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

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

REPLY BRIEF ON APPEAL – DEFENDANT-APPELLANT

ORAL ARGUMENT REQUESTED

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SUMMARY OF ARGUMENT

Taub herein briefly responds to Madugula's position on the questions this Court ordered the parties to brief. As to the first question – whether claims brought under MCL 450.1489 are equitable claims to be decided by a court of equity – Madugula's response ignores the fact that every court and commentator to have considered the issue has concluded that a forced buyout of stock is an equitable remedy to be decided by a court of equity. Even where a jury sits as a factfinder to determine claims for damages based on alleged shareholder oppression, the trial court is still required to make an independent determination as to whether oppression occurred and the proper equitable remedy (if any). Despite Madugula's attempts to characterize the trial court's order as an independent determination, it plainly was not. At the very least, this case must be remanded for the trial court to make its own findings regarding liability and its own judgment as to any available remedy.

As to the second question – whether the provisions of a stockholders' agreement can create shareholder interests protected by MCL 450.1489 – Madugula's answer is that the stockholders' agreement in this case vested him with certain interests. But just calling a private contract a "shareholders' agreement" does not give a party the right to enforce alleged breaches of that contract with the shareholder oppression statute. Moreover, Madugula cannot claim that the agreement gave him rights without also recognizing that the agreement gave him limited remedies. Indeed, an article written by Madugula's own counsel draws the distinction between the contractual and statutory remedies available to minority shareholders. Madugula cannot use the shareholder oppression statute to evade the contractually bargained-for remedies he agreed to for alleged violations of the stockholders' agreement.

As to the final question – 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 – Madugula does not dispute that he continues to hold shares, receive dividends (including, contrary to Madugula's argument, dividends in excess of his tax liabilities), sit on the board of directors, vote at all shareholder meetings, and examine the corporate financial information. Madugula instead argues that the salary paid to his employer for his consulting services was somehow a shareholder interest and he had an expectation of lifetime employment. Michigan has rejected the interpretation of the shareholder oppression statute Madugula advances and he has no real response to this argument.

I. A FORCED BUYOUT OF SHARES UNDER MCL § 450.1489(1)(c) IS AN EQUITABLE REMEDY TO BE DECIDED BY A COURT SITTING IN EQUITY.

A claim under Michigan's shareholder oppression statute for a forced buyout of stock is indisputably a claim for equitable relief, not a claim for damages. As the "oft-cited oppression expert" Douglas K. Moll, (Resp. Br. 26), has explained:

> [T]he buyout remedy creates an equitable 'parting' between the majority shareholder and the aggrieved minority shareholder. The majority shareholder continues to operate the close corporation and to participate in the company's successes and failures, while the minority shareholder recovers the value of the shareholder's invested capital and removes himself or herself from the company's affairs.

Douglas K. Moll, *Reasonable Expectations v. Implied-in-Fact Contracts: Is the Shareholder Oppression Doctrine Needed?*, 42 B.C. L. Rev. 989, 1019 (2001). Contrary to Madugula's argument, ordering one party to purchase the property of another party is not a legal remedy akin to a money judgment. As this Court has recognized, a "money judgment" simply "orders the payment of a sum of money, as distinguished from an order directing an act to be done or property to be restored or transferred." *People ex rel. Wayne Cnty. Prosecutor v. $176,598.00 U.S. Currency*, 465 Mich. 382, 386, 633 N.W.2d 367, 369 (2001). As courts and commentators uniformly agree, a forced buyout of stock is an equitable remedy in that it directs property to be

transferred.[1] Taub had a constitutional right to have a court sitting in equity decide the question of whether equitable relief was warranted based on findings articulated by the court.[2]

In arguing that it was proper for the court to use a jury to decide and award the equitable relief of a forced buyout, Madugula attempts to establish that a shareholder oppression claim is akin to various common law claims considered legal in nature in 1963. (Resp. Br. 11-16). But his argument ignores the plain text of the statute. MCL § 450.1489 vests authority only in the circuit court, not a jury, to "make an order or grant relief as it considers appropriate." Indeed, Madugula's own counsel has written about the "wide discretion *vested in trial courts* as to the

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[1] *See, e.g., Forsberg v. Forsberg Flowers, Inc.*, No. 263762, 2006 WL 3500897, at *4 (Mich. Ct. App. Dec. 5, 2006) (Add. 19) (explaining that "five of the six enumerated remedies in MCL 450.1489," including a forced buyout of stock under subsection (1)(e), "are equitable in nature"); *Moore v. Carney*, 84 Mich. App. 399, 405, 269 N.W.2d 614, 617 (1978) (holding that the trial court's order requiring a forced buyout of stock under the predecessor statute to MCL 450.1489 was "not a mere money judgment" but was "part of an equitable remedy"); *Saber v. Saber*, 146 Mich. App. 108, 111, 379 N.W.2d 478, 479 (1985) (explaining that "a judgment which ordered a shareholder's stock to be purchased was an equitable remedy and not a money judgment"); *Ritchie v. Rupe*, 339 S.W.3d 275, 289 (Tex. App. – Dallas 2011, pet. granted) (noting that a "buyout of an oppressed minority shareholder" is "an equitable remedy for shareholder oppression"); *Edenbaum v. Schwarcz-Osztreicherne*, 165 Md. App. 233, 260-61, 885 A.2d 365, 380-81 (2005) ("[J]oin[ing] other courts today which have interpreted their similar statutory counterparts to allow alternative equitable remedies," including "the entry of an order requiring the corporation or a majority of its stockholders to purchase the stock of the minority stockholders[.]"); *Orloff v. Weinstein Enters., Inc.*, 247 A.D.2d 63, 65, 677 N.Y.S.2d 544, 545 (1998) (describing buyout as "equitable relief").

[2] Madugula cites no case in which a jury decided a claim for a buyout under MCL § 450.1489 absent consent of the parties. The court in *Irish v. Natural Gas Compression Sys., Inc.*, No. 266021, 2006 WL 2000132 (Mich. Ct. App. July 18, 2006) (Add. 12-15), relied upon by Madugula, is the only Michigan court to have held that a buyout is akin to damages, but it did so in a ruling addressing only statute of limitations issues and its reasoning has been rejected. *See* Stephen H. Schulman, *Michigan Corporation Law & Practice* § 4.22, at 4-65 (2014 Supp.) ("[T]he incorporation of an express limitation period for monetary damages in subsection (1)(f) indicates that *the general rules for equitable actions apply to other forms of relief under the section such as the purchase of shares at fair value.*"). Madugula also relies on *Schimke v. Liquid Dustlayer Inc.*, No. 282421, 2009 WL 3049723 (Mich. Ct. App. Sept. 24, 2009) (Add. 109-15). But that case actually finds "an order directing the purchase of minority stock is an *equitable remedy, not a money judgment.*" *Id.* at *7 (Add. 114) (emphasis added).

appropriate remedy" for shareholder oppression. Gerard V. Mantese et al., *Shareholder and Corporate Oppression Actions*, 91 Mich. Bar J. 25, 28 (2012) (emphasis added).

Here, the court plainly did not decide the equitable questions at issue in this case. Madugula's claim that the trial court's Order of Judgment "stated that" the court was "separately and independently" ordering the buyout remedy in light of the jury's findings is blatantly false. (Resp. Br. 21). The trial judge merely affixed his stamped signature to an Order of Judgment prepared by the plaintiff and attached as an exhibit to a Motion for Entry of Order of Judgment. (App. 196a). The court exercised no independent discretion, did not find any facts, and did not in any way make an independent determination as to the appropriateness of equitable relief and, if so, on what basis. The court was simply following its earlier ruling, in which it explicitly stated that it was abdicating its responsibility *to the jury* to make determinations as to equitable remedies such as a forced buyout of stock. (App. 125a-26a). Nor did the court "separately ratif[y]" the jury's award in its ruling on Taub's post-trial motions, as Madugula claims. (Resp. Br. 21). Again, the court did not "independently conclude[]" anything. (*Id.* at 22). Rather, the court explicitly stated that it was bound "not [to] substitute its judgment for that of the jury." (App. 244a). Madugula's argument that the trial court "separately" or "independently" found any facts or ordered any relief is not credible.

As Taub has maintained throughout this proceeding, even if Madugula were entitled to a jury trial on the question of damages, he was not entitled to a jury trial on his equitable claim for a forced buyout of stock. Madugula cites no Michigan case, and Taub is aware of none, in which a jury was charged with making an equitable determination about stock buyout. Indeed, the Texas case that Madugula relies on to argue that the use of a jury was proper actually states the opposite, finding that "[w]hen the facts are in dispute, the jury determines what acts occurred,

but the trial court determines whether those acts constitute shareholder oppression and exercises its equitable authority to decide the appropriate remedy." *Cardiac Perfusion Servs., Inc. v. Hughes*, 380 S.W.3d 198, 202 (Tex. App. – Dallas 2012, pet. filed) (emphasis added).[3]

As Judge Ronayne Krause recognized in her dissent below (App. 263a), there is an established procedure for handling cases that include both jury submissible and equitable claims, and that procedure was not followed here. "[I]n 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." *Smith v. Univ. of Detroit*, 145 Mich. App. 468, 479, 378 N.W.2d 511, 516 (1985). Where the court fails to employ these dual factfinding tracks, a remand is required for a separate bench trial on the equitable claims. *See id.*; *see also, e.g., Malik v. Salamy*, No. 264780, 2007 WL 1224033, at *2 (Mich. Ct. App. Apr. 26, 2007) (holding that "the trial court was not required to defer to the jury's findings of fact; doing so would have improperly denied [defendants] their right to have the judge decide their equitable claims") (Add. 102); *Prentis Family Found., Inc. v. Barbara Ann Karmanos Cancer Inst.*, 266 Mich. App. 39, 53, 698 N.W.2d 900, 911-12 (2005).[4] Should this Court fail to reverse the verdict in its entirety for the reasons set forth below, then at the very least, Taub is entitled to a "remand for a new bench trial." (App. 263a).[5]

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[3] *See also Syndicated Commc'n Venture Partners IV, LP v. BayStar Capital, L.P.*, 51 A.D.3d 546, 547, 859 N.Y.S.2d 125, 127 (2008) (holding that the plaintiff's joinder of legal claims with an equitable claim of shareholder oppression "resulted in a waiver of the right to a jury trial").

[4] Madugula offers no authority for his assertion that a trial court has the discretion to "utilize a jury in awarding the remed[y] of . . . a buy-out of stock," but that a "trial court's discretion to use a jury in awarding a remedy would not extend to" the other equitable remedies listed in the statute. (Resp. Br. 19). There is no legal precedent for such a position, nor does it make sense.

[5] Madugula does not dispute that a harmless error analysis is inapplicable and thus a remand is required if this Court agrees that it was error to submit equitable issues to the jury. (Taub Br. 27).

II. PARTIES CANNOT CONTRACTUALLY CREATE PRIVATE RIGHTS ENFORCABLE BY THE SHAREHOLDER OPPRESSION STATUTE.

Madugula contends that the parties' contract in this case created shareholder interests protectable under MCL § 450.1489. (Resp. Br. 29). But private agreements – even those called "shareholders' agreements" – cannot privately create shareholders' rights that are independently enforceable under MCL § 450.1489. *See, e.g., Wojcik v. McNish*, No. 267005, 2006 WL 2061499, at *5 (Mich. Ct. App. July 25, 2006) ("Plaintiff's claims regarding breach of an employment contract and breach of a stock purchase agreement are not interests of plaintiff as a shareholder, and therefore, are not protected by § 489. Absent fraud or other unlawful conduct, which interferes with plaintiff's right to vote at pertinent shareholders meetings, plaintiff has no cause of action under § 489." (internal citation omitted)) (Add. 93-94). Taub's position is not – as Madugula incorrectly contends – that a breach of a corporate governance contract can never be evidence of shareholder oppression. Rather, Taub's position is that the right to a $150,000 salary or to a supermajority vote on certain issues are not inherently shareholder rights. Madugula obtained those rights by contract, and therefore his remedies for any alleged breach of those rights are defined and limited by what was agreed to in that contract. As Professor Moll has explained, to use the shareholder oppression statute to enforce Madugula's contract expectations would mean that "oppression law is effectively stepping in for contract law and is accomplishing what contract law itself should be doing." Moll, *supra*, 42 B.C. L. Rev. at 995.

While Madugula cites many cases that discuss in dicta whether evidence of a contractual breach can also serve as evidence of a violation of a shareholder oppression statute (Resp. Br. 39-41), such cases are inapposite and irrelevant to the real question at issue here. Madugula cites no case (and Taub is aware of none) that holds that simply putting a provision into a "shareholders' agreement" turns it into a shareholder interest. Nor is Taub aware of any case

that holds that the contractual remedies provided for in corporate governance agreements can be ignored and/or overridden in favor of the far more drastic remedies set forth in the shareholder oppression statute. Corporate governance agreements cannot create shareholder rights enforceable by the shareholder oppression statute.[6]

If Madugula's position is correct, then shareholders' agreements will become essentially useless. There is no reason to bargain for specific rights and remedies in a shareholders' agreement if the bargain struck can always be evaded simply by recourse to the shareholder oppression statute. Here, Madugula had contractually-provided remedies for the breach of any rights contractually vested in him. (App. 182a). This arrangement is in keeping with the general public policy in Michigan of encouraging shareholders in close corporations to establish corporate governance documents. Indeed, as Madugula's counsel has written:

> [C]ounsel for minority shareholders should insist on carefully drafted agreements and corporate documents such as employment agreements, buy-sell agreements, bylaws, articles of incorporation, and agreements specifying those actions that require super-majority shareholder votes, so that their clients' expectations and interests are protected. Minority shareholders cannot lightly assume that they will be entitled to invoke the remedies of Section 489 if they are unhappy with the direction that those in control of the corporation are taking, or with the treatment they are experiencing by those in control.

Gerard V. Mantese & Ian M. Williamson, *Minority Shareholder Oppression: From* Estes *to* Franchino, 84 Mich. Bar J. 16, 19 (2005). If this Court holds that privately-created rights among shareholders can be enforced with the shareholder oppression statute, then there will be no incentive for majority shareholders to enter into such contracts, which will have deleterious public policy consequences for Michigan's close corporations.

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[6] Madugula states that "this case does not necessarily turn on whether the Stockholders' Agreement actually creates shareholder interests protected by section 1489" because "Taub's actions, even independent of the Stockholders' Agreement, amply sustain the oppression claim." (Resp. Br. 29). That is false. As the trial court's post-trial rulings make clear, the entirety of Madugula's case turned on alleged violations of the Stockholders' Agreement. (App. 243a-44a).

III. SALARY PROVIDED FOR CONSULTING SERVICES IS NOT A SHAREHOLDER INTEREST AND MICHIGAN HAS REJECTED THE REASONABLE EXPECTATIONS TEST RELIED ON BY MADUGULA.

Madugula does not dispute that he continues to be the second-largest shareholder at Dataspace, continues to hold a position on the Board of Directors, continues to participate in and vote at all shareholder meetings, and continues to receive dividends from Dataspace. Madugula instead complains that his rights "as a shareholder" were violated because he no longer receives $150,000 per year for the consulting services that he is no longer providing to Dataspace. That is not what the Legislature intended when it amended the statute to provide 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.*" MCL § 450.1489(3). Madugula offers no response to Taub's argument that the court's ruling below establishes a *per se* rule preventing corporations from ever terminating minority shareholders' employment without facing liability, (Taub Br. 41), even where, as here, the majority shareholder believes the termination will actually protect the minority shareholder "as a shareholder." (App. 141a).

Madugula instead attempts to establish that his termination interfered with his "shareholder interests" by arguing that the $150,000 per year that Dataspace paid to Madugula's employer for Madugula's consulting services was Dataspace's method of "distributions" to its shareholders. But as Madugula himself admitted, the $150,000 per year was a "salary." (Resp. Br. 43). In fact, this $150,000 annual salary was roughly equivalent to the compensation Madugula received prior to becoming a shareholder, when he was paid $75 per hour as an hourly consultant. (App. 24b; *see also* App. 281a-290a (Dataspace payment records distinguishing between "[p]ersonnel" payments to Midwest Business Associates and "[d]istributions" to

Madugula)). The primary benefit of stock ownership was not a large salary. Other Dataspace executives who were not shareholders also received salaries of $150,000 per year. (App. 87b). The primary benefit of becoming a shareholder was having an ownership stake in the company and receiving dividends. (App. 60b). Madugula continues to own 36.25% of Dataspace and continues to receive dividends, including, contrary to Madugula's contentions, dividends in excess of his tax liabilities. (*See, e.g.*, App. 27b, 167a). Because he is an owner of 36.25% of the shares, Madugula's far-fetched theory that he was terminated so that Taub could sell the company and retain the benefits is both unsupported and illogical. Even though he was terminated, Madugula would still receive 36.25% of the proceeds from any sale. (App. 153a).

Finally, Madugula misleads this Court in claiming that he "invested $87,000 to become a shareholder of Dataspace" and that his "investment in this business was major" because he "paid his savings of $87,000 for his initial shares." (Resp. Br. 43, 45; *see id.* at 43 (stating that Madugula "invested his savings . . . taking a substantial risk")). In fact, Madugula did not pay a dime when he initially became a shareholder of Dataspace. He executed a promissory note to Taub for $87,000, and at the time he filed suit, he still owed Taub more than $107,000 on that note. (App. 72a-73a; 178.1a). This is not a case in which the minority shareholder provided significant capital and then was squeezed out. Madugula provided nothing to Dataspace other than consulting services, for which he was compensated. Having invested no capital in the company, Madugula now stands to obtain a windfall of more than $1.2 million from the forced buyout of shares he did not even pay for upon becoming a shareholder.

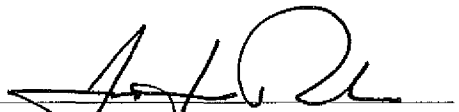
In sum, Madugula's argument is that his expectation of continued employment and benefits was frustrated by Taub. But Michigan has rejected the "reasonable expectations" test for shareholder oppression, and with good reason. *See Franchino v. Franchino*, 263 Mich. App.

172, 187-88, 687 N.W.2d 620, 630 (2004); *see also* Mantese, *supra*, 84 Mich. Bar J. at 19 (noting the rejection of the reasonable expectations test). The focus of Michigan's statute is on protecting "shareholder interests," not guaranteeing lifetime employment for minority shareholders, as the Legislature reaffirmed when it amended the shareholder oppression statute in 2006. *See* Taub Br. 38-40; *see also Arevalo v. Arevalo*, No. 285548, 2010 WL 1330636, at *6 (Mich. Ct. App. Apr. 6, 2010) ("A shareholder may not sue under the statute for oppression suffered in his capacity as a director or an employee.") (Add. 50). Madugula's termination did not constitute an interference with his interests "as a shareholder."

CONCLUSION

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

Respectfully submitted this 18th day of November:



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ADDENDUM

ADDENDUM TO APPELLANT'S REPLY BRIEF

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The following materials can be found in the Addendum to the Brief on Appeal – Defendant-Appellant, filed July 30, 2013.

Not Reported in N.W.2d, 2006 WL 2061499 (Mich.App.)
(Cite as: 2006 WL 2061499 (Mich.App.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
Mark WOJCIK and Marjorie Wojcik, Plaintiffs/ Counter-Defendants-Appellants,
v.
William J MCNISH and McNish's Sporting Goods & Trophies Inc, Defendants/ Counter-Plainitffs-Appellees.

Docket No. 267005.
July 25, 2006.

Oakland Circuit Court; LC No.2003-052644.

Before: KELLY, PJ, and MARKEY and METER, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 In 1982, Mark Wojcik ("plaintiff" or "Wojcik") [FN1] and William J. McNish ("defendant" or "McNish") formed the defendant McNish Sporting Goods and Trophies, Inc. (the "company" or the "corporation"). The business relationship between plaintiff and defendant soured after defendant, the majority stockholder in the company, insisted that his son-in-law, Christian Beaudoin ("Beaudoin"), participate in the business. Plaintiff claims that elevating Beaudoin to company management forced him to resign as day-to-day manager of the company, and that subsequently, defendants refused to buy his stock contrary to the parties' agreement to form the corporation. The trial court granted defendants' motion for summary disposition. Plaintiffs appeal by right. We affirm in part, reverse in part, and remand for further proceedings.

FN1. The singular "plaintiff" refers only to plaintiff Mark Wojcik unless otherwise specified. The factual and legal bases of plaintiff Marjorie Wojcik's claims are so inadequately briefed that they are deemed abandoned. *Prince v. MacDonald,* 237 Mich.App 186, 197; 602 NW2d 834 (1999)

I

Plaintiffs originally filed an eight-count complaint, which grew to nine counts in plaintiffs' first amended complaint. Plaintiffs alleged defendants breached fiduciary duties, engaged in actionable oppressive conduct under MCL 450.1489, breached employment contracts and a stock purchase agreement, wrongfully terminated or constructively discharged plaintiff, discriminated because of age, and owed money damages in a corporate "derivative" claim. Plaintiffs also sought declaratory and injunctive. After discovery was completed, defendants moved for summary disposition. Plaintiffs filed a response brief and also moved for summary disposition. The trial court heard arguments of counsel at the conclusion of which the trial court took the matter under advisement. The trial court issued its opinion and order granting defendants' motion for summary disposition on January 31, 2005.

The court ruled that plaintiffs' minority oppression claim failed because it lacked evidentiary support that defendants engaged in "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of a shareholder as a shareholder." MCL 450.1489. The court granted defendants summary disposition on plaintiff's age discrimination claim because plaintiff had not established that he had suffered an adverse employment action. The court determined that at best plaintiff had established only nepotism, which was not actionable under either state or federal law.

Regarding plaintiff's contract claims, the court

ruled without further explanation, "that no questions of fact exist and Defendants' motion as to claims relating to the written agreement is granted." The trial court opined with respect to the stock purchase agreement, "that there is no evidence that the parties ever reached an agreement on the essential terms and even if such an agreement existed, Wojcik repudiated it when he stated that he would not abide by the agreement without a guaranty from McNish." Thus, the court concluded that because plaintiff repudiated the agreement, defendants were entitled to treat the agreement as terminated.

*2 After the trial court issued its ruling, plaintiffs believed that some counts remained viable. Subsequently, after further motions and briefing, the trial court issued a second opinion and order, clarifying that it had dismissed all of plaintiffs' claims, and that only defendants' counterclaims remained. Plaintiffs appeal by right.

II

We review de novo a trial court's decision to grant or deny summary disposition. *Maiden v. Rozwood,* 461 Mich. 109, 118; 597 NW2d 817 (1999). A party's motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. *Id.* at 120. The trial court must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion to determine if a party is entitled to judgment as a matter of law. *Id.* at 118, 120. If the moving party fulfills its initial burden, the party opposing the motion then must demonstrate with evidentiary materials that a genuine and material issue of disputed fact exists, and may not rest upon mere allegations or denials in the pleadings. MCR 2.116(G)(4); *Quinto v. Cross & Peters Co,* 451 Mich. 358, 362; 547 NW2d 314 (1996). A trial court properly grants summary disposition when no genuine issue regarding any material fact exists and the moving party is entitled to judgment as a matter of law. *West v. Gen Motors Corp.* 469 Mich. 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

We review questions of law de novo. *Bertrand v. Mackinac Island,* 256 Mich.App 13, 28; 662 NW2d 77 (2003). Accordingly, this Court reviews de novo the interpretation and application of a statute. *Eggleston v Bio-Medical Applications of Detroit, Inc,* 468 Mich. 29, 32; 658 NW2d 132 (2003). Further, both the questions of whether contract language is ambiguous and the proper interpretation of a contract are questions of law, which we review de novo. *Klapp v United Ins Group Agency, Inc,* 468 Mich. 459, 463; 663 NW2d 447 (2003).

III

Plaintiff argues that the trial court erred by dismissing his claim that McNish, as majority stockowner, breached his fiduciary duty to both the corporation and plaintiff, a minority stockholder, because material questions of fact remain regarding this claim. We disagree.

In *Production Finishing Corp v. Shields,* 158 Mich.App 479, 486; 405 NW2d 171 (1987), this Court citing elemental rules of agency observed: "It is beyond dispute that in Michigan, directors and officers of corporations are fiduciaries who owe a strict duty of good faith to the corporation which they serve." Applying common-law agency principles, " '[a] fiduciary owes a duty of good faith to his principal and is not permitted to act for himself at his principal's expense during the course of his agency." ' *The Meyer and Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute,* 266 Mich.App 39, 49; 698 NW2d 900 (2005), quoting *Central Cartage v. Fewless,* 232 Mich.App 517, 524; 591 NW2d 422 (1998).

*3 Here, all of the alleged breaches of fiduciary duty by defendant relate to the appointment of Beaudoin as an officer and manager of the company. In essence, plaintiff claims that Beaudoin's promotion would ultimately lead to the financial ru-

in of the company and consequent depreciation in the value of the company's stock. Plaintiff cites *Salvador v. Connor*, 87 Mich.App 664; 276 NW2d 458 (1978), in support of his position. But, in that case the plaintiff alleged the defendants hired relatives for managerial positions where they "performed few, if any, services of value for the corporation," and the defendants otherwise fraudulently diverted corporate money for the defendants own benefit. In contrast, plaintiff alleges that Beaudoin was simply not capable of managing the company, not that McNish was diverting corporate assets to his own use. When a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned. *Prince v. MacDonald*, 237 Mich.App 186, 197; 602 NW2d 834 (1999).

Moreover, plaintiffs' claim of harm to the corporation is based on speculation about the company's performance in the future. After a change in management, company revenues may decrease for any number of reasons, including a general downturn in economic conditions, economic health of clients, loss of key personnel, change in accounting practices, or increased competition. Indeed, plaintiff acknowledged that after his departure from the company, the company would face a difficult transition. In addition, plaintiff testified that after leaving the company he started working for the company's competitors. In sum, plaintiff's claim regarding breach of fiduciary duty must fail because it is based on speculation regarding future profitability of the corporation. The causal relationship between the alleged breach of duty and the alleged harm is too speculative to be sustained. See, e.g., in another context, *Skinner v. Square D Co*, 445 Mich. 153, 164; 516 NW2d 475 (1994) ("To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation.").

Moreover, McNish's decisions are shielded by the business judgment rule, under which courts are reluctant to interfere with the discretion vested in the directors and officers of the corporation to manage its affairs. *In re Estate of Butterfield*, 418 Mich. 241, 255; 341 NW2d 453 (1983); See, also, *Dodge v. Ford Motor Co*, 204 Mich. 459, 500; 170 NW 668 (1919), quoting 2 Cook on Corporations (7th Ed.), § 545: " 'The discretion of the dircctors will not be interfered with by the courts, unless there has been bad faith, wilful neglect, or abuse of discretion." '

Plaintiffs have not alleged, nor did they present any evidence to the trial court that McNish engaged in bad faith, willful neglect, or abuse of discretion. Plaintiff conceded in his deposition that he could not believe McNish would ever do anything to intentionally harm the company. Further, the company had not adopted an anti-nepotism policy; relatives of both plaintiff and defendant had worked for the company in the past. Indeed, if a change in corporate management or nepotism in a close corporation could serve as a basis for a claim of bad faith, willful neglect, or abuse of discretion, the courts would be flooded with litigation. In sum, because plaintiff did not allege or present any evidence of bad faith, willful neglect, or abuse of discretion, the trial court properly dismissed plaintiff's claim for breach of fiduciary duties.

IV

*4 Next, plaintiffs argue that the trial court erred by granting summary disposition on their claim under MCL 450.1489. We disagree. Plaintiffs failed to produce evidence to create a material question of fact that defendants engaged in "willfully unfair and oppressive conduct" through a "continuing course of conduct or a significant action or series of actions" that substantially interfered with plaintiff's interests as a shareholder. So, the trial court properly granted defendants' motion for summary disposition on this claim.

This Court has held that MCL 450.1489, § 489 of the Michigan Business Corporation Act (MBCA) creates a cause of action to which the residual six-year limitation period of MCL 600.5813 applies. *Estes v Idea Engineering & Fabricating, Inc*, 250 Mich.App 270, 285-286; 649 NW2d 84 (2002). The

Estes conflict panel did not address, however, what conduct could be actionable under § 489. But this Court considered that question in *Franchino v. Franchino,* 263 Mich.App 172; 687 NW2d 620 (2004), a case involving a close corporation similar to this case. In *Franchino,* the plaintiff was a 31% shareholder, director, and an employee of the corporation. The defendant was a 69% shareholder, director, and the plaintiff's father. The plaintiff sought relief under § 489 after the defendant fired him and orchestrated the plaintiff's removal as a director of the corporation. *Franchino, supra* at 176-178. The plaintiff alleged that the defendant engaged in "willfully unfair and oppressive conduct" under § 489 "by terminating [the] plaintiff's employment in violation of the employment contract, removing [the] plaintiff from the board of directors, and amending the bylaws of the corporation." *Franchino, supra* at 178. This Court affirmed the trial court's grant of summary disposition in favor of the defendant, opining that § 489

> neither explicitly protects minority shareholders' interests as employees or directors, nor is it silent on the issue. Rather, 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.*" MCL 450.1489(3) (emphasis added). To construe the statute in a way that allows plaintiff to sue for oppression of his interests as an employee and director would ignore the Legislature's decision to insert the phrase "as a shareholder" and render the phrase nugatory, which is contrary to a fundamental rule of statutory construction. Accordingly, we hold that the trial court correctly concluded that MCL 450.1489(3) does not allow shareholders to recover for harm suffered in their capacity as employees or board members.[FN2] [*Franchino, supra* at 185-186 (citations omitted).]

> FN2. We note that the Legislature has amended this subsection to add: "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, effective March 20, 2006.

Thus, the *Franchino* Court held that § 489 "only gives rise to a cause of action in cases where a minority shareholder suffered oppression in his capacity as a shareholder" *Franchino, supra* at 189. The trial court properly granted summary disposition to the defendant because "employment and board membership are not generally listed among rights that automatically accrue to shareholders." *Id.* at 184. The Court noted that shareholder'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." *Id.,* citing 12 Fletcher Cyclopedia Corporations, ch 58, § 5717, p 22. Under the MBCA, the principal rights of shareholders in an ordinary business corporation "are to have a certificate of stock in proper form, to attend and vote at corporate meetings, and to take part in the election of directors." 9 MLP Corporations, § 191 (citations omitted). In general, corporate actions requiring a shareholder vote are "authorized by a majority of the votes cast by the holders of shares entitled to vote on the action, unless a greater vote is required in the articles of incorporation." MCL 450 .1441(2).

***5** In this case, plaintiff has not offered evidentiary support for his claim that defendants engaged in "a continuing course of conduct or a significant action or series of actions that substantially interfere[d]" with him as a shareholder to participate at shareholder meetings, or to access corporate books and records. Plaintiff's claims regarding breach of an employment contract and breach of a stock purchase agreement are not interests of plaintiff as a shareholder, and therefore, are not protected by § 489. *Franchino, supra* at 185-186, 189. Absent fraud or other unlawful conduct, which interferes

with plaintiff's right to vote at pertinent shareholders meetings, plaintiff has no cause of action under § 489 to contest selection of personnel to serve as officers to manage the company by the majority of the shareholders. Thus, plaintiff has no cause of action under § 489 to contest the appointment of Beaudoin as an officer and manager of the company simply because plaintiff believes Beaudoin is not qualified for the position.

Furthermore, we reject plaintiff's claim that the appointment of Beaudoin indirectly affected his interests as a shareholder because the company will be less profitable than it otherwise could become. Undoubtedly, a shareholder has an interest in having his investment become as profitable as possible. See *Thompson v. Walker*, 253 Mich. 126, 134-135; 234 NW 144 (1931) (the officers and directors of a corporation have a fiduciary duty to manage the corporation so "as to produce to each stockholder the best possible return for his investment"), and *Dodge, supra* at 507 ("A business corporation is organized and carried on primarily for the profit of the stockholders."). For the reasons discussed already, plaintiff's claim is inherently speculative. To be actionable under § 489, defendants' conduct must be "illegal, fraudulent, or *willfully* unfair and oppressive." MCL 450.1489(1)(emphasis added). This is defined by the statute to be "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). The statute places the focus on the actions of the majority, not the reasonable expectation of the shareholders to profits. See *Franchino, supra* at 188. Thus, to be actionable under § 489, the conduct of the majority must have been intended to cause the purported oppressive result. Here, plaintiff only testified that McNish would not listen to his warnings regarding Beaudoin's capabilities. Plaintiff, produced no evidence that McNish acted intentionally to harm the company, testifying "it would be hard for me to believe that because he has a large regard for money and damaging the corporation would damage his worth...."

In sum, plaintiffs failed to create a material question of fact that defendants engaged in "illegal, fraudulent, or willfully unfair and oppressive" conduct, or a "continuing course of conduct or a significant action or series of actions" that substantially interfered with plaintiff's interests as a shareholder. MCL 450.1489. Therefore, the trial court properly granted defendants' motion for summary disposition on this claim. *Franchino, supra* at 181.

V.

A. Plaintiff Mark Wojcik's Employment Contract Claims

*6 We find that plaintiff's claim for breach of a written contract for lifetime employment as manager of the company is without merit. We also find without merit plaintiff's claim that because of oral promises, his position as manager was subject to termination only on just cause.

This issue presents a question of contract interpretation. The main goal of a court when interpreting a contract is to ascertain and enforce the parties' intent. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich. 362, 375; 666 NW2d 251 (2003). A court must first look to the contract's language and accord that language its plain meaning. *Wilkie v. Auto-Owners Ins Co*, 469 Mich. 41, 61; 664 NW2d 776 (2003). Also, courts "read contracts as a whole, giving harmonious effect, if possible, to each word and phrase." *Id.* at 50 n 11. When the words used in a contract are clear, the contract must be enforced as written unless a provision is unlawful or violates public policy. *Id.* at 51.

Additional rules of construction apply when a party claims a contractual right to lifetime employment, or claims that an employment relationship is subject to termination only for just cause. In general, a contract of employment for an indefinite term is terminable at will by either party. *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 596; 292 NW2d 880 (1980). "[T]he presumption of at will employment may be overcome by proof of an express contract for a definite term or by a provision forbidding discharge without just

cause." *Bracco v Michigan Technological University*, 231 Mich.App 578, 598; 588 NW2d 467 (1998). When a party asserts that oral statements form the basis for employment security, "the oral statements of job security must be clear and unequivocal to overcome the presumption of employment at will." *Rowe v. Montgomery Ward & Co*, 437 Mich. 627, 636; 473 NW2d 268 (1991). Moreover, " 'lifetime' employment contracts are extraordinary and, being so, 'must be expressed in clear and unequivocal terms before a court will conclude that an employer intended to enter into such a weighty obligation.' " *Bracco, supra* at 595, n 11, quoting *Bullock v Automobile Club of Michigan*, 432 Mich. 472, 517; 444 NW2d 114 (1989) (Griffin, J., concurring in part and dissenting in part). See, also, *Rowe, supra* at 640-641.

In this case, plaintiff relies on the parties' 1982 agreement to form the corporation. The agreement names plaintiff Mark Wojcik as the company's first vice-president and first secretary, "until their respective successors are duly elected and qualified...." Further, the agreement states that plaintiff Mark Wojcik "shall also be General Manager for the Corporation," and also provides for compensation and perquisites for that service. The agreement does not provide for the term of office for vice-president, secretary, or general manager. Accordingly, the agreement, to the extent it is an employment contract, is presumed to be for an indefinite term subject to termination at will by either party. *Bracco, supra* at 598.

*7 In addition, the 1982 agreement to form the corporation contains no express provision forbidding discharge without just cause. To establish a contractual right to employment terminable only on just cause requires proving with objective evidence that the employer and the employee mutually assented to such a term of the contract. *Rowe, supra* at 640. "The test for whether there was mutual assent to a just-cause provision is an objective one, looking at the express words of the parties and their visible acts." *Bracco, supra* at 598, citing *Rowe, supra*. Here, the parties' written contract contains no express words indicating mutual assent to a provision forbidding discharge without just cause. Further, plaintiff failed to identify any specific promises of just cause employment by McNish. Thus, there is no express written, or clear and unequivocal oral promise, to overcome the presumption that plaintiff's indefinite contract of employment as general manager was terminable at the will of either party.

Moreover, plaintiff cannot base his claim to lifetime employment on his "reasonable expectation" of lifetime employment as the company's general manager. "The practice of interpreting contracts on the basis of reasonable expectations rather that the plain language of the contract was repudiated by [our Supreme] Court in *Wilkie, supra* at 63." *Rory v. Continental Ins Co*, 473 Mich. 457, 461, 481 n 48; 703 NW2d 23 (2005).

Similarly, plaintiff has no claim to employment subject only to just-cause termination under the "legitimate expectations" leg of *Toussaint* and its progeny. As explained by our Supreme Court in *Rood v. General Dynamics Corp*, 444 Mich. 107, 137-138; 507 NW2d 591 (1993), quoting *Toussaint* at 613, the rationale for enforcing an employers policies and procedures relating to employee discharge is grounded on "the intuitive recognition that such policies and procedures tend to enhance the employment relationship and encourage an 'orderly, cooperative and loyal work force' for the ultimate benefit of the employer." But this extra-contractual enforcement policy applies only to "employer policy statements that are disseminated either 'to the work force in general or to specific classifications of the work force, rather than to an individual employee.' " *Rood, supra* at 138, quoting *In re Certified question (Bankey v Storer Broadcasting Co)*, 432 Mich. 438, 443, n 3; 443 NW2d 112 (1989). So, the *Toussaint* "legitimate expectations" theory for enforcing an employer's policies and procedures relating to employee discharge is "inappropriate where [the] policies and

procedures are applicable only to an individual employee." *Rood, supra* at 138 n 31.

Plaintiff's categorization of his resignation as a "constructive discharge" is unavailing. A constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the that a reasonable person in the employee's position would feel compelled to resign. *Vagts v. Perry Drug Stores, Inc,* 204 Mich.App 481, 487; 516 NW2d 102 (1994). We find it unnecessary to address Wojcik's claim that his promotion to president was actually inferior to Beaudoin's position as vice-president, and therefore, a "demotion" that supports his constructive discharge claim. Likewise, it is not necessary to consider whether a demotion or change in job assignments without any reduction in pay, benefits, or perquisites, may support a constructive discharge claim. Such issues are irrelevant here because "constructive discharge is not in itself a cause of action," but rather, "is a defense against the argument that no suit should lie in a specific case because the plaintiff left the job voluntarily." *Id.* at 487. Because plaintiff has no underlying cause of action for wrongful discharge based on contract or his legitimate expectations, his claim fails.

B. Stock Purchase Agreement

***8** The parties' 1982 agreement to form the corporation states in ¶ 12: "The Subscribers agree to sign, and cause the corporation to sign, the Stock Purchase Agreement attached as Exhibit E." Paragraph 3 of the attached stock purchase agreement provides: "If MARK H. WOJCIK terminates his employment, he must offer his stock for sale to the Corporation and the Corporation must purchase." The parties do not dispute that plaintiff Mark Wojcik was a "subscriber" of the 1982 agreement, that plaintiff owned 30% of the issued common stock of the company, and that plaintiff terminated his employment with the company. Defendants claim that the parties never reached an agreement, or that if they did, plaintiff repudiated his right to have the company buy his shares in the company. We find defendants' argument without merit.

First, the contract was complete in 1982 when the corporation was formed. Second, the doctrine of anticipatory breach, or repudiation, applies when a party to a contract prior to the time of performance unequivocally indicates through words or actions the intent not to perform; the other party may either sue immediately for breach of contract or wait until after the repudiating party fails to perform. *Paul v. Bogle,* 193 Mich.App 479, 493-494; 484 NW2d 728 (1992). Here, plaintiff had fully performed his part of the contract. Plaintiff had subscribed to the 1982 agreement to form the corporation, contributed cash to acquire his shares in the company, worked in excess of twenty years as the company's manager, terminated his employment with the company, and offered his shares of stock for sale to the company. The parties' failure to reach agreement on the details of defendants' required performance; "the Corporation must purchase" language cannot negate that plaintiff fully performed his part of the bargain.

Moreover, defendants' claim that plaintiff repudiated the contract by insisting on a personal guarantee by McNish of the company's installment payments to purchase plaintiff's stock, is factually inaccurate. Paragraphs 6 of the stock purchase agreement provides: "The purchase price will be paid by downpayment of twenty-five (25%) at closing and the balance payable over twenty-four (24) equal monthly installments at nine percent (9%) interest, with right of prepayment and provision for acceleration in the event of default, *and provision for personal guarantee by the remaining shareholder."* (Emphasis added).

Thus, the trial court erred by dismissing plaintiff's claim that defendants breached the agreement to form the corporation and its incorporated stock purchase agreement. Plaintiff had performed all of the clearly stated prerequisites to trigger his contractual right to have the company purchase his stock, with a personal guarantee of payment by defendant McNish. The parties' contract regarding plaintiff's right to have the company purchase his

stock is clear and equivocal. "An unambiguous contract must be enforced according to its terms." *Burkhardt v. Bailey*, 260 Mich.App 636, 656; 680 NW2d 453 (2004).

VI

*9 Plaintiff also argues that he is a member of a protected class and established a prima facie case of age discrimination by showing that he suffered an adverse employment action and that Beaudoin, a younger man, was treated dissimilarly. We disagree. Plaintiff's age discrimination claim fails because plaintiff failed to produce sufficient evidence that he suffered a materially adverse employment action. Plaintiff's claim also fails because the facts and circumstances of this case do not create an inference of unlawful animus.

Section 202 of Michigan's Civil Rights Act, MCL 37.2202, provides in relevant part:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, *discharge, or otherwise discriminate* against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, *because of* religion, race, color, national origin, *age*, sex, height, weight, or marital status. [Emphasis added.]

The essence of an age discrimination claim requires proving that age was a determining factor in an adverse employment action. *Matras v. Amoco Oil Co*, 424 Mich. 675, 682-683; 385 NW2d 586 (1986). A person may prove unlawful age discrimination under § 202(1)(a) with either direct or indirect evidence. *Matras, supra* at 683. When a plaintiff presents direct evidence of discrimination, the case is one of "intentional discrimination," sometimes referred to as a "mixed-motive" case. See *Wilcoxon v Minnesota Mining & Manufacturing Co*, 235 Mich.App 347, 360; 597 NW2d 250 (1999). In a "mixed motive" case, "where the adverse employment decision could have been based on both legitimate and legally impermissible reasons, a plaintiff must prove that the defendant's discriminatory animus was more likely than not a 'substantial' or 'motivating' factor in the decision." *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich. 124, 133; 666 NW2d 186 (2003).

A person may alternatively prove unlawful age discrimination by circumstantial evidence, employing the burden-shifting framework adopted in *McDonnell Douglas v. Green*, 411 U.S. 792; 93 S Ct 1817; 36 L.Ed.2d 668 (1973). *Matras, supra* at 683. Under the *McDonnell Douglas* approach, a prima facie case consists of evidence that the plaintiff (1) belongs to a protected class, (2) suffered an adverse employment action, (3) was qualified for the position, and (4) the adverse employment action was taken under circumstances giving rise to an inference of unlawful discrimination. *Hazle v. Ford Motor Co*, 464 Mich. 456, 463; 628 NW2d 515 (2001). If a plaintiff establishes a prima-facie case, the burden shifts to the employer to come forward with a legitimate nondiscriminatory reason for the adverse employment action. If the employer does so, the burden returns to the plaintiff to establish that the employer's stated legitimate reason is merely a pretext for discrimination. *Sniecinski, supra* at 134; *Wilcoxon, supra* at 359.

*10 Whether a plaintiff attempts to prove unlawful discrimination by using direct evidence or under the *McDonnell Douglas* approach, an element of the plaintiff's discrimination claim is an adverse employment action. *Wilcoxon, supra* at 362. An "adverse employment action" for the purposes of proving unlawful discrimination "(1) must be materially adverse in that it is more than 'mere inconvenience or an alteration of job responsibilities,' and (2) must have an objective basis for demonstrating that the change is adverse, rather than the mere subjective impressions of the plaintiff." *Meyer v. City of Centerline*, 242 Mich.App 560, 569; 619 NW2d 182 (2000). There is no exhaustive list of adverse employment actions, but "typically it takes 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 NW2d 351 (2003), quoting *White v Burlington Northern & Santa Fe Co,* 310 F3d 443, 450 (CA 6, 2002).

Here, defendants did not terminate plaintiff's employment. Although plaintiff asserts his resignation was a constructive discharge, he must still prove an adverse employment action created conditions so intolerable that it would cause a reasonable person to feel compelled to resign. *Vagts, supra* at 487. In other words, plaintiff cannot use his resignation as evidence he suffered an adverse employment action. *Id.* at 486 (The plaintiff's claim that she was constructively discharged for refusing to violate the law failed "because she use[d] her resignation as proof of both a constructive discharge and a refusal to violate the law.").

Plaintiff claims that he was demoted in favor of Beaudoin and that company minutes of a shareholders' meeting on January 9, 2003 evidence his claim. On our review of the minutes in the light most favorable to plaintiff, we conclude that the minutes do not support the claim that plaintiff's position was inferior to Beaudoin's position. Quite to the contrary, the minutes evidence that Beaudoin held an inferior position, but changes might occur in the future.

Plaintiff also asserts that a January 23, 2003 memorandum shows that his position as president was inferior to Beaudoin's as vice-president of company. But plaintiff in his brief on appeal concedes that this memorandum is dated the same day that plaintiff met for breakfast with McNish to resign his position and demanded that the company buy his stock.

Plaintiff owned 30% of the outstanding common stock of the company and was promoted to president of the company when Beaudoin was named vice-president. Plaintiff admits that his pay, benefits, and other perquisites were not reduced. Although McNish asked plaintiff to work with Beaudoin and to train him, plaintiff fails to highlight any objective evidence of statements or actions by defendants that evidence plaintiff's position with the company was inferior to that of Beaudoin. Rather, plaintiff testified about his subjective belief that he "knew" that he was being replaced by Beaudoin. For example, plaintiff testified, "I became painfully aware at one point in time that Chris [Beaudoin] was going to run the company and I was out, you know, those are all things that [McNish] and Chris decided somewhere between them...."

***11** In sum, plaintiff failed to produce objective evidence that he suffered a materially adverse employment action that was more than a mere inconvenience or an alteration of job responsibilities. Plaintiff's testimony established only that he was concerned that Beaudoin would replace him in the future. Plaintiff's age discrimination claim fails because the alleged adverse employment action is based only plaintiff's own subjective impression regarding what might happen in the future. *Meyer, supra* at 569; *Wilcoxon, supra* at 364.

Moreover, regardless of the evidentiary approach a plaintiff takes to prove unlawful discrimination, a causal link between the adverse employment action and the unlawful animus must be established. *Sniecinski, supra* at 134-135; *Matras, supra* at 682-683. If a plaintiff establishes a prima facie case of discrimination under the *McDonnell Douglas* burden-shifting framework, a presumption of unlawful discrimination is created and a causal link is presumed, requiring the employer to rebut the presumption. *Sniecinski, supra* at 135; *Hazle, supra* at 464-465. But, a claimant must first establish a prima facie case under the *McDonnell Douglas* framework before the causal presumption arises. To establish a prima facie case of discrimination under the *McDonnell Douglas* approach, the

adverse employment action must occur in circumstances that give rise to an inference of unlawful discrimination. *Hazle, supra* at 463; *Wilcoxon, supra* at 359. Although the *McDonnell Douglas* framework is flexible and "should be tailored to the facts and circumstances of each case," *Sniecinski, supra* at 134 n 7, the circumstances must at a minimum give rise to an inference of unlawful discrimination.

In the present case, an experienced fifty-year-old manager was asked to train a less-experienced forty-year-old manager. This commonplace occurrence hardly gives rise to an inference of discrimination on the basis of age. Further, the circumstances of this case suggest that any favorable treatment accorded the younger person was based on nepotism, not age. Indeed, plaintiff's own testimony establishes that the company did not discriminate against older workers. Plaintiff testified that a "bunch of bald headed old guys" worked for the company. Further, after plaintiff resigned from the company, a sixty-year-old person replaced him. Simply put, the facts and circumstances of this case do not give rise to an inference that age was a motivating factor in any of defendants' actions that plaintiff claims to be adverse employment action. Consequently, plaintiff failed to establish a prima-facie case of age discrimination. The trial court properly granted defendants summary disposition on this claim.

VII

Plaintiff argues that trial court erred by dismissing his claim under MCL 450.1487 to inspect the books and records of the corporation. We disagree. Because plaintiffs did not allege in their complaint that defendants had denied them access to company records, and defendants affirmatively allege they have provided or offered to provide access to records, there is "no genuine issue as to any material fact, and [defendants are] entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

VIII

*12 Plaintiffs next argue that the trial court erred by dismissing their "derivative" claim. We hold that the trial court properly dismissed this claim because plaintiffs do not seek damages on behalf of the company but rather sought damages from the company for themselves as individuals and a shareholder.

" 'Derivative proceeding' means a civil suit in the right of a domestic corporation or a foreign corporation that is authorized to or does transact business in this state." MCL 450.1491a(a). It is a suit to enforce the right of the corporation. MCL 450.1492a(b). " 'Any recovery runs in favor of the corporation, for the shareholders do not sue in their own right. They derive only an incidental benefit. If the defendants account, it must be to the corporation and not to the shareholders." ' *Futernick v. Statler Builders, Inc,* 365 Mich. 378, 386; 112 NW2d 458 (1961), quoting *Dean v. Kellogg,* 294 Mich. 200, 207; 292 NW 704 (1940) (citations omitted). Generally, an action to enforce corporate rights or to redress or prevent injury to the corporation must be brought in the name of the corporation and not that of a stockholder, officer or employee. *Michigan Nat'l Bank v. Mudget,* 178 Mich.App 677, 679; 444 NW2d 534 (1989). MCL 450.1492a provides an exception to this general rule, but the shareholder must "fairly and adequately represents the interests of the corporation in enforcing the right of the corporation." MCL 450.1492a(b). "The minimum requirements for such a suit are proof of fraud or abuse of trust in the board of directors of the corporation in failing or refusing to enforce a corporation right or claim, plus demand on said board by the stockholder for such action or proof that the demand would be useless." *Futernick, supra* at 387; MCL 450.1493a.

In their "derivative" claim, plaintiffs generally allege breach of fiduciary duty, fraud, breach of contracts, minority oppression, and wrongful termination, which have caused unspecified damages to plaintiffs and the company. Plaintiffs do not further allege in their complaint, or explain in their

brief on appeal, the nature of the damages to the corporation, or proffer evidence to support such a claim. Plaintiffs pray for judgment against "defendants" for "hundreds of thousands of dollars," and for an order for the dissolution of the company, or "the purchase of Mark Wojcik's shares by Defendants." Thus, plaintiff Mark Wojcik, as a shareholder, does not seek damages from McNish for the benefit of the company. Rather, plaintiff seeks damages from McNish *and* the company for alleged injures to plaintiff in his capacity as a party to a contract, as a minority shareholder, and as an employee. Accordingly, plaintiff's claim is not a true derivative action on behalf of the company but only a restatement of plaintiff's other claims for his alleged personal injuries as a party to a contract, as an employee, and as an alleged oppressed minority shareholder. Although plaintiffs assert breach of fiduciary duty and fraud, the essence of their claim is that majority stockholder McNish exercised poor business judgment promoting less qualified Beaudoin over more qualified Mark Wojcik. Such purported poor judgment is not the type of fraud or abuse of trust that will support a derivative suit. The trial court properly dismissed this claim.

IX

*13 Last, plaintiffs argue defendants were not entitled to summary disposition on plaintiffs' count I (breach of fiduciary duty), count IV (wrongful termination), count V (constructive discharge), count VII (accounting), and count VIII (derivative action), because defendants failed to identify the issues for which there was no genuine dispute of any material fact. MCR 2.116(G)(4); *Meyer, supra* at 575.

We find this argument without merit. As required by MCR 2.116(G)(4), defendants specifically identified the issues of material fact they believed were undisputed and argued they were entitlement to judgment as matter of law on all of the theories that plaintiffs advanced in their shotgun complaint. Further, MCR 2.116(I)(1) requires the trial court to render judgment without delay, "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits of other proofs show that there is no genuine issue of material fact." Additionally, for the reasons discussed *supra,* the trial court reached the correct result regarding the issues that plaintiffs assert were decided on defective procedure. " 'This Court will not reverse a trial court's order if it reached the right result for the wrong reason." ' *Yee v Shiawassee Co Bd of Comm'rs,* 251 Mich.App 379, 407 n 72; 651 NW2d 756 (2002), quoting *Detroit v. Presti,* 240 Mich.App 208, 214; 610 NW2d 261 (2000).

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

Mich.App.,2006.
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Not Reported in N.W.2d, 2006 WL 2061499 (Mich.App.)

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Not Reported in N.W.2d, 2007 WL 1224033 (Mich.App.)
(Cite as: 2007 WL 1224033 (Mich.App.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
Ghaus MALIK and Sahib Malik, Plaintiffs/ Counter–Defendants–Appellants
v.
Shakeeb SALAMY and D.E.S. Building Company, Inc., Defendants/Counter–Plaintiffs.
and
Dana Emergency Services, Defendant,
and
Perfect Marble & Granite Inc., Macomb Stairs Inc., Elvin Construction Company, and Philip F. Greco Title Company, Defendants/ Counter–Plaintiffs–Appellees.
and
Stock Building Supply, LLC, Defendant/ Counter–Plaintiff/ Cross–Plaintiff/Third–Party Plaintiff,
and
Taylor Door, Defendant,
and
Sam Vagnetti and Linda Vagnetti, Third–Party Defendants.

Docket No. 264780.
April 26, 2007.

Oakland Circuit Court; LC No.2002–046022–CH.

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

PER CURIAM.

*1 Plaintiffs appeal as of right the December 2, 2004 judgment for foreclosure of construction liens, attorney fees and costs entered in favor of defendants Elvin Construction Company (Elvin), Perfect Marble & Granite, Inc. (PMG) and Macomb Stairs, Inc (MSI). We reverse that portion of the trial court's judgment that awards PMG and MSI 1.5 percent interest per month on the unpaid amount of their liens. We affirm the trial court's judgment in all other respects.

Plaintiffs contracted with D.E.S. Building Company (DES), for whom Shakeeb Salamy (Salamy) was their principal contact, for the construction of a home in Bloomfield Township. DES was to serve as the general contractor and was to receive payment for all costs of construction plus a management fee of twelve percent of those costs. The contract was subject to a cap of $1,225,000, which could only be exceeded by written agreement. The contract was signed on November 27, 2000. Elvin, PMG and MSI provided materials, supplies, and/or labor used in the construction of plaintiffs' home. Plaintiffs terminated DES from the project in November 2002, and sued DES and Salamy for breach of contract, fraud and misrepresentation. DES and Salamy counterclaimed for breach of contract and quantum meruit/unjust enrichment. Those claims were tried to a jury, which returned a verdict in favor of plaintiffs. Plaintiffs also prevailed on their claim that Greco Title Company breached a fiduciary duty to them to ensure that DES properly paid subcontractors and that waivers of lien were obtained. No part of the jury verdict is at issue in this appeal.

As part of the action below, Elvin, PMG and MSI, among others, asserted claims against DES for unpaid materials, supplies and labor. DES entered into Consent Judgments relating to those claims. Elvin, PMG and MSI also commenced equitable actions against plaintiffs to foreclose on their respective construction liens. These foreclosure claims were tried to the bench concurrently with the jury trial of the claims between plaintiffs, DES, Salamy and Greco. After the jury verdict, the trial court ruled that Elvin, PMG and MSI were entitled to liens on plaintiffs' property in the amount sought. Subsequently, the trial court entered a judg-

ment of foreclosure on those liens and awarded Elvin, PMG and MSI attorney fees and costs. It is that judgment that plaintiffs appeal.

Plaintiffs first argue that the trial court failed make sufficient findings of fact, as required by MCR 2.517, in rendering its decision in favor of the lien claimants. We disagree.

A trial court sitting without a jury must make specific findings of fact, state its conclusions of law separately, and direct entry of the appropriate judgment. MCR 2.517(A)(1). A trial court's findings of fact are sufficient if they are "[b]rief, definite, and pertinent," if it appears that the trial court was aware of the issues in the case and correctly applied the law, and if appellate review would not be facilitated by requiring further explanation. MCR 2.517(A)(2); *Triple E Produce Corp. v. Mastronardi Produce, Ltd.*, 209 Mich.App 165, 176–177; 530 NW2d 772 (1995). Whether the trial court's findings of fact complied with MCR 2.517(A)(1) is a question of law, which this Court reviews law de novo. *Cardinal Mooney High School v. Michigan High School Athletic Ass'n*, 437 Mich. 75, 80; 467 NW2d 21 (1991).

***2** We find that, considered together, the trial court's findings of fact issued when ruling on defendants' motions for directed verdict at the close of plaintiffs' case, its comments at the conclusion of the jury trial, and its adoption of the proposed findings of fact put forth by Elvin's counsel at the motion to settle the judgment were sufficient to indicate that the trial court was aware of the issues in the case and correctly applied the law. The trial court addressed each of the issues necessary to resolving the claims before it, including the amount of the contract between plaintiffs and DES, and the amount and validity of the liens asserted by Elvin, PMG and MSI. No additional explanation is needed to facilitate this Court's review of the issues presented on appeal. Therefore, there is no need to remand for further findings by the trial court. MCR 2 .517(A)(2); *Triple E, supra*, 209 Mich.App 176–177.

Plaintiffs' real complaint is that the trial court adopted Elvin's counsel's recitation of the facts necessary to support the conclusion reached by the trial court. However, plaintiffs offer this Court no authority to invalidate a trial court's findings of fact merely because the trial court adopted findings presented by a party. "This Court will not search for authority to support a party's position, and the failure to cite authority in support of an issue results in its being deemed abandoned on appeal." *Flint City Council v. Michigan*, 253 Mich.App 378, 393 n 2; 655 NW2d 604 (2002). Further, our Supreme Court has recognized that there is "no impropriety, after a circuit judge has determined in his own mind how he will decide a case tried before him without a jury" in adopting findings of fact proposed by the attorney for the prevailing party. *Bateman v. Blaisdell*, 83 Mich. 357, 359–360; 47 NW233 (1989).

Additionally, plaintiffs complain that the trial court's findings of fact contradict the jury's verdict in their favor on their claims against DES. However, the trial court was an independent finder of fact on the lien claimants' equitable claims; it was not bound by the jury's determination. *Smith v. University of Detroit*, 145 Mich.App 468, 479; 378 NW2d 511 (1985). As this Court explained in *Smith*,

> While this implies the startling possibility of contradictory findings in the same case on the common issue of fact, this apparently is a consequence which must be accepted if each party has a constitutional right to a different mode of trial.
>
> 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.* (emphasis added).]

Contrary to plaintiffs' implicit assertion, the tri-

al court was not required to defer to the jury's findings of fact; doing so would have improperly denied Elvin, PMG and MSI their right to have the judge decide their equitable claims for foreclosure. *Id.*

*3 Plaintiffs next argue that the trial court erred in determining that substantial compliance with the notice of furnishing requirement set forth in MCL 570.1109 was sufficient for the validity of the construction liens at issue. We disagree.

The question whether the construction lien act, MCL 570.1101 *et seq,* (the act) permits substantial compliance with the notice of furnishing requirement presents a question of statutory interpretation and application, which this Court undertakes de novo. *Schuster Construction Services, Inc. v. Painia Development Corp.*, 251 Mich.App 227, 232; 651 NW2d 749 (2002). The question whether a party substantially complied with the requirements of the act is a factual determination, which this Court reviews for clear error. *Glen Lake–Crystal River Watershed Riparians v. Glen Lake Ass'n,* 264 Mich.App 523, 531; 695 NW2d 508 (2004). "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Bracco v. Michigan Technological Univ.*, 231 Mich.App 578, 585; 588 NW2d 467 (1998). In reviewing the trial court's findings, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Id.*

MCL 570.1109(1) requires that a subcontractor or supplier who contracts to provide an improvement to real property provide a notice of furnishing to "the designee and the general contractor, if any," identified on the notice of commencement of construction activities within 20 days after furnishing the first labor or material. The notice of furnishing serves to notify "owners of the identity of subcontractors improving the property who may become future lien claimants." *Vugterveen Systems, Inc. v. Olde Millpond Corp.*, 454 Mich. 119, 122; 560 NW2d 43 (1997). Although a subcontractor's failure to timely provide a notice of furnishing may reduce the value of its lien, it does not defeat its right to a lien. *Id.* As MCL 570.1109(6) explains in relevant part:

> The failure of a lien claimant to provide a notice of furnishing within the time limit specified in this section *shall not defeat* the lien claimant's right to a construction lien for work performed or materials furnished by the lien claimant before the service of the notice of furnishing *except to the extent that payments were made by or on behalf of the owner or lessee to the contractor pursuant to either a contractor's sworn statement or a waiver of lien* in accordance with this act for work performed or material delivered by the lien claimant. [Emphasis added.]

In *Vugterveen, supra* at 130–131, our Supreme Court explained that the act "is remedial in nature, and substantial compliance is sufficient to meet the requirements of part one of the act" including the notice of furnishing requirement set forth in MCL 570.1109. The Court held that where the subcontractor and the owner met and discussed the work to be performed and the property to be improved, and thus, "[t]he owner knew the identity of the subcontractor, the work that was to be performed, and the property to be improved" the subcontractor substantially complied with the act's notice of furnishing requirement. *Id.* at 131.

*4 Plaintiffs do not dispute the effect of the *Vugterveen* decision, but rather argue that it has been implicitly overruled by *Devillers v. Auto Club Ins. Ass'n,* 473 Mich. 562, 564; 702 NW2d 539 (2005), in which our Supreme Court reversed prior precedent on the basis that it contravened express statutory language. Plaintiffs assert that *Vugterveen's* allowance of substantial compliance contravenes the express language of MCL 570.1109 , which unambiguously provides that a subcontractor "shall" serve a notice of furnishing. However, § 302 of the act, upon which the *Vugterveen* Court relied, expressly provides that:

> This act is declared to be a remedial statute, and shall be liberally construed to secure the beneficial results, intents, and purposes of this act. *Substantial compliance with the provisions of this act shall be sufficient for the validity of the construction liens provided for in this act,* and to give jurisdiction to the court to enforce them. [MCL570.1302(1) (emphasis added).]

Thus, the Court in *Vugterveen* did not render a decision on policy grounds in contravention of clear statutory language. Rather, the *Vugterveen* Court's decision is in accord with the explicit language of the statute, which clearly and unambiguously states that substantial compliance with the provisions of the act is sufficient to validate the construction liens at issue. Testimony presented at trial established that plaintiffs had actual knowledge that Elvin, PMG and MSI were providing labor and/or materials at their property. This was sufficient to allow the trial court to conclude that Elvin, PMG and MSI substantially complied with the act's notice of furnishing requirement. *Vugterveen, supra.*

Plaintiff also challenges the trial court's inclusion of interest of 1.5 percent per month in the liens claimed by Elvin, PMG and MSI. The question whether a time-price differential is properly included in the amount of a lien is a question of statutory construction, which this Court reviews de novo. *Erb Lumber Co. v. Homeowner Construction Lien Recovery Fund,* 206 Mich.App 716, 719; 522 NW2d 917 (1994). The question whether a contract includes a time-price differential is a question of fact, which this Court reviews for clear error. *Linsell v. Applied Handling, Inc.,* 266 Mich.App 1, 12; 697 NW2d 913 (2005); *Glen Lake–Crystal River Watershed, supra* at 531.

In *Erb Lumber, supra* at 720–722, this Court concluded that a two percent time-price differential established in the contract for the supply of materials was properly included in the plaintiffs' lien. The Court noted that, "[t]he supply contract provided that payment for materials must be made within 150 days of delivery. If not, a time-price differential charge of two percent per month would be added until the total was fully paid." *Id.* at 717. There, as here, trial court concluded that this time-price differential was properly included in the construction lien claim. And there as here, the complaining party asserted on appeal that inclusion of these amounts was improper because "interest payments are not properly included in determining the amount of a lien." *Id.* at 718–719. In affirming the trial court's judgment, this Court explained that the act clearly "provides that the amount of the lien is to be calculated by taking the lien claimant's contract price, less the amount already paid on it." *Id.* at 720. Therefore, where the lien claimant's contract establishes a different price for materials depending on when those materials are paid for—that is, a "time-price differential" for delayed payment—that time-price differential is properly included in the amount of the lien. *Id.* at 721–722.

*5 Pursuant to this Court's decision in *Erb Lumber,* then, Elvin, PMG and MSI were each entitled to include a time-price differential in the amount of their lien if a time-price differential for delayed payment was provided for in the contract for the provision of the goods or services underlying that lien. Elvin's president, Fred Elvin, testified at trial that his company's agreement with DES included a 1.5 percent time-price differential. Salamy also testified that Elvin was entitled to that differential as part of its contract with DES. Plaintiffs do not challenge this testimony. Therefore, the trial court did not err in concluding that Elvin was entitled to include such amounts in its lien. *Erb Lumber, supra* at 722.

However, there was no evidence presented to establish that a time-price differential was part of any agreement between plaintiffs or DES and PMG, or between plaintiffs or DES and MSI, to supply materials for the construction of plaintiffs' property. Sunny Surana, PMG's president, testified that there was no agreement between the parties to pay a time-price differential before PMG supplied materials to the project, but that the time-price differential

was set forth on invoices PMG submitted to DES thereafter. On appeal, PMG points to its consent judgment with DES, in which DES stipulated to entry of judgment in an amount including 1.5 percent interest per month as supporting its claim. However, under *Erb Lumber, supra,* PMG is only entitled to include the 1.5 percent differential *if* that differential was part of the contract price plaintiffs and/or DES agreed to pay for the materials purchased from PMG. PMG presented no evidence to establish that payment of a time-price differential was part of the contract for the supply of materials between PMG and plaintiffs/DES, post-agreement invoices notwithstanding.[FN1] Consequently, the trial court clearly erred in permitting PMG to include a time-price differential of 1.5 per cent per month in the amount of its lien.

> FN1. We also note that Surana testified that he had not worked with DES or plaintiffs before this project. Therefore, there is no historical basis for either DES or plaintiffs to have been aware of the time-price differential set forth on PMG's invoices at the time they agreed to purchase material from PMG.

Similarly, MSI points only to its pre-trial stipulation with DES that the balance owed on DES's contract with MSI included interest at a rate of 1.5 percent per month. Unlike PMG's invoices, MSI's invoices contain no reference to a time-price differential. Nor was there any testimony that MSI's agreement to supply goods and services to plaintiffs included such a charge. Consequently, the trial court also clearly erred in permitting MSI to include a time-price differential of 1.5 per cent per month in the amount of its lien.

Plaintiffs next argue that the trial court erred in denying their motion, brought pursuant to MCR 2.116(C)(10), to summarily dismiss the liens on the basis of the homeowner's affidavit plaintiffs submitted in accordance with § 203 of the act. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v. Ameribank,* 468 Mich. 557, 561; 664 NW2d 151 (2003). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. MCR 2.116(G)(5); *Dressel, supra* at 561. Summary disposition should be granted if, and only if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v. Robertson,* 212 Mich.App 45, 48; 536 NW2d 834 (1995).

*6 Section 203 of the act, MCL 570.1203, sets forth specific requirements that must be fulfilled (1) by a homeowner in order to avoid paying a lienholder for amounts already paid to the contractor and (2) by a lienholder in order to seek recovery from the construction lien recovery fund in lieu of payment by the homeowner. *Erb Lumber, Inc. v. Gidley,* 234 Mich.App 387, 394; 594 NW2d 81 (1999). Pertinent to the homeowner's avoidance of liens, § 203 provides:

> (1) A claim of construction lien shall not attach to a residential structure, to the extent payments have been made, if the owner or lessee files an affidavit with the court indicating that the owner or lessee has done all of the following:
>
> (a) Paid the contractor for the improvement to the residential structure and the amount of the payment.
>
> (b) Not colluded with any person to obtain a payment from the fund.
>
> (C) Cooperated and will continue to cooperate with the department in the defense of the fund.
>
> (2) ... In the absence of a written contract ..., the filing of an affidavit under this section shall create a rebuttable presumption that the owner or

lessee has paid the contractor for the improvement. The presumption may be overcome only by a showing of clear and convincing evidence to the contrary. [MCL 570.1203.]

Plaintiffs argued that they were entitled to dismissal of the liens based on a homeowner's affidavit from plaintiff Ghaus Malik (Malik) that recited the requirements as set forth in § 203. Malik's affidavit explained that plaintiffs had paid $1,047,000 to DES, with an understanding that extras incurred through July 2002 were "probably no more than $30,000.00 over the original maximum set contract amount," and that they paid $354,949.78 to other contractors, for a total amount paid of $1,475,349.78 on a contract with a cap of $1,225,000. Thus, plaintiffs asserted that they were entitled to dismissal of the liens pursuant to § 203.

In response, Elvin, PMG, MSI and others presented the court with an affidavit from Salamy discussing numerous verbal change orders made by plaintiffs that resulted in price increases to the contract. More specifically, in his affidavit, Salamy averred that it was his "good faith belief that DES is owed more than $870,000 on the project," which included "various sums owed to DES subcontractors and material suppliers." Further, Salamy noted the additional work, including revision of the plans and the "significant changes in elevations and layout of the house, including driveways and site clearing and grading," requiring "[s]ignificant amounts of engineered fill," resulting from errors in the original depiction of the site. He further averred that throughout the course of construction, plaintiffs continually changed and upgraded the scope of the project and made substantial upgrades in materials. Elvin and MSI also attached portions of Malik's deposition acknowledging increases in the cost of windows selected by plaintiffs, in the amount of steel needed for the construction of the stacked garages and in the cost of the front stairway.

*7 In addition, defendant Homeowner Construction Lien Recovery Fund (the Fund) [FN2] noted that the contract between DES and plaintiffs "clearly contemplated that the $1,162,371 price given, was an estimated price," in that the contract noted, "[t]hese figures are subject to change, based on actual costs as they are incurred during the construction." The Fund also noted that the revised plans increased the size of plaintiffs' residence from approximately 6,900 square feet to approximately 10,640 square feet and changed the configuration of the garages from two one-level garages on cement slabs to one two-level garage on steel footings. These changes resulted in substantial increases to the contract price, including for example, an increase in excavation costs from the $20,000 set forth on the specification sheet to an amount exceeding $112,000. The Fund also reported that DES paid out $1,052,188.88 to subcontractors and suppliers for the project and that the costs of the contract upgrades and modifications approved by plaintiffs totaled $705,869.52, bringing the total contract price to $1,868,041 .36. The Fund attached an affidavit from Salamy, together with a supporting spreadsheet, attesting to these figures.

FN2. The Fund is not a party to this appeal.

The trial court denied plaintiffs' motion, concluding that there were genuine issues of material fact as to the terms of the agreement between DES and plaintiffs and as to whether plaintiffs paid for all of the improvements to their property. We agree with the trial court that the affidavits and other documentary evidence submitted by defendants were sufficient to establish a genuine issue of material fact regarding whether plaintiffs fully paid DES for all improvements to their property. Therefore, the trial court did not err in concluding that plaintiffs were not entitled to summary dismissal of the liens under § 203 of the act.

Finally, plaintiffs argue that the trial court erred in determining the amount and timeliness of Elvin's lien. We disagree. Fred Elvin testified that all invoices underlying the amount claimed in the amended lien were for work performed at plaintiffs'

property. While plaintiffs point to an invoice bearing the name of another project and question the propriety of sequentially numbered job tickets, the trial court was free to believe Elvin's testimony. Plaintiffs did not question Fred Elvin at trial regarding the numbering of the job tickets or inquire about the invoice they now argue was for work Elvin performed for a different client. Thus, giving due regard to the trial court's opportunity to judge the credibility of the witnesses that appeared before it, *Bracco, supra* at 585, this Court is not left with a firm and definite conviction that a mistake was made.[FN3]

> FN3. We note that the invoice to which plaintiffs object, and the job tickets underlying it, all indicate that the work was performed at plaintiffs' address. Fred Elvin testified that Elvin maintained its records according to lot number or address. Therefore, despite bearing an incorrect developer name, the invoice and underlying documentation do not support plaintiffs' assertion that they were invoiced for work not performed at their property. We also note that Fred Elvin testified that he kept a daily job ticket book in his truck and that if he left one site to go to another, he would write one ticket for one job and the next for the other job. In such cases, job tickets would not be sequentially numbered for a single job. However, job tickets would be numbered sequentially if Fred Elvin was at the same job for a number of consecutive days. Fred Elvin also testified that he preferred to keep one job ticket book for each job. That practice would also explain a series of sequentially numbered daily job tickets for a single job. Thus, we find nothing inherently sinister in the mere fact that some of Elvin's tickets were sequentially numbered in this case.

We also conclude that the trial court did not err in determining that Elvin's work at the site was performed as part of a "single operation" to perform work as requested by DES for the construction of plaintiffs' property.

*8 Section 111 of the act provides in relevant part:

> Notwithstanding section 109 [relating to notices of furnishing], the right of a contractor, subcontractor, laborer, or supplier to a construction lien created by this act shall cease to exist unless, *within 90 days after the lien claimant's last furnishing of labor or material for the improvement, pursuant to the lien claimant's contract,* a claim of lien is recorded in the office of the register of deeds for each county where the real property to which the improvement was made is located. [MCL 570.1111(1) (emphasis added).]

Testimony established, and the parties do not dispute, that Elvin performed general miscellaneous work at plaintiffs' property from May 2000 or earlier through June 2002, that Elvin installed the septic field in June 2002, and that Elvin performed work on the storm drainage system dating from July 15, 2002 to November 15, 2002. Thus, Elvin was actively working at the site from at least May 2000 through November 2002. On November 21, 2002, Elvin filed a single lien for all amounts owing for work performed at plaintiffs' property. Elvin asserts that all such work was performed pursuant to a single contract with DES to undertake whatever work was needed at the site, and that written agreements setting fixed prices for septic work and storm drainage work were part of this single contract. Fred Elvin explained that Elvin's arrangement with DES was to charge hourly for labor and equipment where it was difficult to determine in advance the total scope or cost of work needed and to place in writing a fixed price for those projects, such as the septic field and the storm drainage work, that were amenable to an advance determination.

As noted above, the act specifies that a lien claimant must record a claim of lien "within 90 days after the lien claimant's last furnishing of labor

or material for the improvement, pursuant to the lien claimant's contract ..." MCL 570.1111(1). The act defines "improvement" as:

> the result of labor or material provided by a contractor, subcontractor, supplier or laborer, including but not limited to, surveying, engineering and architectural planning, construction management, clearing, demolishing, excavating, filling, building, erecting, constructing, altering, repairing, ornamenting, landscaping, paving, leasing equipment, or installing or affixing a fixture or material, pursuant to a contract. [MCL 570.1104(7).]

The act further defines contract as "a contract of whatever nature, for the providing of improvements to real property, including any and all additions to, deletions from and amendments to the contract." MCL 570.1103(4). Under MCL 570.1111(1), then, Elvin was required to file its claim of lien within 90 days after it last furnished labor or material for the "improvement" of plaintiffs' property pursuant to its contract with DES, including any additions to that contract.

The trial court determined that all of Elvin's work was supplied to the property as part of a single contract with DES relative to the construction of plaintiffs' home. We conclude that the trial court did not clearly err in reaching this conclusion, given testimony from both Fred Elvin and Salamy that Elvin was hired by DES to do what was needed at the site for the construction of a single improvement—plaintiffs' home—contemplated by their agreement, and that Elvin performed a wide range of tasks throughout the duration of the project. The trial court's conclusion that the septic field and storm drain agreements were part of this single contract is further supported by the act's definition of "contract" as including "additions" or "amendments" thereto. Therefore, this Court is not left with a "firm conviction" that the trial court erred in concluding that Elvin and DES had a single contract for all work Elvin provided at plaintiffs' property. Consequently, the trial court did not err in concluding that Elvin's lien covering the entirety of Elvin's work was timely filed.

*9 Because we find that the trial court did not clearly err in concluding that each of the invoices underlying Elvin's lien reflected work performed or materials supplied to plaintiffs' property, and that all of Elvin's work was performed pursuant to a single contract with DES, there is no basis for concluding that Elvin's lien was filed in bad faith and should have been dismissed.

We reverse that portion of the trial court's judgment in favor of lien claimants that awards PMG and MSI 1.5 percent interest per month on the unpaid amount of their liens. We affirm the trial court's judgment in all other respects.

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Not Reported in N.W.2d, 2009 WL 3049723 (Mich.App.)
(Cite as: 2009 WL 3049723 (Mich.App.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
H. John SCHIMKE, Plaintiff/
Counter-DefendantAppellee,
v.
LIQUID DUSTLAYER, INC., Wendy Steel, Trustee of the Richard C. Rademaker Trust, and Tina L. Rademaker, Defendants/
Counter-PlaintiffsAppellants.

Docket No. 282421.
Sept. 24, 2009.

Manistee Circuit Court; LC No. 01-010606-CK.

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

*1 Defendants Liquid Dustlayer, Inc., Wendy Steel, as Trustee of the Richard Rademaker Trust, FN1 and Tina L. Rademaker (Tina) appeal as of right from a judgment, following a bench trial, awarding plaintiff $769,600 for the value of his minority interest in Liquid Dustlayer. We affirm.

FN1. Richard Rademaker was originally named as a defendant, but died during the pendency of this action. The trust was thereafter substituted in his place.

Plaintiff, a minority shareholder of Liquid Dustlayer, a closely held corporation, brought this action for willfully unfair and oppressive conduct, contrary to § 489 of the Michigan Business Corporation Act, MCL 450.1489, in connection with a proposed plan by Richard Rademaker (Rademaker), the sole director of Liquid Dustlayer, to have Liquid Dustlayer redeem his stock on terms not made available to plaintiff.

I. Pretrial Motion for Summary Disposition and Injunction

Defendants first argue that the trial court erred in denying their motion for summary disposition and in enjoining the proposed redemption of Rademaker's shares. We disagree.

A. Summary Disposition

A trial court's decision on a motion for summary disposition is reviewed de novo. *Maiden v. Rozwood*, 461 Mich. 109, 118; 597 NW2d 817 (1999). When reviewing a motion brought under MCR 2.116(C)(10), a court must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Quinto v. Cross & Peters Co.*, 451 Mich. 358, 361-362; 547 NW2d 314 (1996). A question of fact exists when reasonable minds could differ with regard to the conclusions to be drawn from the evidence. See *Glittenberg v. Doughboy Recreational Industries (On Rehearing)*, 441 Mich. 379, 398-399; 491 NW2d 208 (1992); see also *Quinto, supra* at 367, 371-372. Questions of statutory interpretation are also reviewed de novo. *Heinz v. Chicago Rd. Investment Co.*, 216 Mich.App 289, 295; 549 NW2d 47 (1996).

At all relevant times, § 489 provided:

(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 re-

lief 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.

*2 (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. 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.

Although there are four published decisions addressing this statute, *Franchino v. Franchino,* 263 Mich.App 172; 687 NW2d 620 (2004), *Estes v. Idea Engineering & Fabricating, Inc.,* 250 Mich.App 270; 649 NW2d 84 (2002) (*Estes II*), *Estes v. Idea Engineering & Fabricating, Inc.,* 245 Mich.App 328, 338-346; 631 NW2d 89 (2001) (*Estes I*), vacated in part 245 Mich.App 801 (2001), and *Baks v.. Moroun,* 227 Mich.App 472; 576 NW2d 413 (1998), overruled in part by *Estes II,* only *Franchino* and *Estes II* remain good law with regard to § 489.

In *Estes II, supra* at 271-272, a special panel of this Court was convened under MCR 7.215(J) [FN2] to resolve a conflict between *Estes I* and *Baks* with respect to whether § 489 creates a cause of action. This Court resolved the conflict in favor of *Estes I* and against *Baks* by holding that § 489 creates a cause of action, rather than simply being a venue provision. *Estes II, supra* at 278-279. In *Franchino, supra* at 173-174, this Court held that § 489 only protects a shareholder's interest *as a shareholder,* not as a member of a board of directors or as an employee of a corporation.[FN3]

FN2. The rule applicable in *Estes II* was at that time found in MCR 7.215(I).

FN3. Section 489(3) was amended by 2006 PA 68, effective March 20, 2006, to add 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, it appears that this portion of *Franchino* has been legislatively overruled.

Defendants argue that plaintiff failed to demonstrate that there were questions of material fact for

trial and, therefore, the trial court should have granted defendants' motion for summary disposition. We note, however, that in his response to defendants' motion, plaintiff did not claim that there existed issues of material fact for trial, but rather argued that he, not defendants, was entitled to judgment as a matter of law. Defendants now argue that they were entitled to judgment as a matter of law for various reasons. We disagree.

Defendants argue that plaintiff failed to establish a violation of § 489 because he failed to show a *pattern* of "willfully unfair and oppressive conduct." However, § 489(3) 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" (emphasis added). Thus, "willfully unfair and oppressive conduct" may be established by proof of *either* (1) a continuing course of conduct, (2) *a significant action,* or (3) a series of actions. Accordingly, a single significant action that substantially interferes with a shareholder's interests as a shareholder is sufficient to support a cause of action under § 489.

*3 Defendants also argue that they were entitled to summary disposition because the proposed redemption never took place. However, § 489 does not require that an act be completed before a court may intervene. Indeed, § 489(1)(c) allows a court to issue an "injunction against a resolution or other act of the corporation." Similarly, § 489(1)(d) allows a court to "prohibit [ ] ... an act of the corporation or of shareholders, directors, officers, or other persons party to the action." Therefore, the fact that the contemplated redemption had not yet occurred did not entitle defendants to judgment as a matter of law.

Defendants also argue that plaintiff failed to show that the proposed redemption would diminish the value of his stock. However, § 489 does not require a showing that oppressive conduct diminished the value of the shareholder's stock. Rather, § 489(3) requires a showing that the misconduct "substantially interferes with the interests of the shareholder as a shareholder." In this case, the plan to redeem Rademaker's stock did not include plaintiff. To the extent that defendants were willing to consider redeeming plaintiff's stock, it was at a much lower price. This discrepancy affected the value of plaintiff's shareholder interest in Liquid Dustlayer and was sufficiently indicative of a substantial interference with plaintiff's rights as a shareholder.

For these reasons, the trial court did not err in denying defendants' motion for summary disposition.

B. Temporary Restraining Order (TRO)

Defendants argue that the trial court erred in sua sponte enjoining the proposed stock redemption, without a showing of imminent or irreparable harm.

MCR 3.310(B)(1)(a) requires a showing of immediate and irreparable harm before a TRO may be issued without advance notice to the other party. In this case, the trial court sua sponte issued a TRO, without prior notice to defendants and without discussing the requirements of MCR 3.310(B)(1)(a). However,

> an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice. [MCR 2.613(A).]

At trial, Rademaker testified that he had voluntarily refrained from implementing the redemption pending the outcome of this lawsuit. He also took the position that the redemption was merely a hope or a dream that had not been finalized, not a real plan. Once the trial court decided the matter on the merits and ascertained the value of plaintiff's stock, it lifted the injunction and allowed Liquid Dustlayer to redeem Rademaker's shares on the same terms

as plaintiff's. Under the circumstances, any error in issuing the TRO was harmless. Failure to grant appellate relief would not be inconsistent with substantial justice.

II. Finding of Willful and Oppressive Conduct

*4 Defendants argue that the trial court erred in concluding that the proposed redemption plan was sufficient to establish willful and oppressive conduct under § 489. We disagree.

A trial court's findings of fact at a bench trial are reviewed for clear error. *Sands Appliance Service, Inc. v. Wilson,* 463 Mich. 231, 238; 615 NW2d 241 (2000). Regard is given to the trial court's special opportunity to evaluate the credibility of witnesses who appeared before it. See *Morris v. Clawson Tank Co.,* 459 Mich. 256, 271; 587 NW2d 253 (1998). A finding is clearly erroneous when, although there is evidence to support it, the appellate court is left with a definite and firm conviction that a mistake has been made. *Arco Inds. Corp. v. American Motorists' Ins. Co.,* 448 Mich. 395, 410; 531 NW2d 168 (1995), overruled in part on other grounds *Frankenmuth Mut. Ins. Co. v. Masters,* 460 Mich. 105, 116-117 n. 8; 595 NW2d 832 (1999). Questions of law are reviewed de novo. See *Sands, supra* at 238.

Defendants argue that the proposed redemption plan was merely an inchoate dream and, therefore, was not actionable under § 489. We disagree. The evidence presented at trial showed that Rademaker repeatedly indicated that he wanted Liquid Dustlayer to redeem his stock and that he was not willing to redeem plaintiff's shares immediately, or at the same price. Even after transferring some of his stock to his daughter Tina, Rademaker controlled a majority of the shares. Rademaker had his attorney draft closing documents for the company-financed redemption of his remaining stock, at $15,000 a share. Rademaker also proposed scheduling a shareholders' meeting on the issue, but stated that the meeting could be held on the same day as the closing, thus suggesting that whatever happened at the meeting was unlikely to affect Rademaker's plans. In light of the evidence on the entire record, the trial court did not clearly err in finding that Rademaker had a well-formed imminent plan to cause Liquid Dustlayer to redeem his remaining shares of stock, but not plaintiff's shares, for $15,000 a share. As discussed previously, §§ 489(1)(c) and (d) contemplate that oppressive conduct that has not yet been completed is actionable under the statute.

Defendants argue that the redemption plan was mere speculation and could not support an award of damages or the trial court's decision to interfere with the officers' discretion. However, § 489 contemplates that in a closely held corporation, directors may sometimes exercise their discretion in a willful and oppressive manner, to the disadvantage of minority shareholders. As indicated, § 489 allows a court to intervene before an action is finalized. Further, § 489(1)(e) specifically authorizes a court to order a corporation to purchase a plaintiff's shares of stock.

Defendants next observe that MCL 450.1261(i) and (m) authorize a corporation to buy and sell shares, but we note that plaintiff here never claimed that the proposed redemption plan was ultra vires.

*5 Defendants also argue that plaintiff failed to prove a continuing pattern of oppressive conduct, but, as explained previously, a single "significant action" is sufficient to show willful and oppressive conduct under § 489(3).

Defendants argue that a violation of § 489 was not established because the evidence showed that plaintiff's retirement interests were being considered. They contend that Rademaker did not intend to divert so much money that he would hurt Liquid Dustlayer, and thereby his daughter or plaintiff, and that the proposed price of $15,000 a share was simply a "talking point." They also assert that Rademaker intended to obtain an appraisal of Liquid Dustlayer and that no witness analyzed the proposed terms or the effect of the inchoate redemption plan. Thus, defendants argue, plaintiff

failed to prove that he had a "right" to unlock the value of his stock or that he would have been hurt if Liquid Dustlayer redeemed Rademaker's stock.

As previously explained, the evidence at trial showed that the proposed redemption was imminent. While defendants claim that plaintiff's retirement interests would be protected, the evidence showed that Rademaker offered plaintiff approximately one third of what Rademaker was demanding for his shares, and Rademaker had voting control of Liquid Dustlayer. In the meantime, Rademaker and Tina remained steadfast in refusing to pay dividends, despite Liquid Dustlayer's substantial cash reserves, essentially preventing plaintiff from receiving any benefit whatsoever from his nearly one-third ownership of Liquid Dustlayer. The trial court did not clearly err in finding that defendants engaged in "willfully unfair and oppressive conduct," entitling plaintiff to relief under § 489.

III. Remedy of Redemption

Defendants next argue that the trial court erred in ordering Liquid Dustlayer to redeem plaintiff's stock. We again disagree.

"An inquiry into the nature, scope, and elements of a remedy is a question of law that is reviewed de novo." *Auto-Owners Ins. Co. v. Amoco Production Co.*, 468 Mich. 53, 57; 658 NW2d 460 (2003). However, a trial court's choice among available remedies is reviewed for an abuse of discretion. See, generally, *Rasheed v. Chrysler Corp.*, 445 Mich. 109, 122; 517 NW2d 19 (1994).

Section 489(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...." Thus, § 489 grants a court broad discretion to fashion a remedy it "considers appropriate."

In *Estes II, supra* at 280, this Court recognized that in a closely held corporation, such as this one, "a shareholder ... is unable to escape an oppressive situation by dispensing of his shares of ownership in the public arena" (internal citation, quotation marks, and emphasis omitted). The Court also recognized that "the relationship among those in control of a closely held corporation requires a higher standard of fiduciary responsibility, a standard more akin to partnership law." *Id.* at 281 (internal citation and quotation marks omitted). Accordingly, § 489(1)(e) specifically authorizes a court to order the purchase of a plaintiff's shares. Section 489(1)(a) also allows a court to order "[t]he dissolution and liquidation of the assets and business of the corporation."

***6** In the present case, the continuing injunction prevented Liquid Dustlayer from redeeming Rademaker's shares. However, the evidence showed that Rademaker continued drawing a salary from Liquid Dustlayer, as well as substantial bonuses. Tina was similarly paid a generous salary and bonuses. Liquid Dustlayer had never paid dividends to its shareholders, and Rademaker and Tina opposed the idea of doing so. Plaintiff held nearly a one-third interest in Liquid Dustlayer, but received no dividends (and no salary), and he had no voting influence. Thus, Rademaker and Tina continued receiving a benefit from their stock ownership, while plaintiff received nothing. Extending the injunction, without ordering the purchase of plaintiff's stock, would merely have perpetuated this inequitable status quo. Under the circumstances, the trial court did not abuse its discretion in ordering Liquid Dustlayer to redeem plaintiff's stock.

IV. Valuation of Plaintiff's Stock

Defendants next argue that the trial court erred by failing to discount the value of plaintiff's minority shares. We disagree.

An award of damages following an evidentiary hearing is reviewed for clear error. *Woodman v. Miesel Sysco Food Service Co.*, 254 Mich.App 159, 190; 657 NW2d 122 (2002); *Jansen v. Jansen*, 205 Mich.App 169, 170-171; 517 NW2d 275 (1994). "A trial court has great latitude in determining the value of stock in closely held corporations," and no

clear error will be found where the court's valuation is "within the range established by the proofs." *Id.* at 171.

Section 489(1)(e) authorizes a court to order "[t]he 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" (emphasis added). The trial court's order for the parties to obtain a normalized valuation of plaintiff's stock must be viewed in the context of the statute. Defendants received the report of David Richards, a certified business evaluator, in January 2007, and failed to produce any contrary evidence at the valuation hearing.

As defendants observe, MCL 450.1761(d) states that

> "[f]air value," with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.

Michigan has not adopted the requirement that fair value be ascertained without a discount for lack of marketability or minority status. Conversely, the definition contained in § 761 does not *require* a court to discount the value of minority shares. The trial court correctly recognized this principle.

In the present case, Rademaker owned 37.78 percent of Liquid Dustlayer, Tina owned 33.33 percent of Liquid Dustlayer, and plaintiff owned 28.89 percent. Thus, the parties held similar ownership interests.[FN4] Richards testified that "the ownership percentages were so close together that I just-a huge discount ... would not be appropriate." Richards later testified that it was appropriate to take into account *no* discount in this case. Under the circumstances, the trial court did not err in declining to discount the value of plaintiff's shares; its decision was supported by the proofs.

FN4. As noted by the trial court, during his employment, plaintiff contributed greatly to the success and profitability of Liquid Dustlayer.

V. Interest

*7 Defendants lastly argue that the trial court erred in awarding plaintiff prejudgment interest on the purchase price of his stock.

Generally, a decision whether to award prejudgment interest is reviewed de novo. *Griswold Properties, LLC v. Lexington Ins Co.*, 275 Mich.App 543, 569; 740 NW2d 659 (2007), superceded in part on other grounds 276 Mich.App 551 (2007). However, "[t]his Court reviews an award of interest in equity for an abuse of discretion." *Olson v. Olson*, 273 Mich.App 347, 349; 729 NW2d 908 (2006).

Under MCL 600.6013(8), a plaintiff is entitled to prejudgment interest accruing from the date a complaint is filed through the date the judgment is satisfied. In this case, however, the trial court did not award interest from the filing of the complaint, nor did it cite § 6013 as authority for its award of interest. Further, an order directing the purchase of minority stock is an equitable remedy, not a money judgment. See, generally, *Olson, supra* at 354, n. 6; see also *Moore v. Carney*, 84 Mich.App 399, 404-406; 269 NW2d 614 (1978). Therefore, § 6013 does not apply.

However, an award of interest on an equitable remedy "may be appropriate pursuant to the trial court's discretion under its equitable powers." *Olson, supra* at 354. "An equitable award of interest ... is not intended to serve the purpose of compensating a party for the lost use of funds." *Id.* at 354-355 (internal citation and quotation marks omitted). Rather, it "prevents the delinquent party from realizing a windfall and assures prompt compliance with court orders." *Id.* at 355 (internal citation and quotation marks omitted); see also *In re Forfeiture of $176,598*, 465 Mich. 382, 388 n. 12; 633 NW2d 367 (2001).

In the present case, the evidentiary hearing to determine damages was held in July 2007, 18 months after the case was initially decided, and the judgment was not entered until November 20, 2007. In the meantime, defendants continued to operate Liquid Dustlayer and had full use of its assets, while plaintiff received no dividends or other benefit from his ownership interest. If equitable interest had not been ordered, defendants would have received a windfall from the delay. Therefore, the trial court did not abuse its discretion in ordering defendants to pay equitable interest on the judgment.

Affirmed.

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