies, while allowing the jury's verdict on the damages claim to stand. (App. 262a). As Judge Ronayne Krause recognized (App. 263a), this Court in *Abner A. Wolf, Inc. v. Walch*, 385 Mich. 253, 259, 188 N.W.2d 544, 547 (1971), held that "[t]he right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury" (quotation marks omitted). Judge Ronayne Krause noted that the shareholder oppression statute "creates equitable remedies, which should be determined by a bench trial," and that only the claim for damages should have been submitted to a jury. (App. 263a). Judge Ronayne Krause determined that "the trial court should not have submitted any matters pertaining to MCL 450.1489(1)(a)-(e) to a jury for determination, absent consent by all the parties to the case." *Id.* Because Taub had not consented to a jury trial, Judge Ronayne Krause therefore would have "remand[ed] for a new bench trial to determine what equitable relief is available for the plaintiff." *Id.*

E. Supreme Court Proceedings

On December 5, 2012, Taub timely filed an application for leave to appeal the Court of Appeals' decision. (App. 3a). This Court granted leave to appeal on June 5, 2013. (App. 264a). The Court directed the parties to brief the following three issues:

> (1) whether claims brought under MCL 450.1489 are equitable claims to be decided by a court of equity;
>
> (2) whether the provisions of a stockholders' agreement can create shareholder interests protected by MCL 450.1489; and
>
> (3) whether the plaintiff's interests as a shareholder were interfered with disproportionately by the actions of the defendant-appellant, where the plaintiff retained his corporate shares and his corporate directorship.

(App. 264a). Per the Court's request, these issues are addressed below.

ARGUMENT

I. CLAIMS BROUGHT UNDER MCL 450.1489(1)(a)-(e) ARE EQUITABLE CLAIMS THAT ARE CONSTITUTIONALLY REQUIRED TO BE DECIDED BY A COURT OF EQUITY, AND THE TRIAL COURT CLEARLY ERRED IN SUBMITTING A PURELY EQUITABLE CLAIM UNDER THE SHAREHOLDER OPPRESSION STATUTE TO A JURY.

Standard of Review

Whether a party is entitled to a jury trial is a constitutional question the Court reviews de novo. *Anzaldua v. Band*, 457 Mich. 530, 533, 578 N.W.2d 306, 307 (1998).

A. Claims Brought Under MCL 450.1489(1)(a)-(e) Are Equitable Claims That Must Be Decided By A Court Of Equity.

This Court has long recognized that "[t]he right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury." *Brown v. Kalamazoo Circuit Judge*, 75 Mich. 274, 284, 42 N.W. 827, 830 (1889); *see also Abner A. Wolf, Inc. v. Walch*, 385 Mich. 253, 260, 188 N.W.2d 544, 548 (1971). Indeed, the right to have equity claims heard by a judge sitting in equity is a constitutional right. *Dutka v. Sinai Hosp. of Detroit*, 143 Mich. App. 170, 173, 371 N.W.2d 901, 903 (1985) ("The parties have a constitutional right in Michigan to have equity claims heard by a judge sitting as a chancellor in equity."); *see also, e.g., Robair v. Dahl*, 80 Mich. App. 458, 462, 264 N.W.2d 27, 29 (1978) ("Where equity has jurisdiction, it is for the court to hear and not a jury."). It is thus well-established in Michigan that "[t]he cognizance of equitable questions belongs to the judiciary as a part of the judicial power, and under our constitution must remain vested where it always has been vested heretofore." *Brown*, 75 Mich. at 285, 42 N.W.2d at 831.

The existence of this constitutional right is appropriate, given the distinct limitations of the jury system; after all, "[j]uries cannot devise specific remedies, or safely deal with complicated interests, or with relief given in successive stages, or adjusted to varying conditions." *Brown*, 75 Mich. at 285, 42 N.W.2d at 831. Whether a corporation should be dissolved, a chief executive officer removed, or stock forced to be bought back, are paradigmatic examples of the types of complicated, equitable questions that are inappropriate for submission to a jury.

In determining whether a claim is equitable in nature, "[i]t has been said that the legal or equitable nature of a proceeding is to be determined by the pleadings, the relief sought, and the nature of the case." 1 Am Jur. 2d *Actions* § 6 (2005). One way to distinguish an action at law from one in equity "is that an action at law is a proceeding in which the relief afforded is ordinarily an award of money damages, while an action in equity permits the court the discretion to adapt the relief to the circumstances of the case." *Id.*; *see also Black's Law Dictionary* 1408 (9th ed. 2009) (explaining that an equitable remedy is "usually a nonmonetary one"). Equitable remedies "are distinguished for their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use." Steven C. Bahls, *Resolving Shareholder Dissension: Selection of the Appropriate Equitable Remedy,* 15 J. Corp. L. 285, 310 n.155 (1990) (citation and internal quotation marks omitted).

While the shareholder oppression statute provides for damages under MCL 450.1489(1)(f), it also provides for broad equitable remedies in MCL 450.1489(1)(a)-(e). These remedies include the dissolution and liquidation of the assets and business of the corporation; the cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation; the cancellation, alteration, or injunction against a resolution or other act of the corporation; the direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action; and the purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts. MCL 450.1489(1)(a)-(e). The equitable nature of these remedies is well-established and beyond cavil. *See Forsberg*, 2006 WL 3500897, at *4(Add. 19) (explaining that "five of the six enumerated remedies in MCL 450.1489 are equitable in nature"); *cf.* Douglas K. Moll, et al., *The Law of Closely Held Corporations* § 8.02[B][1] at 8-20 (2012 Supp.) (referring to a court-mandated buyout as an "equitable 'parting'"); Bahls, *Resolving Shareholder Dissension*, 15 J. Corp. L. at 312 (describing dissolution, court-mandated buyouts, and the power to remove directors, order payment of dividends, remove directors and officers, set aside corporate actions, order an accounting, and appoint a custodian as "equitable powers courts may apply").

Whether and how to employ these broad and complicated equitable remedies are questions that have traditionally been submitted to courts of equity, not to juries,[5] both in Michigan and elsewhere. *See, e.g., Levant v. Kowal,* 350 Mich. 232, 241, 86 N.W.2d 336, 341 (1957) (holding "that a court of equity has inherent power to decree the dissolution of a corporation when a case for equitable relief is made out upon traditional equitable principles"); *cf. Brenner v. Berkowitz*, 134 N.J. 488, 513, 634 A.2d 1019, 1031 (1993) (explaining that "a court exercising its equitable powers" can "compel the purchase of a shareholder's stock"); *Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 142-43, 641 S.E.2d 53, 57 (S.C. Ct. App.

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[5] Indeed, shareholder oppression actions have historically been viewed as equitable in nature:

> It has long been recognized that courts have broad equitable power to fashion remedies in shareholder suits. The first time a court of equity intervened in a shareholder suit was in the 1828 English case of *Hichens v. Congreve*. . . . The broad powers of the court to fashion equitable remedies to protect shareholders rapidly developed. Courts recognized that as business became increasingly complex and as the nature of shareholder participation changed, the powers of a court of equity were sufficiently elastic to provide the appropriate remedy to shareholders.

Bahls, *Resolving Shareholder Dissension*, 15 J. Corp. L. at 294.

2007) ("[A]n action to determine the fair market value of stocks . . . constitutes a proceeding in equity to be tried by a judge without a jury."); *Whitehorn v. Whitehorn Farms*, Inc., No. DV-03-41, 2007 Mont. Dist. LEXIS 856, at *33 (Mont. Dist. Ct. Mar. 30, 2007) (Add. 36) ("A shareholder oppression action is an equitable proceeding[.]"), *aff'd*, 346 Mont. 394, 195 P.3d 836 (2008); *Hopkins v. Duckett*, No. A-5883-08T1, 2012 N.J. Super. Unpub. LEXIS 93, at *44 (App. Div. Jan. 17, 2012) (Add. 87) (explaining that "injunctive relief on an oppressed minority shareholder theory" is "equitable relief as to which a trial by jury [is] unavailable"); Md. Code Ann., Corps. & Ass'ns § 3-413 (directing a shareholder to "petition a court of equity" to seek dissolution of a corporation upon a finding of shareholder oppression).

Nonetheless, perhaps because of the mixed nature of Michigan's shareholder oppression statute, which offers both damages and equitable relief, the courts of appeals have split on the constitutional question of whether the statute creates a right to a trial by jury or whether it instead requires that equitable claims be tried to a court of equity. The majority of the court below – over the dissent of one panel member – held that a plaintiff has a right to a trial by jury under Michigan's shareholder oppression statute, although the majority did not agree on the rationale for its holding. While Judge Riordan apparently held that there is a right to a trial by jury as to *all* remedies sought under the Michigan shareholder oppression statute, Judge Borrello adopted the opinion of Chief Judge Murphy in *Forsberg*, reasoning that there is a right to a jury trial as to a claim for damages under the shareholder oppression statute, but not as to equitable claims. In so doing, the court below created a direct split with its sister circuit in *Forsberg*, which squarely held – over the dissent of Chief Judge Murphy – that there was no right to a trial by jury under Michigan's shareholder oppression statute. For the reasons that follow, the *Forsberg* decision, and not that of the court below, accords with the Michigan Constitution and the precedent of this Court.

The Michigan Court Rules provide that "[a] party may demand a trial by jury of an issue ***as to which there is a right to trial by jury*** by filing a written demand for a jury trial" in a timely manner. MCR 2.508(B)(1) (emphasis added). A party has a "right to trial by jury" only where such a right has been either (1) statutorily created or (2) preserved by the Michigan Constitution. *In re Forfeiture of $1,159,420*, 194 Mich. App. 134, 154-55, 486 N.W.2d 326, 337 (1992). Thus, in evaluating whether a party has a right to a jury trial on a statutory cause of action, courts in Michigan engage in a two-step inquiry: first, they consider whether the applicable statute provides a right to a jury; if not, they then consider whether trial by jury is nevertheless constitutionally required. *Anzaldua*, 457 Mich. at 533-49, 578 N.W.2d at 308-15.

In determining whether a statute creates a right to trial by jury, "[t]he foremost rule of statutory construction is to discern and give effect to the intent of the Legislature." *Id.* at 534, 578 N.W.2d at 308 (citation omitted). "If statutory language is clear and unambiguous, lawmakers must have intended the meaning they clearly expressed, and the statute must be enforced as written." *Id.* at 535, 578 N.W.2d at 308. In cases where there is no express statutory provision creating or denying a right to a jury trial, a court should examine (1) the nature of the claim created by the statute and (2) the relief granted under the statute, to discern if the Legislature intended to create a right to a jury trial. *Id.* at 549, 578 N.W.2d at 314.

The text of the shareholder oppression statute clearly does not provide an explicit right to trial by jury. The statute merely dictates that "[a] shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located" and that if the shareholder establishes grounds for relief, "the circuit court may make an order or grant relief as it considers appropriate." MCL 450.1489(1) (Add. 4). Nothing in the nature of the relief granted in MCL 450.1489(1)(a)-(e) suggests a legislative intent to create a right to a trial by jury, as the remedies provided in MCL 450.1489(1)(a)-(e) are all equitable in nature – the touchstone for judicial resolution.

Having demonstrated that the shareholder oppression statute does not afford a statutory right to trial by jury, it must next be determined if such a right is provided by the Michigan Constitution. Whether the Michigan Constitution guarantees a right to a jury trial for a newly created statutory cause of action hinges upon whether the statutory cause of action is legal or equitable in nature: if legal, there is an associated constitutional right to a jury trial; if equitable, there is no constitutional right to a jury trial. *See Wolfenden v. Burke*, 69 Mich. App. 394, 399, 245 N.W.2d 61, 64 (1976). For the reasons discussed above, the nature of the action in MCL 450.1489(1)(a)-(e) is equitable, and it would have been denominated as such in 1963, when the Michigan Constitution was adopted. *See, e.g., Multiplex Concrete Machinery Co. v. Saxer*, 310 Mich. 243, 259, 17 N.W.2d 169, 174 (1945) (explaining that "[w]here a case presents such complications, such obstacles to a disposition at law, and such questions peculiar to equity as to make it manifest that a court of law could not so deal with it as to effect a proper adjustment and bring about a complete termination of the contention, equity has jurisdiction"). Because claims under MCL 450.1489(1)(a)-(e) are equitable in nature, it is required by the Michigan Constitution that they be tried by a court of equity. *See Anzaldua*, 457 Mich. at 538 n.6, 578 N.W. at 310 n.6.

B. The Court of Appeals Clearly Erred In Ruling Contrary To The Precedent Of This Court And Other Courts Of Appeals That The Trial Court Properly Submitted The Purely Equitable Claim For A Forced Buy-Out Of Stock Under The Michigan Shareholder Oppression Statute To The Jury And A Remand For A Bench Trial Is The Proper Remedy.

Given the above analysis, the Court of Appeals clearly erred in ruling contrary to the precedent of this Court in *Anzaldua v. Band*, 457 Mich. 530, 578 N.W.2d 306 (1998), *Brown v. Kalamazoo Circuit Judge*, 75 Mich. 274, 42 N.W. 827 (1889), and *Abner A. Wolf, Inc. v. Walch*, 385 Mich. 253, 188 N.W.2d 544 (1971), as well as the Courts of Appeals in *Dutka v. Sinai Hosp. of Detroit*, 143 Mich. App. 170, 171 N.W.2d 901 (1985), and *Robair v. Dahl*, 80 Mich. App. 458, 264 N.W.2d 27 (1978), that a plaintiff has a constitutional right to submit purely equitable claims to a jury. The court below also clearly erred in ruling contrary to the Court of Appeals in *Forsberg v. Forsberg Flowers, Inc.*, No. 263762, 2006 WL 3500897 (Mich. Ct. App. Dec. 5, 2006) (Add. 16-26), that equitable shareholder oppression claims can be submitted to the jury over the defendant's objection.

The two-step inquiry conducted above precisely mirrors the analysis that this Court set forth in *Anzaldua v. Band*, 457 Mich. 530, 533-49, 578 N.W.2d 306, 308-15 (1998), and it was exactly the analysis the Court of Appeals adopted in *Forsberg*. The courts below, however, pointedly refused to conduct any of this analysis. (App. 245a, 259a). Both the trial judge and Judge Riordan simply rejected any reliance on *Forsberg* because it was an unpublished opinion and they were not bound to follow it. *Id.* Taub's argument, however, was never that *Forsberg* was binding. Rather, Taub consistently argued that the authorities cited in *Forsberg* were binding and that the analysis set forth in *Forsberg* was legally correct. Pursuant to those binding authorities and that legally correct analysis, the *Forsberg* court properly held that the Michigan shareholder oppression statute does not create a right to a trial by jury where equitable remedies were sought. *See Forsberg*, 2006 WL 3500897, at *4, *6 (explaining that "[b]y its unambiguous language . . . MCL 450.1489 does not provide for a right to a jury trial," and "the right to a jury trial does not 'remain' under the Michigan Constitution for this action," which meant "plaintiff had no right to a jury trial").

As Taub argued in his briefs to the Court of Appeals, even if Madugula had a jury trial right as to his claim for lost compensation and benefits under MCL 450.1489(1)(f), his other claims under MCL 450.1489(1)(a)-(e), and in particular, his claim for a forced buy-out of his stock, were equitable in nature and therefore should not have been tried to a jury.[6] It is well established that in cases where a plaintiff seeks both equitable relief and legal relief in the form of damages, the plaintiff only has a constitutional right to a jury trial as to the damages claim. *Dutka*, 143 Mich. App. at 174, 371 N.W.2d at 903. In such cases, the court still must make all findings of fact and conclusions of law as to the equitable claim. *See id.*[7]

That is exactly what Judge Ronayne Krause recognized in her dissent. As she noted, the dispute that the majority had focused on over the binding nature of the *Forsberg* opinion was entirely beside the point. The real issue in this case is whether a party has a constitutional right

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[6] Judge Borrello concurred in the denial of Taub's appeal on the basis of Chief Judge Murphy's partial dissent in *Forsberg,* reasoning that there was a right to a jury trial under the shareholder oppression statute as to any claim for damages. (App. 261a). But Judge Borrello apparently did not realize that Taub had conceded that point below. Indeed, although Judge Borrello's opinion is denominated a "concurrence" while Judge Ronayne Krause's opinion is denominated a "dissent" with respect to the issue of whether the case was properly submitted to the jury, both panel members apparently agreed with Taub that the jury trial right under Michigan's shareholder oppression statute extends only to claims for damages under that statute, and not to equitable claims.

[7] *See also* Stephen H. Schulman, et al., *Michigan Corporation Law & Practice* § 4.22 at 4-68 n.179m (2013 Supp.) ("A litigant seeking jury trial on at least some issues implicated by a lawsuit alleging oppression could demand trial by jury on common law counts such as claims of fraud or breach of fiduciary duty. That might prompt the court to have the jury answer special interrogatories as to the existence of facts which might, if proven, constitute willfully unfair and oppressive conduct. The ultimate finding of whether the conduct was indeed willfully unfair and oppressive, however, would be for the court, not the jury, to make.").

to have equity controversies dealt with by equitable methods in a bench trial. And as she further recognized, this Court has already answered that question, holding that "[t]he right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury." *Abner A. Wolf, Inc.*, 385 Mich. at 259, 188 N.W.2d at 547. Yet the majority below utterly failed to address Taub's arguments to that effect.

Taub's right to have equitable matters dealt with by a court of equity was plainly violated in this case – a clear error that caused material injustice as the jury entered a verdict on a purely equitable claim, ordering Taub to purchase Madugula's shares in Dataspace at a price of $1.2 million. The jury was not required to make any detailed findings as to shareholder oppression, as a court of equity would have been required to do. The jury was not required to explain how it arrived at its valuation of Madugula's stock (a valuation that varied wildly from the valuation presented by either party's experts), as a court of equity would have been required to do.[8] And perhaps most importantly, the jury was not afforded the discretion that a court of equity has. Under the statute, even if the grounds for shareholder oppression are met, a court sitting in equity is not obligated to grant the remedies enumerated in the statute. *See* Stephen H. Schulman, et al., *Michigan Corporation Law & Practice* § 4.22 at 4-52 (2013 Supp.) (referring to the statute's enumerated remedies as a "nonexclusive shopping list of possible remedies"). While Michigan's shareholder oppression statute provides only that "[i]f the shareholder establishes grounds for relief, the circuit court *may make an order or grant relief as it considers appropriate*, including, without limitation, an order providing for any of the following [remedies]," MCL 450.1489(1)

[8] Determining the "fair value" of stock in a closely held corporation is a complex endeavor, making a court of equity much better suited for the task. *See* Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 Duke L.J. 293, 295 (2004) (explaining that "[i]n the close corporation context, the task of measuring value is a particularly thorny one . . . , as a close corporation, by definition, lacks a market for its stock").

(Add. 4) (emphasis added), the jury here was given a particular remedy and instructed that this remedy – forced buy-back of stock – was the *only* remedy available and that this was the remedy *required* upon a finding of shareholder oppression. (App. 190a-191a). This was a violation of Taub's constitutional rights.

If this Court does not enter judgment outright in Taub's favor on the shareholder oppression claim for the reasons explained *infra* in Parts II and III, then the proper remedy to address the violation of Taub's constitutional right is to remand for a bench trial. Harmless error analysis is not appropriate here. *See Forsberg*, 2006 WL 3500897, at *12-13 (Add. 26) (Chief Judge Murphy in dissent "question[ing] whether a harmless error analysis is appropriate in the context of a denial of plaintiff's statutory right to a jury trial" and holding that he would remand for a new trial where the plaintiff's damages claim under the shareholder oppression statute was submitted to the judge rather than the jury) . Indeed, harmless error analysis is never appropriate when a claim is submitted to the wrong factfinder. It is difficult to imagine an error that more fundamentally causes "structural defects in the constitution of the trial mechanism" than employing the wrong trial mechanism altogether. *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991) (defining structural errors not subject to harmless error review).

Thus, at the very least, if judgment is not entered for Taub, the case must be remanded such that Taub will have "an opportunity to argue the facts independently before [the trial judge] in effort to persuade him that – irrespective of the jury's general and advisory verdict – the proof did not preponderate in favor of [plaintiff]." *Abner A. Wolf*, 385 Mich. at 266-67, 188 N.W.2d at 551; *see id.* at 267, 188 N.W.2d at 551 (holding that the "record should be remanded for reargument of the cause before the trial judge, for preparation by him of an independent opinion, and for entry of a new decretal judgment which, consistent with the foregoing procedural views, should decide the merits of plaintiff's" claims); *see also Zurcher v. Herveat*, 238 Mich. App. 267, 301, 605 N.W.2d 329, 345 (1999) (where trial court erroneously allowed an equitable claim to go to the jury, the proper remedy was to reverse and remand for the trial court to make appropriate factual findings and "if any party wishes to make a record, through testimony or otherwise, regarding these factual questions, the trial court shall permit this"). For the reasons set forth below, the Court should enter judgment for Taub on the shareholder oppression claim. But if the Court does not enter judgment in Taub's favor, it should remand for a bench trial to determine what equitable relief, if any, is available to Madugula.[9]

II. THE COURT OF APPEALS CLEARLY ERRED IN RULING THAT AN ALLEGED BREACH OF A PRIVATE SHAREHOLDERS AGREEMENT GAVE RISE TO A VIOLATION OF THE SHAREHOLDER OPPRESSION STATUTE AND ITS BROAD EQUITABLE REMEDIES.

Standard of Review

This Court reviews de novo a trial court's denial of a motion for judgment notwithstanding the verdict. *Reed v. Yackell*, 473 Mich. 520, 528, 703 N.W.2d 1, 6 (2005). Likewise, the Court reviews questions of statutory interpretation de novo. *Ayar v. Foodland Distributors*, 472 Mich. 713, 715, 698 N.W.2d 875, 876 (2005).

A. Michigan's Shareholder Oppression Statute May Not Be Used To Enforce Private Rights Established In A Shareholders' Agreement.

This case presents this Court's first opportunity to opine as to the proper interpretation of the Michigan shareholder oppression statute. A violation of the statute occurs when a majority

[9] The trial court's order staying the judgment in this case and ordering Taub to post only a $300,000 bond (App. 254a) to protect Madugula's interests suggests that the trial court may well be open to persuasion that the jury's valuation of Madugula's stock at $1.2 million was wildly off-base and that the price should have been much closer to the $303,065 that Taub's expert opined the shares were worth (App. 174a). Of course, Taub should also be permitted to argue to the trial court that there was no shareholder oppression at all and therefore no need for any forced buy-back of stock.

shareholder engages in "willfully unfair and oppressive conduct," which means "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder *as a shareholder*." MCL 450.1489(3) (Add. 4) (emphasis added). In its finding that Taub engaged in shareholder oppression, the Court of Appeals erroneously held that private parties can create public shareholder interests through private shareholders' agreements, after which alleged breaches of those agreements will constitute evidence of shareholder oppression. This misunderstanding served as the basis for the court's finding that Taub engaged in shareholder oppression by purportedly breaching the supermajority voting provision of the Stockholder's Agreement.

Under Michigan law, it is well-settled that MCL 450.1489 creates a "separate and independent statutory cause of action" that is distinct from a cause of action arising directly under a shareholders' agreement. *Estes v. Idea Engineering & Fabricating, Inc.*, 250 Mich. App. 270, 285-86, 649 N.W.2d 84, 93 (2002); *see id.* at 274-75, 649 N.W.2d at 87 (distinguishing between plaintiff's breach-of-contract cause of action brought under written stock purchase agreements and plaintiff's shareholder oppression claim, which was not memorialized in written agreement); *see also generally* Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 Bus. Law. 699 (1993) (discussing development of statutory causes of action for shareholder oppression in various states as distinct from common law remedies). Thus, while a shareholder oppression statute is meant to provide "special relief from ongoing oppression," *Estes*, 250 Mich. App. at 281, 649 N.W.2d at 91, suffered by minority shareholders who may not have written agreements to enforce, *id.* at 275, 649 N.W.2d at 87, a breach of a shareholder's agreement gives rise to a breach-of-contract action that must be governed by the terms of that contract.

In Michigan, shareholder agreements are governed by MCL 450.1488, the statutory provision immediately preceding the shareholder oppression statute. MCL 450.1488 explains that private shareholder agreements are permissible even though certain of their provisions may conflict with other provisions of Michigan's Business Corporation Act. *See* MCL 450.1488(1). The drafters of the provision were therefore clearly aware of the way in which shareholder agreements might interact with other provisions of the Business Corporation Act, and yet nowhere does this provision state that shareholder agreements can be enforced through the shareholder oppression statute located in the very next section. The court simply – and impermissibly – read such an enforcement mechanism into the statute.

By holding that a violation of the supermajority provisions of the Stockholders' Agreement was a violation of the shareholder oppression statute, the court below essentially equated the contractual definition of shareholder rights as agreed to by the private parties with the common law definition of shareholder rights as developed by courts. Under the common law, "[s]hareholder's rights are typically considered to include voting at shareholder's meetings, electing directors, adopting bylaws, amending charters, examining the corporate books, and receiving corporate dividends." *Franchino v. Franchino*, 263 Mich. App. 172, 184, 687 N.W.2d 620, 628 (2004). The court below, however, gave shareholders a new right – the right to enforce private contracts by bringing a statutory claim for equitable relief under MCL 450.1489.

The court stated that the "supermajority provision [in the Stockholders' Agreement] is highly relevant in determining if Madugula's interests as a shareholder were substantially interfered with because this provision details what Madugula's interests and rights are." (App. 258a). In other words, the Court of Appeals held that private parties can create shareholder rights through private shareholders' agreements, after which alleged breaches of those rights will constitute shareholder oppression and give rise to the broad equitable remedies of MCL 450.1489.

It cannot be that all a shareholder must do to show "grounds for relief" under the Michigan statute is to show that a private agreement among the shareholders was breached. That would lead to absurd results. For example, if all shareholders in a closely held corporation agree in a stockholders' agreement that the annual meeting will take place on January 15th and the meeting instead takes place on January 16th, this would constitute "shareholder oppression." This cannot be what the Legislature intended. While it is true that under Michigan's shareholder oppression statute, "[t]he term [willfully unfair and oppressive conduct] does not include conduct or actions that are permitted by an agreement," MCL § 450.1489(3) (Add. 4), it does not follow that the converse is true, *i.e.*, that any conduct or action *not* permitted by an agreement necessarily constitutes shareholder oppression. Rather, the statute explicitly states that to be willfully unfair and oppressive, conduct must also "interfere with distributions or other shareholder interests disproportionately as to the affected shareholder." *Id.* The statute is therefore concerned with public shareholder rights recognized by the common law, not private shareholder agreements negotiated by contract.

To turn the shareholder oppression statute into a means of enforcing private shareholder agreements would be to impose upon the parties terms for which they had not bargained. As noted above, the remedies afforded under the shareholder oppression statute are far broader than those that would be authorized in a typical breach-of-contract action for violation of a shareholders' agreement, including "dissolution and liquidation of the assets and business of the corporation," MCL 450.1489(1)(a) (Add. 4), or the "purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts," MCL 450.1489(1)(e) (Add. 4). If a breach of a shareholders' agreement can give rise to a shareholder oppression claim, the corporation itself could be dissolved merely upon a showing of a breach of contract.

The court below clearly erred in ordering breach-of-contract remedies that the parties never bargained for or contemplated. Indeed, the court actually ordered remedies that are completely contrary to those for which the parties bargained. The parties agreed that all disputes under the Stockholders' Agreement would be subject to binding arbitration, and they specifically negotiated a Buy-Sell Agreement to detail what should happen in the event one of the shareholders wanted to sell his stock. The Court of Appeals blithely dismissed the concern about what the parties had bargained for, stating that while the trial court's decision "permits Madugula to avoid the arbitration clause in the stockholders' agreement," this was fine because "the stockholders' agreement can be relevant evidence for separate causes of actions." (App. 258a). The court then imposed the jury-made equitable remedy of a forced buy-out of stock at the arbitrary price of $1.2 million. Thus, instead of finding himself before an arbitrator defending a breach-of-contract action as was contemplated in the Stockholders' Agreement, Taub instead found himself before a jury, which was empowered by the trial judge to require Taub to buy back Madugula's stock at a price of $1.2 million. That is plainly not what Taub bargained for in the Stockholders' Agreement.

B. The Court of Appeals' Decision Is An Outlier That Is Contrary To The Public Policy Of The State Of Michigan.

The Court of Appeals' decision is an outlier that conflicts with decisions of other courts that have considered the issue of whether the shareholder oppression statute can be used to enforce contractual rights. The decision is also contrary to the public policy in Michigan of encouraging shareholders in closely-held corporations to protect themselves by contract.

While the Court of Appeals here held that MCL 450.1489 could be used to enforce private contractual rights of shareholders, another Court of Appeals decision reached exactly the opposite conclusion. In *Trapp v. Vollmer*, No. 297116, 2011 WL 2423884 (Mich. Ct. App. June 16, 2011) (Add. 62-64), the court rejected the plaintiff's claim that the majority shareholder's failure to comply with a *contractual* obligation requiring the minority shareholders' consent for a sale of stock could constitute shareholder oppression. As the Court stated: "Here, the affected interests plaintiff alleged pertained to defendant's compliance with [a paragraph of the succession agreement]. *Implementation of a succession agreement is not an interest that accrued to plaintiff by virtue of being a shareholder*. Thus, plaintiff could not maintain his shareholder oppression claim." *Id.* at *2 (emphasis added) (Add. 64). The Court then dismissed the shareholder oppression claim. The *Trapp* case therefore rejected the idea that shareholder rights can be contractually created, but instead held to the idea that shareholder rights are those common law rights that accrue to a shareholder "by virtue of being a shareholder" – *i.e.*, voting at shareholders' meetings, electing directors, adopting bylaws, amending charters, examining the corporate books, and receiving corporate dividends. *Franchino*, 263 Mich. App. at 184, 687 N.W.2d at 628.

The *Trapp* case is in accord with the decisions of other courts to have considered the issue. For example, the Delaware Supreme Court has rejected the notion that a breach of a stockholders' agreement can give rise to broad equitable remedies. As that court noted in facing a similar question: "The tools of good corporate practice [of making stockholder agreements] are designed to give a purchasing minority stockholder the opportunity to bargain for protection before parting with consideration. It would do violence to normal corporate practice and our corporation law to fashion an *ad hoc* ruling which would result in a court-imposed stockholder buy-out for which the parties had not contracted." *Nixon v. Blackwell*, 626 A.2d 1366, 1380 (Del. 1993). This is equally true here. The parties neither contemplated nor contracted for dissolution of the corporation or buy-out of stock in the event of a breach of the Stockholders' Agreement. Yet that is the remedy that the trial court imposed for an alleged breach of the Agreement.

If the ruling of the court below becomes governing law in Michigan, it will negatively impact the public policy of this state. Shareholder agreements play an important role in closely held corporations, allowing stockholders to privately order the management of a firm and promoting stability. Daniel D. Quick & Jeffrey R. Dobson, Jr., *Drafting Air-Tight Shareholder Agreements*, Mich. Bar Journal at 38 (Jan. 2005). Indeed, these "agreements are the most useful tool for protecting minority interests and insuring the active participation of the minority in the course of a business." Julian Javier Garza, *Rethinking Corporate Governance: The Role of Minority Shareholders*, 31 St. Mary's L.J. 613, 667 (2000). Allowing a breach of those shareholders' private contractual arrangements to serve as the basis for a shareholder oppression lawsuit, giving rise to its broad equitable remedies, would discourage majority shareholders from entering into these contractual arrangements in the first place. This would only serve to disadvantage minority shareholders in the long run.

This Court should therefore hold that the provisions of a shareholders' agreement cannot create shareholder interests that are enforceable by bringing an action under MCL 450.1489. Rather, shareholders' agreements are to be enforced through breach-of-contract actions and subject to the remedies available for breach of contract. A contrary holding would have deleterious public policy consequences for Michigan corporations.

III. THE COURT OF APPEALS CLEARLY ERRED IN HOLDING THAT MADUGULA'S INTERESTS AS A SHAREHOLDER WERE INTERFERED WITH DISPROPORTIONATELY BY THE ACTIONS OF TAUB WHERE MADUGULA RETAINED HIS CORPORATE SHARES AND HIS CORPORATE DIRECTORSHIP.

Standard of Review

As stated above, this Court reviews de novo a trial court's denial of a motion for judgment notwithstanding the verdict. *Reed*, 473 Mich. at 528, 703 N.W.2d at 6. Likewise, the Court reviews questions of statutory interpretation de novo. *Ayar*, 472 Mich. at 715, 698 N.W.2d at 876.

A. The Plain Text And Legislative History Of Michigan's Shareholder Oppression Statute Demonstrate That It Does Not Protect Employment Interests Unless They Are Also Shareholder Interests.

For the reasons set forth above, the Court of Appeals clearly erred in holding that Taub's alleged breaches of the supermajority provisions in the parties' Stockholders' Agreement constituted shareholder oppression. But the court also erred in holding that Taub's termination of Madugula's consulting services amounted to shareholder oppression. Madugula retained his corporate shares and his corporate directorship and lost only his consulting position, not any shareholder rights. This case is therefore fundamentally different from other cases of shareholder oppression in which the majority shareholders are trying to squeeze out a minority shareholder who has made a major investment in the company. *See, e.g.*, *Berger v. Katz*, No. 291663, 2011 WL 3209217, at *4 (Mich. Ct. App. July 28, 2011) (Add. 68); *Irish v. Natural Gas Compression Sys., Inc.*, No. 266021, 2006 WL 2000132, at *1-2 (Mich. Ct. App. July 18, 2006) (Add. 13-14).

In this case, no one has been squeezed out.[10] Despite the fact that he lost his position as vice president of sales for Dataspace, Madugula remains the second-largest shareholder of the corporation, he remains a director of the corporation, he continues to elect directors to the corporation, he continues to receive annual dividends from the corporation, and he continues to be invited to participate in and vote at shareholder meetings for the corporation. Indeed, in the five years that have passed since Madugula filed suit against Taub, Madugula has attended and participated in every Dataspace shareholders meeting. He has attended and participated in every Dataspace Board of Directors meeting. And he has received dividend payments of more than $100,000. *See supra.* The only thing that happened here is that Madugula's consulting services to the corporation were terminated and this was allegedly done without supermajority approval under the shareholder's agreement. That may give rise to a breach-of-contract action, but it does not give rise to a shareholder oppression claim.

Both the plain text and the legislative history of Michigan's shareholder oppression statute demonstrate that it was not intended as a broad protection of employment interests. It was just over ten years ago that the Michigan Legislature first added the language defining "willfully unfair and oppressive conduct" to Michigan's shareholder oppression statute. As the Legislature described it, "'willfully unfair and oppressive conduct' means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder *as a shareholder*." MCL 450.1489(3) (Add. 4) (emphasis added). The 2001 legislative subcommittee comments regarding the amendment specifically stated that "[t]he

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[10] A squeeze out "refer[s] to conduct that is designed to deny a shareholder his participatory rights in the business, his financial rights in the business, or, most often, both sets of rights." Douglas K. Moll, et al., *The Law of Closely Held Corporations* § 7.01[A] at 7-5 n.8 (2012 Supp.).

proposed amendment makes clear that section 489 *does not protect employment interests* unless an action or a course of conduct affecting employment also affects the shareholder's interests as a shareholder. In this connection, 'interests' as a shareholder means financial return related to status as a shareholder." *Michigan Corporation Law & Practice* § 4.22 at 4-56 n.173a (quoting 2001 Subcommittee Comments) (emphasis added).

Indeed, as recounted in *Michigan Corporation Law & Practice*, the definition of "willfully unfair and oppressive" conduct added by the Legislature in 2001 "was intended as a limitation on the use of section 489 in ordinary employment and shareholder disputes." *Id.* § 4.22 at 4-56. Thus, the 2001 language operated to "remove purely employment or status type claims," but a "claim should remain . . . if, for example, a termination of employment deprived a shareholder of an economic return while the other shareholders received disguised dividends through large salaries and bonuses." *Id.* at 4-57.[11]

Five years later, in 2006, the Legislature again amended the shareholder oppression statute, this time in direct response to the Court of Appeals' decision in *Franchino*. In *Franchino*, a minority shareholder brought an action for shareholder oppression alleging that the termination of his company employment and position on the board of directors constituted willfully unfair and oppressive conduct. The shareholder reasoned that his interests as a shareholder had been affected by his termination because the salaries paid by the corporation

[11] One commentator argues that "oppression should be viewed as a doctrine that protects the fair value of a close corporation shareholder's investment." Douglas K. Moll, *Shareholder Oppression v. Employment at Will in the Close Corporation: The Investment Model Solution*, 1999 U. Ill. L. Rev. 517, 520-21 (1999). Under that rubric, "[t]o the extent that employment in a close corporation may be a component of that [shareholder's] investment, the investment model of oppression may indirectly protect the job as well. But this corporate law protection of employment should only be present when a job is proven to be part of a shareholder-employee's investment." *Id.*

were a means of distributing corporate profits to shareholders, and that he had been fired for his refusal to amend the stockholder's agreement. *Id.* at 183, 191, 687 N.W.2d at 627, 631-32. The Court of Appeals disagreed that this conduct constituted shareholder oppression. It examined the language of the statute, focusing on its limitation to actions that affected the rights of a shareholder "as a shareholder," and concluded that because "employment and board membership are not considered shareholder rights," *id.* at 184-85, 687 N.W.2d at 628, a termination of employment and board membership could not constitute shareholder oppression, *id.* at 186, 687 N.W.2d at 629.

In response to this holding, the Legislature amended the statute to provide simply that "[w]illfully unfair and oppressive conduct *may* include the termination of employment or limitations on employment benefits," but only "to the extent that the actions interfere with *distributions or other shareholder interests* disproportionately as to the affected shareholder." MCL 450.1489(3) (Add. 4) (emphasis added). The legislative subcommittee comments from the 2006 amendment process make clear that this amendment was meant to respond to the specific factual scenario *Franchino* presented. According to the 2006 Comments, the "revised definition [of willfully unfair and oppressive conduct] authorizes consideration of employment actions if the actions disproportionately affect shareholder interests, such as through denial of shareholder distributions or a termination of employment to coerce shareholder action." *Michigan Corporation Law & Practice* § 4.22 at 4-60 n.175f. Thus, "[a] showing that actions of the defendant interfered with the planned distribution of financial returns through employment compensation" can "be considered an indicator of oppression under section 489," *id.* at 4-60 - 4-

61,[12] but the statute is still not meant to cover a claim that is purely employment-related. In all cases, plaintiff must show that his interests "as a shareholder" were affected by the termination in order to make out a claim of shareholder oppression. *See Arevalo v. Arevalo*, No. 285548, 2010 WL 1330636, at *6 (Mich. Ct. App. Apr. 6, 2010) (Add. 50) ("A shareholder may not sue under the statute for oppression suffered in his capacity as a director or an employee.").

Importantly, in amending the statute in 2006, the Legislature did not choose to bring it into line with broader protections offered by other states' shareholder oppression statutes, many of which explicitly protect the rights of officers or employees. As *Franchino* described, New Jersey, for example, protects the rights of minority shareholders in their capacities as "shareholders, directors, officers, or employees." 263 Mich. App. at 184-185, 687 N.W.2d at 628 (quotation marks omitted). Similarly, South Carolina provides relief for a minority shareholder who is oppressed "whether in his capacity as a shareholder, director, or officer" of the corporation. And Illinois likewise furnishes remedies to a minority shareholder "whether in his or her capacity as a shareholder, director, or officer." *Id.* But instead of following suit, the Michigan Legislature left wholly intact the requirement that conduct termed willfully unfair or oppressive "substantially interfere[] with the interests of the shareholder *as a shareholder*." MCL 450.1489(3) (Add. 4). Thus, the Legislature actually reinforced, rather than weakened, the requirement that any act alleged to constitute shareholder oppression – including the termination

[12] Similarly, "where corporate profits customarily are distributed through bonuses rather than dividends, termination of employment should be treated as interference with interests of the former employee 'as a shareholder' and will support a 489 action." *Michigan Corporation Law & Practice* § 4.22 at 4-62 n.175i.

of employment – must be an act that ultimately interferes with "shareholder interests," not the interests of directors or employees. *Id.*[13]

B. The Court Of Appeals Clearly Erred In Finding That The Termination Of Madugula's Consulting Services Interfered Disproportionately With Madugula's Shareholder Interests Where Madugula Retained His Corporate Shares And Corporate Directorship.

The Court of Appeals found that the termination of Madugula's consulting services "disproportionately affected Madugula's interest as a shareholder because Madugula's compensation was reduced to zero and he was no longer involved in decisions on material issues such as the development of JPAS." (App. 259a). The Court was wrong on both counts. First, the Court failed to recognize that a shareholder is not entitled to *compensation*; a shareholder is entitled to *dividends*. And Madugula continues to this day to receive dividends from the company. Indeed, since the time of first filing his complaint, Madugula has received more than $100,000 in dividends from Dataspace. Thus, Madugula's *shareholder interests* cannot be disproportionately affected simply because his *compensation as a consultant* ended.

Second, the Court failed to explain how the fact that Madugula "was no longer involved in decisions on material issues such as the development of JPAS" following his termination (App. 259a) could constitute shareholder oppression. A shareholder is not entitled to participate in decisions on the day-to-day management of the company, such as the development of JPAS. Courts have found "without ambiguity that corporate governance is not a shareholder right and therefore not actionable under Section 1489." *Hofmesiter Family Trust v. FGH Industries, LLC*,

[13] Indeed, during debate over the amendment, the arguments against its passage were that it "does not actually do what it is meant to do" because it continued to protect only the interests of the shareholder "as a shareholder" and did not give a minority shareholder a cause of action to protect his or her interests as an employee of the corporation. Dep't of Labor & Economic Growth, Analysis of Enrolled House Bill 5323, S. 93-0506, Reg. Sess., at 1-2 (Mich. 2006) (Add. 10-11).

No. 06-CV-13984-DT, 2007 WL 1106144, at *5 (Add. 44) (E.D. Mich. April 12, 2007). With respect to decisions on material issues, a shareholder is entitled to vote at shareholder meetings. And Madugula continues to this day to vote at shareholder meetings. He has attended, participated in, and voted at every shareholder meeting since he filed his complaint in 2008. Madugula even serves on the corporation's Board of Directors. Thus, it cannot be that Madugula's *shareholder interests* were disproportionately affected simply because he was no longer involved in *operational decisions* after his termination.[14]

The ruling of the court below establishes a *per se* rule preventing corporations from ever terminating minority shareholders' employment without facing liability for shareholder oppression. That is not what the Legislature intended when it amended the statute to provide that termination of employment "may" constitute shareholder oppression, but only when employment is a shareholder interest because the corporation uses employment as a means of distributing dividends or bonuses. MCL 450.1489(3) (Add. 4). The statute cannot be used as a lifetime guarantee of employment to minority shareholders in closely held corporations. Here, Taub testified that he terminated Madugula's consulting services because Madugula was not doing his job. In terminating Madugula's services, Taub believed he was acting in the best interests of the corporation and thereby *protecting* Madugula's interests as a shareholder. A corporation's chief

[14] In addition, according to the Court of Appeals, evidence of shareholder oppression existed because "Madugula was not afforded the opportunity to examine the corporate books," but rather was provided financial information "only in the form of excel spreadsheets." (App. 258a). However, Madugula offered no evidence at trial that he was ever formally denied access to Dataspace's books. In order to gain access to a corporation's books, a shareholder is required to submit a "written demand describing with reasonable particularity his or her purpose and the records he or she desires to inspect." MCL 450.1487 (Add. 1). Madugula propounded no evidence at trial that he ever submitted such a request. To the contrary, Madugula was informed of Dataspace's financial condition at company meetings and Dataspace's financial statements were regularly sent to Madugula. (*See, e.g.*, App. 186a-188a). Denial of access to the books therefore cannot serve as the basis of a shareholder oppression claim against Taub.

executive officer must be free to make these decisions on behalf of the corporation without fear that the entire corporation could be dissolved because of it.

While it may be true that in some instances, a termination of employment *does* impact a shareholder's interests as a shareholder – such as where an employee's salary is really a form of dividend – that is simply not the case here. In determining liability for shareholder oppression, it is "important to distinguish investors who obtain their return on investment through benefits provided to them as employees from employees who happen also to be investors." *See Hollis v. Hill*, 232 F.3d 460, 470-71 (5th Cir. 2000). Madugula is akin to the latter, not the former. Madugula was not a founding member of Dataspace who poured his life savings into the corporation. He was a consultant, hired by the founder of Dataspace and then given an opportunity by Taub, the founder of Dataspace, to become an investor. Indeed, Taub even loaned Madugula the money he needed to become an investor (money he still owed Taub when he filed suit). Madugula was a consultant first and an investor second, and the termination of his consulting services left his shareholder interests fully intact. The shareholder oppression statute should not be held to protect Madugula in these circumstances.

The court below erred and caused material injustice to Taub in ordering him to pay $191,675 in damages and buy out Madugula's shares at a price of $1.2 million despite the fact that Madugula's shareholder interests were never injured in this case. The court fundamentally misconstrued and misapplied the shareholder oppression statute to the situation at issue here and its decision should be reversed.

RELIEF SOUGHT

Taub respectfully requests that this Court reverse the decision of the trial court and enter judgment in his favor. In the alternative, Taub requests that this Court remand this case to allow for a bench trial.

Respectfully submitted,

July 30, 2013

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ADDENDUM

ADDENDUM TO APPELLANT'S BRIEF

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BUSINESS CORPORATION ACT (EXCERPT)
Act 284 of 1972

450.1487 Request for balance sheet, statement of income, and statement of source and application of funds; inspection of records; court order; definition; holder of voting trust certificate deemed shareholder.

Sec. 487. (1) Upon written request of a shareholder, a corporation shall mail to the shareholder its balance sheet as at the end of the preceding fiscal year; its statement of income for the fiscal year; and, if prepared by the corporation, its statement of source and application of funds for the fiscal year.

(2) Any shareholder of record, in person or by attorney or other agent, shall have the right during the usual hours of business to inspect for any proper purpose the corporation's stock ledger, a list of its shareholders, and its other books and records, if the shareholder gives the corporation written demand describing with reasonable particularity his or her purpose and the records he or she desires to inspect, and the records sought are directly connected with the purpose. A proper purpose shall mean a purpose reasonably related to such person's interest as a shareholder. The demand shall be delivered to the corporation at its registered office in this state or at its principal place of business. In every instance where an attorney or other agent shall be the person who seeks to inspect, the demand shall be accompanied by a power of attorney or other writing which authorizes the attorney or other agent to act on behalf of the shareholder.

(3) If the corporation does not permit an inspection within 5 business days after a demand has been received in compliance with subsection (2), or imposes unreasonable conditions upon the inspection, the shareholder may apply to the circuit court of the county in which the principal place of business or registered office of the corporation is located for an order to compel the inspection. If the shareholder seeks to inspect the corporation's books and records other than its stock ledger or list of shareholders, he or she shall first establish that he or she has complied with this section respecting the form and manner of making demand for inspection of the documents, that the inspection he or she seeks is for a proper purpose, and that the documents sought are directly connected with the purpose. If the shareholder seeks to inspect the corporation's stock ledger or list of shareholders and has established compliance with this section respecting the form and manner of making demand for the inspection of the documents, the burden of proof shall be upon the corporation to establish that the inspection that is sought is for an improper purpose or that the records sought are not directly connected with the person's purpose. The court may, in its discretion, order the corporation to permit the shareholder to inspect the corporation's stock ledger, a list of shareholders, and its other books and records on conditions and with limitations as the court may prescribe and may award other or further relief as the court may consider just and proper. The court may order books, documents and records, pertinent extracts, or duly authenticated copies, to be brought within this state and kept in this state upon terms and conditions as the court may prescribe.

(4) A director shall have the right to examine any of the corporation's books and records for a purpose reasonably related to his or her position as a director. The director may apply to the circuit court of the county in which the principal place of business or registered office of the corporation is located for an order to compel the inspection. The court may, in its discretion, order the corporation to permit the director to inspect any and all books and records, on conditions and with limitations as the court may prescribe and may award other and further relief as the court may consider just and proper.

(5) If the court orders inspection of the records demanded under subsection (3) or (4), it shall also order the corporation to pay the shareholder's or director's costs, including reasonable attorney fees, incurred to obtain the order unless the corporation proves that it failed to permit the inspection in good faith because it had a reasonable basis to doubt the right of the shareholder or director to inspect the records demanded.

(6) As used in this section, "the right to inspect records" includes the right to copy and make extracts from the records and, if reasonable, the right to require the corporation to supply copies made by photographic, xerographic, or other means. The corporation may require the shareholder to pay a reasonable charge, covering the costs of labor and material, for copies of the documents provided to the shareholder.

(7) A holder of a voting trust certificate representing shares of the corporation is deemed a shareholder for the purpose of this section and section 485.

History: 1972, Act 284, Eff. Jan. 1, 1973;—Am. 1989, Act 121, Eff. Oct. 1, 1989.

BUSINESS CORPORATION ACT (EXCERPT)
Act 284 of 1972

450.1488 Shareholder agreement.

Sec. 488. (1) An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with this act in 1 or more of the following ways:

(a) It eliminates the board or restricts the discretion or powers of the board.

(b) It governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to limitations in sections 345 and 855a pertaining to the protection of creditors.

(c) It establishes who shall be directors or officers of the corporation, or the terms of office or manner of selection or removal of directors or officers of the corporation.

(d) In general or in regard to specific matters, it governs the exercise or division of voting power by or between the shareholders and directors or by or among any of the shareholders or directors, including use of weighted voting rights or director proxies.

(e) It 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 or among the shareholders, directors, officers, or employees of the corporation.

(f) It transfers to 1 or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders.

(g) It requires dissolution of the corporation at the request of 1 or more of the shareholders or if a specified event or contingency occurs.

(h) It establishes that shares of the corporation are assessable and includes the procedures for an assessment and the consequences of a failure by a shareholder to pay an assessment.

(i) It otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors, and the corporation, or among any of the shareholders or directors, and is not contrary to public policy.

(2) An agreement authorized by this section shall meet both of the following requirements:

(a) Is set forth in a provision of the articles of incorporation or bylaws approved by all persons that are shareholders at the time of the agreement, or in a written agreement that is signed by all persons that are shareholders at the time of the agreement and that is made known to the corporation.

(b) Is subject to amendment only by all persons that are shareholders at the time of the amendment, unless the agreement provides otherwise.

(3) The existence of an agreement authorized under this section shall be noted conspicuously on the face or back of a certificate for shares issued by the corporation or on the information statement required under section 336. If at the time of the agreement the corporation has shares outstanding represented by certificates, the corporation shall recall the outstanding certificates and issue substitute certificates that comply with this subsection. The failure to note the existence of the agreement on the certificate or information statement does not affect the validity of the agreement or any action taken pursuant to it. Any purchaser of shares that did not have knowledge of the existence of the agreement at the time ownership is transferred is entitled to rescission of the purchase. A purchaser has knowledge of the existence of the agreement at the time ownership is transferred if the agreement's existence is noted on the certificate or information statement in compliance with this subsection and, if the shares are not represented by a certificate, the information statement is delivered to the purchaser at or before the time ownership of the shares is transferred. An action to enforce the right of rescission authorized under this subsection must be commenced within 90 days after discovery of the existence of the agreement or 2 years after the shares are transferred, whichever is earlier.

(4) An agreement authorized under this section shall cease to be effective when shares of the corporation are listed on a national securities exchange or regularly traded in a market maintained by 1 or more members of a national or affiliated securities association.

(5) If an agreement authorized under this section is no longer effective for any reason and is contained or referred to in the corporation's articles of incorporation or bylaws, the board may without shareholder action adopt an amendment to the articles of incorporation or bylaws to delete the agreement and any references to it.

(6) An agreement authorized under this section that limits the discretion or powers of the board shall relieve the directors of, and impose on the person or persons in which the discretion or powers are vested, liability for acts or omissions imposed by law on directors to the extent that the discretion or powers of the directors are limited by the agreement. The person or persons in whom the discretion or powers are vested are

treated as a director or directors for purposes of any indemnification and any limitation on liability under section 209(1)(c).

(7) The existence or performance of an agreement authorized under this section is not grounds for imposing personal liability on any shareholder for the acts or debts of the corporation or for treating the corporation as if it were a partnership or unincorporated entity, even if the agreement or its performance results in failure to observe the corporate formalities otherwise applicable to the matters governed by the agreement.

(8) Dissolution pursuant to an agreement authorized in subsection (1)(g) shall be implemented by filing a certificate of dissolution under section 805.

(9) Incorporators or subscribers for shares may act as shareholders with respect to an agreement authorized under this section if shares have not been issued when the agreement is made.

(10) The failure to satisfy the unanimity requirement of subsection (2) with respect to an agreement authorized under this section does not invalidate any agreement that would otherwise be considered valid.

History: Add. 1997, Act 118, Imd. Eff. Oct. 24, 1997;—Am. 2001, Act 57, Imd. Eff. July 23, 2001;—Am. 2012, Act 569, Imd. Eff. Jan. 2, 2013.

BUSINESS CORPORATION ACT (EXCERPT)
Act 284 of 1972

450.1489 Action by shareholder.

Sec. 489. (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:

(a) The dissolution and liquidation of the assets and business of the corporation.

(b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.

(c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.

(d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.

(e) The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.

(f) An award of damages to the corporation or a shareholder. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.

(2) No action under this section shall be brought by a shareholder whose shares are listed on a national securities exchange or regularly traded in a market maintained by 1 or more members of a national or affiliated securities association.

(3) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

History: Add. 1989, Act 121, Eff. Oct. 1, 1989;—Am. 1997, Act 118, Imd. Eff. Oct. 24, 1997;—Am. 2001, Act 57, Imd. Eff. July 23, 2001;—Am. 2006, Act 68, Imd. Eff. Mar. 20, 2006.

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BILL ANALYSIS

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House Bill 5323 (as passed by the House)
Sponsor: Representative Steve Tobocman
House Committee: Commerce
Senate Committee: Economic Development, Small Business and Regulatory Reform

Date Completed: 2-22-06

CONTENT

The bill would amend the Business Corporation Act to include in its definition of "willfully unfair and oppressive conduct" by a corporation the termination of employment or limitations on employment benefits to the extent that the actions interfered with distributions or other shareholder interests disproportionately as to the affected shareholder. The bill also would allow a corporation to give guarantees to a domestic or foreign limited liability company.

Willfully Unfair & Oppressive Conduct

Under the Act, a shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder.

"Willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

Under the bill, willfully unfair and oppressive conduct could include the termination of employment or limitations on employment benefits to the extent that the actions interfered with distributions or other shareholder interests disproportionately as to the affected shareholder.

Limited Liability Company Guarantees

Under the Act, a corporation, subject to certain limitations, has the power to make contracts, give guarantees and incur liabilities, borrow money at rates of interest as the corporation may determine, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of any of its property or an interest in its property. This power includes the power to give guarantees that are necessary or convenient to the conduct, promotion, or attainment of the business of any of the following corporations, whether or not subject to the Act:

-- All of the outstanding shares of which are owned, directly or indirectly, by the contracting corporation.

-- A corporation that owns, directly or indirectly, all of the outstanding shares of the contracting corporation.
-- All of the outstanding shares of which are owned, directly or indirectly, by a corporation, whether or not subject to the Act, that owns, directly or indirectly, all of the outstanding shares of the contracting corporation.

Under the bill, the power to make contracts, give guarantees, incur liabilities, etc. would include the power to give guarantees that were necessary or convenient to the conduct, promotion, or attainment of the business of any of the following corporations, whether or not subject to the Act, and domestic or foreign limited liability companies:

-- All of the outstanding shares or interests of which were owned, directly or indirectly, by the contracting corporation.
-- A corporation or limited liability company that owned, directly or indirectly, all of the outstanding shares of the contracting corporation.
-- All of the outstanding shares or interests of which were owned, directly or indirectly, by a corporation, whether or not subject to the Act, or a limited liability company that owned, directly or indirectly, all of the outstanding shares of the contracting corporation.

As currently provided, those guarantees would have to be considered to be in furtherance of the corporate purpose of the contracting corporation.

MCL 450.1106 et al. Legislative Analyst: J.P. Finet

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

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House Bill 5323 (as reported without amendment)
Sponsor: Representative Steve Tobocman
House Committee: Commerce
Senate Committee: Economic Development, Small Business and Regulatory Reform

CONTENT

The bill would amend the Business Corporation Act to include in its definition of "willfully unfair and oppressive conduct" by a corporation the termination of employment or limitations on employment benefits to the extent that the actions interfered with distributions or other shareholder interests disproportionately as to the affected shareholder. The bill also would allow a corporation to give guarantees to a domestic or foreign limited liability company.

Under the Act, a shareholder may bring an action in the circuit court to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder.

"Willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. The bill would expand the definition as described above.

MCL 450.1106 et al. Legislative Analyst: J.P. Finet

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Date Completed: 2-27-06 Fiscal Analyst: Elizabeth Pratt
Maria Tyszkiewicz

Legislative Analysis

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BUSINESS CORPORATION ACT AMENDMENTS

House Bill 5315
Sponsor: Rep. James Marleau

House Bill 5316
Sponsor: Rep. Lorence Wenke

House Bill 5317
Sponsor: Rep. Bill Huizenga

House Bill 5318
Sponsor: Rep Leslie Mortimer

House Bill 5319
Sponsor: Rep. Tonya Schuitmaker

House Bill 5320
Sponsor: Rep. Kevin Elsenheimer

House Bill 5321
Sponsor: Rep. Judy Emmons

House Bill 5322
Sponsor: Rep. David Law

House Bill 5323
Sponsor: Rep. Steve Tobocman

Committee: Commerce

Complete to 11-7-05

A SUMMARY OF HOUSE BILLS 5315-5323- AS INTRODUCED 10-18-05

Each of the bills would amend a different section of the Business Corporation Act (MCL 450.1101 et seq.). The following is a description of changes to the act that the bills appear to be making.

House Bill 5315 would rewrite and re-arrange the provision that requires a foreign (out-of-state) corporation to comply with Sections 1021 (dealing with amended applications) and 1035 (the filing of required information) in order to merge with or enter into a share exchange with a domestic (in-state) corporation.

House Bill 5316 would amend a section addressing the dissolving of companies to say that the dissolution depends, among other things, on proof that shareholders who have entered into *an agreement authorized by Section 488* are unable to agree on material matters respecting management of the corporation's affairs or are divided in voting power so as to be unable to elect successor directors. The reference to the Section 488 agreement replaces a reference to the shareholders acting under the corporation's articles of incorporation. Section 488 allows shareholders to enter into agreements to exercise the corporate powers or the management of the business, even to the extent of eliminating the board of directors or restricting their powers.

House Bill 5317 would amend a section that allows for amendments to the articles of incorporation. Some amendments can be made by the board without shareholder action; others require shareholder approval. The bill would amend language dealing with shareholder approval to say that: "Other amendments of the articles of incorporation, except as otherwise provided in this act, shall be proposed by the board and approved by the shareholders as provided in this section. The board may condition its submission of the amendment to the shareholders on any basis." The underlined portions are the new language.

House Bill 5318 would amend a section dealing with committees of a corporation created by the board to specify that a committee could create one or more subcommittees and delegate all or part of its power or authority to a subcommittee, unless prohibited by a resolution of the board, the articles of incorporation, or the bylaws.

House Bill 5319 would specify that when a shareholder abstains from voting or submits a ballot marked "abstain," that does not count as a vote cast (unless the articles provide otherwise). This affects a section that requires actions to be authorized by "a majority of votes cast." House Bill 5320 would make a similar amendment to a section that deals with voting by a class or series of shares. The two bills are tie-barred.

House Bill 5321 addresses cases where a corporation is required or desires to provide a written notice, report, statement, or communication to shareholders sharing a common address. The bill would allow them to do so if all of the following requirements were met: 1) the corporation addresses the writing to shareholders as a group, individually, or in any other form to which there are no shareholder objections; 2) the corporation gives at least 60 days notice to the shareholders sharing the common address; 3) there are no written objections from any shareholder with the common address. If there is an objection, the corporation would have to begin providing separate copies to those who have objected within 30 days of receiving the objection.

House Bill 5322 addresses when documents filed with the relevant state administrator become effective. The bill specifies that "when endorsed by the administrator, a document becomes effective as of the date of receipt, unless a subsequent effective date, not later than 90 days after the date of delivery, is set forth in the document." This rewrites the existing provision that says the document is effective when it is endorsed.

House Bill 5323 would amend the definition in the act of "willfully unfair and oppressive conduct" to specify that such conduct could include *the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder*. Under the act, for example, a shareholder can bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or *willfully unfair and oppressive* to the corporation or to the shareholder

FISCAL IMPACT:

There is no fiscal impact on the State of Michigan or its local units of government.

Legislative Analyst: Chris Couch
Fiscal Analyst: Richard Child

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

JENNIFER M. GRANHOLM
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
LANSING

ROBERT W. SWANSON
ACTING DIRECTOR

Analysis of Enrolled House Bill 5323

Topic:	Definition of Willful and Unfair Conduct
Sponsor:	Representative Huizenga
Co-Sponsors:	Representative Tobocman
Committee:	House Commerce Senate Economic Development, Small Business & Regulatory Reform
Date Introduced:	October 18, 2005
Date Enrolled:	March 2, 2006
Date of Analysis:	Revised March 3, 2006

Position: The Department of Labor & Economic Growth supports the bill.

Problem/Background:

This bill is in response to the case *Franchino v. Franchino*, by the Michigan Court of Appeals decided in 2004. The court concluded that there is not a private cause of action when a shareholder's employment by the corporation is terminated under willfully unfair and oppressive conduct by the majority shareholder, when it does not affect his interest as a shareholder.

Description of Bill:

The bill is intended to give the shareholder a cause of action against the corporation when his employment by the corporation is terminated by willfully unfair and oppressive conduct on behalf of the corporation.

Arguments For:

The Court of Appeals in *Franchino* applied the provision narrowly and ruled that it did not permit termination of employment to be considered as shareholder oppression. The amendment is intended to authorize consideration of employment actions if the actions disproportionately affect shareholder interests, such as through denial of shareholder distributions or a termination of employment to coerce shareholder action.

It expands the rights of the shareholder, as a shareholder. It is trying to protect the minority shareholder from the majority shareholder, where he is an employee of the corporation, from being terminated by the willfully unfair and oppressive conduct of the majority shareholder.

Arguments Against:

This bill does not actually do what it is meant to do. It was meant to solve the situation that was presented in the *Franchino* case where a minority shareholder, who was an employee of the corporation, is terminated. They are trying to provide the shareholder with a cause of action, but the court determined that there was no cause because his interest was not affected "*as a shareholder*." This bill only provides him a cause of action if the willfully unfair and oppressive

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conduct affects his interest as a shareholder. If it does not affect his interest *"as a shareholder"* there will be no cause of action.

Supporters:

Business Law Section of the State Bar of Michigan

Opponents:

The only opposition to any of the bills in this package was to House Bill 5322. The Department of Labor & Economic Growth opposed House Bill 5322, because the problem that the bill was designed to solve had already been addressed in the expedited fee bills.

Other Pertinent Information:

This bill is part of a package of bills (House Bills 5315-23) developed by the Business Law Section of the State Bar of Michigan as part of a regular review of Michigan's corporation laws. These reviews occur roughly at four-year intervals.

Administrative Rules Impact:

There is no administrative rules impact.

Fiscal Impact:

There is no fiscal impact.

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
Randy IRISH, Plaintiff–Appellant,
v.
NATURAL GAS COMPRESSION SYSTEMS, INC., Craig Anderson, William Jenkins, Tracy Larsen, Ian Phair, Mark Ritola, James Sanor, Richard Sheteron, James Stricker, A.J. Yuncker, and Colleen Yuncker, Defendants–Appellees.

Docket No. 266021.
July 18, 2006.

Background: Former shareholder brought action against company and its directors alleging shareholder oppression and breach of contract following a "squeeze-out" merger. Company moved for summary disposition asserting a statute of limitations defense and alleging failure to state a claim. The Circuit Court, Grand Traverse County, granted the motion. Shareholder appealed.

Holdings: The Court of Appeals held that:
(1) former shareholder did not have standing to bring action alleging shareholder oppression;
(2) appraisal was the exclusive remedy available to former shareholder; and
(3) limitations period for claims seeking damages applied.

Affirmed.

West Headnotes

[1] Corporations and Business Organizations 101 ⚷2683

101 Corporations and Business Organizations
101X Mergers, Acquisitions, and Reorganizations
101X(B) Mergers and Consolidations
101k2680 Actions by or Against Surviving Corporation
101k2683 k. Persons entitled to sue; standing. Most Cited Cases
(Formerly 101k584)

Former shareholder of company did not have standing to bring action alleging shareholder oppression against company and its directors following a merger designed to eliminate the former shareholder's shares, where former shareholder did not have shareholder status at the time of the action, as required by statute governing such actions. M.C.L.A. § 450.1489.

[2] Corporations and Business Organizations 101 ⚷2671(2)

101 Corporations and Business Organizations
101X Mergers, Acquisitions, and Reorganizations
101X(B) Mergers and Consolidations
101k2666 Rights and Remedies Of, and Actions By, Dissenting Shareholders
101k2671 Proceedings for Appraisal
101k2671(2) k. Exclusive remedy. Most Cited Cases
(Formerly 101k584)

The exclusive remedy available to former shareholder alleging shareholder oppression against company and its directors following a merger designed to eliminate the former shareholder's shares was to request appraisal as a dissenting shareholder in order to address his claim that he received less than the fair market value for his stock; even though company did not mail shareholder notice of annual meeting concerning the merger vote, the merger was not unlawful or fraudulent as might allow for an alternative remedy. M.C.L.A. § 450.1762(1)(a), (3).

[3] Corporations and Business Organizations 101 ⚷1572

101 Corporations and Business Organizations
101VI Shareholders and Members
101VI(B) Rights and Liabilities as to Corporation and Other Shareholders or Members
101k1568 Actions Between Shareholders or Members and Corporation
101k1572 k. Estoppel, waiver, limitations, and laches. Most Cited Cases
(Formerly 101k189(6))

Limitation of Actions 241 ⚿95(18)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(18) k. Securities; corporations. Most Cited Cases

Three-year limitation period from accrual, or two-year limitation period from discovery, of claims seeking damages for shareholder oppression, rather than six-year limitation period applicable to claims seeking equitable relief, applied to former shareholder's action against company, even though shareholder ostensibly requested equitable relief, where shareholder sought to have company compelled to purchase his shares at fair value, which amounted to a claim for damages. M.C.L.A. §§ 450.1489(1)(f), 600.5813.

Grand Traverse Circuit Court; LC No. 05–024788–CK.

Before: NEFF, P.J., and BANDSTRA and ZAHRA, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 Plaintiff appeals by right from the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(7) (statute of limitations) and (8) (failure to state a claim). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was a founding director and stockholder in Natural Gas Compression Systems, Inc. (Natural Gas Compression) and owned 13.2 percent of its stock. In September 2002, a change in the capital structure of Natural Gas Compression was proposed that involved eliminating plaintiff as a shareholder by means of a "cash out" merger and merging NGCS, Inc., an independent corporation, into Natural Gas Compression. The merger provided that investors who had been terminated as directors or employees, of whom plaintiff appears to be the only one, were ineligible to receive stock in the surviving company and would receive $0.39 for each of their existing shares. This price was calculated as the average of the stock's (1) equity value of $0 per share, (2) price to book value of $1.59 per share, and (3) price to earnings value of $0.22. Non-terminated founding member shareholders received shares in the new corporation. The per-share liquidation preference for the stock in the new company was $14.63, which is the original subscription price paid by outside investors whose shares were converted into priority stock in the resulting corporation.

At the Natural Gas Compression's annual shareholder meeting on September 5, 2002, 84.7 percent of the eligible shares were voted in favor of the merger. Plaintiff claims that he did not receive notice of the meeting until after it occurred so that he was unable to vote his stock against the merger. However, plaintiff's 13.2 percent of the stock would not have altered the approval of the merger because the merger required only a 71 percent affirmative vote.

Under the terms of the merger documents, plaintiff's shares were canceled. On October 21, 2002, Natural Gas Compression mailed a check to plaintiff for his canceled shares based on the per share value of $0.39. On October 29, 2002, plaintiff returned the check, stating that he believed the company's actions were illegal and oppressive, and he intended to find legal representation to protect his rights. Natural Gas Compression sent the check back to plaintiff. Plaintiff's attorney then sent letters to Natural Gas Compression demanding that plaintiff be paid $14.63 per share for his canceled stock.

Natural Gas Compression's financial position improved after plaintiff was "squeezed out". Net profits before taxes for the year ending July 31, 2002, were $24,937. Net profits before taxes for the year ending July 31, 2005, were $3,471,761.

Plaintiff did not contact Natural Gas Compression again until he filed his complaint on August 24, 2005, which was two years and ten months after he rejected the check from Natural Gas Compression and retained counsel. In his complaint, plaintiff alleged a count of shareholder oppression under MCL 450.1489 and a count of breach of contract.

*2 Defendants moved for summary disposition under MCR 2.116(C)(7) (statute of limitations) and MCR 2.116(C)(8) (failure to state a claim of shareholder oppression under MCL 450.1489). At the hearing on defendants' motion, the trial court found that a "squeeze-out" merger is lawful in Michigan, that plaintiff did not show that the merger violated any contractual relations, and that plaintiff's votes were effectively voted against the merger because the merger documents required only affirmative votes to pass. The court concluded that plaintiff had no standing to assert a claim for shareholder oppression under MCL 450.1489 because he was not a current shareholder and that after the merger plaintiff failed to exercise his exclusive appraisal remedy as a dissenting shareholder under MCL 450.1762 and MCL 450.1772. The trial court also concluded that plaintiff's claim was barred by the two-year limitation period under the discovery rule in MCL 450.1489(1)(f) because plaintiff did not sue defendants until August 24, 2005, two years and ten months after he knew, when he returned the check on October 29, 2002, that he had a claim against Natural Gas Compression.

Plaintiff appeals by right claiming that he timely and properly brought his claim under MCL 450.1489. We disagree.

[1] This Court reviews de novo an appeal from an order granting summary disposition. *Bryant v. Oakpointe Villa Nursing Ctr, Inc,* 471 Mich. 411, 419, 684 N.W.2d 864 (2004). The trial court did not err in concluding that plaintiff did not state a claim under MCL 450.1489 because plaintiff is not a shareholder and has no standing under MCL 450.1489 and because plaintiff's exclusive remedy is an appraisal action under MCL 450.1762(3) and MCL 450.1772.

MCL 450.1489(1) provides that "[a] shareholder may bring an action in the circuit court ... to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder." Under MCL 450.1109(1), a "shareholder" is a "person holding units of proprietary interest in a corporation." "Holding" is a present active participle, modifying shareholder and, accordingly, means a current shareholder, i.e., holding the shares in the present. Further, in *Estes v. Idea Engineering & Fabricating, Inc.,* 250 Mich.App. 270, 282, 649 N.W.2d 84 (2002), this Court stated that "plaintiffs in a § 489 suit may only be current shareholders." Because plaintiff's shares were canceled incident to the September 5, 2005 merger, plaintiff ceased being a shareholder and was not a current shareholder when he sued defendants on August 24, 2005. Therefore, plaintiff did not have standing to sue under MCL 450.1489.

[2] Further, plaintiff was limited to an exclusive appraisal remedy for his claim that he received less than fair market value for his stock. Plaintiff had the right to dissent from the corporate merger. MCL 450.1762(1)(a). However, a shareholder's remedy for such a corporate action is limited to dissent and an appraisal. A shareholder may not actually challenge the corporate action, unless the action is unlawful or fraudulent with respect to the shareholder or the corporation. MCL 450.1762(3).

*3 Plaintiff did not show that the merger was unlawful or fraudulent with respect to either the corporation or himself. In support of his claim, plaintiff primarily claims that Natural Gas Compression did not mail him a notice of the annual meeting so that he did not attend and did not vote his shares against the merger. However, even if plaintiff had received notice of the meeting and had voted all of his shares, it would have made no difference because 84 percent of the eligible shares voted for the merger and only 71 percent of the eligible votes were needed for the merger to pass.

[3] Plaintiff also maintains that the trial court erred in finding that he did not timely file his claim because the limitation period in MCL 450.1489(1)(f) applies only to claims for damages, it does not apply to claims for equitable relief requested under MCL 450.1489(a)-(e). We disagree.

Under *Estes, supra* at 272, 286, 649 N.W.2d 84, this Court held that the residual catch-all, six year limitation period in MCL 600.5813 applies to claims under MCL 450.1489. However, in 2001 PA 57, the Legislature added MCL 450.1489(1)(f) that provides a three-year limitation period from accrual and a two-year limitation period from discovery for claims requesting damages. But, as plaintiff argues, the amendment did not specifically address the limitation period for claims seeking equitable relief. Accordingly, the residual six-year limitation period in MCL 600.5813 presumably applies to plaintiff's claim insofar as he requests equitable relief instead of damages. But this does not assist plaintiff.

Plaintiff ostensibly requests equitable relief in his complaint, including the unwinding of the merger and the "uncanceling" of his shares. However, plaintiff actually requests damages because he seeks equitable relief only to compel Natural Gas Compression to purchase his shares at "fair value." Thus, the two-year limitation period under the discovery rule applies. As noted above, plaintiff acknowledged that he had a potential cause of action on October 29, 2002, when he informed Natural Gas Compression that he would retain an attorney. However, plaintiff did not file his complaint until two years and ten months later. Therefore, plaintiff's complaint was untimely, even assuming that plaintiff had standing under MCL 450.1489.

Affirmed.

Mich.App.,2006.
Irish v. Natural Gas Compression Systems, Inc.
Not Reported in N.W.2d, 2006 WL 2000132 (Mich.App.)

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
Stephen D. FORSBERG, Plaintiff-Appellant,
v.
FORSBERG FLOWERS, INC, Lou Ann Balding, and Mark H. Forsberg, Defendants-Appellees.

Docket No. 253762.
Dec. 5, 2006.

Marquette Circuit Court; LC No. 02-039529-NZ.

Before: WHITBECK, C.J., and MURPHY and SMOLENSKI, JJ.

PER CURIAM.

*1 Plaintiff appeals as of right an order granting summary disposition in favor of defendants on his wrongful termination claim, an order denying his request for a jury trial, and an order granting defendants involuntary dismissal on his remaining claims arising under MCL 450.1489. We affirm.

Defendant Forsberg Flowers, Inc. (defendant corporation) is a Michigan close corporation. Plaintiff is a minority shareholder of the business. Defendants Mark Forsberg (defendant Forsberg) and Lou Ann Balding (defendant Balding) (collectively "defendants") are also shareholders. The three are siblings. Though plaintiff's business relationship with defendants has generally been marked by disagreement and discord, this dispute arises most directly out of a shareholders' meeting in which plaintiff was removed from his employment with defendant corporation by defendants.

I

Plaintiff first argues the circuit court erred in dismissing his claim for wrongful termination. We disagree. We review summary disposition rulings de novo. *McClements v. Ford Motor Co,* 473 Mich. 373, 380; 702 NW2d 166 (2005). Review of a motion for summary disposition under MCR 2.116(C)(8) assumes the "factual allegations in the nonmoving party's pleadings are true and ... [assesses whether] there is a legally sufficient basis for the claim." *Salinas v. Genesys Health Sys,* 263 Mich.App 315, 317; 688 NW2d 112 (2004). Our review is limited to the pleadings. *Maiden v. Rozwood,* 461 Mich. 109, 119-120; 597 NW2d 817 (1999).

"Generally, and under Michigan law by presumption, employment relationships are terminable at the will of either party." *Lytle v. Malady (On Rehearing),* 458 Mich. 153, 163; 579 NW2d 906 (1998) (opinion of Weaver, J.). This presumption may be overcome, *Rood v.. Gen Dynamics Corp,* 444 Mich. 107, 117; 507 NW2d 591 (1993), and a plaintiff alleging wrongful discharge may prove the same through one of the following:

> (1) proof of "a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause"; (2) an express agreement, either written or oral, regarding job security that is clear and unequivocal; or (3) a contractual provision, implied at law, where an employer's policies and procedures instill a "legitimate expectation" of job security in the employee. [*Lytle, supra* at 164 (citations omitted).]

A two-step inquiry is utilized to evaluate a "legitimate expectation" claim: "The first step is to decide 'what, if anything, the employer has promised,' and the second requires a determination of whether that promise is 'reasonably capable of instilling a legitimate expectation of just-cause employment....' " *Id.* at 164-165 (citation omitted and alteration in original).

Upon review of his complaint, we conclude that plaintiff has failed to state a claim for wrongful termination cognizable at law. *Salinas, supra* at 317. Plaintiff does not allege either "a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause" or "an express agreement, either written or oral, regarding job security that is clear and unequivocal." *Lytle, supra* at 164. The only reference to any such agreement is plaintiff's claim that he was terminated "in breach of ... [his] employment contract." This allegation, however, does not purport to establish a "just cause" or "definite term" provision, nor does it allege a "clear and unequivocal" agreement. *Id.* Indeed, this statement is nothing more than a conclusory allegation that an employment contract existed, with no reference to its specific terms. And it is well-established that "[c]onclusory statements, unsupported by factual allegations, are insufficient to state a cause of action." *Churella v. Pioneer State Mut. Ins. Co.,* 258 Mich.App 260, 272; 671 NW2d 125 (2003), citing *ETT Ambulance Service Corp. v. Rockford Ambulance, Inc.,* 204 Mich.App 392, 395; 516 NW2d 498 (1994); see also *NuVision, Inc. v. Dunscombe,* 163 Mich.App 674, 681; 415 NW2d 234 (1987).

*2 Plaintiff's wrongful termination claim may be best characterized as a "legitimate expectation" claim because, plaintiff argues on appeal, his status as a shareholder, officer and director of the business afforded him such an expectation. But plaintiff does not allege " 'what, if anything, ... [defendant corporation] has promised,' " nor whether and how any such promises reasonably instilled in him " 'a legitimate expectation of just-cause employment.' " *Lytle, supra* at 164-165. Moreover, plaintiff's status as a shareholder and officer could not, in and of itself, legitimately create such an expectation. See *Franchino v. Franchino,* 263 Mich.App 172, 184; 687 NW2d 620 (2004) (noting that "employment and board membership are not considered shareholder rights"); MCL 450.1535(1) ("An officer elected or appointed by the board may be removed by the board with or without cause. An officer elected by the shareholders may be removed with or without cause, only by a vote of the shareholders...."). Plaintiff thus did not enjoy a legitimate expectation of employment for a definite term or absent just cause.

II

Plaintiff next argues that the circuit court erred in denying his request for a jury trial. We disagree. We review questions of statutory interpretation de novo. *Ayar v. Foodland Distributors,* 472 Mich. 713, 715; 698 NW2d 875 (2005). And whether a party is entitled to a jury trial is a constitutional question we review de novo. *Anzaldua v. Band,* 457 Mich. 530, 533; 578 NW2d 306 (1998).

A statutory cause of action may or may not grant the right to a jury trial, depending on legislative design. See *id.* at 533-550. We must therefore evaluate whether MCL 450.1489 afforded plaintiff a jury trial right.

MCL 450.1489(1) provides as follows:

A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:

(a) The dissolution and liquidation of the assets and business of the corporation.

(b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.

(c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.

(d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.

(e) The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.

*3 (f) An award of damages to the corporation or a shareholder. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Casco Twp v. Secretary of State,* 472 Mich. 566, 571; 701 NW2d 102 (2005). This intent is best discerned from the statutory language. *Neal v. Wilkes,* 470 Mich. 661, 665; 685 NW2d 648 (2004). "Clear and unambiguous statutory language is given its plain meaning, and is enforced as written." *Ayar, supra* at 716.

In *Anzaldua, supra,* our Supreme Court addressed whether a right to a jury trial was guaranteed under sections 3 and 4 of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq. Anzaldua, supra* at 534. Section 3 provides that

(1) A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act.

(2) An action commenced pursuant to subsection (1) may be brought in the circuit court for the county where the alleged violation occurred, the county where the complainant resides, or the county where the person against whom the civil complaint is filed resides or has his or her principal place of business.

(3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney fees. [MCL 15.363.]

Section 4 provides that,

A court, in rendering a judgment in an action brought pursuant to this act, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the court determines that the award is appropriate. [MCL 15.364.]

The Court observed that the WPA did not expressly indicate whether actions under its provisions were to be tried by a judge or jury. *Anzaldua, supra* at 535. In evaluating the relevant provisions, the Court reasoned as follows:

Defendants argue that the Legislature's use of "court" rather than "court or jury" is determinative. We disagree. What is important in understanding the Legislature's intent is not that it used the word "court" instead of "jury," but, rather, what it provided that the "court" should do. The Legislature described the court's role in WPA actions in terms of "rendering a judgment," *not* in terms of "awarding damages." The expressions are not interchangeable; "awarding damages" and "rendering a judgment" have different meanings.

*4 When a court renders a judgment, it is entering an order based on previously decided issues of fact. "Rendering judgment" does not mean the judge is making a determination of the entitlement of a party to an award of actual damages. Instead, it is the procedural step the judge takes after the factfinder has made that determination.

The difference in the terms is made clear by the statute itself. The WPA provides that the court is to "award attorney fees." Deciding the entitlement to an award of attorney fees has traditionally been the job of a judge, not a jury. Because the act provides that the court should award attorney fees, it is clear that the Legislature intended that a judge should decide whether a party is entitled to fees, and in what amount. [*Id.* at 536-537 (emphasis in original).]

By its unambiguous language, we conclude MCL 450.1489 does not provide for a right to a jury trial. It does not direct before whom an action is to be tried. However, it expressly indicates that, when a party establishes grounds for relief, "the circuit court may make an order or grant relief as it considers appropriate." MCL 450.1489(1). This is a directive as to what the court "should do." *Anzaldua, supra* at 536. It does not presume, in contrast to the WPA, that in doing so the court "is entering an order based on previously decided issues of fact." *Id.* Moreover, five of the six enumerated remedies in MCL 450.1489 are equitable in nature. See MCL 450.1489(1)(a)-(e); cf. *Anzaldua, supra* at 541 (discussing legal remedy of money damages). While the court is likewise authorized to award damages, MCL 450.1489(1)(f), "the mere fact that damages are sought is not determinative of the legal or equitable nature of the action, because damages may be recovered in purely equitable proceedings." *Anzaldua v. Band,* 216 Mich.App 561, 576 n 4; 550 NW2d 544 (1996), aff'd 457 Mich. 530 (1998) [hereinafter " *Anzaldua II* "]. Because MCL 450.1489 contemplates that the circuit court fashion an order or grant relief it deems appropriate, a jury trial right is not embodied in the statute.

Although the inclusion of a potential award of damages under MCL 450.1489 could be deemed legal in nature, and thus within the province of a jury, see *Anzaldua, supra* at 541, such a conclusion is not consistent with the history of this statute. As originally enacted, MCL 450.1489 contained the remedies enumerated in its current form, including language expressly authorizing an award of damages. See 1989 PA 121, § 489. The predecessor to MCL 450.1489 was MCL 450.1825. See 1972 PA 284, § 825; see also *Estes v. Idea Engineering & Fabricating, Inc,* 250 Mich.App 270, 284; 649 NW2d 84 (2002). MCL 450.1825 granted circuit courts the power to take the same actions currently stated under MCL 450.1489, except that the courts were not specifically authorized to award damages. Both statutes empowered circuit courts to "make orders" or "grant relief" as appropriate. However, the actions embodied in MCL 450.1825 were traditionally considered to be equitable in nature. See, e.g., *Barnett v. International Tennis Corp,* 80 Mich.App 396, 403-404, 416-417; 263 NW2d 908 (1978). The addition of authority to award damages did not change the character of these actions, given that the other provisions remained substantially the same. Further, nothing surrounding the enactment of MCL 450.1489 suggests that the Legislature intended this authorization to alter the equitable nature of the action.

*5 Having concluded that MCL 450.1489 does not provide for a jury trial right, we must still evaluate whether a jury trial is nonetheless constitutionally required. The Michigan Constitution guarantees that "[t]he right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law." Const 1963, art 1, § 14. This right exists as it has previously become known to the jurisprudence of Michigan. *Phillips v. Mirac, Inc,* 470 Mich. 415, 425; 685 NW2d 174 (2004). That is, to the extent MCL 450.1489 embodies a legal cause of action cognizable at common law, the right of a jury trial is preserved for an action under its terms. And this remains despite the absence of an express grant of a jury trial right under its provisions.

In *Anzaldua II, supra,* this Court addressed this constitutional requirement in the context of the WPA. We held that "the appropriate test for determining whether a right to a jury trial 'remains' is to examine the nature of the action." *Anzaldua II, supra* at 584. This inquiry involves evaluating "whether the cause of action would have been denominated as legal at the time that the 1963 constitution was adopted and, therefore, whether a party bringing the action would have been accorded a right to a jury trial." *Id.* at 565.

Michigan has long recognized "that a court of equity has inherent power to decree the dissolution of a corporation when a case for equitable relief is made out upon traditional equitable principles." *Levant v. Kowal,* 350 Mich. 232, 241; 86 NW2d 336 (1957). Similarly, a court of equity,

> has ample power in other ways [than dissolution] to give relief for substantially all corporate ills. It may require an accounting for misappropriation of funds, secret profits, and the like. It may restrain or compel the corporation and its officers to lawful conduct, and, ordinarily, protect the stockholders in all their rights without dissolution. [*Stott Realty Co v. Orloff,* 262 Mich. 375, 381; 247 NW 698 (1933) (citation omitted).]

See also *Burch v. Norton Hotel Co.,* 261 Mich. 311, 314-315; 246 NW 131 (1933). In such circumstances, courts of equity operated as fact-finders, independent of a jury. See *Holden v. Lashley-Cox Land Co.,* 316 Mich. 478; 25 NW2d 590 (1947); *Turner v. Calumet & Hecla Mining Co.,* 187 Mich. 238, 251; 153 NW 718 (1915); *Miner v. Belle Isle Ice Co.,* 93 Mich. 97; 53 NW 218 (1892).

Although MCL 450.1489 did not exist as a cause of action prior to 1963, its "nature" is similar to a traditional equitable action. It authorizes an action for fraudulent or oppressive conduct visited upon minority shareholders, cf. *Turner, supra* at 240-247; *Miner, supra* at 98-108, and authorizes various equitable remedies in the event of such conduct, Cf. *Turner, supra* at 250; *Miner, supra* at 117-118; see also *Stott Realty Co., supra* at 381. Indeed, we recently recognized that MCL 450.1489 was

> *6 "added to the Michigan statutes to give a statutory cause of action to shareholders who are abused by controlling persons. The claim under section 489 is direct, not derivative. The statutory cause of action is, of course, similar to the common law shareholder equitable action for dissolution, but is independent of that traditionally limited and uncertain cause of action." [*Estes, supra* at 284 (citation omitted).]

Given these similarities, we conclude that an action under MCL 450 .1489 "would have been denominated as" equitable when "the 1963 constitution was adopted." *Anzaldua II, supra* at 565. Hence, the right to a jury trial does not "remain" under the Michigan Constitution for this action. Const 1963, art 1, § 14. Therefore, the trial court did not err when it concluded that plaintiff had no right to a jury trial.

III

Plaintiff next argues that a 2006 amendment to MCL 450.1489(3), see 2006 PA 68, § 489, should be applied retroactively. We disagree.

Whether a statutory amendment should be applied retroactively is a question of statutory construction that this Court reviews de novo. *Frank W. Lynch & Co. v. Flex Technologies, Inc.,* 463 Mich. 578, 583; 624 NW2d 180 (2001). In determining whether a statute should be applied retroactively or prospectively, the primary rule is that legislative intent governs. *Id.* "Amendments of statutes are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent." *Tobin v. Providence Hosp.,* 244 Mich.App 626, 661; 624 NW2d 548 (2001). However, " 'statutes which operate in furtherance of a remedy or mode of procedure and which neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively unless a contrary legislative intent is manifested.' " *Lynch, supra* at 584, quoting *Franks v. White Pine Copper Division,* 422 Mich. 636, 672; 375 NW2d 715 (1985).

At the time of the bench trial, MCL 450.1489(3) defined "willfully unfair and oppressive conduct" to mean "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder." In *Franchino, supra* at 184-186, this Court construed this definition and determined that, because employment and membership on the board of directors were not traditionally considered shareholder rights, termination of a shareholder's employment or membership on the board could not constitute conduct that substantially interfered with the interests of the shareholder as a shareholder. In granting defendants' motion for involuntary dismissal, the trial court relied on *Franchino* for the proposition that plaintiff's termination from employment could not support his claim of shareholder oppression. However, after the June 2005 involuntary dismissal of plaintiff's case, the Legislature amended MCL 450.1489(3) to include the following sentence: "Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder." 2006 PA 68, § 489.

*7 There is no language in 2006 PA 68 that indicates a clear legislative intent to have the act apply retroactively. Hence, there is a presumption that the act operates prospectively only. *Tobin, supra* at 661. Further, because the amendment affects defendants' substantive rights by enlarging the scope of the conduct that constitutes willfully unfair and oppressive conduct, it cannot be applied retroactively as a remedial amendment. *Lynch, supra* at 584-586. Therefore, it only applies prospectively.

IV

Finally, plaintiff argues that the circuit court erred in granting defendants' motion for involuntary dismissal. We disagree. In a bench trial, a defendant may move for involuntary dismissal at the close of the plaintiff's proofs "on the ground that on the facts and the law the plaintiff has shown no right to relief." MCR 2.504(B)(2). "[A] motion for involuntary dismissal calls upon the trial judge to exercise his function as a trier of fact, weigh the evidence, pass upon the credibility of witnesses and select between conflicting inferences." *Marderosian v. The Stroh Brewery Co.,* 123 Mich.App 719, 724; 333 NW2d 341 (1983). The evidence is not viewed in the light most favorable to the plaintiff. *Id.* Our review of an involuntary dismissal is de novo, but the court's findings of fact are reviewed for clear error. *Samuel D. Begola Services, Inc. v. Wild Bros,* 210 Mich.App 636, 639; 534 NW2d 217 (1995).

MCL 450.1489(1) allows a shareholder to "bring an action ... to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder." As it existed during the circumstances of this dispute, MCL 450.1489(3) defined "willfully unfair and oppressive conduct" as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder." See 2001 PA 57, § 489. We conclude that the trial court did not err in concluding that plaintiff failed to establish the requisite misconduct.

Plaintiff presented no evidence that defendants' actions were illegal or fraudulent. The court found, and the record supports, that defendant Forsberg's use of corporate resources did not amount to embezzlement, as various family members enjoyed similar benefits, including plaintiff. At best, plaintiff's evidence related to his claim that defendants' conduct was "willfully unfair and oppressive ." Yet the evidence failed to support such a claim.

Plaintiff was required to demonstrate "a continuing course of conduct or a significant action or series of actions that substantially interfere[d] with" his interests as a shareholder. MCL 450.1489(3). As the trial court found, defendant's actions did not rise to this level. Both defendant Forsberg and plaintiff reaped personal benefits incident to their ownership of defendant corporation, including insurance benefits, corporate vehicles, gasoline, and various other personal expenses. The court found that defendant Forsberg enjoyed more personal benefits, but that this was offset by his financial contributions to defendant corporation. This conclusion is supported by the record, namely that defendant Forsberg loaned thousands of dollars to defendant corporation as circumstances warranted, when "cash flow" problems arose, and then personally assumed the costs associated with these loans. The court determined that the personal benefits enjoyed by the parties and their family were a common occurrence in the operation of defendant corporation, and the record supports this. There is accordingly little reason to suggest that plaintiff's evidence demonstrated willfully unfair and oppressive conduct because defendants' conduct effectively constituted consistently applied corporate policies. Cf. MCL 450.1489(3). Defendants' conduct was not willfully unfair and oppressive toward plaintiff as a shareholder, particularly given that plaintiff enjoyed benefits incident to the conduct he claims was willfully unfair and oppressive.

*8 Though the record supports the court's finding that plaintiff worked longer hours and took fewer vacations than defendant Forsberg, as the court also found, this does not illustrate conduct that substantially interfered with plaintiff's status as a shareholder. MCL 450.1489(3). As an owner of defendant corporation, plaintiff was free to work hours he chose, and he was not at liberty to compel another owner to do the same. The court found that plaintiff was the cause behind defendants' action to suspend his employment. That plaintiff was argumentative, hostile, and volatile in the work environment is evidenced in the record, and the court's determination was not erroneous. Furthermore, despite that it was the genesis of this dispute, plaintiff's removal from his employment was not grounds upon which the court could find he was oppressed as a shareholder. *Franchino, supra* at 186.

Plaintiff presented no evidence that his interests "as a shareholder" were substantially interfered with. *Id.* On the facts and the law, plaintiff was not entitled to relief. MCR 2.504(B)(2). The court's dismissal was proper.

Affirmed.

MURPHY, J. (concurring in part and dissenting in part).

I agree with the majority that the trial court did not err in dismissing the claim for wrongful termination. However, I disagree with the majority's conclusion that the trial court did not err in denying plaintiff's request for a jury trial. I would hold that plaintiff was entitled to a jury trial on his claim for money damages under MCL 450.1489. I further agree with the majority that the trial court did not err in granting defendants' motion for involuntary dismissal, but only to the extent that the dismissal reached plaintiff's claims for equitable relief, not the request for money damages. Finally, I agree with the majority that the 2006 amendment to MCL 450.1489(3) should not be applied retroactively. FN1 Accordingly, I concur in part and dissent in part, and shall address only the jury trial issue.

> FN1. I note that the amendment did not even become effective until after the trial and after the claim of appeal was filed. 2006 PA 68.

My analysis requires interpretation of MCL 450.1489. Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v. Annapolis Hosp,* 471 Mich. 540, 548-549; 685 NW2d 275 (2004). The words contained in a statute provide us with the most reliable evidence of the Legislature's intent. *Id.* at 549. In ascertaining legislative intent, this Court gives effect to every word, phrase, and clause in the statute. *Id.* We must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme. *Id.* This Court must avoid a construction that would render any part of a statute surplusage or nugatory. *Bageris v. Brandon Twp,* 264 Mich.App 156, 162; 691 NW2d 459 (2004). "A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v. Mecosta Co Gen Hosp,* 466 Mich. 57, 63; 642 NW2d 663 (2002).

*9 MCL 450.1489 provides a statutory basis for shareholders such as plaintiff to bring suit with respect to claims of illegal, fraudulent, or willfully unfair and oppressive acts. The statute provides, in pertinent part, as follows:

(1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:

(a) The dissolution and liquidation of the assets and business of the corporation.

(b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.

(c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.

(d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.

(e) The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.

(f) *An award of damages to the corporation or a shareholder.* An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first. [Emphasis added.]

While some of plaintiff's claims were for equitable relief, e.g., demands for repurchase of his shares and dissolution of the corporation, plaintiff also made a claim for money damages based on defendants' alleged willfully unfair and oppressive conduct.

Contrary to the majority's conclusion, I would find that our Supreme Court's decision in *Anzaldua v. Band,* 457 Mich. 530; 578 NW2d 306 (1998), dictates that plaintiff here had a statutory right to a jury trial for his money damages claim arising out of MCL 450.1489(1)(f). The *Anzaldua* Court indicated that a statutory cause of action may or may not provide a right to a jury trial depending on the intent of the Legislature as reflected by the words used in the statute. *Anzaldua, supra* at 533-548. In *Anzaldua,* the Supreme Court held that the Whistleblowers' Protection Act (WPA), MCL 15.361 et seq., and particularly sections 3 and 4 of the act, contains a right to a jury trial. Section 3 provides, in relevant part:

(1) A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act.

* * *

*10 (3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney fees. [MCL 15.363.]

Section 4 provides:

A court, in rendering a judgment in an action brought pursuant to this act, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the court determines that the award is appropriate. [MCL 15.364.]

The *Anzaldua* Court acknowledged that the WPA does not contain an express provision regarding whether an action brought under the act was to be tried by a judge or jury. *Anzaldua, supra* at 535. The Court also noted that the WPA provides several equitable remedies. *Id.* at 537. MCL 450.1489 also contains several equitable remedies. The *Anzaldua* Court, however, also stated that the WPA expressly provides for actual damages, which the Court found to be significant, and which indicated "that the Legislature intended that the damages issue be tried by a jury, upon request." *Anzaldua, supra* at 539. The Court reasoned:

Like Congress, when it adopted the Age Discrimination in Employment Act and included "legal remedies," the Michigan Legislature created a cause of action in the WPA and provided for "actual damages." As far back as 1877, the Court has held that a jury is proper where a statute creates a cause of action for actual damages without specifying before whom the action is to be tried. The Legislature is deemed to be aware of the meaning given to the words it uses, including the jury right that accompanies actual damages. Our holding recognizes that the Legislature imported into the WPA the meaning of actual damages.... We hold that, by including that term, the Legislature intended that the act contain a right to a trial by jury. [*Anzaldua, supra* at 542-543.]

Here, MCL 450.1489(1)(f) provides for "[a]n award of damages." Therefore, consistent with *Anzaldua,* I would conclude that an action brought under MCL 450.1489 entitles a plaintiff to a trial by jury on any claim for money damages if properly and timely requested.

Footnote 6 in *Anzaldua, supra* at 538, discusses equitable and legal issues and situations in which both legal and equitable relief are requested:

[W]e note that, under MCR 2.509(D), the court, on motion or its own initiative, may use a jury in an advisory capacity to try equitable issues. The parties may consent to have a jury decide issues that otherwise are not triable to a jury as a matter of right. Also, under subrule B, if a party has a right to a trial by jury but does not demand it, the court has discretionary authority to order a jury trial anyway.

Moreover, as explained by the Court of Appeals in *Dutka v. Sinai Hosp of Detroit,* 143 Mich.App 170, 173-174; 371 NW2d 901 (1985):

***11** "The parties have a constitutional right in Michigan to have equity claims heard by a judge sitting as a chancellor in equity. If a plaintiff seeks only equitable relief, he has no right to a trial by jury. *However, in this case, the plaintiff sought both equitable relief in the form of specific performance and legal relief in the form of damages. In this situation the plaintiff had a right to have a jury hear his damage claim.*

* * *

These cases, which allow a chancellor to award consequential damages along with equitable relief, do not bar plaintiff's demand for a jury where legal remedies are sought along with equitable relief. *The cases defendant relies on only suggest that in some instances a chancellor may also award money damages in fashioning an appropriate remedy. The cases do not bar a jury trial on legal claims when it has been properly demanded.* [Emphasis added.]"

See also *B & M Die Co. v. Ford Motor Co.,* 167 Mich.App 176; 421 NW2d 620 (1988). [Citations omitted.]

MCL 450.1489 provides for both equitable and legal claims and relief, and plaintiff had a right to a trial by jury with respect to his claim for legal relief, i.e., money damages, while the claims for equitable relief could be decided by the judge. [FN2] It does not matter whether the determination on underlying factual questions, regarding whether there was illegal, fraudulent, or willfully unfair and oppressive conduct, can serve as the basis for either granting or denying *both* the equitable and the legal claims for relief. Indeed, in *Smith v. The Univ of Detroit,* 145 Mich.App 468, 479; 378 NW2d 511 (1985), this Court acknowledged that the consequence of accepting a party's right to a jury trial on an issue that may be dependent on facts that are also considered by a judge on an equitable claim may be "the startling possibility of contradictory findings in the same case on the common issue of fact...." (Emphasis deleted; citations omitted.) The *Smith* panel held:

> FN2. MCL 450.1489(1)(f) clearly distinguishes a claim for money damages and even provides a separate statute of limitations specifically for such claims.

Therefore, in a case such as this where both equitable issues and jury submissible issues coexist, the proper procedure is to hold trial before a jury and follow presentation of evidence with two separate factual determinations; court factfinding on the equitable claims and jury factfinding on the claims of damages. [*Id.* at 479.] [FN3]

> FN3. See also *The Meyer & Anna Prentis Family Foundation, Inc. v. Barbara Ann Karmanos Cancer Institute,* 266 Mich.App 39, 53; 698 NW2d 900 (2005) (appropriate for jury to determine factual issues relative to damages claim and court to determine factual issues relative to equitable claim in the same case).

I would hold that plaintiff was entitled to have a jury render a verdict on his claim for money damages despite the fact that the trial judge would also be examining the factual issues regarding whether there was illegal, fraudulent, or willfully unfair and oppressive conduct when making a ruling on the equitable claims. In light of my view that MCL 450.1489 provided plaintiff with a right to jury trial, it is unnecessary for me to explore any constitutional right to jury trial. See *Anzaldua, supra* at 549.

I respectfully disagree with the majority that language in the WPA distinguishes it from MCL 450.1489 such that the outcome in *Anzaldua* cannot be reached here. As noted above, the WPA provides that "[a] court, in rendering a judgment in an action brought pursuant to this act, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies." MCL 15.364. MCL 450.1489(1) provides that, "[i]f the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following...." Both statutes reference the court ordering relief that the court deems or considers appropriate. Such language did not prevent the Court in *Anzaldua* from finding that a right to jury trial existed. The *Anzaldua* Court did note that the "rendering a judgment" language of the WPA indicated that a judge would be entering an order based on previously decided factual issues and not that the judge would be making a determination on whether to award damages. *Anzaldua, supra* at 536. I do not believe that simply because MCL 450.1489 lacks the "rendering a judgment" language that it is distinguishable.

***12** *Anzaldua* distinguished the WPA's attorney fee provision, finding that there was no right to jury trial on the issue of attorney fees, where the "WPA provides that the court is to 'award attorney fees.' " Anzaldua, supra at 537. The Court had stated that there is a difference between "rendering a judgment" and "awarding damages." *Id.* at 536. MCL 450.1489(1), however, does not directly state that the court is to or may award, among other relief, damages, rather, it provides that a court may "make an order or grant relief ... **providing for**" an award of damages "[i]f the shareholder establishes grounds for relief[.]" (Emphasis added.) This language suggests that the court can enter an order granting or providing for a damage award on the basis of a previous finding that the shareholder established grounds for monetary relief, and not necessarily that the court itself had to render a factual finding on money damages. Further, the trial court's ability to "grant relief" under MCL 450.1489(1) could certainly encompass the rendering of a judgment. I see no reason why the entry of an order under MCL 450.1489 cannot be premised on a jury verdict. Moreover, and importantly, the *Anzaldua* Court noted that attorney fees have traditionally been within the province of a judge and not a jury, and the primary focus and basis of the Supreme Court's ruling that a right to jury trial exists under the WPA was the language providing for a damage award, which is also provided in MCL 450.1489, and which has traditionally been within the province of a jury if demanded. *Anzaldua, supra* at 537-548.

Additionally, the majority's reliance on the history of MCL 450.1489 is unavailing because, as the majority itself concedes, MCL 450.1825, the predecessor of MCL 450.1489, see 1972 PA 284, did not specifically authorize an award of damages.

Finally, my agreement with the majority that the trial court did not err in granting the motion for involuntary dismissal relative to the equitable claims does not negate my position nor mean that a jury could not have found differently on the claim for money damages even though it would have been assessing similar facts and making comparable determinations. See *Smith, supra* at 479. I also disagree with defendants that reversal would be unwarranted because the trial court indicated that it would have granted a directed verdict if a jury trial had been required. First, a motion for a directed verdict requires the court to view the evidence in a light most favorable to the adverse party, and if reasonable persons could reach different conclusions the case is properly left to the jury. *Smith v. Jones,* 246 Mich.App 270, 273; 632 NW2d 509 (2001). The motion for involuntary dismissal under MCR 2.504(B) required the trial court to act as the trier of fact, weigh the evidence, select between conflicting inferences, and reflect on the credibility of the witnesses. *Marderosian v. The Stroh Brewery Co .,* 123 Mich.App 719, 724; 333 NW2d 341 (1983). The evidence is not viewed in a light most favorable to the plaintiff. *Id.* In my opinion, even though I cannot conclude that the trial court clearly erred in its factfinding with regard to the motion for involuntary dismissal relative to equitable relief, *Samuel D. Begola Services, Inc. v. Wild Bros,* 210 Mich.App 636, 639; 534 NW2d 217 (1995), there was sufficient evidence to allow the claim for money damages to go to a jury under the principles regarding motions for directed verdict. Furthermore, I question whether a harmless error analysis is appropriate in the context of a denial of plaintiff's statutory right to a jury trial.

***13** I would affirm in part, reverse in part, and remand for a jury trial on plaintiff's claim for money damages. Accordingly, I respectfully concur in part and dissent in part.

Mich.App.,2006.
Forsberg v. Forsberg Flowers, Inc.
Not Reported in N.W.2d, 2006 WL 3500897 (Mich.App.)

END OF DOCUMENT

BRIAN D. WHITEHORN, Plaintiff, vs. WHITEHORN FARMS, INC., a Montana corporation; EARL G. WHITEHORN; and WAYNE A. WHITEHORN, Defendants. WHITEHORN FARMS, INC., a Montana corporation; EARL G. WHITEHORN; and WAYNE A. WHITEHORN, Counter-Plaintiffs, vs. BRIAN D. WHITEHORN and UNITY WITH GOD CHURCH, Counter-Defendants.

Cause No. DV-03-41

TWELFTH JUDICIAL DISTRICT COURT OF MONTANA, CHOUTEAU COUNTY

2007 Mont. Dist. LEXIS 856

March 30, 2007, Decided

SUBSEQUENT HISTORY: Affirmed by *Whitehorn v. Whitehorn Farms, Inc., 2008 MT 361, 346 Mont. 394, 195 P.3d 836, 2008 Mont. LEXIS 591 (2008)*

PRIOR HISTORY: *Whitehorn v. Whitehorn Farms, 2005 Mont. Dist. LEXIS 1013 (2005)*

JUDGES: [*1] David G. Rice, District Judge.

OPINION BY: David G. Rice

OPINION

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

P1. STATUS OF THE CASE: This matter was heard before the Court sitting without a jury beginning at 9:00 a.m. on December 12, 2005, and concluding on December 13,2005. Ward "Mick" Taleff represented the Plaintiff and Counter Defendants, Brian Whitehorn (Brian) and Unity with God Church. Jean Faure and David Dennis represented the Defendant and Counter Plaintiff, Whitehorn Farms, Inc (Corporation). The Court received testimony from Brian Whitehorn, Earl Whitehorn, Jeff Winter, Wayne Whitehorn, Wendy Whitehorn, Anna Whitehorn, Rick Reisig, David Hodges, Becky Jourdonais, and Vicki Peterson, and received various exhibits into evidence. Brian argues that he is an oppressed minority shareholder and asks the Court to remedy his oppression by requiring a buyout of his shares. The Defendants respond that Brian is not oppressed because his position was caused by his own wrongful acts. They further ask for the return of wrongfully converted corporate assets. The Court allowed the parties to provide amended findings following the hearing. Those were submitted by January 18, 2006. The same parties appeared [*2] before the Court on June 6,2006 (with different counsel for Brian) on Chouteau County Cause No. DV-04-24, and asked the Court to also consider the evidence submitted in this case. That request is part of the reason the Court has delayed issuing this decision.

P2. ISSUES: In its Order of April 13, 2005, the Court directed that all issues relating to whether minority shareholder and marketability discounts apply for purposes of valuing shares of Whitehorn Farms would be determined, if necessary, in a separate hearing. Further, on the first day of trial, the parties stipulated that the only issue to be determined is whether Plaintiff is an oppressed minority shareholder of Whitehorn Farms and entitled to relief under Montana law. The additional issue of whether Brian is indebted to Defendants for conversion of corporation assets was also presented.

P3. Having considered the foregoing, the Court makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

P4. The Court makes the following Findings of Fact by a preponderance of evidence on issues in dispute and on undisputed facts.

P5. 1. Plaintiff Brian Whitehorn is a resident of Cascade County, State of Montana.

P6. [*3] 2. Defendant Whitehorn Farms, Inc. ("Whitehorn Farms") was at all times relevant hereto, a family farming corporation organized and existing under the laws of the State of Montana, with its principal place of business located near Floweree, Chouteau County, Montana.

P7. 3. Whitehorn Farms, Inc. is a corporation engaged in the business of farming. The shareholders of Whitehorn Farms, their share ownership, and voting interest are as follows:

Shareholder	Shares Owned	Life Int.	Remainder Int.	% Voting Int.
Earl Whitehorn	851		29	27.8
Brian Whitehorn	654		65	21.3
Wayne Whitehorn	497	425		30.0
Jacqueline Whitehorn	347			11.3
Stanley Whitehorn	143			4.8
Patsy Whitehorn	143			4.8
Wendy Whitehorn	10		10	0.003
Daniel Whitehorn			208.5	
Eulalie Whitehorn			48.5	
Total	2,645	425	258.04	100.00%

P8. 4. The farmland owned by Whitehorn Farms, near Floweree, Montana, was homesteaded by Chester Whitehorn in the early 1900's. In 1960, his sons, Stanley G. Whitehorn, Wayne A. Whitehorn, and Wallace W. Whitehorn, incorporated Whitehorn Farms for the purpose of conducting farming and ranching operations on the land. Articles of Incorporation of Whitehorn Farms were filed with the Secretary of State for the State of Montana on December 9, 1960.

P9. 5. The Bylaws [*4] of Whitehorn Farms grant to the directors the power "[t]o appoint and remove at pleasure all officers and agents of [Whitehorn Farms]."

P10. 6. Plaintiff and Earl Whitehorn are the sons of Stanley and Patsy Whitehorn. Plaintiff and Earl Whitehorn also have three sisters: Wendy Whitehorn, Becky Jourdonais, and Vicki Peterson.

P11. 7. The Whitehorn farming operation is modest and operates on thin margins. The corporation's net income for the past four years (which can be determined by adding the corporation's depreciation expense [line 20 on page 1 of the corporation's tax returns] to the taxable income or loss [per books] shown on Schedule M-1 on page four of its returns) was as follows" 2004: $ 5,474.00 2003: 2002: $ 3,666.00 2001: $ 12,592.00

P12. The net income of the corporation reflects the amount added to the corporation's bottom-line to be used in making future capital investments or to be used for other contingencies. It has never paid dividends to stockholders. The retained earnings of the corporation represent the running total of the corporation's income or loss per books during the time the corporation has been in existence and does not represent cash presently available [*5] to the corporation.

P13. 8. Whitehorn Farms pays reasonable compensation to its officers and employees. They also receive health insurance, gas, vehicle use, housing, utilities, and groceries. Total compensation of officers and employees for the past four years was as follows: 2004: $ 28,571.00 (Wayne Whitehorn, Earl Whitehorn, Stanley Whitehorn, Josh Whitehorn) 2003: $ 38,975.00 (Wayne Whitehorn, Earl Whitehorn, Stanley Whitehorn) 2002: $ 57,893.00 (Wayne Whitehorn, Earl Whitehorn, Stanley Whitehorn, Brian Whitehorn) 2001: $ 46,092.00 (Wayne Whitehorn, Earl Whitehorn, Stanley Whitehorn, Brian Whitehorn)

P14. 9. Plaintiff lived on the farm until he left for college in 1969. Plaintiff returned to the farm in 1975, where he worked until September of 1980 when he left the farm and accepted fulltime employment with Columbia Grain in Great Falls.

P15. 10. Plaintiff s employment with Columbia Grain ended in 1985.

P16. 11. Immediately following the termination of his employment with Columbia Grain, Plaintiff and Earl Whitehorn formed B & E Farms, Inc. ("B & E Farms"). Plaintiff and Earl Whitehorn operated B & E Farms for fifteen (15) years, from 1985 through 2000. During that period, Plaintiff [*6] was a director and President of the corporation. Plaintiff and Earl Whitehorn were the only shareholders (along with their spouses), directors, and officers of B & E Farms. During the fifteen (15) years that they operated B & E Farms, neither Plaintiff nor Earl Whitehorn was an employee of Whitehorn Farms.

P17. 12. B & E Farms, Inc. was a separate and distinct corporation and business entity from Whitehorn Farms, Inc. The entities had separate Articles of Incorporation and Bylaws. Plaintiffs salary and other compensation was paid by B & E Farms. B & E farmed parcels of land which it leased from third parties. In addition, B & E performed custom contract farming work for Whitehorn Farms.

P18. 13. Following the 2000 crop year, B & E Farms lost its leases on the separate cropland it farmed, reducing its revenue source to only the custom contract work it performed for Whitehorn Farms. As a result, B & E Farms discontinued its operations, eventually merging with Whitehorn Farms in January 2002.

P19. 14. In January of 2001, Plaintiff and Earl Whitehorn accepted employment with Whitehorn Farms. As with most family farm corporations, day-to-day decisions were made informally. Earl, Wayne, [*7] and Plaintiff typically met in the mornings and decided what needed to be accomplished during the day. They also discussed grain marketing and other farm issues. Although Stanley Whitehorn was mostly retired because of his physical limitations, he continued to be involved in important decisions regarding the farm.

P20. 15. When Plaintiff and Earl Whitehorn joined Whitehorn Farms as employees, the corporation agreed to pay each of them a salary of $ 900.00 per month. Plaintiffs job duties included, but were not limited to, marketing and selling grain for Whitehorn Farms. He made grain sales largely without input from others because of his experience.

P21. 16. In addition to their salaries, Plaintiff and Earl Whitehorn, along with Wayne Whitehorn and Stanley Whitehorn, received periodic in-kind distributions of grain. The officers of the corporation - Plaintiff, Earl Whitehorn, Wayne Whitehorn, and Stanley Whitehorn determined the amount and timing of in-kind grain distributions to employees. The officers would meet periodically to determine whether the corporation could afford to distribute grain to employees of the corporation, and if so, the quantity of grain each employee was to [*8] receive. Grain distributions by the corporation were always agreed upon in advance, and were based upon the current financial condition of the corporation. During some years, Whitehorn Farms made no in-kind distributions of grain because the corporation lacked the resources to do so. There was no formal or written policy regarding officer duties or grain distribution.

P22. 17. No officer or employee of Whitehorn Farms had the authority to unilaterally authorize and receive a distribution of grain. No officer or employee of Whitehorn Farms had ever taken a distribution of grain without the prior authorization, knowledge, and consent of the other officers of the corporation. No officer or employee had ever taken, or been authorized to take, an advance on salary. No officer or other employee of the corporation had ever changed, or been authorized to "change", that method of compensation. Brian was the first to do so when he took grain from the corporation and sold it for his own benefit in November 2002. Wayne once gave away rocks that had no value to the corporation and plowed under an area of damaged crop before an insurance adjustment could be done. However, these actions were ratified [*9] as acceptable to the corporation after they occurred.

P23. 18. Between 1985 and 2002, Plaintiff held a number of other jobs outside and independent of his employment with either B & E or Whitehorn Farms. Plaintiff worked as a certified financial planner, a tax return preparer (at H & R Block), an insurance producer at PMI Insurance in Great Falls, Montana, and was an owner and employee of Healthy Home Contracting, Inc. In January of 2003, Plaintiff attended school to become a massage therapist.

P24. 19. Plaintiff told Anna Whitehorn that he planned to "retire by age 50." Plaintiff turned 50 years old on September 3, 2001.

P25. 20. Plaintiff first became a director of Whitehorn Farms in 1991.

P26. 21. Plaintiff first became an officer of Whitehorn Farms in 2001, when he was elected Vice-President of the corporation at the Combined Annual Meeting of Shareholders and Directors held on February 12, 2001. Plaintiff was re-elected to this position the following year at the corporation's Annual Meeting of Shareholders and Directors held on October 1, 2002.

P27. 22. From 1962 to 1990, Whitehorn Farms held annual meetings of shareholders and directors and kept minutes of such meetings. No [*10] minutes exist for any meetings of shareholders and directors from 1991 to 2000. From 2001 forward, Whitehorn Farms has held annual meetings of shareholders and directors and kept minutes of such meetings.

P28. 23. From 1989 through 2000, Plaintiff received the following gifts of shares from Stanley and Patsy Whitehorn: 1989: 52 shares 1991: 30 shares 1992: 38 shares 1993: 38 shares 1996: 38 shares 1997: 38 shares 1998: 38 shares 1999: 38 shares 2000: 38 shares In total, Plaintiff received 348 of his 654 shares of stock in Whitehorn Farms by gift from his parents. 53% of Plaintiffs shares were acquired by gift.

P29. 24. In addition to the shares he received by gift, in 1990 Plaintiff purchased 178 shares from the Estate of Wallace Whitehorn and from Laurel Romine and Carol Coville. This purchase was funded by the proceeds of two life insurance policies on Wallace Whitehorn. The life insurance policies were originally purchased by Whitehorn Farms. Shortly before Wallace's death, the corporation transferred ownership of the policies to Plaintiff and Earl Whitehorn with the intent that the proceeds be used to purchase shares of stock in Whitehorn Farms held by Wallace's estate and his [*11] heirs.

P30. 25. The vast majority of Plaintiffs stock in Whitehorn Farms was acquired by him long before he became an officer and employee of Whitehorn Farms. The only shares of stock Plaintiff received after becoming employed by Whitehorn Farms in 2001 were 27 shares which Plaintiff acquired as a result of the merger of B & E Farms into Whitehorn Farms in 2002.

P31. 26. Prior to Plaintiff s separation from his wife in 2002, Plaintiff, Earl Whitehorn, Stanley Whitehorn, and Wayne Whitehorn all lived in close proximity to one another on property belonging to Whitehorn Farms.

P32. 27. In the late 1990's, Plaintiff and his wife, Jacqueline Whitehorn, decided to construct a residence on land belonging to Whitehorn Farms. Prior to that time, they had lived in Great Falls.

P33. 28. To allow Plaintiff to obtain a loan to finance construction of the residence, Whitehorn Farms deeded to Plaintiff and Jacqueline Whitehorn a four-acre parcel of land near the residences of Earl Whitehorn, Wayne Whitehorn and Stanley Whitehorn. Whitehorn Farms received no consideration from Plaintiff or Jacqueline Whitehorn for the four-acre parcel.

P34. 29. In 1999, Plaintiff proposed to transfer ownership of [*12] the residence and four acres (the "Residence") to Whitehorn Farms, if Whitehorn Farms paid $ 60,000.00 toward Plaintiffs construction loan. Whitehorn Farms agreed, and issued a corporate check for $ 60,000.00 to Norwest Bank as payment on Plaintiff s construction loan.

P35. 30. Following Whitehorn Farms' payment of $ 60,000.00 to Norwest Bank, Plaintiff and Whitehorn Farms treated the Residence as property belonging to Whitehorn Farms. Whitehorn Farms paid all expenses associated with the Residence, including property taxes, utilities and insurance, and provided for maintenance and upkeep of the Residence.

P36. 31. In addition, ownership of the Residence by Whitehorn Farms allowed Plaintiff to take advantage of the corporation's paying for his groceries and other personal expenses while he was residing on corporate property.

P37. 32. Although Whitehorn Farms made the agreed $ 60,000.00 payment to Norwest Bank on Plaintiff's construction lien, Plaintiff did not execute a deed for the agreed transfer of the Residence to Whitehorn Farms. The corporation's attorney did not present a deed for Brian to sign, so he knew that needed to be done to transfer the ownership.

P38. 33. During the [*13] 2001 Combined Annual Meeting of Shareholders and Board of Directors of Whitehorn Farms, held on February 12, 2001, Plaintiff represented to the officers, directors and shareholders of Whitehorn Farms that the Residence belonged to Whitehorn Farms. He further represented that his wife, Jacqueline Whitehorn, had contributed $ 100,000.00 of proceeds she received from the sale of her personal home toward the construction of the Residence. Plaintiff then proposed that Jacqueline Whitehorn be compensated for her investment in the Residence, and stated that Jacqueline would be willing to accept 200 shares of stock in Whitehorn Farms as fair compensation for her investment in the Residence.

P39. 34. Based upon Plaintiff s representations, the Board of Directors of Whitehorn Farms passed the following resolution: RESOLVED, that, in consideration of the contribution of $ 100,000.00 from the equity of her home, this corporation shall issue Jacqueline Whitehorn 200 shares of the stock of this corporation and the officers shall cause the stock to be issued to her forthwith.

P40. 35. Well before October 2002, Plaintiff moved out of the residence because he and his wife, Jacqueline Whitehorn were [*14] having marital difficulties. 36. Sometime prior to October 1, 2002, Plaintiff was aware that he and Jacqueline Whitehorn had not deeded ownership of the Residence to Whitehorn Farms.

P42. 37. On October 1, 2002, Whitehorn Farms, Inc. held a combined Annual Meeting of Shareholders and Directors of Whitehorn Farms. Brian and Jacqueline were in attendance. Whitehorn Farms issued stock certificate no. 141 to Jacqueline Whitehorn for 200 shares of stock in Whitehorn Farms, pursuant to the Resolution passed at the 2001 Annual Meeting of Shareholders and Directors. The shares were issued based on representations made by Plaintiff that ownership of the Residence had been deeded to Whitehorn Farms.

P43. 38. Ignoring his fiduciary obligations as a shareholder, officer and director, Plaintiff failed to advise Whitehorn Farms of the fact that the Residence had not been transferred to the corporation, despite his opportunity to do so prior to issuance of the 200 shares to Jacqueline Whitehorn. Plaintiff remained silent while Whitehorn Farms issued 200 shares to Jacqueline Whitehorn, based upon the corporation's erroneous belief that the corporation owned the Residence.

P44. 39. Moments after the [*15] President and Secretary of Whitehorn Farms signed stock certificate no. 141 for 200 shares in favor of Jacqueline Whitehorn, she announced to the shareholders and directors of Whitehorn Farms that the Residence had not been deeded to Whitehorn Farms. In addition, immediately following Jacqueline Whitehorn's disclosure, Brian Whitehorn presented a proposal for Whitehorn Farms to purchase all of Jacqueline Whitehorn's 347 shares of the Corporation, including the 200 shares issued to Jacqueline on the basis of Plaintiffs representations that Whitehorn Farms owned the Residence. The directors declined to take action on Plaintiff s proposal.

P45. 40. Plaintiff had an obligation to transfer ownership of the Residence to the Corporation. Rather than fulfill this obligation to Whitehorn Farms, nine days later, on October 10, 2002, Plaintiff executed a quit claim deed, transferring his interest in the Residence to Jacqueline Whitehorn, as part of their marital settlement agreement.

P46. 41. On September 26, 2002, Plaintiff filed Articles of Incorporation with the Nevada Secretary of State, forming the "Unity With God Society", a Nevada "Corporation Sole."

P47. 42. Plaintiff is the only person [*16] authorized to act on behalf of the Corporation Sole. Plaintiff asked Earl Whitehorn to witness Plaintiff's signature on the documents. Earl Whitehorn accommodated Plaintiff's request as demonstrated by the designation of Earl Whitehorn as a "scribe" in the Corporation Sole documents. Earl did nothing more than that with the corporation.

P48. 43. Although Plaintiff claims he formed the Unity with God Society because he could not find a church at which to worship, the church in reality was used to shield his assets from a judgment creditor.

P49. 44. Shortly after forming the Unity with God Society, Plaintiff requested Earl Whitehorn, President and Treasurer of Whitehorn Farms, to issue his monthly wage checks to the Unity with God Society. Plaintiff's reason for doing so was to protect his income from a judgment against him which resulted from his financial planning business.

P50. 45. Earl Whitehorn discussed the request with Whitehorn Farms' accountant, Rick Reisig. Plaintiff also discussed the issue with Rick Reisig. Mr. Reisig advised Earl Whitehorn that Whitehorn Farms could not pay Plaintiff s compensation directly to his corporation sole. Based upon advice received from Mr. Reisig, **[*17]** Earl Whitehorn declined Plaintiff s request. Brian took no further action with the corporation on this issue.

P51. 46. In late October of 2002, the officers of the Whitehorn Farms - Earl Whitehorn, Wayne Whitehorn, Stanley Whitehorn, and Plaintiff- met to discuss whether to take in-kind distributions of grain. After discussion, the officers agreed that the corporation could afford to pay each officer an in-kind distribution of 2,500 bushels of grain.

P52. 47. On October 28, 2002, Plaintiff delivered three truck loads of grain belonging to Whitehorn Farms, totaling 2,997.93 bushels, to Cereal Food Processors, Inc. ("CFP") in Great Falls, Montana. The load was 497.93 bushels more than the agreed upon in-kind grain distribution, and Brian directed CFP to credit the grain to the account of the "Unity with God Church."

P53. 48. Plaintiff could have sold his 2,500 bushel distribution to CFP on a "cash" basis, received payment for his 2,500 bushels that day, and had the remainder of the delivery credited to Whitehorn Farms' account. In fact, all of Whitehorn Farms' previous sales to CFP had been conducted on a cash basis. Instead, Plaintiff decided to sell the grain pursuant to a "basis" **[*18]** (futures) contract. Because CFP rarely dealt in basis contracts, they requested Plaintiff to execute a contract for 5000 bushels, because "basis" contracts are traded in 5000 bushel lots on the commodities exchange. Although CFP requested that the contract be for 5,000 bushels, the contract could have been filled with 2,500 bushels of grain credited to Whitehorn Farms' account and 2,500 bushels of grain credited to the "Unity with God Church" account.

P54. 49. On November 4, 2002, Plaintiff made two additional deliveries of Whitehorn Farms' grain, totaling 2,119.15 bushels, to CFP. Plaintiff could have delivered the additional grain for Whitehorn Farms' account, and combined the accounts to fill the 5,000 bushel contract requirement. Instead, Plaintiff directed that the November 4, 2002, delivery also be credited to the account of the Unity with God Church.

P55. 50. In total, Plaintiff contracted to sell, and delivered, 5,117.08 bushels of Whitehorn Farms' grain to CFP for the account of Unity with God Church. This amount exceeded the distribution of grain Plaintiff was authorized to receive by 2,617.08 bushels.

P56. 51. Plaintiff locked-in the price on the basis contract on November **[*19]** 27, 2002, and a check for the proceeds of the sale was issued five days later. On December 2, 2002, at Plaintiffs direction, CFP issued check number 414809, in the amount $ 22,280.47, to Unity with God Church as payment for the entire 5,117.08 bushels. On the following day, December 3, 2002, Plaintiff deposited check number 414809 from CFP in the amount of $ 22,280.47 to an account with Stockman Bank in the name of the "Unity with God Society."

P57. 52. Plaintiff first considered taking the entire 5,117 bushels for his own benefit on the name of the Unity with God Church on November 4, 2002 -the date he delivered the fourth and fifth loads of grain to CFP.

P58. 53. Twenty-eight days passed from the date Plaintiff first considered appropriating the entire 5,117 bushels for his own benefit to the date Plaintiff directed that a check be issued to his church for the entire 5,117 bushels. During these 28 days, Plaintiff had every opportunity to request permission from the officers of Whitehorn Farms to receive an additional distribution of grain. However, he never requested authorization to take an additional grain distribution, an advance on his salary, or a different method of compensation. **[*20]**

P59. 54. Wayne Whitehorn was present on the farm during this period, but Plaintiff did not speak to him.

Plaintiff did not seek permission from Wayne to receive an extra distribution of grain. Even though Wayne helped load the grain, he was not aware that Brian was taking the grain as an advance on his wages for 2003. In fact, Plaintiff did not seek permission from any officer or director of Whitehorn Farms to take a grain distribution in excess of the 2,500 bushels approved by the officers of Whitehorn Farms.

P60. 55. Plaintiff admitted that he did not make the request because he knew it would be denied. During Whitehorn Farms' 2003 annual shareholders meeting, Plaintiff stated he "did not feel Earl would be receptive if he were to ask for permission to sell some extra grain and treat it as an advance on his wages for 2003."

P61. 56. In December 2002, just after taking an unauthorized 2,617 bushels of grain, Plaintiff admitted to his sister, Becky Jourdonais, that he did not ask permission to keep the proceeds from the sale because he "needed the money" and he could not take the risk that the corporation would deny his request. Plaintiff further admitted to Becky that even if the **[*21]** corporation had denied his request to keep the additional $ 11,567.14 in sale proceeds to which he was not entitled, he would have kept the proceeds anyway.

P62. 57. Plaintiffs improper motives are also apparent from his actions immediately following his delivery of the grain. After Plaintiffs November 4; 2002, grain deliveries to CFP, Plaintiff did not promptly deliver the scale tickets to the President of Whitehorn Farms, Earl Whitehorn. Customarily, scale tickets were provided to Earl Whitehorn within a day or two of a grain delivery. Earl Whitehorn made several unsuccessful requests to Plaintiff to deliver the scale tickets for the October 27, 2002, and November 4, 2002, deliveries. However, it was not until a month later, after the contract had been priced, and the check issued to the "Unity with God Church", that Plaintiff finally left the scale tickets in the Whitehorn Farms' shop for Earl Whitehorn.

P63. 58. When Earl Whitehorn discovered that Plaintiff had delivered 5,117 bushels of grain, and had done so in the name of Unity with God Church, he became concerned and made a trip to CFP in Great Falls to check on the status of the grain. At that time, Earl Whitehorn discovered **[*22]** that CFP, on Plaintiffs instruction, had already issued a check to Unity with God Church for the entire 5,117 bushels. When he returned to the farm, Earl Whitehorn discussed the matter with Wayne Whitehorn and Stanley Whitehorn. Earl Whitehorn did not immediately discuss the sale with Plaintiff, because Plainitff had moved off the farm to live in Great Falls, he was not around the farm, and Earl did not have his address or telephone number.

P64. 59. A few days later, Plaintiff visited the farm and Plaintiff and Earl Whitehorn discussed the grain sale. The discussion was heated, and Earl Whitehorn clearly expressed his disapproval of Plaintiff s actions, characterizing Plaintiff s unauthorized retention of the $ 11,567.14 in sale proceeds as embezzlement. Earl Whitehorn then advised Plaintiff that Plaintiff needed to discuss his actions with Wayne Whitehorn. Plaintiff never did so, despite the fact that Wayne was at his home, just a few hundred feet away, at the time.

P65. 60. Despite the fact that Earl Whitehorn, the President of the Corporation, had expressed grave concerns about Plaintiffs actions, and had advised Plaintiff that he considered his actions to constitute embezzlement, **[*23]** Plaintiff made no further effort to discuss the matter with either Earl Whitehorn, or any other officer or director of the Corporation.

P66. 61. Plaintiff left a handwritten note in the Whitehorn Farms' shop, apparently intended to explain his misappropriation of 2,617.08 bushels of grain belonging to Whitehorn Farms. The note advised as follows: 1) I sold my 2500 bu as we agreed would be our grain in kind (delivered 3 loads). 2) CFP asked to do basis contracts in 5000 bu lots (this was their first) so I delivered 2 more loads. 3) Earl denied my request to have my monthly checks written to my [Corporation Sole]Rick [Riesig] said it was legal. 4) I then decided I would take all my income as [grain in kind] instead of any monthly checks-this saves the farm corp. over $ 800/yr in FICA taxes. Because of the nature of grain sales, this gave me Nov., Dec. income, plus the equivalent of 10 months of next years salary in one lump sum. 5) Questions?

P67. 62. Some time after their meeting in early December 2002, Earl Whitehorn found Plaintiffs note in the Whitehorn Farms' shop. Earl Whitehorn reviewed the note, and shared the note with the other officers, directors and shareholders of Whitehorn **[*24]** Farms. As Plaintiff did not have authorization to receive grain from the corporation in excess of2,500 bushels, the directors and shareholders of the corporation viewed Plaintiff s appropriation and sale of the excess 2,617.08 bushels as a theft and conversion of corporate property. The corporation has treated the grain sale as a loan. Brian has not received credit against it for his wages due from October 2002 to March 2003.

P68. 63. On December 10, 2002, Plaintiff withdrew all the funds, totaling $ 1574.40, from a bank account held by Healthy Homes, Inc., a closely-held Montana corporation of which Plaintiff and Earl Whitehorn were shareholders. Plaintiff appropriated the corporate funds to himself without the authorization, consent from or even knowledge of any of the other officers, directors, or shareholders of Healthy Home Contracting, Inc.

P69. 64. In mid-December, 2002, Plaintiff left Montana. He told family members he was going to take a winter vacation in Oregon, go to California for a massage therapy class, and do a walk-about in Arizona. Plaintiff performed no work or services for Whitehorn Farms after he left the state in December 2002, and received no compensation from [*25] the corporation for monthly wages after September 2002.

P70. 65. In January, 2003, Earl Whitehorn, as President and Treasurer of Whitehorn Farms, discovered that Plaintiff opened an unauthorized account in the name of Whitehorn Farms at The Root and the Leaf in Great Falls, Montana, and charged a number of personal items to the corporate account.

P71. 66. Plaintiff s misappropriation of grain, combined with Plaintiff's actions relating to the Residence and his other actions in late 2002, created a great deal of concern among the officers, directors, and shareholders of Whitehorn Farms. These concerns were discussed informally among the officers and shareholders of Whitehorn Farms during December, 2002, and January, 2003.

P72. 67. After several weeks of discussion, the shareholders and directors of Whitehorn Farms held a special meeting during which Plaintiff was removed as a director, officer, and employee of the corporation. At the special meeting, held on February 17, 2003, the shareholders and directors of Whitehorn Farms were not merely concerned with the damage Plaintiff had already had caused to the corporation. They believed that Plaintiff could not be trusted, and as an officer, [*26] director, and employee of the corporation, Plaintiff was in a position to cause further harm.

P73. 68. Wayne Whitehorn felt that Plaintiffs actions with respect to the Residence were "intolerable" and that Plaintiff s misappropriation of grain proceeds was the "final straw in a series of incidents that proved we had an employee that would steal from the corporation." Wayne Whitehorn believed that the directors had no reasonable option but to terminate an employee who had demonstrated a willingness to steal from the corporation.

P74. 69. Wendy Whitehorn was similarly influenced by the series of acts through which Plaintiff had harmed the corporation. Plaintiff s actions with respect to the Residence, the opening of an unauthorized personal account in the name of the corporation, and finally, Plaintiffs outright theft of grain from the corporation "showed a pattern of behavior and attitude" that proved to her that Plaintiff could not be trusted as a director, officer, or employee of the company.

P75. 70. Earl Whitehorn held a similar opinion. Plaintiff s failure to transfer the residence to the corporation, his subsequent conveyance of his interest in the residence to Jacqueline Whitehorn [*27] in their October 2002 divorce settlement, his misappropriation of grain in November and December of 2002, and the emptying of the Healthy Homes, Inc., bank account in midDecember 2002, led Earl Whitehorn to conclude that Plaintiff could not be trusted as a director, officer or employee of Whitehorn Farms.

P76. 71. The February 17, 2003, special meeting was properly noticed, in compliance with the corporation's bylaws. On February 7, 2003, Whitehorn Farms issued a Notice of Special Meeting of Shareholders and Board of Directors of Whitehorn Farms, Inc. The meeting date was scheduled for February 17, 2003. The notice was mailed to all shareholders and directors 10 days prior to the date of the Special Shareholders and Directors Meeting, in compliance with the corporation's bylaws. The Notice stated that one of the purposes of the special meeting was to "consider and vote on the removal of Brian D. Whitehorn as a director and officer of the Corporation and the termination of Brian D. Whitehorn's employment by the Corporation."

P77. 72. At the time the Notice was mailed, Plaintiff had not been in contact with any officer or director of Whitehorn Farms for several weeks. When he left Montana, [*28] Plaintiff did not provide any of the shareholders, directors, or officers of Whitehorn farms with an address or telephone number where he could be reached.

P78. 73. In a good faith effort to give Plaintiff actual notice of the Special Meeting and an opportunity to respond, Whitehorn Farms mailed notice of the meeting to Plaintiffs last known address, 500 Whitehorn Lane, Floweree, MT 59440 and also mailed notice to Tana Anderson in Great Falls, Montana, whom the directors and officers of the corporation believed was in periodic contact with Plaintiff.

P79. 74. Plaintiff received actual notice of the meeting (before it occurred), by telephone, from Tana Anderson, and knew that the purpose of the meeting was to consider whether to terminate him as a director, officer and employee of Whitehorn Farms.

P80. 75. Although Plaintiff claims that his reaction to the notice was "utter shock and disbelief," his actions reflect otherwise. After receiving notice of the Special Meeting, Plaintiff made no attempt to attend the Special Meeting. Nor did Plaintiff contact any director or officer of Whitehorn Farms to offer an additional or different explanation for his actions, to advise the corporation [*29] whether he would be able to attend the Special Meeting, or to request that the Special Meeting be postponed until his return. Plaintiff did contact his mother, Patsy Whitehorn, following his receipt of the notice, and thus, had the means to contact the officers and directors of Whitehorn Farms if he so desired.

P81. 76. On February 17, 2003, the Special Meeting was held, as scheduled, at 9:00 a.m. at the offices of Church, Harris, Johnson & Williams, P.C. in Great Falls, Montana. Shareholders present at the meeting included Earl G. Whitehorn, Wayne A. Whitehorn (individually and as owner of a life estate in shares in which Daniel Joseph Whitehorn, Brian D. Whitehorn, Whitehorn Farms, Inc., Eulalie N. Whitehorn, Earl G. Whitehorn, and Wendy Whitehorn own various remainder interests), Stanley G. Whitehorn, Patsy Whitehorn, and Wendy Whitehorn. Only two shareholders, Brian Whitehorn and Jacqueline J. Whitehorn, were absent from the meeting. In addition, three of the four directors were present: Earl Whitehorn, Wayne Whitehorn and Stanley Whitehorn. Plaintiff was the only director not in attendance.

P82. 77. At the Special Meeting, the directors and shareholders concluded that it was [*30] necessary to remove Plaintiff as an officer and director of Whitehorn Farms and to terminate his employment with Whitehorn Farms, in order to protect the corporation and prevent further harm to Whitehorn Farms. At the Special Meeting, the shareholders of Whitehorn Farms voted unanimously to remove Plaintiff as a director of the corporation, and elected Wendy Whitehorn as his successor. The directors voted unanimously to remove Plaintiff as Vice-President of the corporation and elected Wendy Whitehorn as his successor. Finally, the directors voted unanimously to terminate Plaintiff's employment with Whitehorn Farms.

P83. 78. Following the Special Meeting, Plaintiff was notified of his removal as a director, officer and employee of Whitehorn Farms by letter.

P84. 79. Plaintiff returned to the state of Montana in late February of 2003. Plaintiff had been absent from the state for approximately two and a half months. Although, in earlier years, Plaintiff had taken some time off during the winter months, he never before had been absent for this length of time.

P85. 80. Upon his return Plaintiff made no attempt to contact Earl Whitehorn or Wayne Whitehorn, or any other officer or director [*31] of Whitehorn Farms, to request to have his employment reinstated, to contest his removal, or to offer any additional or different explanation Rather, in early April 2003, Plaintiff demanded that the corporation purchase his shares.

P86. 81. Plaintiff attended and actively participated in the Annual Meeting of Shareholders of Whitehorn Farms held on January 27, 2004. Prior to voting on directors, Plaintiff was advised of his ability to cumulate his votes and vote for any candidate he chose. Plaintiff inquired as to who the current directors were, and after being advised that the current directors were Earl G. Whitehorn, Wayne A. Whitehorn, Stanley G. Whitehorn and Wendy Whitehorn, Plaintiff nominated and moved to re-elect those individuals as directors. Plaintiff made no effort to nominate or have himself elected to the board of directors, even though Plaintiff could have done so by cumulating his votes.

PRINCIPLES OF LAW

P87. The following principles of law are applicable to resolution of this case:

P88. 1. The Court has jurisdiction over the parties and this controversy.

P89. 2. Montana's shareholder oppression statutes are codified at *Mont. Code Ann. §§ 35-1-938* and *939* (2005) which [*32] provide, in relevant part, as follows: *35-1-938*. Grounds for judicial dissolution. The district court may dissolve a corporation: ... (2) in a proceeding by a shareholder if it is established that: (b) the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent; (emphasis added) *35-1-939*. Discretion of court to grant relief other than dissolution. (l) In any action filed by a shareholder or director to dissolve the corporation on the grounds enumerated in *35-1-938*, the court may make any order to grant the relief other than dissolution as, in its discretion, it considers, appropriate, without limitation, and order: (a) canceling or altering any provision contained in the articles of incorporation, in any amendment of the articles of incorporation, or in the bylaws of the corporation; (b) canceling, altering, or enjoining any resolution or other act of the corporation; (c) directing or prohibiting any act of the corporation or of shareholders, directors, officers, or other persons party to the action; or (d) providing for the purchase at fair value of shares of any shareholder, either by the corporation [*33] or by other shareholders. (2) Relief under subsection (1) may be granted as an alternative to a decree of dissolution or may be granted whenever, under the circumstances of the case, relief but not dissolution would be appropriate.

P90. 3. Oppression under *§ 35-1-938 (2)(b), MCA*, has been defined by prior decisions. Oppressive conduct is generally defined under 3 factors: a. Harsh, dishonest or wrongful conduct and a visible departure from the standards of fair dealing which inure to the benefit of the majority and the detriment of the minority. (citations omitted) b. Violation of the fiduciary duty of good faith and fair dealing owed by the majority of shareholders to the minority. (citations omitted) c. Failure to consider the reasonable expectations of the minority shareholders in light of the particular circumstances of each case. (citations omitted) *Fox v. 7L Bar Ranch Company, 198 Mont. 201, 209-210, 645 P.2d 929 (1982)*.

P91. 4. A shareholder oppression action is an equitable proceeding (decided on a case by-case basis) in which "[r]elief will be granted when, in view of all the circumstances, to deny it would permit one of the parties to suffer a gross wrong at the hands of [*34] the other party who brought about the condition." *Skierka v. Skierka Brothers, Inc., 192 Mont. 505, 519-520, 629 P.2d 214,221-222 (1981)*. No evidence of illegal or fraudulent acts by the majority against the minority have been plead or shown in this case.

P92. 5. Shareholders in a closely-held corporation have a duty to act in the "utmost good faith and loyalty" to one another. Controlling shareholders are not to be stymied by a minority shareholder's grievances, provided the controlling shareholders can demonstrate a legitimate business purpose and the minority shareholder cannot demonstrate a less harmful alternative. *Daniels v. Thomas, Dean & Hoskins, Inc., 246 Mont. 125, 137-138,804 P.2d 359, 366 (1990)* (citing *Donahue v. Rodd Electrotype Co., 367 Mass. 578, 328 N.E.2d 505 (Mass. 1975))*. This duty of utmost good faith and loyalty flows both ways among shareholders. It applies not only to majority shareholders, but also to a minority shareholder who has the power to do damage to the corporation. *Sletteland v. Roberts, 2000 MT 382, 304 Mont. 21, 29, 16 P.3d 1062, 1067 (2000)*; see also, *Gimpel v. Bolstein, 125 Misc. 2d 45, 477 N.Y.S.2d 1014, 1019 (N.Y. Sup. 1984)*.

P93. 6. In addition to the fiduciary duties [*35] as a shareholder, one is held to the fiduciary standards of both directors and officers set forth in *Mont. Code Ann. §§ 35-1-418* and *443*, respectively. Both statutes require that directors and officers discharge their duties: "(a) in good faith; (b) with the care an ordinarily prudent person in a similar position would exercise under similar circumstances; and (c) in a manner the director [or officer] reasonably believes to be in the best interests of the corporation."

P94. 7. Directors and officers of a corporation have a duty of loyalty to "act solely for the benefit of the corporation in all matters that come before them." See Steven C. Bohls, Montana's New Business Corporation Act, 53 Mont. Law Review I, 14 (1992). The duty of loyalty to a corporation encompasses at least five sub-duties, including the duty not to "unduly profit individually" or through a related party from a transaction with the corporation, and the duty to use corporate property, material, and corporate position only for the benefit of the corporation. Montana's New Business Corporation Act, 53 Mont. Law Review at pp.14-15.

P95. 8. Conversion [1] of corporate property is a clear violation of a fiduciary duty as [*36] a shareholder, director, and officer. *Trifad Entertainment, Inc. v. Anderson, 2001 MT 227, 306 Mont 499, 36 P.3d 363, 371 (2001)*. Damages for conversion include the value of the property when taken with interest. *§27-1-320 (1), MCA.*

> 1 A claim for conversion must satisfy the following elements: ownership of property, a right of possession, unauthorized dominion over that property by another, and resulting damages. *Eatinger v. Johnson, 269 Mont 99, 104, 887 P.2d 231, 234 (1994)*. Further, there must be a transfer of ownership for a claim of conversion to exist. *Farmers State Bank of Victor v. Imperial Cattle Co., 218 Mont. 89, 96, 708 P.2d 223, 227(1985).* Cited in *Trifad at P 38.*

P96. 9. The Montana Supreme Court has also analyzed oppression in terms of "the reasonable expectations of the minority shareholders. "Because of the special circumstances underlying closely held corporations, courts must determine the expectations of the shareholders concerning their respective roles in corporate affairs. These expectations must be gleaned from the evidence presented. *Exadaktilos, 167 N.J. Super. 141,400 A.2d 554, 561 (1979)" Fox at 210.* When examining the "reasonable expectations" of shareholders, courts [*37] have focused on expectations that are "held by minority shareholders in committing their capital to the particular enterprise" and are "central to [a shareholder's] decision to join the venture." *Kemp v. Beatley, Inc., 64 N.Y.2d 63, 473 N.E.2d 1173, 1179, 484 N.Y.S.2d 799 (N.Y. 1984)*. See also, *Balvik v. Sylvester, 411 N.W.2d 383, 387 (N.D. 1987)* (courts look to the 'reasonable expectations' held by the minority shareholders in committing their capital and labor to the particular enterprise), and *Davis v. Sheerin, 754 S.W.2d 375, 381 (Tex.App. 1988)* ("[O]ppression should be deemed to arise only when the majority's conduct substantially defeats the expectations that objectively viewed were both reasonable under the circumstances and were central to the minority shareholder's decision to join the venture.")

P97. 10. As the court stated in *Gimpel v. Bolstein, 125 Misc. 2d 45, 477 N.Y.S.2d 1014, 1019 (N.Y. Sup. 1984)*, the "reasonable expectations" test is inapplicable where the shareholder claiming oppression is a second or third generation owner, who acquired shares by bequest or gift and thus did not choose his .fellow business associates. The "original participants in a close corporation enter into their agreement on the basis of [*38] the assessments of each other's talents, assets, intentions and characters and their agreement must, therefore, be regarded as personal in nature." Id. Unless the original shareholders "manifest some unmistakable expression of their intent to the contrary, the agreement will not 'run' with the shares." Id.

P98. 11. "A court should give relief, dissolution or some other remedy to a minority shareholder whenever corporate managers or controlling shareholders act in a way that disappoints the minority shareholder's reasonable expectations, even though the acts of the managers or controlling shareholders fall within the literal scope of powers granted them by the corporation act or the corporation's charter or bylaws. The reasonable expectations of the shareholders, as they exist at the inception of the enterprise, and as they develop thereafter through a course of dealing concurred in by all of them, is perhaps the most reliable guide to a just solution of dispute among shareholders, at least a dispute among shareholders in the typical close corporation. In a close corporation, the corporation's charter and bylaws almost never reflect the full business bargain of the participants." O'Neal, [*39] Close Corporations: Existing Legislation and Recommended Reform, 33 Bus. Law 873, 886 (1978).

P99. 12. "Specifically, Meisleman outlines a four-step requirement for relief under the reasonable expectations analysis. First, the complaining shareholder must prove he had one or more substantial reasonable expectations that were known or assumed by the other shareholders. (citation omitted) Examples of such expectations might be ongoing participation in the management of the company or secure employment with the company. (citation omitted) Second, he must demonstrate that the expectation or expectations have been frustrated. (citation omitted) Next, the complaining shareholder must show that this frustration of expectations was not the product of his own fault and was largely beyond his control. (citation omitted) Finally, he must show that the specific circumstances warrant some form of equitable relief" *Royals v. Piedmont Elec. Repair Co., 137 N.C. App. 700, 704, 529 S.E. 2d 515 (2000)*, citing *Meiselman v. Meiselman, 309 N.C. 279, 301, 307 S.E.2d 551 (1983)*. "In order for the fault of a complaining shareholder to be a bar to judicial dissolution of a closely held corporation, there [*40] must be some causal connection between the frustration of the shareholder's reasonable expectations and his or her faulty behavior." 19 Am Jur 2d § 2374, citing *Royals, supra.*

P100. 13. It is not reasonable for a shareholder to expect continued employment when the shareholder-employee's own misconduct gives rise to his termination. *Gunderson v. Alliance of Computer Professionals, Inc., 628 N.W.2d 173, 192 (Minn. App. 2001).* See also, *Gimpel 477 N.Y.S.2d at 1020* ("All such expectations [of employment] were shattered when [the shareholder] stole from the corporation. [the shareholder's] own acts broke all bargains."); *Exadaktilos v. Cinnaminson Realty Co., 167 N.J. Super. 141, 400 A.2d 554, 559, 561-62 (N.J. Super. 1979)*, affd. *173 N.J. Super. 559, 414 A.2d 994 (N.J. Super. 1980)*(court held no oppression where 20% shareholder of restaurant corporation was terminated for incompetence, even though corporation paid no dividend, and the complaining shareholder had entered the business with the expectation of employment); and *Pankratz Farms, Inc. v. Pankratz, 2004 MT 180, 322 Mont. 133, 152, 95 P.3d 671 685 (2004)* (Montana Supreme Court holding no oppression where minority shareholder's discharge from employment was based on reasonable job-related **[*41]** grounds).

P101. 17. No one can take advantage of his own wrong. *Mont. Code Ann. § 1-3-208* (2005). A party requesting the court to grant equitable relief must have "clean hands." *Kauffman-Harmon v. Kauffman, 2001 MT 238, 307 Mont. 45, 52, 36 P.3d 408, 413 (2001).* Consequently, the court "will not aid a party whose claim had its inception in the party's wrongdoing, and where the victim of the wrongdoing is the other party or a third party." *Kauffman-Harmon at 52, 36 P.3d at 413.*

P102. ANALYSIS: Whitehorn Farms has been in existence for many years and those who make up its shareholder base are all related to one another. While one must legally refer to Whitehorn Farms as a corporation, it still functions as a family farm. The lack of formality in corporate procedures, until this recent series of events, is not a surprise as it is common with many similar farming operations. Brian was not part of the creation of the farm or even creation of the corporation. However, he and Earl are good examples of the descendants to whom these farms pass in time. They grew up on the farm, worked there as youngsters, and eventually lived and worked there as adults. This was after they spent many years doing contract **[*42]** farming for the corporation while carrying on business with their own separate corporation. On the way to where they found themselves in 2001, they acquired shares in the corporation. Most of their acquisitions were by gift or purchase with insurance proceeds insuring the lives of ancestors. Neither Brian nor Earl had any reasonable expectation of profit or ownership from the farm until they owned substantial numbers of shares and actively participated as employees in the operation of the farm. Once that occurred, they both depended on their work on the farm as their means of livelihood. Part of that was created by their share ownership, but most of it was created by their positions as officers and employees. Those positions allowed them the benefits set forth in the findings. A comfortable living was assured each year and the bonus of surplus grain for their individual sale became expected. Through all of this, since they became active employees of the farm corporation, informal meetings set the tone for all operations of the farm, including the agreement to receive surplus grain at the end of the farming season. Because Brian and Earl had only been employed with the corporation since **[*43]** 2001, they could never have any formal assurance to expect the benefits they received after that time. However, they were well aware of their father's and their Uncle Wayne's benefits and surely expected to reap the same at some point in their lives. So, by 2002, with Brian and Earl pretty much in control of the operation, and receiving the benefits they had come to expect, life on the farm would have continued but for Brian's acts that lead to his termination as an employee and removal as an officer.

P103. The picture of a good life on the farm began to fade when Brian came to the others and asked that his wages be paid to his religious corporation. This request was refused, upon advice of the corporate accountant, but it showed Brian's intentions to use the corporation for his own benefit. His need to avoid a judgment creditor was known to all and admitted by him. The next event that changed the color of the picture of a good life was his handling of the home he and his wife built on corporate ground. It was not enough that he was deeded the land so he could get a loan to build the home, but he then secured additional corporate funds to payoff the loan and did not sign a deed (as **[*44]** he had agreed) to transfer it back to the corporation. While he blamed the corporate attorney for not preparing the deed, he knew the deed was not done and that neither he nor his wife had signed it. To further damage the farm picture, he asked the farm corporation to pay his wife for money she invested in the home by giving her some corporate stock. Once that was done, he announced to the other shareholders that the home had never been transferred back to the corporation, but that it would be if they bought his wife's shares for a specified amount. The Court can only imagine the shock that struck the others as they realized the fraud that had been perpetrated on them by both Brian and his wife. They were not only family members, but also shareholders, and yet they acted with total disregard for the respect that should be expected in those groups. Brian's final act that completely destroyed the farm picture was his removal of grain from the farm without the agreement of the other officers. Without any regard to the simple process of presenting his plan to the others, he took excess grain beyond the agreed amount and sold it in the name of his religious corporation. Again, he disregarded [*45] his corporate duty to deal fairly with the others and acted only to serve himself. His parting note explaining his plan to take an advance on salary was left for others to read as he went off on vacation. Brian knew of Earl's disagreement with his removal and sale of the excess grain, but he did nothing to correct the act before he left. While this final act was the proverbial "last straw", it was the culmination of a number of months of misdeeds that together, showed his loyalty only to himself and not to the other shareholders. Due to his acts, it was reasonable for the other shareholders to conclude that there were no measures short of termination to assure that he would not do further damage to the corporation. He had only been employed for two years and they could not afford to wait for his next act to decide if he would change his ways.

P104. Brian and Earl are near equals in this closely held farm corporation. Neither of them were present at the creation, so neither of them had any capital investment that would lead to an expectation of profit from that. When they acquired their various shares as gifts from their parents, they still received no benefits, as dividends were never [*46] paid. Only their employment by the farm caused them to receive the full benefits as employees and officers, just the same as they saw received by their father and uncle. They both had reasonable expectation that they would continue to receive those benefits. Earl continues to do so as he has remained loyal to the family and the farm corporation. Brian has lost his benefits due to his own acts showing his disregard for both the family and the farm corporation. The corporation's actions were reasonable in light of his behavior. They had no ulterior motive. Therefore, the corporate action was not harsh, dishonest, or wrongful under the definition of corporate oppression. He cannot complain to this court or anyone else about his current situation as a shareholder who is receiving nothing from his shares. The Court did not receive any evidence that Brian was being squeezed out of participation as a shareholder. He cannot expect to resume his role as an officer, director, or employee and what he should receive from his shares is not before the Court at this time. Brian Whitehorn has reaped what he sowed.

CONCLUSIONS OF LAW:

P105. 1. Plaintiff is not an oppressed minority shareholder of Whitehorn [*47] Farms, Inc.

P106. 2. Plaintiff, as counter-defendant, is indebted to Whitehorn Farms, Inc. for conversion of corporate assets.

ORDER

P107. IT IS HEREBY ORDERED as follows:

P108. 1. The Clerk of Court shall enter judgment in favor of Whitehorn Farms, Inc.;

P109. 2. Whitehorn Farms, Inc. shall recover its costs and fees.

P110. 3. Plaintiff's and Counter-Defendants' Complaint is dismissed with prejudice.

P111. 4. Plaintiff and Counter-Defendants shall pay to Whitehorn Farms, Inc. the sum of $ 11,394.00 plus interest at the statutory rate of Ten Percent (10% per annum, less credit for unpaid wages due to Plaintiff (from October 2002 to March 2003) until the termination of his employment.

DATED this 30th day of March, 2007.

David G. Rice District Judge

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
George S. HOFMESITER FAMILY TRUST Dated June 21, 1991, et al, Plaintiffs,
v.
FGH INDUSTRIES, LLC, et al, Defendants.

No. 06-CV-13984-DT.
April 12, 2007.

Arnold S. Schafer, Joseph K. Grekin, Kenneth R. Beams, Schafer & Weiner, Bloomfield Hills, MI, for Plaintiffs.

Kenneth B. Morgan, Birmingham, MI, for Defendants.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS COUNTS I AND II, GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS COUNT VI AND GRANTING DEFENDANTS' MOTION TO DISMISS COUNT VII

ROBERT H. CLELAND, United States District Judge.

*1 Pending before the court are three motions by Defendants: (1) the February 18, 2007 "Motion to Dismiss Counts I and II of Complaint Pursuant to Fed.R.Civ.P. 12(b)(6)," (2) the February 18, 2007 "Motion to Dismiss Count VI of Complaint Pursuant to Fed.R.Civ.P. 12(b)(6)" and the February 19, 2007 "Motion to Dismiss Count VII of Complaint Pursuant to Fed.R.Civ.P. 56 and 12(b)(6)." Plaintiff has filed responses and, the matter having been fully briefed, the court concludes that a hearing is not necessary. *See* E.D. Mich. LR 7.1(e)(2). For the reasons stated below, the court will (1) grant in part and deny in part the motion to dismiss Counts I and II, (2) grant in part and deny in part the motion to dismiss Count VI and (3) grant the motion to dismiss Count VII.

I. BACKGROUND

The court takes from its earlier order its understanding of the relationship among the several parties before the court:

> Several interrelated parties are before the court. The Trusts, as the court will refer to these Plaintiffs collectively, are organized in Ohio and bear the following names: (1) George S. Hofmeister Family Trust Dated June 21, 1991 for Scott R. Hofmeister, (2) George S. Hofmeister Family Trust Dated June 21, 1991 for Jamie S. Hofmeister, and (3) George S. Hofmeister Family Trust Dated June 21, 1991 for Megan Hofmeister. (Pls' Mot. at 4.) George Hofmeister, whom the Trusts occasionally retain to do work, created the Trusts for the benefit of his children. (*Id.*) The Trusts, along with Plaintiff Douglas Q. Holmes of Ohio in his capacity as the trustee, brought this action "to protect their ownership interests in corporate entities currently controlled by the Defendants." (*Id.*) According to Plaintiffs, Defendants Daniel Fuhrman ("Fuhrman") and William Gruits ("Gruits") reside in Michigan and "control, directly or indirectly, the rest of the Defendants in this action." (*Id.*)

Fuhrman, Gruits and the Trusts each own one third of FGH Capital, LLC ("FGH Capital), who is not a party to this action. (*Id.*) Defendants FGH Industries, LLC, a Michigan limited liability company, ("FGH-Michigan"), and FGH Industries, LLC, a Delaware limited liability company, ("FGH-Delaware"), are identically named companies that "serve as a holding company for specialized, niche-market manufacturing and services companies." (*Id.* at 5.) The court will collectively refer to these Defendants as "FGH." Fuhrman and Gruits are the managers of FGH, which FGH Capital owns together with an Arizona trust named the Hansen Trust. (*Id.*)

Defendant Trans Industries of Indiana, Inc. ("Trans") is an Indiana corporation that manufactures machining and components for heavy trucks. (*Id.*) FGH is the majority owner of Trans, and the Trusts are minority owners. (*Id.*) Plaintiffs claim that "Trans is FGH's most valuable and important asset." (*Id.*) The Trusts, meanwhile, are majority owners of Soberay Machine & Equipment, Inc., ("Soberay"), which provides services related to heavy manufacturing equipment used in the rubber and plastic industries. (*Id.*) FGH is a minority owner of Soberay. (*Id.*) Plaintiffs contend that Soberay is out of business because Fuhrman and Gruits transferred all of its assets to SME Equipment, LLC, a Michigan limited liability company. (*Id.*) FGH is the exclusive owner of SME, which provided services akin to that of Soberay and which, Plaintiffs believe, is also out of business. (*Id.* at 5-6.)

*2 Defendant Scovey, LLC ("Scovey") is located in Michigan, and Plaintiffs believe that Scovey is owned and operated by Gruits. (*Id.* at 6.) Scovey owns the building at 414 East Street in Rochester, Michigan, at which address Gruits, Fuhrman, FGH Capital, FGH, and SME all keep their offices. (*Id.*) Defendants Allegant Capital, LLC ("Allegant") and Acquisition & Strategy Advisory Partners, LLC ("ASAP") are also located here. (*Id.*) Plaintiff contends that Fuhrman founded and controls Allegant and ASAP. (*Id.*)

According to Plaintiff, "Fuhrman and Gruits have used their control of these companies to launder money for themselves, to engage in self-interested transaction, and to otherwise plunder FGH and FGH Capital at the expense of the Trusts." (*Id.*)

(12/15/06 Order at 2-4 (footnote omitted)). On December 15, 2006, the court determined that a preliminary injunction should issue, based in large part on Plaintiffs' likelihood of success on the merits. The court found, based upon the evidence preliminarily presented, that "Plaintiffs are likely to demonstrate that substantial self-dealing is afoot and that Defendants Fuhrman and Gruits are the principal offenders and beneficiaries." (*Id.* at 17.) FN1 The instant motions test whether some of Plaintiffs claims fail as a matter of law.

FN1. The court also dismissed FGH from the case, eliminating it as a potential joint tortfeasor in several counts and dismissing Count III, the only count that named FGH as the sole tortfeasor. (12/15/06 Order at 10-12.)

II. STANDARD

In ruling on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court must construe the complaint in a light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *Sistrunk v. City of Strongsville,* 99 F.3d 194, 197 (6th Cir.1996); *Kline v. Rogers,* 87 F.3d 176, 179 (6th Cir.1996); *Wright v. MetroHealth Medical Center,* 58 F.3d 1130, 1138 (6th Cir.1995). When an allegation is capable of more than one inference, it must be construed in the plaintiff's favor. *Columbia Natural Resources, Inc. v. Tatum,* 58 F.3d 1101, 1109 (6th Cir.1995); *In re DeLorean Motor Co.,* 991 F.2d 1236, 1240 (6th Cir.1993); *Mayer v. Mylod,* 988 F.2d 635, 638 (6th Cir.1993). Hence, a judge may not grant a Rule 12(b)(6) motion based on a disbelief of a complaint's factual allegations. *Wright,* 58 F.3d at 1138; *Columbia Natural Resources, Inc.,* 58 F.3d at 1109.

Though decidedly liberal, this standard of review does require more than the bare assertion of legal conclusions. *Lillard v. Shelby County Bd. of Educ.,* 76 F.3d 716, 726 (6th Cir.1996); *LRL Properties v. Portage Metro Hous. Auth.,* 55 F.3d 1097, 1100-01 (6th Cir.1995). The complaint should give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Gazette v. City of Pontiac,* 41 F.3d 1061, 1064 (6th Cir.1994). "In practice, 'a ... complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory.' " *Lillard,* 76 F.3d at 726 (emphasis in original) (quoting *Scheid v. Fanny Farmer Candy Shops, Inc.,* 859 F.2d 434, 436 (6th Cir.1988)).

III. DISCUSSION

A. Motion to Dismiss Counts I and II

*3 Defendants' first motion attacks the viability of Plaintiffs claims of conversion and aiding and abetting in the concealment of converted property. The converted assets at issue are, principally, alleged management fee payments that Plaintiffs claim Defendants caused Trans to pay them for little or nothing in return. (Compl. at ¶¶ 41-48, 71-75.) Defendants argue that Counts I and II fail because (1) Plaintiffs have claimed no ownership interest in the assets, which belong to Trans, (2) the assets are monetary and non-specific funds and therefore not subject to a claim of conversion, (3) Michigan's law of conversion is not intended to have an extraterritorial effect in Indiana, where the funds were allegedly converted. (Defs.' 2/18/07 Br. in Support of Motion to Dismiss Counts I and II at 9-12.) Plaintiffs respond that, under Indiana law, they are permitted to pursue a direct action against Defendants to vindicate the rights of Trans. (Pls.' 3/12/07 Br. in Opposition to Motion to Dismiss Counts I and II at 9-10.) Plaintiffs further contend that they have adequately alleged the elements of colorable claims of conversion that now should proceed to discovery. (*Id.* at 10-13.) Finally, Plaintiffs argue that Indiana law equally forbids conversion and that in any event there will be no extraterritorial application of Michigan law because several Defendants are Michigan residents and because the converted funds ended up and were concealed in Michigan. (*Id.* at 13-16.)

The parties have not extensively briefed choice of law. The court will apply Michigan law to the claims that allege explicitly or by implication that wrongful conduct occurred in Michigan or benefitted a Michigan party.[FN2] Under Michigan law, conversion "is defined generally as 'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.' " *Murray Hill Publications, Inc. v. ABC Commcns, Inc.,* 264 F.3d 622, 636-37 (6th Cir.2001) (quoting *Sarver v. Detroit Edison Co.,* 225 Mich.App. 580, 571 N.W.2d 759, 761 (Mich.Ct.App.1997.) "The gist of a conversion claim is that the defendant has interfered with the plaintiff's control and use of its property." *Id.* (quotation omitted).

> FN2. In Michigan, the law of the forum governs a tort claim unless there is a "rational reason" to displace the law of the forum. *Olmstead v. Anderson,* 428 Mich. 1, 400 N.W.2d 292, 305 (1987). As a general matter, the court sees no rational reason to apply non-forum law to a claim that occurred in Michigan or whose effects were felt in Michigan. In this case, the court finds no basis to displace Michigan law with Indiana law.

Plaintiffs' complaint alleges that Defendants converted certain management fees and "other assets *owned by Trans.*" (Compl. at ¶ 71.) Plaintiffs have therefore failed to allege a personal property interest in the converted property. Plaintiffs correctly cite to Indiana law allowing them to bring a direct action against fellow shareholders of Trans, an Indiana corporation, because the formalities of derivative actions are not required in all cases for closely held corporations, where shareholders are more like partners. *See, e.g., G & N Aircraft, Inc. v. Boehm,* 743 N.E.2d 227, 236 (Ind.2001.) But this authority-and Plaintiffs cite no other-does not relax the elements of whatever direct action shareholders might bring against one another. In addition, to support Plaintiffs' action for conversion of money, Defendants must have an obligation to return specific money entrusted to their care. *Head v. Phillips Camper Sales & Rental, Inc.,* 234 Mich.App. 94, 593 N.W.2d 595, 603 (Mich.Ct.App.1999). The complaint merely alleges general misappropriation of the operating budget of Trans. Further, Trans would suffer the direct harm of any conversion, not Plaintiffs. The harm to Plaintiffs would be too indirect in light of the required elements of a claim of conversion. As such, Plaintiffs' alleged harm does not sound in the tort of conversion.

*4 Count II, however, survives. Plaintiffs have adequately alleged that they were "damaged as a result of another person's buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property" and that Defendants knew they were receiving or aiding in the concealment of such property. Mich. Comp. Laws § 600.2919a. The statute authorizes treble damages as a remedy "in addition to any other right or remedy ... at law or otherwise." *Id.* Importantly, the statute contains no limitation incorporating the elements of conversion. As such, the infirmities of Count I (lack of personal claim of ownership and the failure to identify specific funds for return) are not present for Count II. Simple damage as a result of the conversion is sufficient. *Id.* Plaintiffs may therefore pursue their theory of how the alleged conversion against Trans harmed them. Defendants argue to no avail that the Michigan Legislature did not intend to give the statute extraterritorial effect. While the complaint does allege conversion occurring in Indiana, the relevant activity came later. The court's inquiry must focus upon the receiving and concealing of the converted property. A fair reading of the complaint reveals that at least part of this activity happened in Michigan by Michigan parties. As such, Count II is a live controversy that should proceed to discovery.

B. Motion to Dismiss Count VI

Defendants argue that Count VI (minority oppression) fails as a matter of law to the extent that Plaintiffs are not asserting their rights as members of FGH Capital. (Defs.' Second 2/18/07 Br. at 9-13.) Plaintiffs respond that FGH Capital is merely a holding company that manages Trans and that actions taken against Trans impact Plaintiffs' interests as members of FGH Capital. (Pls.' First 3/12/07 Br. at 10-12.)

The governing Michigan statute allows Plaintiffs as shareholders to bring an action "to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder." Mich. Comp. Laws § 450.1489(1).[FN3] The statute defines willfully unfair and oppressive conduct as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder." § 1489(3).

FN3. Defendants contend that the governing law is Mich. Comp. Laws § 450.1515, but that part of the statute was repealed by Public Act 1989, No. 121, § 2, effective October 1, 1989.

The Michigan Court of Appeals interpreted Section 1489 in *Franchino v. Franchino,* 263 Mich.App. 172, 687 N.W.2d 620 (Mich.Ct.App.2004). The court held that the statute did not protect the plaintiff's right to employment by the corporation, or to his seat on the board of directors. *Id.* at 628-30. The court stressed that "the Legislature amended the statute to explicitly state that minority shareholders could bring suit for oppression only for conduct that 'substantially interferes with the interests of the shareholder *as a shareholder.*' " *Id.* (citing § 1489(3)). The court further held that the focus of its inquiry should be the actions of the majority and not the reasonable expectations of the complaining shareholder. *Id.* at 629-30. Shareholder rights, according to the court, typically include voting at shareholder's meetings, electing directors, adopting bylaws, amending charters, examining the corporate books and receiving corporate dividends. *Id.* at 628 (citing 12 Fletcher Cyclopedia Corporations. ch 58, § 5717, p 22 .). "[E]mployment and board membership are not generally listed among rights that automatically accrue to shareholders." *Id.*

*5 In this case, Plaintiffs allege that Defendants Fuhrman and Gruits, as controlling members of FGH Capital, have undertaken a course of action to oppress Plaintiffs' minority interest in FGH Capital by (1) causing Trans to cease making distributions to Plaintiffs under a purchase agreement, (2) causing FGH Industries to take control of Soberay and excluding the Trusts from the governance of Soberay and (3) failing to cause FGH Capital and FGH Industries to make distributions to the Trusts. (Compl. at § 100-03.)

The court finds that, with the exception of the governance of Soberay, Plaintiffs have alleged a viable claim of minority oppressions. As shareholders of FGH Capital, and assuming that the allegations in the complaint are true, Plaintiffs have a right to claim certain corporate dividends or distributions, as the complaint refers to them. Defendants as the majority shareholders owe Plaintiffs that obligation. Further, Defendants control FGH Capital, a holding company that in turn controls Trans. As such, Defendants cannot run Trans in a manner that would constitute oppression to Plaintiffs under Michigan law. The factual circumstances before the court are unique and Defendants have not presented binding authority that cabins the liability of a holding company to behavior aimed only at the minority shareholder directly. To the extent that the alleged oppression of Plaintiffs' rights is committed by Defendants indirectly through other holdings-principally, Trans-that oppression is actionable under Michigan law. Whatever the "reality" of the situation, as Plaintiffs contend, (Pls.' First 3.12.07 Br. at 11), Plaintiffs may proceed to discovery to attempt to substantiate Count VI.

The court will, however, grant Defendant's motion to the extent that Plaintiffs complain that they were excluded from the governance of Soberay. *Franchino* stated without ambiguity that corporate governance is not a shareholder right and therefore not actionable under Section 1489 by Plaintiffs as a shareholder interest. 687 F.2d at 628. The complaint alleges that Fuhrman and Gruits took "actions designed to cause FGH Industries to take control of Soberay and exclud[e] the Trusts from the governance of Soberay." (Compl. at ¶ 103(c).) The allegation is thus materially indistinct from the issue in *Franchino:* whether the plaintiff could regain his seat on the board of directors. Because exclusion from corporate governance is not recognized as minority oppression under Michigan law, the court will dismiss the portion of Count VI that challenges the governance of Soberay.

C. Motion to Dismiss Count VII

Count VII is a claim for unjust enrichment challenging an arrangement whereby Trans paid $3,500 in monthly rent for office space that allegedly did not benefit Trans but instead the holdings of Fuhrman and Gruits. (Compl. at ¶¶ 49-52,106-07.) Defendants argue that Count VII should be (1) dismissed under Rule 12 because Trans made the payments and Plaintiffs cannot bring suit on its behalf and (2) dismissed under Rule 56 because there is no question of material fact concerning the authorization of the rental arrangement. (Defs.' 2/19/07 Br. at 8-12.) Plaintiffs counter that (1) under Indiana law and as members of a closed corporation they may bring a direct action and (2) that there is no authorization for the rental agreement that Defendants allege.

***6** The elements of unjust enrichment are (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the defendant's retention of the benefit. *Barber v. SMH (US), Inc.,* 202 Mich.App. 366, 509 N.W.2d 791, 796 (Mich.Ct.App.1993). As with Plaintiffs' conversion claim, Plaintiffs allege only that Defendants were unjustly enriched at the expense of Trans. For the reasons given for Count I, the authority Plaintiffs cite regarding direct shareholder actions simply does not rewrite the essential elements of whatever direct action is plead. While Plaintiffs may bring a direct action for unjust enrichment, they must still allege the necessary elements, including that Defendants received a benefit *from Plaintiffs.* For purposes of the claim of unjust enrichment, Plaintiffs may not stand in the shoes of Trans. As such, the court will dismiss Count VII under Rule 12 and not reach the Rule 56 arguments.

IV. CONCLUSION

IT IS ORDERED that Defendant's "Motion to Dismiss Counts I and II of Complaint ..." [Dkt # 54] is GRANTED with respect to Count I and DENIED with respect to Count II.

IT IS FURTHER ORDERED that Defendant's "Motion to Dismiss Count VI of Complaint ..." [Dkt # 55] is GRANTED with respect to governance of Soberay and DENIED in all other respects.

IT IS FURTHER ORDERED that Defendant's "Motion to Dismiss Count VII of Complaint ..." [Dkt # 56] is GRANTED.

E.D.Mich.,2007.
Hofmesiter Family Trust v. FGH Industries, LLC
Not Reported in F.Supp.2d, 2007 WL 1106144 (E.D.Mich.)

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
Kelley R. AREVELO, Plaintiff/ Counter-Defendant-Appellant,
v.
Raymond A. AREVALO, Defendant/ Counter-Plaintiff-Appellee,
and
Automacon Industrial Machinery Service, Inc., Defendant-Appellee.
Kelley R. Arevalo, Plaintiff/ Counter-Defendant-Appellant,
v.
Raymond A. Arevalo, Defendant/Counter-Plaintiff,
and
Automacon Industrial Machinery Service, Inc., Defendant-Appellee.

Docket Nos. 285548, 286742.
April 6, 2010.

Wayne Circuit Court; LC No. 06-604610-CZ.

Before HOEKSTRA, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

*1 In Docket No. 285548, plaintiff Kelley Arevalo (Kelley) appeals as of right the May 2, 2008 final judgment entered after a bench trial denying her claim of breach of divorce judgment against defendant Raymond Arevalo (Raymond) and dismissing her alter-ego claim against defendant Automacon Industrial Machinery Service, Inc. (AIMS). In Docket No. 286742, Kelley appeals as of right the July 9, 2008 order granting case evaluation sanctions to AIMS. In Docket No. 285548, we affirm the May 2, 2008 final judgment, as well as the orders granting summary disposition to Raymond on his counterclaim for dissolution and on Kelley's claims for conversion and illegal and oppressive acts, the orders reassigning the case and denying Kelley's demand for a jury trial on the claim for breach of divorce judgment, and the order denying Kelley leave to add a claim for hostile work environment. We reverse the order granting summary disposition to Raymond on Kelley's claim for retaliation. In Docket No. 286742, we affirm the order granting case evaluation sanctions.

I. BASIC FACTS

During their marriage, Kelley and Raymond incorporated K & R Machinery (K & R), a machine repair company. A February 2004 consent judgment of divorce, entered by Wayne Circuit Judge Kathleen M. McCarthy, ended the parties' marriage. The divorce judgment contained three provisions regarding K & R:

> 18. The parties shall continue to maintain their business, K & R Machinery ("the business["]). Each party shall maintain fifty percent (50%) stock ownership in the business. The parties shall cause new stock certificates to be issues [sic] in their respective names as tenants in common.
>
> 19. The parties shall maintain their current salaries from the business. Plaintiff husband shall maintain his salary of Fifty Four Thousand ($54,000) Dollars. Defendant wife shall maintain her salary of Forty Two Thousand ($42,000) Dollars. The listed salaries shall remain in effect unless there is a written agreement signed by both parties.
>
> 20. The plaintiff husband shall maintain his current position operating the company as president.

In February 2006, Kelley obtained a personal protection order (PPO) against Raymond. After the

PPO was continued following a hearing in March 2006, Raymond ceased his employment with K & R. He subsequently worked for AIMS, also a machine repair company, that was incorporated in March 2006 by Terri Kiser, with whom he had a dating relationship.

Kelley sued Raymond, in part, for breach of divorce judgment, conversion, illegal and oppressive acts, and retaliation. She also asserted an alter-ego claim against AIMS. Raymond countersued Kelley for dissolution of K & R. The case was assigned to Judge John A. Gillis, Jr.

Judge Gillis granted summary disposition to Raymond on his counterclaim for dissolution of K & R. The case was then reassigned, by order of then-Chief Judge Mary Beth Kelly, to Judge McCarthy. Judge McCarthy granted summary disposition to Raymond under MCR 2.116(C)(8) on Kelley's claims for conversion, illegal and oppressive acts, and retaliation, and denied Kelley leave to add a claim for hostile work environment. Judge McCarthy also denied Kelley's demand for a jury trial on her claim for breach of divorce judgment. Following a bench trial, Judge McCarthy found that (1) the value of K & R was $39,500 and awarded one-half of this amount to Kelley, (2) Raymond had not breached the divorce judgment, and (3) AIMS was not the alter ego of K & R. Judge McCarthy also awarded $10,773.65 in case evaluation sanctions to AIMS.

II. DOCKET NO. 285548

A. DISSOLUTION OF K & R

*2 Kelley first argues that, because Raymond failed to present evidence that satisfied the requirements of MCL 450.1823, Judge Gillis erred in granting an order to dissolve K & R. We disagree.

We review de novo a trial court's ruling on a motion for summary disposition. *Walsh v. Taylor,* 263 Mich.App. 618, 621, 689 N.W.2d 506 (2004). Raymond moved for summary disposition under MCR 2.116(C)(8) and (10) on his counterclaim for dissolution. Judge Gillis did not articulate under which subrule he granted the motion. Because summary disposition is appropriate under MCR 2.116(C)(8) only if "[t]he *opposing* party has failed to state a claim on which relief can be granted" (emphasis added), summary disposition could not be granted to Raymond under MCR 2.116(C)(8) on his own claim for dissolution. Accordingly, we review the order granting dissolution under the standards applicable to a motion filed pursuant to MCR 2.116(C)(10). Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment ... as a matter of law." We must "consider[ ] the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh,* 263 Mich.App. at 621, 689 N.W.2d 506.

MCL 450.1823 provides for judicial dissolution of a corporation. The statute reads:

> A corporation may be dissolved by a judgment entered in an action brought in the circuit court of the county in which the principal place of business or registered office of the corporation is located by 1 or more directors or by 1 or more shareholders entitled to vote in an election of directors of the corporation, upon proof of both of the following:
>
> (a) The directors of the corporation, or its shareholders if an agreement among the shareholders authorized by [MCL 450.1488] is in effect, are unable to agree by the requisite vote on material matters respecting management of the corporation's affairs, or the shareholders of the corporation are so divided in voting power that they have failed to elect successors to any director whose term has expired or would have expired upon the election and qualification of his or her successor.
>
> (b) As a result of a condition stated in subdivision (a), the corporation is unable to function ef-

fectively in the best interests of its creditors and shareholders.

The first requirement for dissolution under MCL 450.1823 is that the shareholders "are unable to agree by the requisite vote on material matters respecting management of the corporation's affairs." In February 2006, Kelley obtained a PPO against Raymond. In the PPO application, Kelley alleged that, while at K & R premises, Raymond groped her breasts, threw a coffee mug at her, and exploded in a fit of rage. The PPO prohibited Raymond from interfering with Kelley at her place of employment. As a result of the PPO, Raymond ceased his employment with K & R and commenced employment with a third party. Kelley did not dispute Raymond's assertion that they could not be in the same room without arguing. Further, Kelley and Raymond could not agree on whether to continue corporate activities-Raymond wanted to dissolve K & R, while Kelley wanted to continue the business. This evidence establishes that Kelley and Raymond were unable to agree on matters respecting the management of K & R.

*3 The second requirement for dissolution under MCL 450.1823 is that "the corporation is unable to function effectively in the best interests of its creditors and shareholders." Raymond ceased his employment with K & R in March 2006. At the motion hearing, Raymond represented that K & R was no longer performing any business; Kelley did not dispute the representation. Because K & R was no longer conducting business, K & R was no longer able to function effectively in the best interests of its creditors and shareholders.

Because the evidence establishes that the two requirements of MCL 450.1823 were met, we affirm Judge Gillis's order dissolving K & R. In doing so, we reject Kelley's intimation that summary disposition was premature because discovery was not yet complete. Generally, summary disposition under MCR 2.116(C)(10) is premature if discovery has not closed. *Marilyn Froling Revocable Living Trust v. Bloomfield Hills Country Club,* 283 Mich.App. 264, 292, 769 N.W.2d 234 (2009). "However, the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate. The question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position." *Id.* Kelley has not explained what evidence may have been discovered to provide factual support for her position that judicial dissolution of K & R was not permitted. Accordingly, Kelley has not established that the order of dissolution was premature.

B. REASSIGNMENT

Kelley next asserts that Chief Judge Kelly erred in reassigning the case to Judge McCarthy. Specifically, she claims that because the actions that led to the claim for breach of divorce judgment began 18 months after the divorce judgment was signed, the present action did not arise from the same transaction or occurrence as the divorce action. We disagree.

We review de novo the interpretation and application of a court rule. *Nat'l Waterworks, Inc. v. Int'l Fidelity & Surety, Ltd.,* 275 Mich.App. 256, 258, 739 N.W.2d 121 (2007).

Chief Judge Kelly reassigned the present case to Judge McCarthy pursuant to MCR 8.111(D)(2). The court rule provides that "if an action arises out of the same transaction or occurrence as a civil action previously dismissed or transferred, the action must be assigned to the judge to whom the earlier action was assigned[.]" "[A]ctions arise from the same transaction or occurrence only if each arises from the identical events leading to the other or others ." *Armco Steel Corp. v. Dep't of Treasury,* 111 Mich.App. 426, 437, 315 N.W.2d 158 (1981), aff'd 419 Mich. 582, 358 N.W.2d 839 (1984). The only case cited by Kelley in support of her argument that her claim for breach of divorce judgment did not arise from the same transaction or occurrence as the divorce action is *Decker v. Decker,* unpublished opinion per curiam of the Court of Appeals, issued April 25, 2006 (Docket No. 266446). An unpublished opinion is not binding under the rule of stare decisis, MCR 7.215(C)(1), and *Decker* is of no persuasive value. Reassignment was not an issue in the case.

*4 Regardless of the mandate of MCR 8.111(D)(2), Chief Judge Kelly did not err in reassigning the case to Judge McCarthy. In her claim for breach of divorce judgment, Kelley alleged that Raymond breached the provisions in the divorce judgment that pertained to K & R. Specifically, she wanted the provision in the divorce judgment that required her and Raymond to maintain K & R to be enforced. The divorce judgment was a consent judgment. "A consent judgment is in the nature of a contract, and is to be construed and applied as such ." *Laffin v. Laffin,* 280 Mich.App. 513, 517, 760 N.W.2d 738 (2008). However, the remedy for a party's failure to comply with the terms of a consent judgment is the enforcement of that judgment. *Trendell v. Solomon,* 178 Mich.App. 365, 369, 443 N.W.2d 509 (1989). Kelley's remedy to enforce the divorce judgment was enforcement of the judgment, and a motion to enforce was required to be heard by Judge McCarthy. The divorce judgment specifically provided that the trial court (Judge McCarthy) "retain[ed] jurisdiction over this matter in order to enforce all the terms herein." Accordingly, Chief Judge Kelly properly reassigned the claim for breach of divorce judgment to Judge McCarthy. In addition, we find no error in the reassignment of Kelley's remaining claims. Actions may be consolidated when they involve "substantial and controlling common question[s] of law or fact." MCR 2.505(A)(2). Considerations of judicial economy often favor consolidation. *Bordeaux v. Celotex Corp.,* 203 Mich.App. 158, 163, 511 N.W.2d 899 (1993). Kelley's claims contained common questions of fact regarding Raymond's conduct toward her and K & R, and having one judge hear all the claims furthered goals of judicial economy. We affirm the order reassigning the present case to Judge McCarthy.

C. CONVERSION

Kelley claims that the trial court,[FN1] in granting summary disposition to Raymond on her claim for conversion, erred in two conclusions: (1) that she alleged a claim for common-law conversion, rather than statutory conversion; and (2) that she failed to allege a conversion of tangible property. We disagree.

FN1. All references to the "trial court" refer to Judge McCarthy.

The trial court granted summary disposition to Raymond under MCR 2.116(C)(8) on Kelley's claim for conversion. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *USA Cash # 1, Inc. v. Saginaw,* 285 Mich.App. 262, 265, 776 N.W.2d 346 (2009). All well-pleaded allegations must be accepted as true and viewed in the light most favorable to the nonmoving party, and the motion may only be granted if the claim is so legally deficient that recovery would be impossible. *Id.*

"The common-law tort of conversion consists of any distinct act of dominion wrongfully exerted over another person's personal property." *Echelon Homes, LLC v. Carter Lumber Co.,* 261 Mich.App. 424, 436, 683 N.W.2d 171 (2004), rev'd in part on other grounds 472 Mich. 192, 694 N.W.2d 544 (2005) (quotation omitted). The measure of damages is the value of the property at the time of the conversion. *Ehman v. Libralter Plastics, Inc.,* 207 Mich.App. 43, 45, 523 N.W.2d 639 (1994). The Legislature has also provided a statutory cause of action for conversion, in which a plaintiff may obtain treble damages. See MCL 600.2919a.

*5 A complaint must contain "[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend[.]" MCR 2.111(B)(1). In her conversion claim, Kelley did not reference MCL 600.2919a, nor did she request treble damages. There was nothing in the conversion claim to reasonably inform Raymond that he needed to defend a claim of statutory conversion, rather than common-law conversion. Kelley asserts that she "did not allege common law conversion. She alleged statutory conversion under MCL 600.2919a," but she provides no argument for why her conversion claim should be construed as a claim for statutory conversion. Accordingly, we conclude that the trial court did not err in its conclusion that Kelley alleged a claim for common-law conversion.

In addition, we conclude that the trial court did not err in its conclusion that Kelley did not allege a conversion of tangible property. Kelley's assertion that she alleged a conversion of tangible property is not based on the allegations in the conversion claim. Rather, the assertion is based on a factual allegation, that she was a 50 percent shareholder of K & R, and two allegations in the illegal and oppressive acts claim, that Raymond removed personal property belonging to K & R from K & R premises and that Raymond misappropriated K & R's business assets. Kelley may have incorporated all previous allegations into the conversion claim, but in the conversion claim, she only alleged that Raymond converted her "ownership in the business." Thus, the allegations in the conversion claim only informed Raymond that he was being called on to defend a claim that he converted Kelley's ownership interest in K & R. We affirm the trial court's order granting summary disposition to Raymond on the conversion claim.[FN2]

FN2. We deny Kelley's request for an opportunity to amend the complaint to make clear that Raymond's alleged acts of converting tangible property occurred before K & R was dissolved. Because the requested amendment would not affect the allegations in the conversion claim, the amendment would not alter our analysis of the propriety of the trial court's order granting summary disposition to Raymond.

D. ILLEGAL AND OPPRESSIVE ACTS

Kelley claims that, because she sought damages for Raymond's destruction of her interests as a shareholder in K & R, the trial court erred in granting summary disposition under MCR 2.116(C)(8) to Raymond on her claim for illegal and oppressive acts. We disagree.

The Legislature has provided a cause of action for shareholders of a closely held corporation who are abused by those in control of the corporation. *Estes v. Idea Engineering & Fabrications, Inc.,* 250 Mich.App. 270, 278, 649 N.W.2d 84 (2002). MCL 450.1489(1) provides:

> A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors of those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate....

*6 At the time Kelley filed her complaint, MCL 450.1489(3) read:

> As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

In *Franchino v. Franchino,* 263 Mich.App. 172, 189, 687 N.W.2d 620 (2004), this Court held that MCL 450.1489 only gives rise to a cause of action where a shareholder suffered oppression in his or her capacity as a shareholder. A shareholder may not sue under the statute for oppression suffered in his capacity as a director or an employee. *Id.* at 185-186, 687 N.W.2d 620. The Court stated that rights of shareholders include "voting at shareholder's meetings, electing directors, adopting bylaws, amending charters, examining the corporate books, and receiving corporate dividends." *Id.* at 184, 687 N.W.2d 620, citing 12 Fletcher Cyclopedia Corporations, ch. 58, § 5717, p. 22.

In the amended complaint, Kelley alleged that Raymond committed the following 15 "wrongful acts":

A. Removing from the business premises any personal property appertaining to the business of any value, e.g., business related lap-top computers with necessary software, business records, customer lists, trade journals and trade manuals.

B. Inducing key employees to leave their employment.

C. Destroying all good will of the business.

D. Inducing key customers to do business with third-parties instead of the business.

E. Misappropriating all of the business assets, including customer lists, customer files and manuals relating to customer equipment.

F. Engaging in conflicts of interest.

G. Violating duties of good faith and fair dealing.

H. Usurping business opportunities which belong to the business.

I. Violating duties of loyalty and honesty to the business.

J. Violating the duties proscribed and prohibited by MCL 450.1541a.[FN3]

FN3. MCL 450.1541 a(1) provides that a director or an officer of a corporation shall discharge his duties in good faith, with the care of an ordinarily prudent person, and in a manner reasonably believed to be in the best interests of the corporation. The statute also sets forth what information a director or officer may rely. MCL 450 .1541a(2), (3). The statute provides for a cause of action if a director or officer fails to perform his duties under the statute. MCL 450.1541 a(4).

K. After quitting using its credit line to obtain $21,000.00 for non-business purposes.

L. After quitting charging personal expenses to the business.

M. Physically assaulting Plaintiff.

N. Verbally assaulting Plaintiff.

O. Creating a sexually hostile environment.

Kelley fails to explain how any of these alleged wrongful acts affected her rights as a shareholder. She does not explain how Raymond's alleged act of "[i]nducing key employees to leave their employment" or his alleged act of "charging personal expenses to the business" affected her rights to vote at shareholder meetings, to elect directors, to adopt bylaws, to amend charters, to examine corporate books, or to receive corporate dividends. We fail to see any connection between Raymond's alleged wrongful acts and the oppression of Kelley's shareholder rights.[FN4] The alleged wrongful acts are generally torts against Kelley in a personal capacity or against K & R as a breach of fiduciary duty. Accordingly, the trial court did not err in concluding that Kelley failed to allege wrongful acts that affected her rights as a shareholder.

FN4. Some of the alleged wrongful acts, such as "[i]nducing key customers to do business with third-parties" and "[u]surping business opportunities which belong to the business" could possibly effect the *amount* of corporate dividends that Kelley received, but the acts did not impair Kelley's *right* to receive dividends.

*7 Kelley also claims that because of the 2006 amendment to MCL 450.1489(3) she has the right to allege the loss of her employment as part of her damages. In 2006, the Legislature amended MCL 450.1489(3) by adding the following sentence: "Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder." The amendment became effective March 20, 2006. 2006 PA 68.

Kelley gives the argument cursory treatment. She fails to acknowledge the qualifying language in the sentence added by the Legislature. In addition, Kelley fails to make any argument that, even though the effective date of the amendment, March 20, 2006, was more than a month after the date the original complaint was filed, February 15, 2006, the amendment applies to the present case. While the illegal and oppressive acts claim was not in Kelley's original complaint, an amended pleading generally relates back to the date of the originally filed pleading, *Ligons v. Crittenton Hosp.,* 285 Mich.App. 337, 354, 776 N.W.2d 361 (2009), and statutory amendments are to be applied prospectively unless the Legislature manifested a contrary intent, *Davis v. State Employees' Retirement Bd.,* 272 Mich.App. 151, 155, 725 N.W.2d 56 (2006). Based on Kelley's cursory treatment of the issue, we conclude that Kelley has abandoned any argument concerning the 2006 amendment to MCL 450.1489(3). *Peterson Novelties, Inc. v. City of Berkley,* 259 Mich.App. 1, 14, 672 N.W.2d 351 (2003). We affirm the trial court's order granting summary disposition to Raymond on Kelley's claim for illegal and oppressive acts.

E. HOSTILE WORK ENVIRONMENT

Kelley argues that the trial court erred in denying her leave to add a claim for hostile work environment against Raymond. We disagree.

We review a trial court's decision on a motion to amend a pleading for an abuse of discretion. *Hamed v. Wayne Co.,* 284 Mich.App. 681, 699, 775 N.W.2d 1 (2009). "Leave [to amend a pleading] shall be freely given when justice so requires." MCR 2.118(A)(2). "[A] motion to amend should ordinarily be denied only for particularized reasons, including undue delay, bad faith or a dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility." *PT Today, Inc. v. Comm'r of the Office of Financial & Ins. Services,* 270 Mich.App. 110, 143, 715 N.W.2d 398 (2006).

Kelley argued below that the trial court should grant her leave to add a hostile work environment claim because this Court, in *Elezovic v. Bennett (Elezovic II),* 274 Mich.App. 1, 731 N.W.2d 452 (2007), had recently reversed *Jager v. Nationwide Truck Brokers, Inc.,* 252 Mich.App. 464, 652 N.W.2d 503 (2002), in which the Court held that an agent of an employer cannot be held individually liable under the Elliott-Larson Civil Rights Act (CRA), MCL 37.2101 *et seq.* Kelley asserted that before *Elezovic II* was decided in January 2007 she was unable to allege a hostile work environment claim against Raymond.

*8 An "employer," pursuant to the CRA, is prohibited from discriminating on the basis of sex. MCL 37.2202(1)(a); *Elezovic v. Ford Motor Co. (Elezovic I),* 472 Mich. 408, 419, 697 N.W.2d 851 (2005). The CRA defines an "employer" as "a person who has 1 or more employees, and includes an agent of that person." MCL 37.2201(a). A "person" includes a corporation. MCL 37.2103(g). In *Jager,* 252 Mich.App. at 484, 652 N.W.2d 503, this Court held that "the language in the definition of 'employer' concerning an 'agent' of the employer was meant merely to denote respondeat superior liability, rather than individual liability." It, therefore, concluded "that the CRA provides solely for employer liability, and a supervisor engaging in activity prohibited by the CRA may not be held individually liable for violating a plaintiff's civil rights." *Id.* at 485, 652 N.W.2d 503. In *Elezovic I,* 472 Mich. at 411, 697 N.W.2d 851, the Supreme

Court overruled *Jager.* It reasoned "that, when a statute says 'employer' means 'a person who has 1 or more employees, and *includes an agent of that person,'* it must, if the words are going to be read sensibly, mean that the Legislature intended to make the agent tantamount to the employer so that the agent unmistakably is also subject to suit along with the employer." *Id.* at 420, 697 N.W.2d 851 (emphasis in original). FN5

FN5. *Elezovic II* involved the appeal following the Supreme Court's remand to the trial court in *Elezovic I.* The issue in *Elezovic II* was whether the defendant was acting as an agent of his employer when he committed the alleged acts of sexual harassment. The Court acknowledged that, in *Elezovic I,* "the [Supreme] Court overruled the *Jager* holding." *Elezovic II,* 274 Mich.App. at 4, 731 N.W.2d 452.

Because *Jager* was overruled by the Supreme Court in 2005, Kelley's justification for why she should be allowed to add a claim for hostile work environment is meritless. At all times in the present case, which was initiated in February 2006, Kelley could have asserted a hostile work environment claim against Raymond.

However, the trial court did not deny Kelley leave to add a hostile work environment claim for the reason that Kelley's justification for adding the claim was meritless. Rather, the trial court denied leave because Kelley and Raymond, each a 50 percent shareholder, had equal standing in K & R. It essentially concluded that, because Kelley was not Raymond's employee or in a subordinate position to Raymond, amendment to add a hostile work environment claim would be futile. On appeal, Kelley claims that, based on the Supreme Court's holding in *Elezovic I* and the fact that K & R had more than one employee, the trial court erred in its conclusion.

K & R was an "employer" under the CRA. Although shareholders of K & R, Kelley and Raymond were also employees of K & R. FN6 And, based on *Elezovic I,* Raymond can be an "agent" of K & R and be personally liable for any sexual harassment of Kelley committed by him, *if* he had been delegated influence and power over Kelley's employment circumstances. See *Elezovic II,* 274 Mich.App. at 10, 12, 731 N.W.2d 452. In the amended complaint, Kelley alleged that Raymond was in a higher management position than her and that he possessed the ability to exercise influence over hiring, firing, and invoking discipline. However, Kelley's argument on appeal is completely silent regarding whether Raymond had any power over her employment circumstances with K & R. Kelley cites no evidence, whether the evidence be deposition testimony, answers to interrogatories, or trial testimony, that could possibly support a claim that Raymond had been delegated supervisory power over her employment circumstances. Because Kelley makes no argument that Raymond had power over her employment circumstances, Kelley has failed to establish that amendment to add a claim of hostile work environment against Raymond would not be futile. Accordingly, we affirm the trial court's order denying Kelley leave to amend.

FN6. In his answer to the amended complaint, Raymond admitted that he and Kelley were employees of K & R.

F. RETALIATION

*9 Kelley next asserts that the trial court erred in granting summary disposition under MCR 2.116(C)(8) to Raymond on her claim for retaliation. We agree.

In the amended complaint, Kelley specifically alleged that Raymond retaliated against her in violation of § 701 of the CRA. MCL 37.2701 provides, in pertinent part:

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of

this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

To establish a retaliation claim, a plaintiff must prove "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *DeFlaviis v. Lord & Taylor, Inc.,* 223 Mich.App. 432, 436, 566 N.W.2d 661 (1997).

A "person" is prohibited from retaliating against another who has engaged in a protected activity. MCL 37.2701. The CRA defines a "person" as "an individual, agent, association, corporation, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee in bankruptcy, unincorporated organization, the state or a political subdivision of the state or an agency of the state, or any other legal or commercial entity." MCL 37.2103(g). Because the CRA defines a "person," a "person" for MCL 37.2701 may not be defined in any other manner. *Haynes v. Neshewat,* 477 Mich. 29, 35, 729 N.W.2d 488 (2007).

In *Rymal v. Baergen,* 262 Mich.App. 274, 686 N.W.2d 241 (2004), this Court recognized that the antiretaliation provision of the CRA is broader than the antidiscrimination provision. *Elezovic I,* 472 Mich. at 424 n. 21, 697 N.W.2d 851. When this Court decided *Rymal, Jager* was good law, and the issue before the Court was whether the holding of *Jager,* that individuals cannot be held liable for discrimination, precluded individual liability under the antiretaliation provision. The Court concluded that, because the Legislature used different terms in the antidiscrimination provision, MCL 37.2202 (an "employer"), and the antiretaliation provision, MCL 37.2701 (a "person"), and because the CRA's definition of a "person" included an "individual," the Legislature authorized individual liability for retaliatory acts. *Id.* at 298-299, 652 N.W.2d 503. The Court stated, in pertinent part:

> [T]he antiretaliation provision of the CRA, MCL 37.2701, clearly prohibits "[t]wo or more persons ... or a person" from retaliating or discriminating against a person who has opposed a violation of the CRA.... In contrast to MCL 37.2202(1), which prohibits an "employer" from engaging in discrimination practices ... § 2701 refers merely to a "person." And a "person" includes an "individual".... The "employer" definition contained in § 2201(a), and referenced in § 2202(1), is simply not implicated in the antiretaliation provision of the CRA.
>
> * * *
>
> ***10** MCL 37.2701 could not be drafted in a manner that is any more clear or unambiguous; a "person," which by statute and necessity includes an individual, shall not retaliate, and the term invokes individual liability. There is no language that could conceivably be interpreted as limiting an action for retaliation under the CRA against only an employer. Giving effect to the Legislature's intent as expressed in the words of the statute leads us to the conclusion that a CRA retaliation claim under § 2701 can be maintained against individuals apart from employers.... The language in § 2701 is much broader than that in § 2202.... [*Id.* at 297-298, 652 N.W.2d 503.]

The trial court granted summary disposition on the retaliation claim because Kelley was not in a subordinate position to Raymond. We conclude that the trial court erred in its conclusion. A "person" shall not retaliate, MCL 37.2701, and nothing in the definition of "person" requires the person to be in a position of power or authority. As is clear from the *Rymal* decision, the definition of "employer" does not govern who may be sued for retaliation. Raymond is an "individual," and because the definition of a "person" includes an "individual," Kelley can assert a retaliation claim against Raymond.

Raymond sets forth two alternative grounds for affirmance. First, he argues that, because he and Kelley engaged in sexual relations until August 2005, there were no "unwelcome" sexual advances. Necessarily implied in Raymond's argument is the assertion that Kelley voluntarily engaged in the sexual relations. Because Raymond did not raise this argument below, it is unpreserved for appellate review, and we are not obligated to address it. *Polkton Charter Twp. v. Pellegrom,* 265 Mich.App. 88, 95, 693 N.W.2d 170 (2005).

Regardless, there is no merit to the argument. Because Raymond moved for summary disposition under MCR 2.116(C)(8), only the pleadings may be considered. *USA Cash # 1,* 285 Mich.App. at 265, 776 N.W.2d 346. Thus, we may not consider Raymond's affidavit in which he averred that Kelley manipulated him to agree to maintain K & R by engaging in sexual relations with him. In the amended complaint, Kelley alleged that, until late August 2005, she ceded to Raymond's demands for sexual favors in fear of losing employment with K & R. She also alleged that, after she began to resist Raymond's demands, Raymond became more aggressive and threatened to bankrupt K & R and to leave her without employment. Accepting these allegations as true and viewing them in a light most favorable to Kelley, *id.,* Kelley alleged that Raymond's sexual advances were unwelcome.

Second, Raymond argues that Kelley suffered no adverse employment action because dissolution is not an "employment" action. The argument is conclusory. Because Raymond fails to cite any authority for the proposition that dissolution is not an employment action, Raymond has abandoned the issue. *Peterson Novelties,* 259 Mich.App. at 14, 672 N.W.2d 351. Even considering the merits of the argument, we find the argument to be without merit.

*11 To establish a retaliation claim under the CRA, a plaintiff must establish that she suffered an adverse employment action. *DeFlaviis,* 223 Mich.App. at 436, 566 N.W.2d 661. There is no exhaustive list of adverse employment actions. *Chen v. Wayne State Univ.,* 284 Mich.App. 172, 201, 771 N.W.2d 820 (2009). The action must be materially adverse to the employee; "it must be more than a mere inconvenience or minor alteration of job responsibilities." *Id.* Generally, materially adverse employment actions "take[ ] the form of an ultimate employment decision, such as a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Peña v. Ingham Co. Rd. Comm.* ., 255 Mich.App. 299, 312, 660 N.W.2d 351 (2003) (quotation omitted).

"[A] dissolved corporation, its officers, directors and shareholders shall continue to function in the same manner as if dissolution had not occurred." MCL 450.1834. But a dissolved corporation "shall not carry on business except for the purpose of winding up its affairs." MCL 450.1833. Thus, a dissolved corporation may continue to exist only until it has finished winding up its affairs. *Flint Cold Storage v. Dep't of Treasury,* 285 Mich.App. 483, 495-496, 776 N.W.2d 387 (2009). Therefore, after Judge Gillis ordered K & R dissolved, Kelley could not continue her employment as K & R's office manager and bookkeeper. The dissolution of K & R materially affected Kelley's employment with K & R; it terminated the employment.[FN7]

> FN7. Citing six lines from the transcript of the bench trial, Raymond claims that Kelley remained employed after K & R was dissolved. The cited lines only indicate that Tim Cupples, an employee of K & R, continued to work at K & R for a short period after Raymond stopped working for K & R in March 2006.

Raymond, as a shareholder of K & R, had the right to request that K & R be dissolved. MCL 450.1823. However, the CRA, by prohibiting a person from retaliating against another for the other's opposition to a violation of the CRA, MCL 37.2701 (a), prohibited Raymond from seeking dissolution of K & R because Kelley rejected his sexual advances. While Raymond could seek dissolution of K & R, he could not do so for an unlawful purpose.

Under the unique facts of this case, Raymond has not established that his request for dissolution of K & R did not result in an adverse employment action suffered by Kelley for her refusal to submit to Raymond's sexual demands. We reverse the trial court's order granting summary disposition to Raymond on Kelley's retaliation claim.

G. JURY DEMAND

Kelley asserts that the trial court erred in denying her demand for a jury trial on the claim for breach of divorce judgment. She argues that because the claim is for breach of a contract and only monetary damages were requested, the claim is legal in nature. We disagree.

We review questions of law de novo. *Cummins v. Robinson Twp.,* 283 Mich.App. 677, 690, 770 N.W.2d 421 (2009).

Kelley included a demand for a jury trial in her complaint. If a jury trial has been demanded, the issues shall be tried by jury unless "the court on motion or on its own initiative finds that there is no right to trial by jury of some or all of those issues." MCR 2.509(A)(2). The trial court held that, pursuant to MCL 552.12, Kelley was not entitled to a jury trial on her claim for breach of divorce judgment. MCL 552.12 provides:

> ***12** Suits to annul or affirm a marriage, or for a divorce, shall be conducted in the same manner as other suits in courts of equity; and the court shall have the power to award issues, to decree costs, and to enforce its decrees, as in other cases.

There is no right to a jury trial in a divorce action. See *Draggoo v. Draggoo,* 223 Mich.App. 415, 427, 566 N.W.2d 642 (1997). MCL 552.12 grants a court the power to enforce its decrees. As discussed in part II(B), *supra,* Kelley's claim for breach of divorce judgment is a motion to enforce the provision in the divorce judgment that the parties shall maintain K & R.

Neither of the two cases cited by Kelley, *ECCO, Ltd. v. Balimoy Mfg. Co., Inc.,* 179 Mich.App. 748, 446 N.W.2d 546 (1989); and *Decker,* unpub. op., support the proposition that a motion to enforce a judgment that was obtained in an equity action may be tried before a jury. In *ECCO,* 179 Mich.App. at 750-751, 446 N.W.2d 546, this Court held that the plaintiff's claim for promissory estoppel, although an equitable action, was properly tried before a jury because the plaintiff sought monetary damages, rather than equitable relief, and there was no claim that monetary damages were not an adequate remedy. However, the promissory estoppel claim in *ECCO* was an original action; it was not a disguised motion to enforce a judgment obtained in equity. In *Decker,* there was no issue concerning the plaintiff's right to jury trial on her claim for one-half of the rental proceeds. The case was decided on a motion for summary disposition. Because Kelley has provided us with no authority to suggest that a motion to enforce a divorce judgment may be tried before a jury, we affirm the trial court's order denying her demand for a jury trial on the claim for breach of divorce judgment.

H. BREACH OF DIVORCE JUDGMENT

Kelley argues that the trial court, at the conclusion of the bench trial, erred in finding that Raymond did not breach the judgment of divorce by refusing to maintain K & R according to the terms of their judgment of divorce. We disagree.

We review a trial court's factual findings at a bench trial for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc. v. Krol,* 256 Mich.App. 505, 512, 667 N.W.2d 379 (2003). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id.*

Resolution of this issue requires determining under what circumstances the agreement between the parties to maintain K & R following their divorce could be terminated. Only paragraphs 18 and 19 of the divorce judgment are potentially relevant to the inquiry. Paragraph 18 of the divorce judgment provided that "[t]he parties shall continue to maintain [K & R]." Paragraph 19 of the divorce judgment provided, in part, that "[t]he listed salaries shall remain in effect unless there is a written agreement signed by both parties."

***13** Kelley admits that paragraph 18 standing alone did not provide for how long the parties were required to maintain K & R. Nevertheless, Kelley claims that the parties intended for K & R to be maintained until she and Raymond mutually agreed to terminate the business because otherwise the salary "guarantee" in paragraph 19 would have no meaning. Thus, when read together, paragraphs 18 and 19 evinced an agreement that the parties would "earn a living from the business until they otherwise mutually agreed."

The goal of contract interpretation is to enforce the parties' intent. *Chestonia Twp. v. Star Twp.*, 266 Mich.App. 423, 432, 702 N.W.2d 631 (2005). A court must examine the contractual language, and if the language is clear and unambiguous, the contract must be enforced as written. *Coates v. Bastian Bros., Inc.*, 276 Mich.App. 498, 503, 741 N.W.2d 539 (2007). A contract is not ambiguous if it "fairly admits of but one interpretation." *Meagher v. Wayne State Univ.*, 222 Mich.App. 700, 722, 565 N.W.2d 401 (1997). The parties to the contract are presumed to understand and intend what the language employed clearly states. *Chestonia Twp.*, 266 Mich.App. at 432, 702 N.W.2d 631. A court may not rewrite an unambiguous contract on the basis of the parties' reasonable expectations. *Burkhardt v. Bailey*, 260 Mich.App. 636, 656-657, 680 N.W.2d 453 (2004). A contract must be read as a whole. *Roberts v. Titan Ins. Co. (On Reconsideration)*, 282 Mich.App. 339, 357, 764 N.W.2d 304 (2009). A court should avoid an interpretation of a contract that renders any part of the contract surplusage or nugatory. *Laurel Woods Apartments v. Roumayah*, 274 Mich.App 631, 638, 480 Mich. 990 (2007).

Contrary to Kelley's argument, we conclude that the guarantee in paragraph 19 is not rendered meaningless if a durational requirement, e.g., that the parties would maintain K & R until otherwise agreed, is not read into paragraph 18. Rather, paragraph 19 means exactly what it says: that, as long as K & R is maintained, the "listed salaries" of Kelley and Raymond shall remain in effect until otherwise agreed. And, this is the only interpretation that can be given to paragraph 19 without reading into paragraph 18 a duration provision that is not included within the plain language of the divorce judgment. A contract must be enforced according to its plain language, *Coates*, 276 Mich.App. at 503, 741 N.W.2d 539, and the plain language of the divorce judgment does not contain a requirement for how long Kelley and Raymond were required to maintain K & R.

We must, however, still determine whether the trial court erred in its conclusion that Raymond did not breach the parties' judgment of divorce. A contract for an indefinite term and that does not contain a specific termination procedure is terminable at the will of either party. *Lichnovsky v. Ziebart Int'l Corp.*, 414 Mich. 228, 236, 242, 324 N.W.2d 732 (1982). The Supreme Court explained:

> It is not the law that an agreement must have a definite term or duration and that therefore an agreement which does not have a definite term or duration is terminable at the will of either party. A franchise agreement need not, any more than an employment or an agency agreement, have an outside time limit to be valid.
>
> ***14** The rule is rather that where the parties have not agreed upon *the term, duration, or manner of termination* of such an agreement it is generally deemed to be terminable at the will of either party because they have not agreed otherwise. The intent of the parties is determinative. An agreement which the parties have agreed is

terminable only for cause, and which is thus by their agreement to endure until so terminated, is legally enforceable until terminated on that ground. [*Id.* at 240-241, 324 N.W.2d 732 (emphasis added).]

In this case, the parties' divorce judgment did not provide for the term, duration or manner of termination of the parties' agreement to maintain K & R. In the absence of these terms, the parties' agreement to maintain K & R was terminable at the will of either party. An at-will contract may be terminated by either party with or without cause. See *Silberstein v. Pro-Golf of America, Inc.,* 278 Mich.App. 446, 451, 750 N.W.2d 615 (2008) ("[E]mployment relationships are terminable at will, with or without case, at any time for any, or no, reason.") (quotation omitted); Black's Law Dictionary (7th ed) (defining "at will" as "able to be terminated or discharged by either party without cause"). Because the parties' agreement to maintain K & R was terminable at will, the trial court did not clearly err in finding that Raymond did not breach the divorce judgment. We affirm the trial court's judgment denying Kelley's claim for breach of divorce judgment.

I. THE VALUE OF K & R

Kelley claims that trial court clearly erred in finding that the value of K & R was $39,500, rather than $111,273. Kelley's argument consists of two points: (1) the trial court erred in not accepting the testimony of her expert, Clinton Meyering, that the Delaware Block method should not be used to determine the value of K & R; and (2) the trial court erred in not accepting Meyering's testimony that the $75,000 sale of a rebuilt machine in 2005 was not a nonrecurring event.

Earl Belger, pursuant to court order, conducted an "estimate of value" of K & R. He explained that an estimate of value is "a curser [sic] review of the books and records," a review in which the "numbers" provided by the accountant are relied on. Belger valued K & R under an adjusted assets method and a capitalized earnings method. He then utilized the Delaware Block method and added the values given by the adjusted assets method and the capitalized earnings method and divided by two. Belger admitted that the Delaware Block method does not have to be used and that the IRS even prefers that one method of valuation be used. However, he stated that it was preferable to use two methods when one does not "trust" or "feels a little bit uneasy" with the numbers. And, he firmly believed that there had been "some manipulation" of the numbers that were given to him by K & R's accountant. Belger admitted that he could have only used the capitalized earnings method to determine the value of K & R, but, under the circumstances, he lacked confidence in that manner of valuation.

***15** Meyering testified that the value of K & R should be determined solely by the capitalized earnings method. He explained that the Delaware Block method is, in reality, never used to determine the value of a business, because a business is always sold for its highest value. The IRS has even condemned the Delaware Block method. Meyering explained that, because K & R was a service-oriented company, whose main asset was its customer base, the value of K & R should be based on its capitalized earnings.

The two experts disagreed regarding whether the capitalized earnings method, by itself, provided an accurate value of K & R. Based on Belger's testimony for why he utilized the Delaware Block method-that he lacked confidence in the capitalized earnings method based on a "manipulation" of the numbers provided to him, we are not left with a definite and firm conviction that the trial court clearly erred in rejecting Meyering's testimony that the value of K & R should be determined solely by the capitalized earnings method. *Alan Custom Homes,* 256 Mich.App. at 512, 667 N.W.2d 379.

Meyering also testified that, in determining the value of K & R under the capitalized earnings method, Belger should not have adjusted the 2005 income of K & R for the $75,000 sale of a rebuilt machine. He explained that the sale was not a nonrecurring event, as it did not meet the two characteristics of nonrecurring events. First, the sale of the machine was related to the business of K & R; the business of K & R was to repair machines. Meyering explained that the sale of chickens would be an event unrelated to the business of K & R. Second, there was no reason that the sale of a machine would not occur again in the future, especially because K & R had a history of selling machines. Meyering noted that there was a line in K & R's general ledger-line 306-for the sale of machines, and that K & R had sold machines in 2001 for $30,000, in 2002 for $90,000, in 2003 for $8,000, and in 2004 for $50,000.

Despite Raymond's explanation for why the sale of the rebuilt machine was "unique" and "totally different" than any other sale of a machine by K & R, we find Meyering's explanation for why the sale was not a nonrecurring event to be reasonable. Nonetheless, we do not believe that the trial court's finding that the 2005 sale of the rebuilt machine was a nonrecurring event was clearly erroneous. Meyering had previously provided legal representation to Kelley. Belger, unlike Meyering, did not know either of the parties, and he did not discuss the value of K & R with either Kelley or Raymond. His estimate of value of K & R was based on the numbers provided by the accountant, as well as discussions he had with the accountant. The accountant informed Belger that the sale of the machine in 2005 was a nonrecurring event, and Belger saw nothing similar to the sale in the books. Notably, the $75,000 received from the 2005 sale was not listed in line 306 of the general ledger for sales of machines; rather, it was originally listed as a travel expense, because the accountant did not know how to characterize it. Under these circumstances, we are not left with a definite and firm conviction that the trial court clearly erred in rejecting Meyering's testimony that the value of K & R under the capitalized earnings method was $111,372. *Alan Custom Homes*, 256 Mich.App. at 512, 667 N.W.2d 379.

***16** Because the trial court did not clearly err in rejecting Meyering's testimony concerning the use of the Delaware Block method and the 2005 sale of the rebuilt machine, we affirm the trial court's finding that the value of K & R was $39,500.[FN8]

> FN8. Kelley also claims that, in only awarding her 50 percent of the value of K & R, the trial court failed to make an adjustment for the $21,000 that Raymond took from K & R's line of credit and which he stipulated he was responsible to repay. The argument does not fall within the question presented, which was whether the trial court's value of K & R was clearly erroneous. We consider the argument abandoned. *Mettler Walloon, LLC v. Melrose Twp.*, 281 Mich.App. 184, 221, 761 N.W.2d 293 (2003). Regardless, Kelley does not explain what adjustment should have been made. We also note that the record contains a stipulated order of indemnity that requires Raymond to indemnify and hold Kelley harmless from any liability to Chase Bank for the $21,000.

J. ALTER EGO

Kelley asserts that the trial court erred in finding that AIMS was not the alter ego of K & R because the trial court failed to understand the "compelling nature" of the facts that were consistent with a conclusion that AIMS was the alter ego of K & R."

An alter-ego claim is not, by itself, a cause of action. *In re RCS Engineered Products Co., Inc.*, 102 F.3d 223, 226 (C.A.6, 1996). Rather, it is a doctrine that allows a court to disregard the corporate entity, i.e., to pierce the corporate veil. *Id.;* see also 18 Am Jur 2d, Corporations, §§ 51-52, pp 698-701. The remedy of piercing the corporate veil is equitable in nature. *Foodland Distributors v. Al-Naimi*, 220 Mich.App. 453, 456, 559 N.W.2d 379 (1996). In reviewing a trial court's decision on a request for equitable relief, we "will set aside a trial court's factual findings only if they are clearly erroneous, but whether equitable relief is proper under those facts is a question of law that an appellate court reviews de novo." *McDonald v. Farm Bureau Ins. Co.,* 480 Mich. 191, 197, 747 N.W.2d 811 (2008); see also *Law Officers of Lawrence J. Stockler, P.C. v. Rose,* 174 Mich.App. 14, 43, 436 N.W.2d 70 (1989).[FN9]

FN9. At the end of the bench trial, the trial court stated that it could not conclude that AIMS was the alter ego of K & R and it was therefore granting AIMS's motion for a "directed verdict." The trial court should have characterized AIMS's motion to dismiss as a motion for involuntary dismissal. "Such a motion is granted in a bench trial when the court is satisfied after the presentation of the plaintiff's evidence that on the facts and the law the plaintiff has shown no right to relief." *Sands Appliance Services, Inc. v. Wilson,* 463 Mich. 231, 235-236 n. 2, 615 N.W.2d 241 (2000) (quotation omitted). In ruling on a motion for involuntary dismissal, a court may determine the facts. MCR 2.504(B)(2).

Kelley claimed that, because Raymond's actions were unjust and fraudulent toward K & R and its creditors, the trial court should declare AIMS to be the alter ego of K & R. She asserted that Kiser was merely a "fictional owner" of AIMS. A court shall disregard the corporate entity and pierce the corporate veil only where the following three prerequisites are satisfied:

> First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff. [*LaRose Market, Inc. v. Sylvan Ctr., Inc.,* 209 Mich.App. 201, 209, 530 N.W.2d 505 (1995) (quotation omitted).]

We determine that AIMS was not used to commit a fraud or wrong. As established in part II(H), *supra,* because the parties' agreement to maintain K & R was terminable at will by the parties, Raymond did not breach the agreement when he ceased working for K & R in March 2006. Having lawfully terminated the parties' agreement to maintain K & R, Raymond was no longer under any obligations to K & R. He was free to work for or to even start another machine repair company; such actions by Raymond would not have been fraudulent or wrongful. Therefore, even if we were to conclude that the trial court's finding that Kiser incorporated AIMS to take advantage of a business opportunity was clearly erroneous, we would not reverse the trial court's judgment dismissing Kelley's alter-ego claim. See *Fisher v. Blankenship,* 286 Mich.App. 54, 70, 777 N.W.2d 46 (2009) ("[T]his Court will affirm where the trial court came to the right result even if for the wrong reason.").

III. DOCKET NO. 286742

***17** Kelley claims that the trial court erred in granting case evaluation sanctions because, based on unusual circumstances, it was within the interest of justice to deny sanctions. We disagree.

Generally, a trial court's decision to grant case evaluation sanctions presents a question of law, which we review de novo. *Tevis v. Amex Assurance Co.,* 283 Mich.App. 76, 86, 770 N.W.2d 16 (2009). However, a trial court's decision regarding whether to invoke the "interest of justice" exception is reviewed for an abuse of discretion. *Harbour v. Correctional Medical Services, Inc.,* 266 Mich.App. 452, 465, 702 N.W.2d 671 (2005).

MCR 2.403(O)(1) provides that "[i]f a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation." The word "must" in the court rule indicates that case evaluation sanctions are mandatory. *Tevis,* 283 Mich.App. at 86, 770 N.W.2d 16. However, a "court may, in the interest of justice, refuse to award actual costs." MCR 2.403(O)(11).

> [T]he "interest of justice" exception should be invoked only in "unusual circumstances," such as where a legal issue of first impression or public interest is present, " 'where the law is unsettled and substantial damages are at issue,' " where there is a significant financial disparity between the parties, or " 'where the effect on third persons may be significant.' " These factors are not exclusive. " 'Other circumstances, including misconduct on the part of the prevailing party, may also trigger this exception.' " [*Harbour,* 266 Mich.App. at 466, 702 N.W.2d 671, (quoting *Haliw v. Sterling Heights,* 257 Mich.App. 689, 707, 669 N.W.2d 563 (2003), rev'd in part on other grounds 471 Mich. 700, 691 N.W.2d 753 (2005) (internal citations omitted).]

Kelley asserts that four circumstances in the present case should invoke the "interest of justice" exception: (1) AIMS was formed under "suspicious" circumstances and the resolution of the alter-ego claim required credibility determinations; (2) AIMS, because it was in the process of being dissolved, would not benefit from case evaluation sanctions; (3) Kelley did not learn until trial that AIMS was being dissolved; and (4) a judgment in favor of K & R on the alter-ego claim would have benefited K & R's creditors. We conclude that the trial court did not abuse its discretion in concluding that these four circumstances were not "unusual circumstances" necessary to invoke the "interest of justice" exception.

First, the fact that AIMS was formed under "suspicious" circumstances and that credibility determinations were required is not an "unusual circumstance." Cases proceed to trial for credibility determinations. It is not unusual that a trier of fact is required to decide the facts of a case.

Second, AIMS, although it is in the process of being dissolved, can benefit from case evaluation sanctions. Kiser testified that she has "an attorney bill on behalf of AIMS." The attorney bill for AIMS does not evaporate simply because AIMS is being dissolved. A dissolved corporation exists until it has finished winding up its affairs. *Flint Cold Storage,* 285 Mich.App. at 495-496, 776 N.W.2d 387.

***18** Third, while a party's "gamesmanship," tactical decisions that cause unnecessary costs to the opposing party, may be an unusual circumstance that invokes the "interest of justice" exception, *Harbour,* 266 Mich.App. at 468, 702 N.W.2d 671, Kelley does not contend that the failure of AIMS's attorney to inform her that AIMS was in the process of being dissolved was misconduct. And, there is no evidence in the record that AIMS sought to keep that information, or any of its financial information, from Kelley. In addition, Kelley was informed before case evaluation that Kiser was thinking of dissolving AIMS. At her May 2007 deposition, Kiser testified that AIMS suffered financial losses for the year 2006 and for the first quarter of year 2007 and that she was not sure that she would continue AIMS. Under these circumstances, Kelley's failure to know that AIMS was no longer conducting business at the time of trial was not an "unusual circumstance" requiring the "interest of justice" exception to be invoked.

Finally, the fact that K & R's creditors would have benefited if Kelley had succeeded on the alter-ego claim is not an "unusual circumstance." The alter-ego claim did not present an issue of public interest and the effect on third persons would not have been significant. Only K & R's creditors could have benefited.

Affirmed in part, reversed in part, and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

Mich.App.,2010.
Arevelo v. Arevalo
Not Reported in N.W.2d, 2010 WL 1330636 (Mich.App.)

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
Daniel J. TRAPP, Plaintiff–Appellant,
v.
Terry L. VOLLMER, Defendant–Appellee.

Docket No. 297116.
June 16, 2011.

Kent Circuit Court; LC No. 08–011944–CK.

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

*1 Plaintiff Daniel Trapp appeals by right the trial court's order granting defendant Terry Vollmer summary disposition and dismissing plaintiff's complaint. We affirm.

Plaintiff was employed by Electro Chemical Finishing Company (ECF), which defendant founded. In 1998, the parties entered into an agreement, ¶ 3 of which is the subject of this litigation. It read:

> Vollmer and Trapp will develop a succession plan whereby they will either sell their stock to an employee stock option plan (ESOP) or exchange their stock through a merger or acquisition. This succession plan is to be in effect by March 1, 2005. Any changes or alternative resolutions must be mutually agreed upon by both parties.

No succession plan or alternative solution was ever implemented.

On appeal, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition on his breach of contract and shareholder oppression claims. We review de novo a trial court's decision on a motion for summary disposition. *Latham v. Barton Malow Co.,* 480 Mich. 105, 111; 746 NW2d 868 (2008). We also review de novo a trial court's interpretation of a contract. *Alpha Capital Mgt., Inc. v. Rentenbach,* 287 Mich.App 589, 611; 792 NW2d 344 (2010). Similarly, we review de novo questions of statutory interpretation. *Detroit v. Ambassador Bridge Co.,* 481 Mich. 29, 35; 748 NW2d 221 (2008).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v. Detroit Bd. of Ed .,* 470 Mich. 274, 278; 681 NW2d 342 (2004). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.* When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.*

With regard to plaintiff's breach of contract claim, the issue is whether ¶ 3 fails for lack of material terms. Michigan law recognizes that parties may enter into an enforceable contract that requires them to execute another contract at a later date. *Opdyke Investment Co. v. Norris Grain Co.,* 413 Mich. 354, 359; 320 NW2d 836 (1982); *Prof. Facilities Corp. v. Marks,* 373 Mich. 673, 679; 131 NW2d 60 (1964); *Hansen v. Catsman,* 371 Mich. 79, 82; 123 NW2d 265 (1963). However, to be valid, a contract to contract must contain all the essential elements that are to be incorporated into the final contract. *Opdyke,* 413 Mich. at 359, citing *Socony–Vacuum Oil Co. v. Waldo,* 289 Mich. 316, 323; 286 NW 630 (1939). If the agreement leaves open any material term to be decided in the future, no contract is made. *Hansen,* 371 Mich. at 82.

Plaintiff argues that, at minimum, a question of fact exists regarding whether ¶ 3 constitutes an enforceable agreement to agree. We disagree. In *Opdyke,* 413 Mich. 79, our Supreme Court stated that "certain matters" are expressly left to be negotiated in the future is some evidence that the parties did not intend to be bound by the agreement. *Opdyke,* 413 Mich. at 359–360. Thus, while essential terms are required to make a valid agreement to agree, the lack of non-essential terms does not automatically invalidate the agreement.

*2 In this case, ¶ 3 identifies the parties (Vollmer and Trapp), the subject matter (the succession plan), and the implementation date (March 1, 2005). It also provides through the use of the word "their" that the succession plan would include both parties either selling or exchanging their stock—"Vollmer and Trapp ... will either sell their stock ... or exchange their stock...." It further identifies who will be responsible for the succession plan's development, both parties—"Vollmer and Trapp will develop a succession plan...." However, it contains no specifics regarding the succession plan such as a mechanism for determining the stock purchase price and the plan's components. On its face, ¶ 3 appears to be an agreement to, in good faith, develop a succession plan and to agree on the plan's details in the future, presumably when the parties committed to a purchaser. Such an interpretation is bolstered by plaintiff's contention that defendant breached the agreement when he allegedly refused to sell ECF, i.e., he did not pursue in good faith the implementation of a succession plan.

However, in Michigan, agreements to negotiate have been held unenforceable for lack of material terms. *Prof. Facilities,* 373 Mich. at 678–679. As stated in 1 Corbin on Contracts § 4.1, p 531:

> When the evidence clearly shows, either by reason of definite language or otherwise, that the only (and the complete) subject matter that is under consideration is left for further negotiation and agreement, there is no contract, not for vagueness or indefiniteness of terms but for lack of any terms. The parties may use words constituting an "agreement to agree" or an "agreement to negotiate", with the result that they feel a sense of "obligation". This is merely an obligation to discuss terms ... not an obligation ... to render any other future performance.

Here, ¶ 3 contains no particulars with regard to its subject matter: the succession plan. As such, it is merely an unenforceable agreement to negotiate, rather than an enforceable agreement to agree, because it failed to outline any of the succession plan terms. Accordingly, the trial court did not err in granting defendant summary disposition on plaintiff's breach of contract claim. [FN1]

FN1. Based on our decision, we need not address plaintiff's issues pertaining to breach of the contract.

Next, we address plaintiff's argument that the trial court erred in dismissing his shareholder oppression claim. [FN2] MCL 450.1489(1) allows a shareholder to sue for "acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder." "Willfully unfair and oppressive conduct" is defined in part as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder." MCL 450.1489(3).

FN2. Plaintiff's argument that the trial court's decision was premature because defendant did not raise the issue or comply with MCR 2.116(G)(3) and (4) is without merit. Defendant's summary disposition motion as to whether plaintiff could maintain his shareholder oppression claim was brought pursuant to MCR 2.116(C)(8) because he relied solely on plaintiff's complaint. *Feyz v. Mercy Mem. Hosp.,* 475 Mich. 663, 672; 719 NW2d 1 (2006).

In *Franchino v. Franchino,* 263 Mich.App 172;

687 NW2d 620 (2004), the Court stated that "willfully unfair and oppressive conduct" refers to conduct that substantially interferes only with rights that automatically accrue to a shareholder by virtue of being a shareholder. Here, the affected interests plaintiff alleged pertained to defendant's compliance with ¶ 3. Implementation of a succession agreement is not an interest that accrued to plaintiff by virtue of being a shareholder. Thus, plaintiff could not maintain his shareholder oppression claim.

*3 Plaintiff further argues that the 2006 amendment to MCL 450.1489(3) negated the portion of the *Franchino* decision that rejected the "reasonable expectations test." The *Franchino* Court rejected the "plaintiff's invitation to define the term 'oppression' to include 'conduct that defeats the reasonable expectations of a minority shareholder.' " *Franchino,* 263 Mich.App at 186. It reasoned that a "reasonable expectations approach" that places the focus on the rights or interests of a shareholder would be inconsistent with a statute that places the focus on the actions of the majority like MCL 450.1489 does. *Id.* at 187–188. Applying such a test, plaintiff reasons that his shareholder oppression claim survives summary disposition. In an apparent reaction to the *Franchino* decision, the Legislature amended MCL 450.1489(3). It added: "[w]illfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder."

Plaintiff cites to the Legislature's addition of employment termination, without further explanation, and its specific reference to the "affected shareholder" as evidence of a change of focus to the impact on minority shareholders. We believe that the amendment's language evinces no such intent. The Legislature simply expressly defined the circumstances under which two types of majority conduct could be considered "willfully unfair and oppressive conduct." In doing so, it expanded with restrictions the type of shareholder interests that could properly be the subject of "willfully unfair and oppressive conduct" beyond those defined in *Franchino.* The focus remained on the majority's conduct in the context of terminating employment or limiting employment benefits, not on the reasonable expectations of a minority shareholder. Therefore, the 2006 amendment to MCL 450.1489(3) neither expressly adopted a reasonable expectations test in determining oppressive conduct nor provided a basis for us to disregard the *Franchino* decision thereby opening the door to adoption of the test. Accordingly, we conclude that the trial court did not err in granting summary disposition on plaintiff's shareholder oppression claim.[FN3]

FN3. Based on our decision, we need not address whether plaintiff's claim is barred by the statute of limitations and whether the parties mutually agreed to extend the succession plan's implementation date.

Affirmed.

Mich.App.,2011.
Trapp v. Vollmer
Not Reported in N.W.2d, 2011 WL 2423884 (Mich.App.)

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
Igor BERGER, a/k/a Gerald Berger, Plaintiff/ Counter–Defendant
v.
Alla KATZ and Paul KATZ, Defendants/ Counter–Plaintiffs–Appellants.
Igor Berger, a/k/a Gerald Berger, Plaintiff–Appellant,
v.
Alla Katz and Paul Katz, Defendants–Appellees.

Docket Nos. 291663, 293880.
July 28, 2011.

Wayne Circuit Court; LC No. 07–707413–CZ.

Before: WILDER, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

*1 Plaintiff and defendants are the owners of IPAX Cleanogel, Inc., a corporation that sells industrial cleaners.[FN1] Plaintiff owns a one-third interest and defendants together own the remaining two-thirds interest in the corporation. Plaintiff filed this action in 2007, alleging willfully unfair and oppressive conduct by defendants, as the majority shareholders, contrary to MCL 450.1489, and alleging additional common-law claims for breach of fiduciary duty, breach of contract, and promissory estoppel. Defendants filed a counterclaim against plaintiff for breach of fiduciary duty. The common-law claims were tried before a jury, which awarded plaintiff $22,000 against each defendant for breach of fiduciary duty. The jury also determined that plaintiff breached a fiduciary duty to defendants, but did not award any damages for the breach. The trial court thereafter conducted a bench trial on plaintiff's statutory claim and found that defendants violated MCL 450.1489 by engaging in willfully unfair and oppressive conduct as majority shareholders. As a remedy for the violation, the court prescribed a buyout procedure whereby one side could purchase the fair value of the other side's shares in the corporation. If that was not possible, the court would appoint a receiver to liquidate the corporation. The trial court also ordered defendants to "reimburse the corporation the amount of legal fees and costs that the corporation paid out for Defendants [sic] willful misconduct in this case." In addition, the court ordered that, during the interim, plaintiff was to be paid $2,000 a month and receive other benefits until the corporation changed hands or was sold. After the trial court entered its final judgment, plaintiff filed a motion for case evaluation sanctions. The trial court determined that plaintiff was not entitled to sanctions and denied the motion. Defendants now appeal as of right in Docket No. 291663, and plaintiff appeals as of right in Docket No. 293880, challenging the denial of case evaluation sanctions. Because the only error established on this record is the trial court's refusal to award plaintiff case evaluation sanctions, we affirm the judgments for plaintiff, but reverse the trial court's order denying case evaluation sanctions and remand for a determination of sanctions.

> FN1. Throughout the bulk of our opinion we refer to plaintiff/counter-defendant merely as "plaintiff," and defendants/ counter-plaintiffs merely as "defendants" for the sake of efficiency. However, with regard to our discussion of Case Evaluation Sanctions, for the sake of clarity, where necessary, we use their designations as counter parties.

This action arises from a strained business relationship between plaintiff and defendants. The parties together established IPAX Cleanogel, Inc.

("IPAX"), to create and market environmentally friendly cleaning products to various industries. The parties also formed API, L.L.C. ("API"), as a holding company for the warehouse and manufacturing facility that it leased to IPAX for its operations. The parties cooperatively operated IPAX for many years, during which time they equally divided the profits and equally participated in decisions affecting the company.

In 2006, plaintiff moved to California and was no longer involved in the day-to-day operations of the business, although he claimed that he continued to be involved in developing business opportunities for the company. Not long thereafter, defendants stopped making distributions to plaintiff and stopped consulting with him on matters involving the company. Plaintiff complained and, following substantial negotiations, the parties agreed to an interim arrangement whereby, pending a final agreement, plaintiff was paid $2,000 a month as advance distributions on profits from IPAX and $2,000 a month as his share of rental income from API, subject to reconciliation at the end of the year. The parties were never able to formally resolve their dispute and they disagreed on the financial condition of the company. Defendants eventually stopped making payments to plaintiff, claiming that the company was losing business and was no longer profitable. Plaintiff claimed that defendants resorted to tactics designed to benefit themselves personally and to artificially lower the corporation's profits to avoid paying him his fair share of his one-third interest in the corporation.

I. DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT

*2 Defendants first argue that the trial court erred in denying their trial motion for a directed verdict with respect to plaintiff's breach of fiduciary duty claim, and in denying their post-trial motion judgment notwithstanding the verdict ("JNOV"). This Court reviews de novo a trial court's ruling on a motion for a directed verdict or JNOV. *Sniecinski v. Blue Cross & Blue Shield of Michigan,* 469 Mich. 124, 131; 666 NW2d 186 (2003). This Court must review the evidence and all legitimate inferences arising from the evidence in the light most favorable to the nonmoving party. The motion should be granted only if the evidence fails to establish a claim as a matter of law. *Id.* If reasonable minds could differ regarding the evidence, the issue is for the jury and a directed verdict or JNOV is improper. *McPeak v. McPeak (On Remand),* 233 Mich.App 483, 490; 593 NW2d 180 (1999).

We disagree with defendants' argument that plaintiff could not prevail on his breach of fiduciary duty claim because plaintiff admitted on cross-examination that he was suing defendants for amounts that he claimed were due from IPAX and API. Although plaintiff agreed that IPAX and API were directly liable for any corporate distributions, plaintiff's theory of the case was that defendants used their control as majority shareholders to manipulate the corporation's financial condition and to divert corporate profits to themselves, to either minimize or foreclose the availability of distributions to plaintiff. Majority shareholders in a corporation owe "the utmost good faith in its control and management as to the minority and it is the essence of this trust that it must be so managed so as to produce to each shareholder, the best possible return upon his investment." *Salvador v. Connor,* 87 Mich.App 664, 675; 276 NW2d 458 (1978), quoting 6 Callaghan's Michigan Civil Jurisprudence (2d ed), § 166, p. 365. Where the evidence shows that majority shareholders improperly diverted corporate funds, a breach of fiduciary duty of the majority shareholders can be found. *Salvador,* 87 Mich.App at 675–677. The evidence that defendants ceased making payments to plaintiff, no longer sought plaintiff's input on matters involving the corporation, and substantially increased their own salaries, at a time when they claimed the corporation was no longer profitable, supports the trial court's decision to submit plaintiff's breach of fiduciary duty claim to the jury.

Defendants also contend that the jury's award of $44,000 in damages is not consistent with the evidence. The jury rejected plaintiff's breach of contract claim, thereby indicating that it did not find an enforceable agreement for defendants to pay plaintiff either $4,000 a month until IPAX was sold, or for defendants to pay equal compensation to plaintiff as long as they all worked for IPAX. Nonetheless, there is no reason why the jury could not have found, consistent with the evidence, that plaintiff was still entitled to his share of the profits from IPAX, as a shareholder of the corporation. There was evidence from which the jury could have found that defendants artificially deflated the corporation's profits by paying themselves excessive salaries and other expenses unrelated to the business, which thereby prevented plaintiff from receiving his fair share of the profits as a shareholder of the corporation. Even if the jury looked to the evidence of the parties' interim arrangement as a basis for determining damages, that is not a reason to set aside the jury's verdict. The evidence showed that the parties had agreed on a figure of $4,000 a month while attempting to reach a final agreement. The jury properly could have found that even though the parties never reached a final agreement, the interim amount reflected plaintiff's damages for defendants' breach of their fiduciary duties. Therefore, defendants have not shown that the jury's verdict was not supported by the evidence.

II. ADDITUR

*3 Defendants next argue that the trial court erred by denying their motion for additur with respect to their counterclaim. This Court reviews a trial court's decision on a motion for additur for an abuse of discretion. *Hill v. Sacka,* 256 Mich.App 443, 460; 666 NW2d 282 (2003). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v. Hidalgo,* 478 Mich. 151, 158; 732 NW2d 472 (2007).

Defendants' counterclaim alleged that plaintiff breached common-law fiduciary duties as a shareholder and director of IPAX when he voluntarily ceased his employment and moved to California. Defendants also claimed that they were personally damaged when plaintiff incurred corporate debt for his own personal benefit, and that his actions decreased the value of the corporation's stock. The jury found that plaintiff breached a fiduciary duty to defendants, but declined to award damages for the breach.

A trial court is permitted to grant a new trial whenever a party's substantial rights have been materially affected, such as where the jury's verdict was either clearly or grossly inadequate or influenced by passion or prejudice. MCR 2.611(A)(1)(c) and (d). If the court finds that the jury's verdict is inadequate, the nonmoving party has the right to accept or reject a new award in lieu of a new trial. See MCR 2.611(E)(1). "When reviewing a trial court's decision on additur, this Court must consider whether the jury award was supported by the evidence." *Hill,* 256 Mich.App at 460. This Court will uphold a jury's verdict if an interpretation of the evidence provides a logical explanation for the jury's findings. *Id.* at 461.

Defendants requested additur in the amount of $27,000. They contended that the evidence showed that plaintiff received $10,000 as an advance on profits for which he was not entitled, another $2,000 for a rental payment in January 2008 that he was not entitled to receive, and $15,000 in unreimbursed personal expenses charged to his corporate credit card. But contrary to defendants' assertions, the evidence of damages was in dispute. With regard to plaintiff's credit card charges, there was evidence that defendants also charged personal expenses to IPAX for which they did not reimburse the corporation. Thus, the jury could have found that defendants were not entitled to damages because defendants incurred similar personal expenses. Further, with regard to the advances on IPAX's profits and the rental payments, the jury could have found that defendants were not entitled to damages because they increased their salaries and generated other corporate expenses to falsely portray IPAX as losing money. If the jury believed that defendants were misrepresenting IPAX's financial status to avoid paying plaintiff his share of the profits and rental payments, it could have found that defendants did not suffer any actual damages related to the value of their stock, that the stock was more valuable than defendants claimed, or that defendants had similarly benefited from the corporation. Accordingly, the trial court did not err in denying defendants' motion for additur.

III. MCL 450.1489

*4 Next, defendants argue that the trial court erred in finding that they violated MCL 450.1489 by engaging in willfully unfair and oppressive conduct. We review the trial court's findings of fact under the clearly erroneous standard. MCR 2.613(C); *King v. State,* 488 Mich. 208, ——; —— NW2d —— (2010). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Reed v.. Reed,* 265 Mich.App 131, 150; 693 NW2d 825 (2005). The trial court's conclusions of law are reviewed de novo. *In re Capuzzi Estate,* 470 Mich. 399, 402; 684 NW2d 677 (2004).

MCL 450.1489 provides, in relevant part:

(1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder....

* * *

(3) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

The trial court found that defendants engaged in willfully unfair and oppressive conduct by (1) the way in which they eliminated plaintiff's salary and gave themselves raises, (2) terminating the rental payments to plaintiff that normally were made to all three directors, (3) issuing a capital call when the corporation was doing fairly well, which diluted plaintiff's stock and shares and forced plaintiff to put his own money into the corporation, and (4) engaging in other less oppressive actions with the intent to "squeeze Plaintiff out of the company rather than to give him his fair share of his investment."

We disagree with defendants' argument that the trial court erred in finding that they engaged in willfully unfair and oppressive conduct because their conduct was authorized by the corporation's bylaws. Although the bylaws gave defendants the general authority to make business decisions such as setting salaries, issuing capital calls, or approving rental payments, that does not mean that defendants were permitted to act in a manner that was willfully unfair and oppressive to plaintiff, as a minority shareholder. The exception in MCL 450.1489(3) cannot be read as permitting willfully unfair and oppressive conduct under the guise of defendants' general authority to run and manage IPAX.

*5 Further, the trial court did not clearly err in finding that defendants' use of their power as majority shareholders to pay themselves higher salaries, while at the same time claiming that the corporation was not profitable to justify their refusal to make any distributions to plaintiff, supported its determination that defendants engaged in willfully unfair and oppressive conduct. The evidence indicated that defendants' salaries were $64,000 in 2005, and $70,000 in 2006. Defendants claimed that the corporation began losing money in 2006, but their salaries were increased to $86,000 or $90,000 in 2007. Similarly, at the time of trial in 2008, defendants were receiving a biweekly salary of $3,500, the equivalent of an annual salary of $91,000.

Defendants also argue that plaintiff was not entitled to recover his salary or any rental payments he was due because those alleged losses were not attributable to his rights as a shareholder. However, defendants inappropriately rely on *Franchino v. Franchino,* 263 Mich.App 172, 182–186; 687 NW2d 620 (2004), for the proposition that MCL 450.1489 does not allow shareholders to recover if they are harmed in a capacity as an employee or board member. At the time *Franchino* was decided, MCL 450.1489(3) did not contain a provision addressing employment-related benefits to shareholders. MCL 450.1489(3) was amended by 2006 PA 68, effective March 20, 2006, to add the provision that "[w]illfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder." Thus, MCL 450.1489(3) now allows a minority shareholder to claim willfully unfair and oppressive conduct as a result of reductions in salary or other employment benefits.

Defendants do not dispute that plaintiff's salary was cut and that plaintiff's rental payments from IPAX to API were stopped. Plaintiff was receiving those payments as a result of his status as a shareholder in this closely-held corporation, as well as the work he performed on the corporation's behalf. Yet, despite defendants' claims that IPAX was financially distressed and losing money, defendants increased their own salaries. The trial court did not clearly err in finding that defendants' conduct was designed to prevent IPAX from showing a profit that could be distributed to plaintiff as either rent or salary. There was also evidence that defendants refused to allow plaintiff to participate in corporate decisions beginning in 2006. Their conduct therefore affected plaintiff's rights, not only with regard to his employment, but also as a shareholder to participate in decisions affecting the corporation. Thus, defendants' actions affected plaintiff's interests as a shareholder.

Further, the jury's verdict did not preclude the trial court from finding that defendants violated MCL 450.1489 by refusing to pay plaintiff his salary or rent. The jury was asked to decide the limited issue whether there was an agreement to pay plaintiff $4,000 a month. The jury's finding that there was no contract did not foreclose the trial court from finding that defendants willfully engaged in unfair and oppressive conduct designed to manipulate IPAX's financial records to foreclose plaintiff's right to distributions as a shareholder.

*6 For these reasons, we find no err in the trial court's determination that defendants violated MCL 450.1489 by engaging in willfully unfair and oppressive conduct.

IV. REMEDIES

Defendants next challenge the various remedies fashioned by the trial court to remedy defendants' violation of MCL 450.1489. Defendants first challenge the following buyout option imposed by the court:

> FIRST, the court will require the Defendants, Alla and Paul Katz [sic] to value Plaintiff, Mr. Berger's stock, and then give Mr. Berger the option of either having his shares purchased by the Defendants at a set price by the Defendants, or be able to purchase the Defendants [sic] shares at twice the price they set. The Defendants are to determine the fair value of Mr. Berger's shares within 60 days of this order and then present him with the option.

If for whatever reason neither side is able to buy the other side out within 90 days of this order

> the court orders that that [sic] a receiver be appointed to take control of the company, Cleanogel, Inc. to sell it and all of its assets. This also includes API, LLC ("API"), and IPAX China ("IPAXChina").

Defendants contend that although the trial court had the authority to require them to purchase plaintiff's shares of stock, it lacked the authority to provide plaintiff with the option of purchasing defendants' shares. MCL 450.1489(1) provides, in pertinent part:

> (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. *If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:*
>
> (a) The dissolution and liquidation of the assets and business of the corporation.
>
> (b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.
>
> (c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.
>
> (d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.
>
> (e) *The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.*
>
> (f) An award of damages to the corporation or a shareholder. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first. [MCL 450.1489(1) (emphasis added.)]

*7 Contrary to defendants' argument, MCL 450.1489(1) does not limit a buyout option to the purchase of a prevailing shareholder's shares. Although that option is permitted by MCL 450.1489(1)(e), the statute authorizes a trial court to "make an order or grant relief as it considers appropriate, including, *without limitation,* an order providing for any of the following...." MCL 450.1489(1). Thus, the statute gives a trial court broad discretion in deciding an appropriate remedy, and those remedies are not limited to those listed in MCL 450.1489(1)(a)-(f).

We also find no merit to defendants' argument that plaintiff's poor health made it inappropriate for the trial court to provide plaintiff with the option of purchasing defendants' shares. Contrary to defendants' assertions, that option did not require plaintiff to be involved in the day-to-day operations of the company. It merely addressed ownership of the corporation.

Defendants also argue that the trial court lacked the authority to appoint a receiver for IPAX, because IPAX was not a party to this lawsuit. This argument is directed at the following provision in the trial court's judgment:

> If for whatever reason neither side is able to buy the other side out within 90 days of this order the court orders that that [sic] a receiver be appointed to take control of the company, Cleanogel, Inc. to sell it and all of its assets. This also includes API, LLC ("API"), and IPAX China ("IPAXChina").

We agree that the trial court could not appoint a receiver for the corporation without the corporation being added as a party to this lawsuit. See *Shouneyia v. Shouneyia,* ––– Mich.App –––; ––– NW2d ––– (Docket No. 297007, issued January 18, 2011), slip op 3–5. However, the trial court imposed the receivership option as a contingent remedy, one that had not yet materialized. The trial court's judgment did not purport to actually appoint a receiver, but rather provided that appointment of a receiver to liquidate the corporation would be available as a contingent remedy if the buyout option was not feasible. Thus, it was not necessary to add IPAX as a party, because no receiver had yet been appointed. In the event it becomes necessary to appoint a receiver, the corporation can be added as a party at that time. See *Shouneyia,* slip op at 3–4.

Furthermore, we disagree with defendants' argument that the contingent remedy of receivership was not factually appropriate. The "dissolution and liquidation of the assets and business of the corporation" is one of the available remedies specified in MCL 450.1489(1)(a). Liquidation seems especially appropriate in this case given that IPAX is a closely-held corporation and that all of the shareholders of IPAX are parties to this action. Although defendants assert that liquidation is not necessary because IPAX would be able to continue to operate, the evidence showed that IPAX was being operated to benefit defendants, who attempted to shut plaintiff out. The parties thereafter attempted to resolve their differences through an interim arrangement, but they were unable to reach a final agreement. Without a buyout, it was not feasible for IPAX to continue to operate as a going concern.

*8 Defendants next argue that the trial court erred by ordering them "to reimburse the corporation the amount of legal fees and costs that the corporation paid out for Defendants [sic] willful misconduct in this case." Defendants contend that this remedy was improper because the corporation's bylaws specifically permitted the corporation to indemnify defendants for their legal expenses. The bylaws provide that the corporation shall indemnify officers and directors for any legal expenses incurred in their capacity as an officer or director, but further provide that "[t]he corporation shall not, however, indemnify such director or officer with respect to matters as to which he shall be liable for wilful misconduct in the performance of his duties as such director or officer." The bylaws are consistent with MCL 450.1561, which provides, in pertinent part:

> A corporation has the power to indemnify a person who was or is a party or is threatened to be made a party to a threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal, other than an action by or in the right of the corporation, by reason of the fact that he or she is or was a director, officer, employee, or agent of the corporation, ... including attorneys' fees, ... if the person acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the corporation or its shareholders....

In this case, the jury found that defendants breached their fiduciary duties to plaintiff as a minority shareholder, and the trial court found that defendants engaged in willfully unfair and oppressive conduct against plaintiff as a minority shareholder. These findings are inconsistent with defendants' contentions that they acted in good faith. On the contrary, they support the trial court's finding of willful misconduct that precludes indemnification under both the corporation's bylaws and MCL 450.1561.

We also reject defendants' argument that the reimbursement provision effectively requires them to pay the cost of their legal expenses twice, because they previously loaned funds to IPAX that IPAX in turn used to pay their legal costs in this action. Although there was evidence that defendants had loaned funds to IPAX; the evidence did not show that the loaned funds were used exclusively to pay the cost of defendants' legal expenses. Regardless, to the extent defendants loaned funds to IPAX, defendants would be permitted to seek repayment of those loans from IPAX. Thus, the trial court's judgment does not require defendants to effectively pay twice for the cost of their legal expenses.

Defendants also argue that it was improper for the trial court to enter an interim order requiring that plaintiff be paid $2,000 a month and other benefits until IPAX changes hands or is sold. Defendants contend that the trial court could not properly order IPAX to make monthly payments because IPAX was not a party to this case, and further, because IPAX is insolvent. However, the trial court's interim order does not impose any obligation on IPAX directly. Rather, it directs that "Plaintiff be paid $2,000 a month along with his health insurance and other benefits until the corporation finally changes hands completely to Plaintiff or Defendants or until the corporation is sold." Because this case concerned the shareholders' control over the corporation and all shareholders in the corporation were parties to this action, the trial court's order was not improper. Further, the record does not support defendants' argument that IPAX is insolvent. Although defendants testified at trial that IPAX was no longer profitable, there was also testimony that IPAX held other assets and real property, including lakefront property. There was no testimony that it was insolvent. Further, if IPAX believes that it is unable to comply with the trial court's order because of its financial condition, it can file an appropriate motion to intervene and seek relief from the trial court's order.

V. PLAINTIFF'S DEPOSITION TESTIMONY

*9 Defendants finally argue that the trial court erred in allowing portions of plaintiff's deposition testimony to be introduced on redirect examination. Defendants contend that the evidence was inadmissible hearsay. Because defendants did not raise a hearsay objection in the trial court, this issue is not preserved. *City of Westland v. Okopski,* 208 Mich.App 66, 72; 527 NW2d 780 (1994). An unpreserved claim of evidentiary error is subject to review for plain error affecting a party's substantial rights. MRE 103(d); *Kern v. Blethen–Coluni,* 240 Mich.App 333, 336; 612 NW2d 838 (2000).

The record discloses that the challenged testimony was offered to rebut defendants' suggestions that plaintiff's trial testimony was recently fabricated or the result of improper influence or motive. MRE 801(d)(1)(B) expressly provides that such statements are not hearsay. Accordingly, there was no plain error.

VI. CASE EVALUATION SANCTIONS

In his appeal in Docket No. 293880, plaintiff argues that the trial court erred in denying his motion for case evaluation sanctions. A trial court's decision to grant or deny case evaluation sanctions is subject to review de novo on appeal. *Elia v. Hazen,* 242 Mich.App 374, 376–377; 619 NW2d 1 (2000).

Plaintiff/counter-defendant's claims and defendants/counter-plaintiff's counterclaim were submitted to case evaluation and resulted in a net award of $50,000 in favor of plaintiff/counter-defendant. Plaintiff/counter-defendant received an award of $75,000 against defendants/counter-plaintiffs. Defendants/counter-plaintiffs received an award against plaintiff/counter-defendant in the amount of $25,000. Plaintiff/counter-defendant accepted the awards and defendants/counter-plaintiffs rejected them. Plaintiff argues, and we agree, that the trial court erred by viewing the net award of $50,000 as a separate award for each defendant, to be measured by the jury's verdict of $22,000 against each defendant. The case evaluation panel's award clearly indicates that a net $50,000 award encompassed plaintiff's claims against both defendants. Therefore, it is appropriate to view the jury's separate verdicts of $22,000 against each defendant as a total verdict of $44,000 for purposes of determining defendants' liability for case evaluation sanctions.[FN2] To avoid liability for case evaluation sanctions, defendants were required to improve their position by more than ten percent after adjustment of the jury's verdict. MCR 2.403(O)(3). Thus, because the net case evaluation award was for $50,000, defendants could avoid liability for case evaluation sanctions only if the adjusted verdict was less than $45,000. Appropriate adjustments include assessable costs and statutory interest. MCR 2.403(O)(3). Plaintiff represented below, and defendants did not dispute, that statutory interest alone exceeded $3,000, which when added to the $44,000 jury verdicts, results in an adjusted verdict in excess of the $45,000 amount necessary to trigger liability for case evaluation sanctions. Therefore, the trial court erred in denying plaintiff's motion for case evaluation sanctions.[FN3]

FN2. Although MCR 2.403(K)(2) indicates that the case evaluation panel should have issued separate awards for plaintiff's claims against each defendant, the award that was issued cannot be interpreted as separate awards. To the extent the rule was not followed, or defendants desired separate awards, it was incumbent on them to raise the issue in an appropriate motion in the trial court. Because they failed to do so, they may not now complain that MCR 2.403(K)(2) was not followed.

FN3. Because the jury verdicts, as adjusted, alone establish defendants' liability for case evaluation sanctions, it is unnecessary to consider the effect of the remaining relief awarded by the trial court for defendants' violation of MCL 450.1489.

*10 We must also note that counter-plaintiffs did not better their position. To avoid liability for case evaluation sanctions, counter-plaintiffs were required to improve their position by more than ten percent after adjustment of the jury's verdict. MCR 2.403(O)(3). They did not, and they were liable for case evaluation sanctions to counter-defendant as well. First, case evaluation is mandatory. MCR 2.403(A)(2). The purpose of mandatory case evaluation is to encourage the parties to settle, settlement being the preferred manner of resolution dispute. While the dissent would forego case evaluation sanctions to plaintiff for failure to object to a unitary award in violation of MCR 2.403(K)(2), in our view such an application works an injustice and defeats the policy in support of mandatory case evaluation. Second, the dissent does not accord plaintiff as the counter-defendant sanctions on the successful completion of that portion of the litigation and for which there is no case evaluation award inconsistency. The conclusion offered by the dissent results in forfeiture. It is clear that neither of the parties sought to reform the award, set the award aside, or sought other intervention by the trial court. To deprive plaintiff of sanctions as either a plaintiff or counter-defendant works an injustice that is cured by treating the failures of the parties to rely on MCR 2.403(K)(2) as a waiver. Treating the parties' avoidance of MCR 2.403(K)(2) as a waiver additionally supports the policy of mandatory case evaluation. Accordingly, we reverse the order denying case evaluation sanctions and remand for a determination of sanctions under MCR 2.403(O).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

WILDER, P.J. (dissenting in part).

I respectfully dissent from part VI of the Court's opinion awarding case evaluation sanctions to plaintiff.

In this case, as the majority opinion concedes, the case evaluation panel disregarded MCR 2.403(K)(2) when it issued one award for plaintiff's claims against both defendants. Plaintiff did not object, however, and therefore, the trial court correctly interpreted the award in accordance with the court rule, finding that there was a net award of $50,000 against *each* defendant. The trial court then compared these awards to the jury verdict of $22,000 against each defendant pursuant to MCR 2.403(O)(4)(a), which clearly prohibits aggregating an award: "in determining whether the verdict is more favorable to a party than the case evaluation, the court *shall* consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties." (Emphasis added.) When construing a court rule, the word "shall" indicates a mandatory provision. *Howard v. Bouwman,* 251 Mich.App 136, 145; 650 NW2d 114 (2002).

***11** Furthermore, in my judgment, consideration of whether defendants, as counter-plaintiffs, bettered their position is not warranted. While courts are prohibited from aggregating mediation awards amongst *multiple defendants,* courts must aggregate the awards stemming from claims and counter-claims amongst *particular pairs of parties.* MCR 2.403(O)(4)(a); see also *Minority Earth Movers, Inc. v. Walter Toebe Const. Co.,* 251 Mich.App 87, 94; 649 NW2d 397 (2002) ("[M]ediation evaluations on a claim and counter-claim are to be treated as a whole for purposes of acceptance or rejection."). Under the applicable case law and court rule, then, it is inappropriate to view in isolation only one side's award from a claim or counter-claim. Instead, a court is required to consider a plaintiff's aggregate award against each particular defendant. Here, for the reasons stated above, the mediation panel is considered to have awarded plaintiff a net amount of $50,000 against Alla Katz. Because the jury verdict only awarded plaintiff $22,000 against Alla, plaintiff is not entitled to sanctions against Alla. Likewise, because the mediation panel awarded plaintiff $50,000 against Paul Katz and the jury only awarded $22,000, plaintiff is not entitled to sanctions against Paul either.

Finally, I disagree with the majority's conclusion that defendants waived or forfeited [FN1] their right to have MCR 2.403(O)(4)(a) enforced because *they* did not object to the form of the mediation award. As noted earlier, neither plaintiff nor defendants objected to the mediation award's form. *Any* party that fails to make such an objection may not later seek to view the award contrary to the plain language of MCR 2.403(O)(4)(a). Cf. *Roberts v. Mecosta Co. General Hosp.,* 466 Mich. 57, 64–67; 642 NW2d 663 (2002) (the failure of the defendant in a medical malpractice case to object to the adequacy of the plaintiff's notice of intent did not constitute a waiver of the notice's requirements that were listed in the plain language of the statute). Thus, in my judgment, plaintiff forfeited the ability to have the $50,000 mediation award treated as anything other than $50,000 against each defendant when he failed to object to its form.

FN1. Because waiver is the "intentional relinquishment or abandonment of a known right" and the parties appeared to have done nothing other than fail to object to the manner of the mediation award, their actions are more akin to forfeiture, which is merely the failure to object. *People v. Carines,* 460 Mich. 750, 763 n. 7; 597 NW2d 130 (1999).

Mich.App.,2011.
Berger v. Katz
Not Reported in N.W.2d, 2011 WL 3209217 (Mich.App.)

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STEPHEN J. HOPKINS and STEPHEN HOPKINS ASSOCIATES, INC., Plaintiffs-Appellants/Cross-Respondents, v. DENNIS J. DUCKETT, MICHAEL R. D'APPOLONIA, KEVIN I. DOWD, HOWARD S. HOFFMANN and NIGHTINGALE & ASSOCIATES, L.L.C., Defendants-Respondents/Cross-Appellants.

DOCKET NO. A-5883-08T1

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2012 N.J. Super. Unpub. LEXIS 93

October 4, 2011, Argued
January 17, 2012, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

On appeal from Superior Court of New Jersey, Chancery Division and Law Division, Bergen County, Docket Nos. C-449-06 and L-7575-07.
Nightingale & Assocs., LLC v. Hopkins, 2008 U.S. Dist. LEXIS 90204 (D.N.J., Nov. 5, 2008)

COUNSEL: Eric D. McCullough argued the cause for appellants/cross-respondents (Waters, McPherson, McNeill, P.C. and Michael J. Breslin, Jr., L.L.C., attorneys; Mr. Breslin, Jr. and Donald J. Fay, of counsel; Mr. Breslin and Mr. McCullough, on the briefs).

Marc J. Gross argued the cause for respondents/cross-appellants (Greenbaum, Rowe, Smith & Davis L.L.P., attorneys; Mr. Gross, of counsel and on the brief; David T. Shivas, on the brief).

JUDGES: Before Judges Payne, Simonelli and Hayden.

OPINION

PER CURIAM

Plaintiffs, Stephen Hopkins, and his firm, Stephen Hopkins Associates, Inc. (SHA), appeal various rulings that resulted in their failure to obtain recovery in their action against defendants Nightingale & Associates, L.L.C. (N&A), a Delaware entity, and those of its members named as defendants, Dennis J. Duckett, Michael R. D'Appolonia, Kevin I. Dowd, and Howard S. Hoffmann. Defendants cross-appeal. We affirm.

I.

The facts and procedural history of this matter are lengthy.

Prior to 1997, N&A was known as Nightingale & Associates, Inc., a company founded in 1975 as a turnaround management [*2] consulting firm providing advice and assistance to financially troubled businesses, their creditors, insurance companies, and to financially troubled debtors. Hopkins was, for a period of time commencing in 1993, its president. He also served as the company's managing member until December 31, 2001. In 1995, Hopkins held an eighty percent ownership share in the corporation. In 1997, Nightingale & Associates, Inc. became Nightingale & Associates, L.L.C., a Delaware limited liability company, with its principal place of business located in Stamford, Connecticut. Pursuant to N&A's February 21, 1997 operating agreement, the interest held by Hopkins in the business was reduced from eighty to twenty-five percent, with the remaining members each holding a fifteen-percent ownership interest. The operating agreement for N&A established Delaware law as governing disputes. Additionally, the operating agreement provided that individual members of N&A would not be personally liable for any act done on behalf of the company unless the act constituted fraud, bad faith, gross negligence, or willful misconduct. All members of N&A shared in the profits and losses of the company in proportion to their [*3] ownership interests. Major management decisions required more than a seventy-five percent vote that Hopkins could block as the result of his retained ownership interest.

In addition to his ownership interest in N&A, Hopkins performed services as an independent contractor for it through a services agreement between N&A and Hopkins's Delaware corporation, SHA. During part of the period that the services agreement was in effect, Hopkins was a New Jersey resident, and he did some work out of his home in New Jersey. He later moved to Indiana. The services agreement between N&A and SHA provided that disputes arising from it would be governed by Connecticut law. It did not contain a "non-compete" clause. Similarly, services agreements between N&A and its other members did not contain such a clause.

Plaintiffs' suit arose from the fact that, in 2000, internal disputes commenced in N&A regarding Hopkins's leadership. In particular, intense acrimony developed between Hopkins and members D'Appolonia and Dowd. In July 2000, Hopkins announced that he intended to step down as managing member at the end of the year, and to retire at the end of 2002.

In response, the members of N&A commenced discussion [*4] of amendments to the operating agreement, which failed to provide retirement benefits or a means for removing a member.

On August 16, 2000, the principals of N&A sent a written proposal for retirement benefits to Hopkins, independent of the operating agreement, that offered percentage of earnings pay-outs in the two years following retirement. The proposal listed as Hopkins's retirement date, "[o]n or before 12/31/02." Hopkins responded to the proposal in a letter dated September 17, 2000, in which he agreed to the payment terms, and to relinquishing his position as managing member on December 31, 2000, but he rejected the fixed retirement date. Hopkins stated:

> Although it may not have been intended, the terms of the proposal require that I *must* retire by 12/31/02 to be eligible for *any* payments. I am offended by this and reject it. I have expressed an expectation that I will retire within this time frame, but see no reason that this must be a condition of your proposal to me.

In response, the August 16 letter was revised to state: "You have expressed a desire to continue working full time until 12/31/02. This firm is flexible regarding this date, both earlier and later."

On January 26, [*5] 2001, the members met to determine who should become the next managing member, eventually designating Hoffmann. They designated D'Appolonia as president, with direct responsibility for the company's marketing efforts.

Hopkins claims that at a February 26, 2001 members meeting, the company's members offered him project work to supplement his income following retirement. Additionally, he claims that he was promised a role in defining the duties and responsibilities of the managing member and president, in allocating personnel resources, in maintaining the quality of the firm's work, in the hiring and training of new employees, and in the company's marketing activities, including new business campaigns. In the present suit, Hopkins alleges that none of these promises was kept.

On May 14, 2001, the members memorialized Hopkins's retirement agreement. Additionally, on that date, they unanimously adopted an amended and restated operating agreement. Pursuant to that agreement, each member, including Hopkins, was given a fifteen-percent interest in the company, with ten percent of the ownership interest reserved for new members. The agreement also reduced the percentage of votes needed for an [*6] amendment to the agreement from more than seventy-five percent to sixty percent. In connection with the amended agreement, Hopkins thus gave up his blocking vote, stating in later trial testimony that he did so in reliance upon the other members' promises regarding his retirement and his post-retirement participation in company business.

Paragraph 3.5 of the amended operating agreement provided that the members could remove a fellow member without cause upon six months' notice and with cause upon fourteen days' notice. In either case, the removed member's shares would be repurchased by the company. However, the provisions for compensation of members dismissed with and without cause differed. The amended agreement preserved the provisions conditionally absolving individual members of personal liability and designating Delaware law for choice of law purposes.

In October 2002, the company planned a major marketing event in Sea Island, Georgia, culminating in a black-tie dinner. A proposal was circulated to utilize the dinner as an opportunity to honor Hopkins and his retirement. However, when Hoffmann mentioned the proposal to Hopkins in August 2002, Hopkins announced that he had changed [*7] his mind, and that he was not retiring. Among other things, Hopkins was reported by Hoffmann as stating that the retirement benefits offered to him by separate agreement were less than those offered by the amended operating agreement to persons removed without cause. Hoffmann was concerned by Hopkins's revised plans, fearing that the acrimony that had existed in 2000 would be rekindled to the detriment of the company.

According to the allegations of the complaint later filed by Hopkins in this matter,

> [d]uring the above-referenced August 2, 2002 conversation, in response to my question to the Defendant Hoffmann as to why I should be forced out (on December 31, 2002), he stated to me that turnaround management was a young man's business and that there was an image to uphold. I responded to the Defendant Howard D. Hoffmann that that explains why Michael R. D'Appolonia, who was now President, with primary responsibility for marketing, won't use me for new business presentations and meetings. In response to my statement, the Defendant Mr. Hoffmann admitted: "Yes."

At the time, Hopkins was sixty-seven years of age.

By letter dated September 2, 2002, Hopkins formally informed the other company [*8] members that he did not intend to retire on December 31, 2002, and he listed in detail his reasons for that decision, including his dissatisfaction with the retirement benefits offered to him. On September 25, 2002, Hoffmann circulated a proposed revision to the operating agreement that reduced the payout for a person removed without cause to the level that Hopkins was to receive as the result of his retirement agreement. The amended agreement also shortened the notice period for removal without cause to thirty days. Hopkins testified at trial that he thought this latter provision was targeted at him.

On September 30, 2002, at a members meeting in Connecticut, Hopkins formally announced that he was not retiring. In response, the members demanded that, within one week, Hopkins provide his retirement plans in writing. Additionally, the members, with the exception of Hopkins and his son Douglas, voted to accept the second amended operating agreement.

On October 6, 2002, Hopkins informed the members in writing that he had "no intention of retiring until some later date." By notice dated November 1, 2002, a meeting was scheduled for November 15, 2002 to consider "whether a Requisite Voting [*9] Interest (as defined in the Operating Agreement) of the Members desires to give notice to Stephen J. Hopkins of their intention to vote on the removal of Mr. Hopkins as a member pursuant to the terms of the Operating Agreement, and any matters related thereto." On the day of the November 15 meeting, D'Appolonia and Hoffmann met with Hopkins in an attempt to resolve matters without the necessity for a vote on removal. Hopkins offered to retire by December 31, 2003. However, the offer was rejected because Hopkins could give no assurance that his undertaking would not again be rescinded.

At the meeting held on November 15, the requisite voting interest determined to provide notice of their intent to vote on Hopkins's removal, listing the principal reasons for the proposed removal as follows:

> o You have a fundamentally different view of the objectives of the Company (operationally and strategically) than do a Requisite Voting Interest of the Members.

o The Requisite Voting Interest of the Members has lost confidence in your ability to conduct Company business in a way that is in the best interest of the Company.

o Relations between you and the Requisite Voting Interest of the Members is strained [*10] and you have acknowledged that your continued presence causes destructive disruption within the Company.

o The disruption caused by the relations between you and the Requisite Voting Interest of the Members is impairing the ability of the Company to conduct its business in a normal manner.

A vote was scheduled for December 16, 2002.

The members met to vote on removal in January 2003, but the required number of votes for removal was not be obtained. However, on September 29, 2003, the members again met, and at that time, they voted in favor of Hopkins's removal, effective October 31, 2003, with the only dissenting votes being cast by Hopkins and his son. He was removed as a member effective November 1, 2003. By letter dated November 14, 2003 from Hoffmann, Hopkins's "change of [his] relationship with Nightingale & Associates, LLC" was confirmed, and his June 1, 1995 services agreement with the company was terminated. In that letter, N&A offered Hopkins an opportunity to remain associated with it and to continue in the role of an independent contractor. However, Hopkins declined the terms offered to him. By letter dated November 24, 2003, Hopkins informed Hoffmann of his intent to approach [*11] his three current clients, Xpectra, Brown Schools and Zeta, to determine whether they wished to retain him individually to complete ongoing projects or to have Nightingale assign another principal to take over the work. Eventually, Hopkins offered to complete the three projects at no charge, and the offer was accepted.

In December 2003, N&A placed amounts allegedly due to Hopkins and SHA[1] in an escrow account. N&A asserted that the funds consisted of Hopkins's retirement proceeds, as well as other funds that were owed to him. However, Hopkins contended that a major portion of those funds were amounts that he was due under his normal distributions, plus the receivables that he had not been paid when he left. He asserted that N&A had issued 1099 tax forms to SHA for the years 2003 and 2004 that stated that SHA had received over $275,000 more in compensation in 2003 than N&A had actually paid to it, and that SHA received $185,188.25 in 2004, when no compensation had been paid. In that regard, the members of N&A claimed that Hopkins was not yet entitled to the compensation, because the clients' bills had not been paid in full, as required by N&A policies.

1 It was later certified that $606,492.91 [*12] was being held in the account.

In the meantime, on November 22, 2002, Hopkins, individually, had filed suit in the United States District Court for the District of New Jersey against Duckett, D'Appolonia, Dowd, Hoffmann, and N&A. The complaint, as subsequently amended, alleged claims under the New Jersey Oppressed Minority Shareholder statute, *N.J.S.A. 14A:12-7(1) to -(10)*, claims under the New Jersey Law Against Discrimination (NJLAD), *N.J.S.A. 10:5-12*, various breach of contract claims, fraud, retaliation, conversion, breach of fiduciary duty, and an ERISA claim pursuant to *29 U.S.C.A. § 1001 to 1461*. Defendants counterclaimed, alleging Hopkins's interference with N&A's business operations and his diversion of funds to himself and SHA.

Through an order to show cause filed prior to the initial vote on his removal, Hopkins sought preliminary restraints against any vote on his removal and the appointment of a custodian to manage the affairs of N&A. However, the application was denied by the court by order dated December 19, 2002. Thereafter, in January 2004, Hopkins moved to supplement his complaint to allege actions occurring since January 2002 and, as an oppressed minority shareholder, [*13] to have the court appoint a custodian to manage N&A's affairs as they related to Hopkins. In connection with the latter relief, Hopkins alleged that N&A was withholding money consisting of the value of his ownership interest in the company, performance fees and the earned income being held in the escrow account established by N&A. However, although Hopkins was permitted to amend his complaint, his motion to appoint a custodian was denied by the federal magistrate hearing the matter, who concluded that Hopkins had failed to meet the stringent requirements for appointing a custodian under either New Jersey or Delaware law.

Hopkins appealed the decision not to appoint a custodian, which was affirmed in the District Court. *Hopkins v. Duckett, 2005 U.S. Dist. LEXIS 47039, at *9-*11 (D.N.J. May 27, 2005)* (*Duckett I*). In reaching its decision, the court agreed with the tentative decision of the magistrate that Delaware law was applicable to the matter, relying in this regard both on the parties' choice of law and on its finding that Delaware had a greater interest than New Jersey in the affairs of N&A. *Id. at *10-*12.* Further, the court recognized that Delaware law does not expressly provide **[*14]** for appointment of a custodian to relieve minority shareholder oppression, but instead authorizes such an appointment only when stockholder or director deadlock scenarios occur or when the managers of the corporation are guilty of fraud or gross mismanagement or of creating such extreme circumstances that an imminent danger of great loss that cannot otherwise be prevented occurs. *Id. at *12.* Such extreme conditions, the court found, had not been demonstrated in this case. *Id. at *12-*13.* Additionally, the court determined that invocation of Delaware law would not violate public policy. *Id. at *13.* Although *N.J.S.A. 14A:12-7(c)* provided for the discretionary appointment of a custodian on proof that officers or directors had acted oppressively or unfairly toward a minority shareholder, the court recognized that appointment of a custodian had long been regarded as an extraordinary remedy. *Ibid.* (citing *Neff v. Progress Bldg. Materials Co., 139 N.J. Eq. 356, 357, 51 A.2d 443 (Ch. Div. 1947))*. The court held: "Custodianship is unnecessary here where Plaintiff's interest in the disputed funds is amply protected by virtue of the escrow account, an accounting of those funds has been provided, and appointment **[*15]** of a custodian would likely hinder Defendants' ability to conduct their business and serve their clients." *Id. at *13-*14.*

At a later point, defendants moved for summary judgment on Hopkins's ERISA claim and for dismissal of his remaining claims. Their motion was granted. In a written opinion dated November 21, 2006, the court held that Hopkins was not a "participant" in an ERISA plan offered by N&A, because he was not an "employee" as defined in *29 U.S.C.A. § 1002(6)* and as further construed by the Supreme Court in *Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24, 112 S. Ct. 1344, 1348-49, 117 L. Ed. 2d 581, 589-90 (1992)*, but rather, an independent contractor. *Hopkins v. Duckett, 2006 U.S. Dist. LEXIS 84559, at *8-*16 (D.N.J. November 21, 2006)* (*Duckett II*). As a consequence, the court dismissed Hopkins's federal ERISA claim and, finding that subject-matter jurisdiction was lacking over the remaining state law claims, the court dismissed those claims without prejudice. *Id. at *17-*25.*

On December 21, 2006, the present action was filed in the Superior Court, Chancery Division, as a verified complaint and order to show cause alleging violations of the Oppressed Minority Shareholder **[*16]** statute, violations of the Law Against Discrimination, breach of contract, violation of the covenant of good faith and fair dealing, fraud, retaliation, tortious interference with contract, and breach of fiduciary duty. As relief, Hopkins sought payment of all money in the escrow account; a detailed accounting and payment of his capital account, distributions, performance fees and invoice collections for the years 2002 through 2004; payment of additional money that would have been payable to him as a former member of N&A under the terms of the May 14, 2002 operating agreement; payment of additional money owed as a continuing member of N&A up to the present, because there had never been a closing to purchase his ownership interest; an order directing sale of his shares in N&A; and compensatory damages. Defendants filed an answer and counterclaim, asserting causes of action for breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, negligent and intentional misrepresentation, tortious interference with contract, and unjust enrichment.

On the return date of the order to show cause, Hopkins sought, as an oppressed minority shareholder, the immediate **[*17]** release of the escrowed funds pursuant to *N.J.S.A. 14A:12-7.* In a written opinion dated February 20, 2007, the court denied relief. The court held that Hopkins was collaterally estopped from challenging the retention of escrowed funds by the interlocutory decisions of the federal magistrate and district court in the federal litigation, which held that *N.J.S.A. 14A:12-7* did not apply to Hopkins's application. It, instead, was governed by Delaware law that did not provide grounds for the requested relief. Additionally, the court found that Hopkins had failed to meet the standards for injunctive relief set forth in *Crowe v. De Gioia, 90 N.J. 126, 447 A.2d 173 (1982)*, since he was unable to demonstrate irreparable harm.

On March 29, 2007, defendants moved to dismiss plaintiffs' claims of minority shareholder oppression and violation of the Law Against Discrimination, and plaintiffs cross-moved for release of the escrowed funds. In a written opinion dated May 25, 2007, the court granted both motions.

In reaching a decision to dismiss the oppressed minority shareholder claim, the court considered the choice of law issue anew, determining that effect should be given to the parties' choice of Delaware law, **[*18]** that Delaware had a substantial relationship to the operating agreement that formed the basis for the present dispute, and that enforcement of the forum selection clause would not be contrary to New Jersey public policy. The court concluded that the claim could not be sustained because Delaware did not have a minority oppression statute; in cases such as *Nixon v. Blackwell, 626 A.2d 1366, 1380 (Del. 1993)*, Delaware courts had refused to apply remedies for alleged oppression; and plaintiff had not demonstrated any common law remedy for minority shareholder oppression that had been recognized in Delaware.

Turning to the NJLAD claim, the court analyzed whether Hopkins was an "employee" for purposes of that statute under the six-factor standard articulated in *Clackamas Gastroenterology Associates v. Wells, 538 U.S. 440, 449-50, 123 S. Ct. 1673, 1680, 155 L. Ed. 2d 615, 626 (2003)*,[2] as adopted by the New Jersey Supreme Court in the context of a Conscientious Employee Protection Act (CEPA)[3] claim in *Feldman v. Hunterdon Radiological Associates, 187 N.J. 228, 246-47, 901 A.2d 322 (2006)*. Finding, as in *Feldman, supra, 187 N.J. at 245-48*, the "question of control and influence [to be] critical," the court **[*19]** held that because Hopkins was a shareholder who participated in the management and control of N&A with an equal vote and voice in all matters, no reasonable factfinder could conclude that he was an employee. Thus, Hopkins's NJLAD claims were dismissed.

2 The factors, utilized by the Equal Employment Opportunity Commission in considering who is an "employee" and when partners, officers, members of boards of directors, and major shareholders qualify as employees under federal anti-discrimination laws, are:

> [1.] Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
>
> [2.] Whether, and if so, to what extent the organization supervises the individual's work;
>
> [3.] Whether the individual reports to someone higher in the organization;
>
> [4.] Whether, and if so, to what extent the individual is able to influence the organization;
>
> [5.] Whether the parties intended the individual to be an employee, as expressed in written agreements or contracts; and
>
> [6.] Whether the individual shares in the profits, losses, and liabilities of the organization.
>
> [*Feldman v. Hunterdon Radiological Assocs., 187 N.J. 228, 244, 901 A.2d 322 (2006)* (quoting *Clackamas, supra, 538 U.S. at 449-50, 123 S. Ct. at 1680, 155 L. Ed. 2d at 626* **[*20]** (citing 2 *Equal Employment Opportunity Commission, Compliance Manual* § 605:0008-605:00010 (2000)).]

3 *N.J.S.A. 34:19-1 to -8.*

Return of the escrowed funds was ordered on the ground that they represented monies earned while Hopkins was performing services for N&A, and that the escrow constituted a prejudgment attachment that was not authorized pursuant to *N.J.S.A. 2A:26-2*.

Plaintiffs moved for leave to appeal from the dismissal of the NJLAD claim, but we denied the motion by order dated August 16, 2007. Thereafter, plaintiffs moved for reconsideration in the chancery court, raising the issue of whether Hopkins's status as an independent contractor barred his action for age discrimination under the NJLAD. In opposing the motion, defendants argued that, by virtue of the choice of law provision in the services agreement between N&A and SHA and the conduct of the parties, Connecticut, not New Jersey, law should apply to the age discrimination claim. The court agreed, determining in an oral opinion rendered on September 20, 2007 that the Connecticut Fair Employment Practices Act, *Conn. Gen. Stat. 46a-51 to -104*, was applicable in the circumstances presented, and that the court's decision recognizing [*21] the applicability of Connecticut law provided an additional reason for dismissal of the claim brought pursuant to the NJLAD. However, the court found that plaintiffs should either be granted a *Rule 4:30A* exemption to allow them to proceed in Connecticut on the age discrimination claim or be afforded the opportunity to amend their complaint in the New Jersey action to assert a claim under the Connecticut Act. The court granted plaintiffs' motion to reinstate the jury demand, determining that concepts of fundamental fairness dictated that course, and to transfer the matter to the Law Division. A further motion for reconsideration was denied, as was plaintiffs' additional motion for leave to appeal the denial of reconsideration.

Following transfer of the action to the Law Division, on January 9, 2009, defendants moved to dismiss plaintiffs' remaining claims. Plaintiffs cross-moved for summary judgment dismissing defendants' counterclaims. Defendants' motion was partially successful, because on March 10, 2009, the court dismissed plaintiffs' claims that defendants tortiously interfered with the September 2000 retirement agreement (Count VIII) and with the May 2001 operating agreement (Count [*22] IX). The court held that, because defendants were parties to both agreements, under existing precedent, they could not have tortiously interfered with their own contracts. Additionally, the court dismissed Count X, alleging breach of fiduciary duty by defendants, determining that there was no fiduciary relationship between the parties following Hopkins's involuntary removal from membership. The court denied plaintiffs' motion for summary judgment on the counterclaims, determining that material issues of fact existed with respect to all counts. A motion to bar the testimony of plaintiffs' expert was also denied. The court declined to grant a motion by defendants for reconsideration of the judge's determination that defendants were parties to the retirement agreement.

Trial of the matter occurred between April 1 and 16, 2009. On April 13, 2009, at the conclusion of plaintiffs' proofs, the court involuntarily dismissed all claims against the individual defendants pursuant to *Rule 4:37-2(b)*, determining that they were acting in their corporate capacities in connection with the actions at issue in the litigation, and that there was no evidence of an individual guarantee or obligation. Additionally, [*23] the court dismissed plaintiffs' claims of fraud, resulting from the failure of N&A to extend Hopkins's retirement date beyond December 31, 2002, holding that any promise to extend that date was a promise to perform a future act that, upon breach, was cognizable as a breach of contract but not as fraud. The court held:

> Here, plaintiff has not presented any proof that, at the time of the contract, the defendants had no intention of actually carrying the promise out. Mere proof of non-performance does not prove a lack of intent to perform. . . .
>
> Here, we had indefinite language about being flexible from an exact written retirement date as the basis for breach and nothing more to show a present intention at the time to violate the nebulous provision . . . other than a subsequent failure to go beyond that written date.

Additionally, the court dismissed plaintiffs' claim for conversion, holding that the money due to SHA and Hopkins was placed by defendants in an escrow account and later paid in full to plaintiffs, and that the money was never wrongfully converted to N&A's use. It denied defendants' motion to dismiss plaintiffs' claims for breach of contract.

Thereafter, the court dismissed defendants' [*24] counterclaims for breach of fiduciary obligation, fraud and negligent misrepresentation. However, it sustained defendants' claim of tortious interference with N&A's existing contractual relationships by plaintiffs while dismissing their claim of tortious interference with prospective economic advantage.

On April 16, 2009, the jury returned a verdict in which it determined that neither plaintiffs nor defendants breached their contracts with the other, and that Hopkins and SHA did not tortiously interfere with defendants' existing contractual relationships. A motion by defendants for attorney's fees was denied.

Plaintiffs have appealed, and defendants have cross-appealed.

II.

On appeal, plaintiffs contend that the chancery court erred in dismissing Hopkins's claim for age discrimination pursuant to the NJLAD, which was premised on Hoffman's statements to Hopkins that the business was a "younger man's business" and that N&A had an "image to uphold." As previously noted, the court initially found that Hopkins was not an "employee" after applying the factors set forth in *Clackamas, supra, 538 U.S. at 449-50, 123 S. Ct. at 1680, 155 L. Ed. 2d at 626*, as adopted by the New Jersey Supreme Court **[*25]** in the context of a CEPA claim in *Feldman, supra, 187 N.J. at 246-47.*[4] Upon reconsideration, the court accepted defendants' additional arguments that, as the result of the choice of law provision contained in the services agreement between N&A and SHA and the conduct of the parties, which had its locus in Connecticut, that state's law should apply. We concur with the court's analysis.

4 New Jersey courts often utilize reasoning derived from analysis of CEPA claims when analyzing claims brought under the LAD. *Feldman, supra, 187 N.J. at 242.*

New Jersey honors choice of law provisions in contracts unless "'(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which * * * would be the state of the applicable law in the absence of an effective choice of law by the parties." *Instructional Sys. v. Computer Curriculum Corp., 130 N.J. 324, 341-42, 614 A.2d 124 (1992)* (quoting *Restatement (Second) of Conflicts of Laws § 187* **[*26]** (1969)).

Plaintiffs contend that the court did not properly analyze New Jersey's relationship to the litigation, noting that Hopkins was a resident of New Jersey during part of the time that he was a member of N&A, moving to Indiana only after he filed his federal complaint; some of the negotiations regarding Hopkins's retirement took place in New Jersey; and Hopkins received faxes as well as drafts of the second amended agreement at his New Jersey address. Additionally, plaintiffs note that neither SHA nor N&A was formed under the laws of Connecticut.

While plaintiffs are correct that ties to New Jersey exist, we agree with the chancery court that Connecticut has more substantial ties to the litigation. N&A's corporate headquarters is located in Connecticut; Hopkins has admitted that, while the managing member, his practice was to be in the Stamford, Connecticut office of N&A "attending to firm administrative matters every day" that he was not traveling;[5] and all meetings to discuss amendments to the operating agreement and Hopkins's removal were conducted at the Stamford headquarters. As a consequence, it cannot be said that Connecticut has no substantial relationship to the parties **[*27]** or the transaction at issue. *Instructional Sys., supra, 130 N.J. at 341.* Indeed, we find relevant relationships with Connecticut predominate over any relationship with New Jersey.

5 *See* letter from Hopkins to the remaining firm members, dated September 17, 2000.

Plaintiffs also claim that Connecticut law conflicts with New Jersey's strong public policy directed at the eradication of workplace discrimination. We disagree. While we acknowledge New Jersey's strong policy in that regard, *Ellison v. Creative Learning Ctr., 383 N.J. Super. 581, 588, 893 A.2d 12 (App. Div. 2006)*, we note that a similarly strong policy has been articulated by the courts of Connecticut. *See, e.g., Thibodeau v. Design Group One Architects, L.L.C., 260 Conn. 691, 802 A.2d 731, 745 (Conn. 2002)* ("there can be no doubt that the elimination of invidious discrimination in employment is the overarching goal of the [Fair Employment Practices A]ct."); *see also Conn. Gen. Stat. § 46a-60(a)(1)* (declaring age discrimination by an employer to be a prohibited employment practice).

Plaintiffs argue that, under New Jersey law, independent contractors can sue for age discrimination, *see Rubin v. Chilton, 359 N.J. Super. 105, 110, 819 A.2d 22 (App. Div. 2003)*, whereas **[*28]** independent contractors are not entitled to such protection under the Connecticut Fair Employment Practices Act, the antidiscrimination protections of which cover employees, only. *See DeSouza v. EGL Eagle Global Logistics L.P., 596 F. Supp. 2d 456, 463-67 (D. Conn. 2009).* Thus, they claim application of Connecticut law would be contrary to New Jersey public policy. However, public policy concerns arise only when the state whose law has not been contractually designated as controlling has a materially greater interest in the controversy than the chosen state. Such is not the case here.

Moreover, we find *Rubin* nonprecedential in the circumstances presented. The chancery court did not find the NJLAD inapplicable to Hopkins because his company, SHA, contracted with N&A, but rather because Hopkins participated in the management and control of N&A, and for that reason, was not an employee. *Rubin* does not address that circumstance. Further, our decision in *Rubin*, which concerned the termination of employment contracts between a hospital and two pathologists, was premised upon a different provision of the NJLAD than that asserted here, *N.J.S.A. 10:5-12(l)*, a provision prohibiting discriminatory [*29] refusals to contract. *Rubin, supra, 359 N.J. Super. at 109-11*. That statutory provision is inapplicable in the present case. *DeSouza*, which focuses on the distinction between employees and independent contractors in construing *Conn. Gen Stat. § 46a-60(a)(1)* in a manner similar to our construction of *N.J.S.A. 10:5-12(a), see Rubin, supra, 359 N.J. Super. at 108-09*, is similarly inapposite.

Plaintiffs have cited no precedent holding, under New Jersey law, that Hopkins as a member of N&A would be deemed an employee of that entity. Indeed, as the chancery court held, application of the six-prong test enunciated in *Feldman, supra, 187 N.J. at 244*, to the facts of this case compels a contrary result. Such application leads to the conclusion that (1) Hopkins had a high degree of independence in how he performed his duties; (2) N&A did not provide supervision over Hopkins's work, as he was highly experienced and was hired as a consultant by different companies; (3) there was no evidence that Hopkins reported to anyone in the organization; (4) as a member, Hopkins had significant influence over the company and had an equal voice with other members in controlling the operation of the business; [*30] (5) the parties never intended for Hopkins to be considered an employee; and (6) Hopkins shared equally with the other members in the profits, losses, and liabilities of the organization. The fact that he might have provided services, through SHA, to N&A as an independent contractor did not nullify his status as a shareholder/director of N&A. As a result, there is no basis to conclude that New Jersey extends broader protections under the NJLAD than does Connecticut law, and as a consequence, New Jersey law should be applied in this case. Even if New Jersey law were applicable, as the foregoing analysis demonstrates, plaintiffs would be unable to prevail on the claim asserted under the NJLAD.

III.

Plaintiffs argue additionally that the chancery court erred in applying Delaware law to dismiss their oppressed minority shareholder claim.

The chancery court addressed the issue of the proper choice of law on two occasions: first, when Hopkins sought, as an allegedly oppressed minority shareholder, the immediate release of escrowed funds by N&A. The court denied relief, declaring that Hopkins was collaterally estopped from challenging the retention of those funds by the interlocutory decisions [*31] of the federal magistrate and the district court in the federal litigation, which applied federal law. Additionally, the court held that Hopkins had failed to meet the standards for injunctive relief set forth in *Crowe, supra, 90 N.J. at 132-34*. The court revisited the issue in its opinion granting defendants' motion to dismiss plaintiffs' claims of minority shareholder oppression and, at that time, gave effect to the choice of law provision contained in the operating agreements, determining that neither exception to a recognition of the parties' choice of law was applicable. It found that New Jersey had no more significant relationship to the transaction or parties than did Delaware, and that application of Delaware law would not violate the public policy of a state with a materially greater interest in the issues in dispute. In support of its position, the court relied on *Kalman Floor Co., Inc. v. Jos. L. Muscarelle, Inc., 196 N.J. Super. 16, 21, 481 A.2d 553 (App. Div. 1984), aff'd, 98 N.J. 266, 486 A.2d 334 (1985)* (adopting the position of the *Restatement (Second) of Conflicts of Laws, supra, § 187*). The court held:

> Nightingale was formed under Delaware law and its members unanimously chose to have their [*32] relationship governed by that law.
>
> . . .
>
> The members of Nightingale were sophisticated businessmen, represented by counsel, making copious sums of money. It would be anomalous and unfounded to reject the agreement freely entered into by the members of the LLC, to provide plaintiffs the benefit they seek.

Additionally, the court again found that the federal choice of law determinations on this issue should be granted preclusive effect.

We reject the court's conclusion that the federal rulings were binding in the state court proceeding and accept plaintiffs' position that, when a federal court has determined that it has no subject matter jurisdiction over an issue, its prior rulings with respect to that issue become a nullity. *Zacharias v. Whatman, P.L.C., 345 N.J. Super. 218, 226-27, 784 A.2d 741 (App. Div. 2001)* (citing *Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 18, 71 S. Ct. 534, 542, 95 L. Ed. 702, 710-11 (1951)* and *Brown v. Francis, 75 F.3d 860, 864, 33 V.I. 385 (3d Cir. 1996)), certif. denied, 171 N.J. 444, 794 A.2d 183 (2002).* Nonetheless, we find no error in the chancery court's determination to apply Delaware law.

In reaching that conclusion, we concur with the chancery court's observation that the parties freely entered **[*33]** into an operating agreement that they explicitly provided was to be governed by Delaware law. Further, it is apparent that the disputes at issue arose out of that agreement, as amended to permit the removal of a member without cause and to establish the procedures for doing so. That some communications by N&A in that connection were received by Hopkins in New Jersey and responses were sent by him from this State does not alter our conclusion that plaintiffs' dispute concerns the management and governance of N&A -- subjects that the parties unanimously agreed would be governed by Delaware law.

Moreover, we are satisfied that, if New Jersey law were to be applied to this dispute, the result would not differ from that obtained by application of Delaware law. In this regard, we note that, at the time that plaintiffs' dispute with N&A arose, N&A was a limited liability company to which *N.J.S.A. 14A:12-7*, the oppressed minority shareholder statute, is inapplicable. *Denike v. Cupo, 394 N.J. Super. 357, 378, 926 A.2d 869 (App. Div. 2007), rev'd on other grounds, 196 N.J. 502, 958 A.2d 446 (2008).*

New Jersey's Limited Liability Company Act, *N.J.S.A. 42:2B-1 to -70* (LLCA), was enacted to enable members of such companies "'to **[*34]** take advantage of both the limited liability afforded to shareholders and directors of corporations and the pass through tax advantages available to partnerships.'" *Kuhn v. Tumminelli, 366 N.J. Super. 431, 439, 841 A.2d 496 (App. Div.)* (quoting *Senate Commerce Committee Statement*, S. Doc. No. 890, at 1 (June 14, 1993)), *certif. denied, 180 N.J. 354, 851 A.2d 648 (2004).* "The LLCA gives members of such companies great discretion to establish structure and procedures, with the statute controlling in the absence of a contrary operating agreement." *Denike, supra, 394 N.J. Super. at 378* (citing *Kuhn, supra, 366 N.J. Super. at 439*).

Here, the second amended operating agreement, adopted by the members of N&A on September 30, 2002, sets forth in a provision entitled "Distributions to Former Members" the rights of a member who is removed without cause. The agreement does not address the rights of a minority member who claims oppression. But then, neither does the LLCA, which has no provision that relates to oppressed minority shareholder-type claims. As a consequence, no relief is available to plaintiffs pursuant to New Jersey law.

IV.

As previously stated, before trial of the matter, the Law Division court dismissed plaintiffs' **[*35]** claims that the individual defendants tortiously interfered with the September 2000 retirement agreement (Count VIII) and with the May 14, 2001 operating agreement (Count IX). The court held that the defendants were parties to both agreements, and under established precedent, they could not interfere with their own agreements. During trial, the court also dismissed claims that the individual defendants breached contracts with plaintiffs, namely, the same September 2000 retirement and the May 2001 operating agreements that had figured in plaintiffs' claims of tortious interference, holding that in signing those agreements, defendants were acting in their corporate capacity, and that there was no evidence of an individual guarantee or obligation.

On appeal, plaintiffs claim that the two rulings are inconsistent, and that the reasoning underlying the court's ruling dismissing plaintiffs' tortious interference claims[6] compels the conclusion that plaintiffs' claims against the individual defendants for breach of contract should not have been involuntarily dismissed pursuant to *Rule 4:37-2(b)*. Alternatively, plaintiffs argue that if the breach of contract claims were properly dismissed, then **[*36]** they should have been permitted to proceed with their claims of tortious interference with contract. In either event, plaintiffs claim, the court committed harmful error.

6 Plaintiffs concede that if defendants were parties to the contracts at issue, they cannot be

found liable for tortiously interfering with them. *See Mandel v. UBS/PaineWebber, Inc., 373 N.J. Super. 55, 80, 860 A.2d 945 (App. Div. 2004), certif. denied, 183 N.J. 213, 871 A.2d 91 (2005).*

We agree with plaintiffs that the individual members of N&A were parties to the operating agreements governing that entity. *See N.J.S.A. 42:2B-2* (defining operating agreement to be "a written agreement among the members"). However, we do not regard that fact as compelling the further conclusion that defendants can be held individually liable for breach of that agreement. As previously noted, paragraph 12.1.1 of the May 2001 operating agreement provided:

> No Member or Manager shall be personally liable to the Company or other Members in acting on behalf of the Company or in his or her capacity as a Member or Manager, except as otherwise required by applicable law, provided that his or her actions or omissions did not constitute fraud, bad faith, gross negligence or **[*37]** willful misconduct.

Further, *N.J.S.A. 42:2B-23* provides:

> Except as otherwise provided by this act, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company; and no member, manager, employee or agent of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company, or for any debt, obligation or liability of any other member, manager, employee or agent of the limited liability company, by reason of being a member, or acting as a manger, employee or agent of the limited liability company.

As the result of these contractual and statutory provisions, we find that the defendant members of N&A are immune from liability as the result of plaintiffs' claims of breach of the May 2001 operating agreement.

We concur with the Law Division court's conclusion that the individual defendant members of N&A were not parties to the retirement agreement -- an agreement separate from the operating agreement. As Hopkins conceded in his deposition, if N&A had dissolved before his retirement, **[*38]** he would not have been able to collect any retirement proceeds from any of the individual defendants. Nonetheless, this conclusion does not compel resurrection of plaintiffs' claim of tortious interference by defendants with the retirement agreement between Hopkins and N&A, because the immunities conferred by the operating agreement and statute remain operative. Moreover, we note that, if such a claim were recognized, it would nonetheless fail, as the trial court recognized, as the result of plaintiffs' failure to proffer evidence of malice -- an essential element in a claim of tortious interference with contract. *See Raymond v. Cregar, 38 N.J. 472, 480, 185 A.2d 856 (1962)* (requiring malice, which the Court defined as "the intentional doing of a wrongful act without justification or excuse").

We recognize the exception to the immunities conferred by the operating agreement that applies if defendants committed fraud. However, as discussed more fully in the next section of this opinion, we are satisfied that plaintiffs failed to produce evidence of such actionable conduct.

V.

In their final argument, plaintiffs claim that the trial court improperly granted defendants' motion for an involuntary dismissal **[*39]** of plaintiffs' claims of fraud. In that regard, plaintiffs state that their fraud count

> was based on misrepresentations and statements made by the Defendants to Hopkins to induce him to give up his blocking vote in Nightingale LLC through adoption of the Amended LLC Operating Agreement. The evidence presented in Plaintiffs' case showed that the Defendants made promises upon which Hopkins relied concerning the flexibility of his retirement date with no intention of honoring them, simply to get Hopkins to relinquish his blocking vote. Hopkins suffered damages through lost income as the result of Defendant's conduct.

Plaintiffs concede that "statements as to future events, expectations or intended acts, do not constitute misrepresentations despite their falsity, if the statements were not made with the intent to deceive." *Notch View Assocs. v. Smith, 260 N.J. Super. 190, 202, 615 A.2d 676 (Law Div. 1992)* (citing *Middlesex Cnty. Sewer Auth. v. Borough of Middlesex, 74 N.J. Super. 591, 605, 181 A.2d 818 (Law Div. 1962), aff'd, 79 N.J. Super. 24, 190 A.2d 205 (App. Div.), certif. denied, 40 N.J. 501, 193 A.2d 138 (1963))*. Plaintiffs concede as well that "[m]ere **[*40]** nonperformance is insufficient to show that the promisor had no intention of performing." *Id. at 203* (citing *Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369, 382, 164 A.2d 607 (App. Div. 1980))*. Nonetheless, plaintiffs contend that if defendants had no intention to perform at the time that the promise of future action was made, their conduct can be recognized as fraudulent. *Id. at 202-03* (citing *Capano v. Borough of Stone Harbor, 530 F. Supp. 1254, 1264 (D.N.J. 1982))*.

In support of their position, plaintiffs rely on the testimony of Douglas Hopkins, the son of Stephen Hopkins, who was also a member of N&A at the time of the negotiations for Stephen's retirement and when he was eventually removed. Douglas Hopkins testified at trial that, at a meeting held on September 30, 2002, after Stephen had announced that he had rescinded his plan to retire, the members met to discuss an amendment to the operating agreement to conform the compensation offered to a member who was removed without cause to that offered to Stephen in the retirement agreement. Douglas opposed the amendment, arguing that the operating agreement should not be utilized to compel Stephen to retire upon a date certain, when **[*41]** he had specifically negotiated for flexibility in that regard. At this point, according to Douglas,

> Mike D'Appolonia erupted indicating that that wasn't the deal, that Steve had to leave. Kevin Dowd erupted saying that wasn't the deal, that Steve had to leave. Both Mike D'Appolonia and Kevin Dowd insisted that this was the first time they had heard that Steve didn't intend to leave.

Nonetheless, the amendment to the operating agreement equalizing compensation was adopted over the objection of Stephen and Douglas Hopkins.

Stephen was then asked to leave the room. While he was absent, Douglas was "attacked" by Kevin Dowd, who claimed that the company had been "betrayed" by Stephen as the result of his change of position regarding retirement, and Dowd asked if Stephen had consulted with counsel regarding litigation over the proper construction of the retirement agreement. At this point, according to Douglas,

> Howard [Hoffmann] said that he simply gave the changed language to Steve in order to allow him to save face, but he never had any intention of allowing Steve to stay past 12/31/02.
>
> * * *
>
> He -- he said, Steve has to retire on time. That this was not a negotiable issue.

When Douglas asked Hoffmann **[*42]** what "flexible" meant, Hoffmann allegedly responded that "he was not intending to be flexible. That he got to interpret flexible. . . . He could decide what it meant." Stephen Hopkins was then permitted to return to the room, and he was informed that he had seven days to confirm that he was going to retire.

In our view, this exchange does not offer evidence that a jury could determine constituted clear and convincing proof of fraud on the part of defendants. At the time the retirement agreement was negotiated in August and September 2000, Hopkins was suffering from medical problems that were curtailing his ability to travel. Hopkins's retirement plans were, in large measure, a response to his medical condition at the time. While he sought flexibility with respect to his retirement date, a fair reading of the documents exchanged at the time suggests that the parties envisioned providing some leeway of weeks or months regarding Hopkins's actual retirement date. There is no evidence in the record to suggest that, when the retirement agreement was executed, defendants envisioned that bargained-for "flexibility" included rescission of the agreement to retire upon an improvement in Hopkins's **[*43]** medical condition. While Hopkins may have construed the agreement to include such an eventuality, no evidence was presented of a meeting of the minds on this point. Thus, from the members' perspective, Hopkins's statement in June 2002 that he did not intend to retire at any specific date was wholly contrary to the members' reasonable expectations.

It was in this context that the statements of the defendant members, as alleged by Douglas Hopkins in his trial testimony, were made. As such, they do not provide any evidence with respect to the members' intent in connection with the implementation of the retirement agreement as it was initially negotiated. Indeed, the record is silent as to whether the members would, knowing of Hopkins's intent to retire, have afforded him some period of time beyond December 31, 2002 in which to order his affairs. We thus concur with the trial court's determination to dismiss plaintiffs' fraud claims.

VI.

We turn next to defendants' cross-appeal. Defendants argue first that the court erred by reinstating plaintiffs' jury demand when the matter was transferred from the Chancery Division to the Law Division. We consider this issue on appeal since the jury rendered [*44] a verdict not only on the breach of contract claim asserted by plaintiffs, but also on the counterclaim for breach of contract and tortious interference with existing contracts, asserted by defendants. Thus, the issue has not been mooted by our affirmance with respect to plaintiffs' appeal.

In the verified complaint filed by plaintiffs in the Chancery Division, plaintiffs included a demand for "trial by jury on all issues so triable." In pursuing their action, plaintiffs initially sought injunctive relief on an oppressed minority shareholder theory pursuant to *N.J.S.A. 14A:12-7* -- equitable relief as to which a trial by jury was unavailable. Thereafter, the court dismissed plaintiffs' claims of minority shareholder oppression and violation of the NJLAD as a matter of law, and exercised its discretion pursuant to *Rule 4:3-1(b)* to transfer the remaining claims, which were legal in nature, for trial in the Law Division and granted plaintiffs' motion for "reinstatement of Plaintiffs' waived jury demand" on grounds of fundamental fairness pursuant to *Rule 1:1-2*. The court held:

> The plaintiff[s'] counsel agreed to waive the jury demand in consideration of maintaining the entire action in the [*45] Chancery Division. It would be inequitable and unfair to the plaintiffs to require that position be maintained if the matter is transferred to the Law Division.
>
> Would it have been preferable to indicate waiver only if the matter retains or remains in the Chancery Division? Certainly, but it would be unduly punitive and prejudicial to the plaintiffs to have that oversight preclude their fundamental right to a jury trial.

The record on appeal does not set forth the circumstances in which jury waiver occurred in this matter. We therefore accept the court's statement that plaintiffs waived a jury with the understanding that the entire matter would be resolved by the chancery court. We recognize that, after rulings by the court disposed of all equitable issues, as well as plaintiffs' NJLAD claim, it was plaintiffs who sought transfer to the Law Division and, in that connection, reinstatement of their jury demand. However, it remained within the chancery court's discretion whether to grant that motion, which it determined to do primarily as the result of the press of a heavy caseload in the Chancery Division.

In the circumstances presented, we do not find an abuse of discretion on the part [*46] of the chancery court in reinstating plaintiffs' jury demand upon transfer of the matter to the Law Division for trial. That the court had such discretion pursuant to *Rule 1:1-2* was recognized by the Supreme Court in *Carolyn Schnurer, Inc. v. Stein, 29 N.J. 498, 502-04, 150 A.2d 490 (1959)*, which held that a request to reinstate a jury demand need not be automatically granted, but that relief could be afforded pursuant to a precursor to *Rule 1:1-2* when a rational basis for it is demonstrated. *Id. at 503*. Here, the nature of plaintiffs' claims was changed by the elimination of those seeking equitable remedies. We find that such legal action provided sufficient cause to permit the court's exercise of its discretion.

VII.

In light of the jury's verdict rejecting plaintiffs' claims, we decline to consider defendants' protective appeal from the court's denial of their motion to bar the testimony of plaintiffs' economic expert and turn to their appeal from the court's involuntary dismissal of their counterclaims for breach of fiduciary duty, tortious interference with prospective economic advantage, and negligent and intentional misrepresentation.

The court dismissed defendants' breach of fiduciary duty [*47] claims on the ground that, following Hopkins's removal from membership in November 2003 and the termination of the services agreement between N&A and SHA at that time, plaintiffs owed no fiduciary duty to N&A. We concur with that legal conclusion. Defendants claim on appeal that, because Hopkins testified that he regarded himself to be a member of N&A after his termination, a breach of fiduciary duty could be found to exist. We reject that argument, determining as a matter of law that the business relationship between plaintiffs and defendants ended when defendants exercised their right of removal without cause pursuant to N&A's amended operating agreement.

Defendants claim additionally that Hopkins breached his fiduciary duty to the company during his tenure as a member by plotting with his son, Douglas, against D'Appolonia and Dowd to starve them of resources and, additionally, to start a new firm in the Nightingale name with Hoffmann and Duckett and without D'Appolonia and Dowd. However, neither Hoffmann nor Duckett agreed to the proposals.

Defendants claim that in November 2001, Hopkins unilaterally promoted and raised the billing rate of an associate named Chip Weismiller. However, [*48] when Hoffmann learned of the promotion, and after consultation with D'Appolonia, the promotion was rescinded.

Defendants also claim that in May 2002, after stepping down as managing member, upon learning that a portion of the assignment responsibilities had been transferred to an investment banking firm, Hopkins unilaterally withdrew Nightingale from a consulting assignment for Farmland Industries, despite the fact that there was still significant work that N&A could have done. Thereafter, N&A was not successful in regaining that work, which was performed by another turnaround consulting firm. However, defendants do not quantify the amount of damages suffered by the company as a result.

In July 2002, according to defendants, an attorney approached N&A, through Hopkins, concerning a project for a large nationwide propane distributor. According to defendants, Hopkins unilaterally declined the assignment on the ground that the company lacked propane experience. However, Hopkins's communication was intercepted, and N&A was successful in obtaining the assignment.

Our review of the record regarding these claims by defendants of breach of fiduciary duty by Hopkins during his tenure as a member [*49] of N&A satisfy us that either the steps taken by Hopkins were ineffectual, they were rescinded, or damages flowing from them were not proven. As a consequence, involuntary dismissal was properly entered.

Defendants also contest the dismissal of their claims for negligent and intentional misrepresentation by Hopkins. Defendants correctly argue that negligent misrepresentation constitutes a recognized cause of action in New Jersey. *See Karu v. Feldman, 119 N.J. 135, 146, 574 A.2d 420 (1990)* (recognizing a cause of action when a party negligently provides false information upon which a reasonably foreseeable recipient relies, resulting in damages); *H. Rosenblum, Inc. v. Adler, 93 N.J. 324, 334, 461 A.2d 138 (1983)* (defining negligent misrepresentation as "[a]n incorrect statement, negligently made and justifiably relied upon," resulting in damages). However, the statement upon which defendants' cause of action is premised is Hopkins's undertaking to retire at the end of 2002. While that undertaking was later rescinded, there is no evidence in the record that Hopkins's statement of his future intent was incorrect at the time it was uttered. Thus, the record does not support defendants' claim of misrepresentation, [*50] whether negligent or intentional.

As a final matter, defendants challenge the claimed dismissal of their causes of action for tortious interference with existing contracts and prospective economic advantage. In that regard, the court explicitly preserved defendants' claim for tortious interference with existing contracts, and that claim was submitted to the jury, which rendered a verdict against defendants. The court dismissed the claim for interference with prospective economic advantage on the ground that the services agreement between N&A and SHA did not contain a non-competition clause, and as a result, Hopkins was free to compete with N&A for business following his involuntary removal as a member of the company. We agree. In the circumstances, whether N&A sustained damages, and whether those damages were quantified at trial, is not relevant to the legal analysis. Contrary to defendants' arguments, we find nothing misleading in Hopkins's statements to clients that he had been involuntarily retired by N&A, that the contract between SHA and N&A had been cancelled, and that his authority to act independently in providing advice and counsel to clients as a representative of the firm [*51] had been revoked.

VIII.

In a final legal argument, defendants contend that Hopkins's continued prosecution of his minority shareholder oppression claim was frivolous, entitling defendants to attorneys' fees and costs pursuant to the frivolous litigation statute, *N.J.S.A. 2A:15-59.1*, and the offer of judgment rule, *Rule 4:58-3*.[7] In this connection with their frivolous litigation claim, defendants argue that, following the dismissal of his oppressed minority shareholder claim in June 2007, Hopkins continued to seek the "fair value" of his share in N&A, relief that defendants contend was available only as the result of the successful prosecution of an oppression claim. Accordingly, defendants claim entitlement to fees in the amount of $103,688.61, and they contend that the court erred in declining to award that amount. Additionally, defendants claim that Hopkins asserted frivolous claims against the individual defendants, contending that, as the result of the retirement agreement, they were obligated to provide continued project work to him after his retirement. In connection with their defense of that claim, defendants seek $120,725.85 in fees and costs.

7 Defendants offered judgment to [*52] plaintiffs in the sum of $315,000 on November 20, 2007. The offer was not accepted.

The court denied the relief in a written opinion of June 1, 2009. In that opinion, it denied relief pursuant to the offer of judgment rule because plaintiffs had not recovered a monetary award. Rather, plaintiffs' claims were either dismissed on summary judgment or dismissed following the jury's no-cause verdict. In those circumstances, an award of attorneys' fees was unavailable.[8]

8 *Rule 4:58-3(c)* provides in relevant part:

> No allowances shall be granted if (1) the claimant's claim is dismissed, [or] (2) a no-cause verdict is returned[.]

The court also denied attorneys' fees pursuant to the frivolous litigation statute, noting that in *Toll Brothers, Inc. v. Township of West Windsor, 190 N.J. 61, 72, 918 A.2d 595 (2007)*, the Supreme Court had held that a party seeking statutory fees must comply with the procedural requirements of *Rule 1:4-8*, the frivolous litigation rule. *See also R. 1:4-8(f)* (requiring "[t]o the extent practicable" the procedures prescribed by the rule shall apply to an application pursuant to *N.J.S.A. 2A:15-59.1*). The court continued by stating that *Rule 1:4-8(b)(1)* requires that, before seeking sanctions [*53] for frivolous litigation, the party must send a detailed letter to the allegedly offending party indicating why the pleading or other submission was frivolous, and demanding its retraction within twenty-eight days in order to avoid sanctions. However, in the present matter, defendants failed to send the safe harbor letter that the rule requires, and offered no excuse for their failure to do so. Additionally, the court held that plaintiffs' complaint was made in good faith, and that in ordering dismissal of various counts, no finding was ever made that the claims were frivolous. The court continued:

> As long as there is litigation of "marginal merit," a court should not reward attorneys' fees and costs to a party. *See Belfer v. Merling, 322 N.J. Super. 124, 144, 730 A.2d 434 (App. Div. 1999)*; *Venner v. Allstate, 306 N.J. Super. 106, 703 A.2d 330 (App. Div. 1997)*. Here, nothing indicates that the Complaint was commenced or used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury. Moreover, nothing indicates that Plaintiff[s] knew or should have known that the Complaint was without any reasonable basis in law or equity and could not be supported with a good faith argument.

Accordingly, [*54] defendants' attorneys' fee claim was denied.

Although defendants challenge the court's decision on appeal, we affirm it for the reasons stated by the Law Division court. We add only that, even if we were to accept defendants' explanation for their failure to serve a safe harbor letter as valid, we would still conclude that plaintiffs' claims were not frivolous, and thus sanctions were not warranted.

The decisions from which the appeal and cross-appeal are taken are affirmed.