IN THE SUPREME COURT OF MISSOURI

JOHN LANGENBACH, et al.,	)	
	)	
Appellant/Cross Respondent,	)	
	)	
v.	)	SC97940
	)	
JOAN ROBINSON,	)	
	)	
Respondent/Cross Appellant.	)	

Transferred from
Missouri Court of Appeals, Eastern District
Appeal No. ED 106781

APPELLANTS/CROSS-RESPONDENTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a Memorandum, Order and Judgment entered by the Circuit Court of St. Louis County on February 13, 2018 (the February 13, 2018 Judgment") and an Amended Judgment entered on January 30, 2018 (DF140; A 1; DFA 138; A 15).[1] The February 13, 2018 Judgment, which followed a bench trial on October 26 and November 1, 2017, constitutes a final judgment because it resolved the last remaining claim in the case, Count I of Plaintiff's Third Amended Petition. The other claims were resolved by the January 30, 2018 Amended Judgment, which was entered following a jury trial on Counts II and III of Plaintiff's Third Amended Petition. Under Mo. R. Civ. P. 81.05, the February 13, 2018 Judgment became final on May 22, 2018, when the Court denied Plaintiff's post-trial motion to amend the judgment. Defendants timely filed their notice of appeal on May 24, 2018 (D206, D202). After the Missouri Court of Appeals, Eastern District issued its opinion, this Court ordered transfer.

This Court has jurisdiction under Art. V, Sec. 10 of the Constitution of Missouri.

1 "A" cites are to the Appendix to the Brief.

STATEMENT OF FACTS

This is a shareholder dispute relating to the management of Perma-Jack Company ("PJC"), a closely-held company owned equally by three siblings, Joan Robinson (Plaintiff below), John Langenbach and Judy Lanfri (Tr 30). John and Judy voted to terminate Plaintiff's employment two years after asking her to resign and this litigation followed.

Perma-Jack Company

PJC was formed by George Langenbach, the father of John, Judy and Plaintiff, in 1975 (Tr 30; D84 p. 1, ¶ 1). PJC's primary business was and is the stabilization of residential and commercial foundations using a frictionless steel pier system. PJC manufactures the pier system, which it sells to dealers trained in its use (Tr 38). The dealers pay PJC a royalty, which is how PJC makes money (Tr 38-39). PJC's growth and viability depends upon satisfaction of existing dealers and recruitment of new ones (Tr 156, 329).

Around 1985, George Langenbach decided to retire (Tr 214; D84 p. 2, ¶ 5). George first asked Judy's husband to take over running PJC, which he did, but only for a matter of months (Tr 142, 214). George then asked John to assume the role as PJC President, but he declined (Tr 31, 214, 325). After John refused George's offer to run PJC, George appointed Plaintiff President and gifted his stock to his children equally (Tr 121; D84 p. 2, ¶ 6).

The PJC Bylaws vest control and management of PJC in the Board of Directors (D. Ex. F; Bylaws at 5). John, Judy and Plaintiff have constituted the Board

since at least 1987 (Tr 30, 121). While an equal shareholder and a director of PJC, Judy lives in California and has never worked for or drawn any salary from PJC since she was gifted her shares (Tr 122, 211, 214).

The Bylaws direct the Board to appoint a President who serves "subject at all times to the control of the Board of Directors" (Bylaws at 9). The Bylaws provide that "[a]ny officer of agent appointed by the Board of Directors may be removed by the Board of Directors whenever in the judgment of the Board the best interests of the corporation shall be served thereby" (Bylaws at 8, 9).

Perma-Jack Company Under Plaintiff's Tenure As President

When George Langenbach appointed Plaintiff President in 1985, PJC had 14 franchisees (D84 p. 2, ¶ 7). In the mid-1990s, PJC hired Plaintiff's son, John Robinson, and John's daughter, Jessica Langenbach. From that point forward until Plaintiff's termination, PJC's job duties were generally divided among the employees as follows:

- John was primarily responsible for the technical or mechanical side of the business, coordinating the manufacture and supply of PJC's materials and parts with PJC's manufacture (Sabermatic) and providing technical support and training for dealers in the use of the PJC system. As time allowed, he visited and recruited new dealers (Tr 31, 34, 121, 125-26, 328)
- Plaintiff, along with some help from her son and Jessica Langenbach, handled the administrative side of the business, paying

bills, purchasing insurance, taking dealer orders, depositing checks, communicating with PJC's attorneys and accountants (Tr 32-34,122-24)

- Jessica Langenbach provided secretarial and administrative support (Tr 36-37, 126)
- John Robinson assisted with the development of PJC's website, helped load trucks and with filing (Tr 37, 126)

Plaintiff instituted a four day, two hours per day work week, indicating that, in her opinion, there was little to do "after the 10 o'clock hour came" (Tr 127).

By 2007, PJC had lost 7 of its 15 franchisees (Tr 158, 328). Plaintiff blamed her brother for the disappointing performance, but did not take any steps as President to fix the problem:

> Q: Langenbach dropped the ball and you didn't pick it up?
>
> A: He didn't ask me to.

(Tr 160). Plaintiff did not develop any responsive business plan and refused to involve herself in the recruitment of new franchisees (Tr 158-59, 218).

PJC lost money from 2008 through 2010:

Year	Net Profit (Loss)
2008	(27,700)
2009	(38,100)

2010 (137,000)[2]

(P.Ex. 29 at 24).

While the parties agreed that the Great Recession affected PJC (Tr 40), John attributed PJC's poor performance to Joan's poor work ethic and her insistence upon a 2 hour per day, four day work week (D140 p. 3, ¶ 9; A 3). Plaintiff had little, if any, contact with PJC's franchisees. Plaintiff visited PJC dealers 4 times over 25 years, and visited PJC's supplier twice over the same period (Tr 161; D140 p. 4, ¶ 10; A 4). Plaintiff did not understand the mechanics of the PJC system and was not qualified to instruct franchisees, or prospective franchisees on the operation of the system (Tr 141).

John was concerned that Plaintiff did not have a plan or strategy to reverse PJC's decline:

> Well, obviously everybody suffered through the recession, and it was a tough time for everybody. And dealers were lost over time; some passed away, other situations occurred. But as the company went down there was no foresight or no thought or plan for the future to get it to grow. And even as the economy got better and some more income came out of that, there was no plan for it to grow or survive any longer.

(Tr 101).

John's Efforts To Revitalize Perma-Jack Company

In 2010, John pushed for change at PJC.

First, he took the initiative by designing a new piering bracket that he felt would give PJC a competitive advantage from a mechanical perspective (Tr 330-32).

[2] Neither John nor Plaintiff drew a salary in 2010 (Tr 162).

Second, John proposed changing from a franchising to a licensing arrangement with PJC's dealers because the lengthy franchise agreements made it difficult for John to recruit new dealers (Tr 168-69, 332-33).

> I dealt with it for over 40 years and I couldn't explain the details to you to this day. So I thought, there's the problem. And several years the contacts that we did have, once I place that franchise agreement in their hand I never heard back from them. Would you pay a lawyer to read all of that? And it was just terribly involved and never heard back from them.

(Tr 333).

Third, John pushed for a more intensive, professional and aggressive work environment. John told Plaintiff, John Robinson and Jessica Langenbach that everyone would have to devote considerably more time to PJC's operations, including franchisee relations, new product development and recruitment of new franchisees (Tr 335-36). John told John Robinson that he could expect 60 hour work weeks with some travel (Tr 201). John Robinson testified that he viewed the suggestion of hard work as a "threat" and flatly refused (Tr 201).

Plaintiff also rejected the idea of increased hours, and her business calendars from 2010-2012 confirm that she devoted little to no time to the company. As the trial court remarked: "In support, defendants introduced Joan's business/personal calendar which contained few, if any, business-related entries on her calendar for a period *of years* (D.Ex. K)" (D140 p. 3, ¶ 9 (emphasis in original); A 3; Tr 179-82).

In 2010, with Judy's support, John asked Plaintiff to resign, promising that he would remain only long enough to train Jessica and John Robinson to run the business

(Tr 102, 167, 336; D84 p. 10, ¶ 12). Plaintiff recalls that "he wanted me to resign, and indicated that he might consider John [Robinson] and Jessica as officers of the company" (Tr 131). John recalls that Plaintiff initially agreed to the proposal, but then refused to resign (Tr 102-03).

John and Judy thought that a meeting with all three siblings might help the situation (Tr 338). Thus, in 2010, Judy travelled to St. Louis for a meeting with John and Plaintiff where they talked about what Plaintiff characterized as the "new Perma Jack" (Tr 131-32, 168, 222). John had completed testing on the new bracket and was anxious to get the patent process moving (Tr 222, 370). Plaintiff and her son assumed responsibility to see that through, but that never occurred (Tr 222).

> Q. You also make a comment where you say before that, "She," referring to your sister, "Is not competent to run this company."
>
> A. Yes.
>
> Q. Was that your honest opinion at the time?
>
> A. Yes.
>
> Q. I mean, nobody had sued anybody?
>
> A. No.
>
> Q. Nobody had done anything like that at this time?
>
> A. No, we wanted her to be part of the solution, and every time we came up with ideas she would -- she would agree with us that her son would run the patent, that she would do the licensing. And then not only would she not do it, she wouldn't tell us she didn't do it. It took an e-mail later that John after that – my brother

> accidently found that showed that she decided not to bring it to patent, or work on the patent and that we were going to let it go, but didn't tell us.

(Tr 224; *see also,* Tr 339).

John reiterated his request for a change to license agreements (Tr 168). The change to license agreements only happened after Plaintiff's termination (Tr 346).

John began assembling a private log of Plaintiff's performance issues (Tr 42). John did this because he anticipated that he and Judy might have to act, and could be asked to explain their actions (Tr 43, 55).

PJC was marginally profitable in 2011, but only because John and Plaintiff did not draw any salaries (Tr 101-2, 162). During 2011, despite her 8 hour work week, Plaintiff left work early or was absent 23 times—her son 54 times (Tr 107). Similarly, in 2012, PJC made approximately $40,000, but John and Plaintiff only paid themselves $30,000 a piece (Tr 102). That year, despite her 8 hour work week, Plaintiff left work early or was absent 11 times—her son 68 times (Tr 107).

Judy became concerned that PJC was losing dealers (Tr 205). On a visit to PJC, Judy described what she saw as follows:

> I was knocked over, literally. I walked into the office and a couple of dogs came, and big dogs, and dog hair all over. And toys from one end of Perma-Jack, I could not walk. The mailman came and dropped something off and I was actually embarrassed that the mailman saw this. My nephew handed one of his kids -- I don't know if it was the first one or second one because we've lost touch, but handed a baby to my niece to get off the computer and feed the baby. And I went, "We got a problem."

(Tr 215-16). The experience caused her "to get more involved in what was going on" (Tr 216).

By mid-2011, John and Judy's concerns over PJC's management began to show up in emails between them. Some of the emails contain colorful language, as one might expect in private emails between siblings (P. Ex. 9, p. 1). By December 2011, Judy expressed her alarm in stark terms:

> I'm thinking of extracting myself from the stock, she will take us down with her. I'm so sorry, she's not competent to run this company. She has not honored the work you put in to try to save the company, my concern is that she is not paying accounts that we owe.

(Tr 56). By May 2012, John and Judy had concluded it would be necessary to terminate Plaintiff and consulted a lawyer (Tr 62, 66).

On June 20, 2012, at a Special Board of Directors meeting, John and Judy voted to terminate Plaintiff (D140, p. 6, ¶ 17; A 6; P.Ex. 6).

Since terminating Plaintiff, John began working six and seven days a week (Tr 345-46, 372). The trial court summarized the new work environment as follows:

> Since terminating Joan, John testified that he began working approximately 60 hours per week and his daughter, Jessica Langenbach, now works a regular 40 hour work week. Larry Palmer, who runs Saberjack, agreed. PJC's other home office employee, Alexis Langenbach, works 30 hours per week.

(D140, p. 6, ¶ 18; A 6; *See also*, P.Ex. 13).

PJC has shown positive financial results under John's guidance and has increased its franchisees/licensees from 6 at the time of Joan's termination, to 16 as of the date of trial (Tr 346).

Evidentiary Rulings

Over John and Judy's continuing objection, the trial court permitted Plaintiff to introduce evidence regarding the salaries and bonuses paid to John and his daughters post-termination (Tr 80, 119). John and Judy argued that the evidence should be excluded because Plaintiff did not intend to (and did not) offer any evidence that the salaries were excessive or unwarranted (Tr 118; D114, pp. 4-5). Presumably for that reason, Plaintiff did not seek to recoup the salaries for PJC in her derivative claim (TR 146-147; D142, pp. 10-11(Count III)).

John and Judy believe that the introduction of this evidence was instrumental in prejudicing the jury and was not admissible or necessary for any reason.

Procedural History

Plaintiff originally filed suit on June 19, 2012 and, in her First Amended Petition, alleged claims for shareholder oppression, breach of fiduciary duty and wrongful termination.[3] The trial court dismissed the wrongful termination claim and entered summary judgment for defendants on the remaining claims. Plaintiff appealed and the Eastern District Court of Appeals affirmed in part and reversed in part,

[3] In her wrongful termination claim, Plaintiff alleged that she fell within recognized exceptions precluding termination of at will employees. *See, e.g.*, Appellants' 3/19/19 Suggestions in Opposition to Motion to Strike, No. ED106781.

remanding for further proceedings. *Robinson v. Lagenbach*, 439 S.W.3d 853 (Mo. Ct. App. 2014).

In her Third Amended Petition following remand, Plaintiff alleged the following claims:

Count I—For equitable relief based on shareholder oppression, seeking an Order requiring John and Judy to repurchase Plaintiff's PJC stock;

Count II—For breach of fiduciary duty to Plaintiff individually arising out of her termination; and

Count III—Derivative claim for breach of fiduciary duty.

(D142).

John and Judy filed and argued motions for directed verdict at the close of Plaintiff's evidence and the close of the case (Tr 297-309, 381-87). The trial court directed a verdict on all of Plaintiff's derivative claims (Tr 305, 316, 382).

Plaintiff instructed the jury on a single issue on her individual claim for breach of fiduciary duty: Whether "John Langenbach and Judy Lanfri did not believe, in good faith, that their removal of plaintiff Joan Robinson was in the best interests of the company" (D145, p. 9). Plaintiff sought damages for the period of time beginning with her termination through the date of trial (Tr 19). During the six years preceding the trial, Plaintiff earned approximately $153,000 (P.Ex. 26, Schedule 4). The jury returned a Plaintiff's verdict in the amount of $390,000.

John and Judy filed a Motion for Judgment Notwithstanding the Verdict, for a New Trial and related relief (D119; D120). The trial court denied the Motion (D123).

Following the trial court's denial of John and Judy's post-trial motions, the parties proceeded to trial on Plaintiff's claim for equitable relief based on shareholder oppression (D140, p.1; A 1). In addition to the evidenced adduced at the jury trial, the parties each presented valuation evidence through expert testimony, Michael Prost (for John and Judy) and Christopher King (for Plaintiff) (D140, p. 7, ¶ 28; A 7). The trial court entered Judgment in favor of Plaintiff on her shareholder oppression claim and ordered John and Judy to purchase Plaintiff's PJC stock (D140). The Court accepted the valuation testimony of Mr. Prost and ordered John and Judy to purchase Plaintiff's stock for $59,000 (D140, pp. 7-10; A 7-10).

This appeal followed.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE DEFENDANTS WERE ENTITLED TO A JUDGMENT AS A MATTER OF LAW ON THEIR AFFIRMATIVE DEFENSE I THAT PLAINTIFF'S STATUS AS A SHAREHOLDER PROVIDES NO RIGHT TO CONTINUED EMPLOYMENT AND ON THE GROUNDS THAT PLAINTIFF'S SHAREHOLDING INTEREST DID NOT GIVE RISE TO A FIDUCIARY-BASED RIGHT TO EMPLOYMENT IN THAT THE MISSOURI COURTS SHOULD ADOPT THE MINORITY VIEW THAT A SHAREHOLDER DOES NOT ENJOY A FIDUCIARY-ROOTED RIGHT TO EMPLOYMENT AND THEREFORE PLAINTIFF DID NOT ALLEGE OR DEMONSTRATE ANY DAMAGE TO HER SHAREHOLDING INTEREST.

Ironite Prods. Co. v. Samuels, 985 S.W.2d 858 (Mo.App. E.D. 1998)

Nickell v. Shanahan, 439 S.W.3d 223 (Mo. 2014)

Ingle v. Glamore Motor Sales, Inc. 535 N.E.2d 1311 (N.Y.App. 1989)

II. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE DEFENDANTS WERE

ENTITLED TO A JUDGMENT AS A MATTER OF LAW ON THEIR AFFIRMATIVE DEFENSE I THAT PLAINTIFF'S STATUS AS A SHAREHOLDER PROVIDES NO RIGHT TO CONTINUED EMPLOYMENT AND ON THE GROUNDS THAT PLAINTIFF'S SHAREHOLDING INTEREST DID NOT GIVE RISE TO A FIDUCIARY-BASED RIGHT TO EMPLOYMENT IF THE MISSOURI COURTS ADOPT THE MAJORITY VIEW THAT A SHAREHOLDER DOES NOT ENJOY A FIDUCIARY-ROOTED RIGHT TO EMPLOYMENT ABSENT A PROTECTABLE INVESTMENT BY THE SHAREHOLDER IN THAT PLAINTIFF DID NOT ALLEGE OR PROVE A PROTECTIBLE INVESTMENT-BASED CLAIM AND/OR THERE WAS A COMPLETE ABSENCE OF PROBATIVE FACTS TO SUPPORT THE JURY'S VERDICT UNDER THE FACTORS IDENTIFIED BY THE MAJORITY RULE IN THE *HOLLIS* DECISION—I.E., PLAINTIFF WAS NOT A FOUNDER OF PJC, PJC DID NOT TYPICALLY DISTRIBUTE ITS PROFITS IN THE FORM OF SALARIES, PLAINTIFF DID NOT RECEIVE HER SHARES AS COMPENSATION FOR SERVICES, PLAINTIFF DID NOT MAKE ANY CAPITAL CONTRIBUTION AND MADE NO INVESTMENT WHATSOEVER FOR HER STOCK—AND THEREFORE PLAINTIFF DID NOT ALLEGE OR DEMONSTRATE ANY DAMAGE TO HER SHAREHOLDING INTEREST AND THERE IS A

COMPLETE ABSENCE OF PROBATIVE FACT TO SUPPORT PLAINTIFF'S BREACH OF FIDUCIARY DUTY CLAIM.

Hollis v. Hill, 232 F.3d 460 (5th Cir. 2000)

Wilkes v. Springside Nursing Homes, Inc., 353 N.E.2d 657 (Mass. 1976)

III. THE COURT SHOULD GRANT A NEW TRIAL BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF THE SALARIES PAID TO JOHN LANGENBACH AND OTHER PJC EMPLOYEES AFTER PLAINTIFF'S TERMINATION IN THAT PLAINTIFF OFFERED NO EVIDENCE THAT THE SALARIES WERE EXCESSIVE OR UNWARRANTED AND DID NOT SEEK TO RECOUP THE SALARIES FOR THE BENEFIT OF PJC IN HER DERIVATIVE CLAIMS; THEREFORE THE EVIDENCE WAS IRRELEVANT TO ANY CLAIM OR ISSUE IN THE CASE AND ONLY SERVED TO PREJUDICE AND INFLAME THE JURY.

Pittman v. Ripley County Memorial Hosp., 318 S.W.3d 289 (Mo.App. S.D. 2010)

State v. Davis, 318 S.W.3d 618 (Mo. 2010)

IV. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF PLAINTIFF ON PLAINTIFF'S CLAIM FOR SHAREHOLDER OPPRESSION BECAUSE THE TRIAL COURT ERRONEOUSLY APPLIED THE LAW IN THAT PLAINTIFF FAILED TO PLEAD, PROVE OR REQUEST A FINDING THAT EQUITABLE RELIEF WAS NECESSARY TO PREVENT IRREPARABLE INJURY, IMMINENT DANGER OF LOSS OR A MISCARRIAGE OF JUSTICE AND, THEREFORE, PLAINTIFF FAILED TO ESTABLISH, AND THE TRIAL

COURT DID NOT FIND, A PREREQUISITE TO RELIEF FOR SHAREHOLDER OPPRESSION.

Fix v. Fix Material Co., 538 S.W.2d 351 (Mo.App. E.D. 1976)

Struckhoff v. Echo Ridge Farm, Inc., 833 S.W.2d 463 (Mo.App. E.D. 1992)

V. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF PLAINTIFF ON HER SHAREHOLDER OPPRESSION CLAIM BECAUSE THE TRIAL COURT'S RULING THAT "DEFENDANTS' TERMINATION OF JOAN ROBINSON CONSTITUTES SHAREHOLDER OPPRESSION" WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THE ENTIRE RECORD, THE EVIDENCE AND ANY REASONABLE INFERENCES DRAWN THEREFROM DOES NOT REASONABLY SUPPORT A FINDING THAT DEFENDANTS ACTED REGARDLESS OF THE CONSEQUENCES TO THE COMPANY AND IN A MANNER INCONSISTENT WITH THE COMPANY'S INTERESTS BUT RATHER ACTED SOLELY TO SUBSERVE SOME OUTSIDE PURPOSE.

Herbick v. Rand, 732 S.W.2d 232 (Mo.App. E.D. 1987)

Struckhoff v. Echo Ridge Farm, Inc., 833 S.W.2d 463 (Mo.App. E.D. 1992).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE DEFENDANTS WERE ENTITLED TO A JUDGMENT AS A MATTER OF LAW ON THEIR AFFIRMATIVE DEFENSE I THAT PLAINTIFF'S STATUS AS A SHAREHOLDER PROVIDES NO RIGHT TO CONTINUED EMPLOYMENT AND ON THE GROUNDS THAT PLAINTIFF'S SHAREHOLDING INTEREST DID NOT GIVE RISE TO A FIDUCIARY-BASED RIGHT TO EMPLOYMENT IN THAT THE MISSOURI COURTS SHOULD ADOPT THE MINORITY VIEW THAT A SHAREHOLDER DOES NOT ENJOY A FIDUCIARY-ROOTED RIGHT TO EMPLOYMENT AND THEREFORE PLAINTIFF DID NOT ALLEGE OR DEMONSTRATE ANY DAMAGE TO HER SHAREHOLDING INTEREST.

Standard of Review

The standard of review applicable to a motion notwithstanding the verdict is as follows:

> Our review of a request for judgment notwithstanding the verdict or a directed verdict is "essentially the same standard" as *de novo* review. *Ellison v. Fry*, 437 S.W.3d 762, 768 (Mo. banc 2014). We will only reverse a trial court's denial on a motion for JNOV or directed verdict if either the plaintiff has not made a submissible case or the defendant establishes an affirmative defense as a matter of law. *Id.; Poage v. Crane Co.*, 523 S.W.3d 496, 514 (Mo. App. E.D. 2017). "A motion for directed verdict or JNOV should be granted if the defendant shows that at least one element of the plaintiff's case is not supported by the evidence." *Ellison*, 437 S.W.3d at 768. "We will only reverse the jury's decision if 'there is a complete absence of probative fact to support the jury's conclusion.'" *Poage*, 523 S.W.3d at 514 (quoting *Smith v. Brown & Williamson Tobacco Corp.*, 410 S.W.3d 623, 630 (Mo. banc 2013)). "We view the evidence 'in the light most favorable to the jury's verdict, giving the plaintiff all reasonable inferences

> and disregarding all conflicting evidence and inferences.'" *Id.* at 510 (*Smith*, 410 S.W.3d at 630).

Payne v. Fiesta Corp., 543 S.W.3d 109, 126 (Mo.App. E.D. 2018). "Pure questions of law would be resolved by a directed verdict at the close of all the evidence." *Dorsch v. Family Med., Inc.*, 159 S.W.3d 424, 434 (Mo.App. W.D. 2005).

Argument

A. Plaintiff must demonstrate a "special obligation" to bring a non-derivative shareholder claim

Defendants were entitled to a directed verdict and judgment notwithstanding the verdict on their Affirmative Defense I, which stated:

> I. Counts I and II are barred because Plaintiff has no right to continued employment by PJC based upon her shareholder status and, under the law of this case, John and Judy had the power and authority to terminate her, and did so according to the Bylaws as set forth in Affirmative Defense E.

(D115, p. 7). Affirmative Defense E stated:

> E. Counts I-III are barred because John and Judy had the power and authority to terminate Plaintiff whenever in their judgment the best interests of PJC would be served by her termination and acted pursuant to that authority

(D115, p. 7).

Although the Missouri courts, like most jurisdictions, have long dealt with shareholder disputes in closely held companies, this case presents an issue of first impression—namely, whether a minority shareholder enjoys a fiduciary-rooted right to permanent employment because of her shareholding interest. This case thus presents an

opportunity for this Court to bring Missouri law in line with the majority of courts which rule that, absent circumstances not present here, a minority shareholder's alleged wrongful termination does not trigger a claim for breach of fiduciary duty against the directors who voted to terminate the shareholder. The shareholder may have other contractual or common law claims, but that is not before the Court on this appeal.

Under settled Missouri law, an individual shareholder's direct (as opposed to derivative) claims are limited to situations where a "special obligation" gives a shareholder standing to maintain an action in his or her own right. *Delahoussaye v. Newhard*, 785 S.W.2d 609, 612 (Mo.App. E.D. 1990). That is because this Court has long recognized that a director's duties run, first and foremost, to the corporation and shareholders as a whole:

> The action is derivative, rather than direct, because the fiduciary duty of a director or officer of a corporation "is generally held to be between the directors and the shareholders as a whole." **In other words, fiduciary duty obliges corporate officers and directors to act in the best interests of all shareholders on a collective basis.**

Nickell v. Shanahan, 439 S.W.3d 223, 227 (Mo. 2014). The majority's fiduciary obligations are limited in commonly understood ways: "Shareholders in control are under a fiduciary duty to refrain from using their control to obtain a *profit for themselves* at the injury or expense of the minority, or to produce corporate action of any type that *is designed* to operate unfairly to the minority." *Fix v. Fix Material Co.*, 538 S.W.2d 351, 358 (Mo.Ct.App. 1976)(emphasis added).

Plaintiff instructed the jury on one, and only one, alleged breach of duty—her termination. This is not a case where a minority shareholder alleges a longstanding or complex web of intrigue, waste or wrongdoing. Plaintiff complains only that the PJC Board of Directors should not have fired her. The question before the Court on this appeal thus is whether the directors owed a "special obligation" to *Plaintiff* when making the decision to terminate Plaintiff—i.e., whether Plaintiff enjoyed a fiduciary-rooted right to continued employment.

B. Plaintiff was an employee at will

As indicated, under the PJC Bylaws, the Board could remove officers "whenever in the judgment of the Board the best interests of the corporation shall be served thereby" (Bylaws at 8, 9). Plaintiff pleaded and argued that she was an employee at will in the context of her original wrongful termination claim. *See, e.g.*, Appellants' 3/19/19 Suggestions in Opposition to Motion to Strike, No. ED106781. Although the Missouri courts have not addressed the effect of this statute directly, numerous other courts have ruled that the language creates an employment at will relationship. For example, in *Piekarski v. Home Owners Savings Bank*, 956 F.2d 1484 (8th Cir. 1991), the Eighth Circuit remarked:

> We also conclude that the Home Owners' by-law Piekarski relies on to support his contract claim does not constitute a definite offer of "for cause" employment. This by-law provides: "Any officer may be removed by the board of directors whenever in its judgment the best interests of the association will be served thereby, but such removal, other than for cause, shall be without prejudice to the contractual rights, if any, of the person so removed." Pl.'s Ex. 29 (emphasis

> added). This simply means that if an officer has certain contract rights, and that officer is removed without cause, the officer's contract rights are not prejudiced. The by-law cannot be read as giving officers the contractual right to be fired only for cause and after notice.

Id., at 1490.

In *Swanger v. Nat'l Juvenile Law Center,* 714 S.W.2d 170 (Mo.App. E.D. 1986), the court of appeals addressed the scope of RSMo. §355.165, the former parallel provision of the Missouri not-for-profit statute that authorized directors to remove officers based on the best interest standard.[4] In *Swanger*, the company bylaws provided that the board could only terminate an officer "with cause." The court of appeals refused to enforce the bylaw because it conflicted with the unfettered discretion afforded by the statute:

> If we accepted the appellant's argument, the trier of fact and not the Center's Board of Directors would become the ultimate authority in the Center's employee-related matters. Indeed, if the Board could only dismiss the appellant "with cause," and if the appellant would then have a right to have a jury determine whether the Board was justified in removing him, the Board's broad discretion to manage the Center would be supplanted by a judicial invasion into the Center's management decisions. No longer would the Center's affairs be guided solely by the Board's judgment of what would be in the Center's best interest.

[4] Section 355.165 has since been repealed.

Id., at 172. The court of appeals concluded that the officer was "an employee at will." *Id.* *Swanger* notably highlights the conflict and near impossible task imposed upon directors who must balance employee wishes with company objectives.

Many cases have interpreted the "best interests" standard to create an employment at will. *Wilson Plywood & Door v. Comm'r,* 1980 Tax Ct. Memo LEXIS 529 *43-44 (U.S. Tax Court 1980)(best interest standard overrides Board's fiduciary duty in employment context); (*Reedy v. Azzar,* 1993 U.S.Dist. LEXIS 12043 *10 (N.D.Ill. 1993)(President "an employee at will who could be removed at any time and for any reason" under Illinois statute and bylaws using "best interests" standard); *Cooper v. Anderson-Stokes, Inc.,* 1990 Del. LEXIS 47 *4 (Del. 1990)(board could remove officer with or without cause under Delaware statute and "best interest" bylaw); *Sholer v. Security Federal Sav. & Loan Ass'n,* 736 F.Supp. 1083 (D.N.M. 1990)(officers employed "at will" under "best interest" regulation); *New Founded Indus. Missionary Baptist Ass'n v. Anderson,* 49 So.2d 342, 344 (La.Ct.App. 1950)("a court has no right or jurisdiction to review the discretionary action of the board in removing an officer, unless the contract rights of the person removed are involved" under Louisiana best interest statute); *Mannix v. Butte Water Co.,* 854 P.2d 834, 842 (Mont. 2006)(decision to remove officer a "subjective one" for the directors under best interest statute).

A company's shareholder officers can contract for something other than employment at will if they so desire, and thus create a requisite "special obligation" owed to each individual shareholder:

> 1. All the shareholders of a statutory close corporation may agree in writing **to regulate the exercise of the corporate powers and the management of the business** and affairs of the corporation or the relationship among the shareholders of the corporation.
>
> 2. An agreement authorized by this section is effective although:
>
> * * *
>
> (2) **It restricts the discretion or powers of the board of directors** or authorizes director proxies or weighted voting rights;

RSMo §351.800 (emphasis added). The PJC shareholders did not avail themselves of that statutory right.

An employee at will, subject to "narrow" exceptions not present here, "may be terminated for any reason or for no reason." *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 91 (Mo. 2010). The practical effect of the jury's verdict below was to create a new exception to the employee at will doctrine, imposing a fiduciary duty on directors' firing decisions where no other wrong is claimed. Consider the ramifications of such a rule. If upheld, corporate directors must factor in an officer's subjective wishes for continued employment when making employment decisions, an impossible conflict of interest. And where do the new individualized fiduciary duties end? Because directors are charged with company operations as a whole, must each decision address every shareholder's unique desires?

C. Under the minority view, Plaintiff had no fiduciary right to employment

The minority view properly separates an officer's shareholding rights from her employment rights. As succinctly stated by the New York Court of Appeals, "[i]t is necessary in this case to appreciate and keep distinct the duty a corporation owes to a minority shareholder *as a shareholder* from any duty it might owe to him as an employee." *Ingle v. Glamore Motor Sales, Inc.* 535 N.E.2d 1311, 1313 (N.Y.App. 1989)(emphasis in original). The plaintiff there argued that "as a minority shareholder in a close corporation [the plaintiff] should be treated as a co-owner, equivalent to a partner, whose employment rights flow from a special duty of loyalty and good faith." *Id.* The court, however, rejected the notion that the plaintiff had "a fiduciary-rooted protection against being fired." *Id. See also, St. Joseph's Regional Health Center v. Munos,* 934 S.W.2d 192, 198 (Ark. 1996)("St. Joseph's owed Dr. Munos no fiduciary duty in its contractual relationship with him").

The bright line standard frees directors to "to act in the best interests of all shareholders o*n a collective basis*" while honoring the parties' statutory right to contract for something different. *Nickell v. Shanahan,* 439 S.W.3d 223, 227 (Mo. 2014)(emphasis added). It is a fair and appropriate standard where, as here, a shareholder complains only that the directors should not have terminated her employment, instructing the jury to impose liability based on that single act. Plaintiff never complained that John paid himself (or his daughters) too much, that they did not earn their salaries or that John or Judy stole from the company. Were it otherwise, Plaintiff would have sought redress on behalf of the company. The Court should not encourage those disappointed by their termination to embroil the remaining officers and directors in expensive litigation, when

those officers and directors are charged with no malfeasance other than their disagreement over the shareholder's value to the company. In the analogous context of shareholder oppression, the Missouri courts have long held that "[u]nless extremely serious, no single act would constitute sufficient oppression to allow dissolution." *Struckhoff v. Echo Ridge Farm, Inc.*, 833 S.W.2d 463, 467 (Mo.App. E.D. 1992).

In fact, Plaintiff acknowledged that she did not tie her employment to her shareholding interest:

> THE COURT: No 4. That the Plaintiff is entitled to a salary or other distribution simply by virtue of her status as a shareholder. The Court understands that the Plaintiff is not going to be arguing that theory of the case and therefore rendering this particular position moot.

(Tr 4-5; *see also*, Tr 17).

The PJC Board *could* not and should not make employment decisions based on one shareholder's self-interested view of her value or contributions, or her individual belief that the termination would interfere with *her* individual expectations of some return on her *shareholding* interest. Such a limitation would make it impossible for the Board to manage employment decisions. Overlaying shareholders' subjective desires for lifelong employment or a particular return on their shareholding interest would force the Board to consider factors important to only *one* shareholder as opposed to the shareholders as a whole—an inquiry absolutely and diametrically opposed to the Directors' actual fiduciary obligation. Plaintiff and Judy could fire John and John and Judy could fire Plaintiff

whenever they felt it was best for the company to do so, subject to any contractual or employment law claims.[5]

II. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE DEFENDANTS WERE ENTITLED TO A JUDGMENT AS A MATTER OF LAW ON THEIR AFFIRMATIVE DEFENSE I THAT PLAINTIFF'S STATUS AS A SHAREHOLDER PROVIDES NO RIGHT TO CONTINUED EMPLOYMENT AND ON THE GROUNDS THAT PLAINTIFF'S SHAREHOLDING INTEREST DID NOT GIVE RISE TO A FIDUCIARY-BASED RIGHT TO EMPLOYMENT IF THE MISSOURI COURTS ADOPT THE MAJORITY VIEW THAT A SHAREHOLDER DOES NOT ENJOY A FIDUCIARY-ROOTED RIGHT TO EMPLOYMENT ABSENT A PROTECTABLE INVESTMENT BY THE SHAREHOLDER IN THAT PLAINTIFF DID NOT ALLEGE OR PROVE A PROTECTIBLE INVESTMENT-BASED CLAIM AND/OR THERE WAS A COMPLETE ABSENCE OF PROBATIVE FACTS TO SUPPORT THE JURY'S VERDICT UNDER THE FACTORS IDENTIFIED BY THE MAJORITY RULE IN THE *HOLLIS* DECISION—I.E., PLAINTIFF WAS NOT A FOUNDER OF PJC, PJC DID NOT TYPICALLY DISTRIBUTE ITS

[5] Even Plaintiff acknowledged that the PJC Board had discretion to terminate an officer who was not aggressively participating in the enterprise (TR 176-177).

PROFITS IN THE FORM OF SALARIES, PLAINTIFF DID NOT RECEIVE HER SHARES AS COMPENSATION FOR SERVICES, PLAINTIFF DID NOT MAKE ANY CAPITAL CONTRIBUTION AND MADE NO INVESTMENT WHATSOEVER FOR HER STOCK—AND THEREFORE PLAINTIFF DID NOT ALLEGE OR DEMONSTRATE ANY DAMAGE TO HER SHAREHOLDING INTEREST AND THERE IS A COMPLETE ABSENCE OF PROBATIVE FACT TO SUPPORT PLAINTIFF'S BREACH OF FIDUCIARY DUTY CLAIM.

Standard of Review

This Court recently summarized the standard of review applicable to a motion notwithstanding the verdict:

> Our review of a request for judgment notwithstanding the verdict or a directed verdict is "essentially the same standard" as *de novo* review. *Ellison v. Fry*, 437 S.W.3d 762, 768 (Mo. banc 2014). We will only reverse a trial court's denial on a motion for JNOV or directed verdict if either the plaintiff has not made a submissible case or the defendant establishes an affirmative defense as a matter of law. *Id.; Poage v. Crane Co.*, 523 S.W.3d 496, 514 (Mo. App. E.D. 2017). "A motion for directed verdict or JNOV should be granted if the defendant shows that at least one element of the plaintiff's case is not supported by the evidence." *Ellison*, 437 S.W.3d at 768. "We will only reverse the jury's decision if 'there is a complete absence of probative fact to support the jury's conclusion.'" *Poage*, 523 S.W.3d at 514 (quoting *Smith v. Brown & Williamson Tobacco Corp.*, 410 S.W.3d 623, 630 (Mo. banc 2013)). "We view the evidence 'in the light most favorable to the jury's verdict, giving the plaintiff all reasonable inferences

> and disregarding all conflicting evidence and inferences.'" *Id.* at 510 (*Smith*, 410 S.W.3d at 630).

Payne v. Fiesta Corp., 543 S.W.3d 109, 126 (Mo.App. E.D. 2018). "Pure questions of law would be resolved by a directed verdict at the close of all the evidence." *Dorsch v. Family Med., Inc.*, 159 S.W.3d 424, 434 (Mo.Ct.App. 2005).

Argument

Defendants were entitled to a directed verdict and judgment notwithstanding the verdict on their Affirmative Defense I even if this Court adopts the majority view of shareholder-based employment cases.

The majority of jurisdictions have eschewed a hardline rule in favor of an investment-based analysis to determine whether the termination of an at-will officer implicates the Board's fiduciary duties:

> Rather, the courts have limited relief to instances in which the shareholder has been harmed as a shareholder. **The fiduciary duty in the close corporation context, as in the context of public corporations, appropriately is viewed as a protection of the shareholder's investment**….

Hollis v. Hill, 232 F.3d 460, 470-71 (5th Cir. 2000)(emphasis added). *See also, Phillips Bros. LP v. Winstead*, 129 So. 3d 906 (Miss. 2014); *Spitzmesser v. Tate Snyder Kimsey Architects, Ltd.*, 2011 U.S. Dist. LEXIS 68696 (D. Nev. 2011). Even the investment-based majority approach begins with the premise that "shareholders do not enjoy fiduciary-rooted entitlements to their jobs. Such a result would clearly interfere with the doctrine of employment-at-will." *Hollis v. Hill*, 232 F.3d 460, 470-71 (5th Cir. 2000).

The Utah Supreme Court described the approach as follows:

> Analyzing breach of fiduciary claims in this light, courts have narrowed the potentially broad duty espoused by *Donahue* to a more investment-based analysis. *Brodie*, 857 N.E.2d at 1079 (Mass. 2006) ("A number of other jurisdictions . . . also look to shareholders' 'reasonable expectations' in determining whether to grant relief to an aggrieved minority shareholder in a close corporation."). For example, beginning again with Massachusetts, in *Wilkes v. Springside Nursing Homes, Inc*., the Massachusetts Supreme Court described the termination of an officer from the close corporation as a squeezeout that "effectively frustrate[d] the minority stockholder's purpose in entering on the corporate venture and also den[ied] him an equal return on his investment." 370 Mass. 842, 353 N.E.2d 657, 663 (Mass. 1976).

McLaughlin v. Schenk, 220 P.3d 146, 157 (Utah 2009). *See also*, *In the Matter of Kemp & Beatley, Inc.*, 473 N.E.2d 1173, 64 N.Y.2d 63, 72 (N.Y.App. 1984)("[t]he question has been resolved by considering oppressive conduct that substantially defeats the 'reasonable expectations' held by minority shareholders *in committing their capital to the particular enterprise*")(emphasis added).

The *Wilkes* decision has been a starting point for many decisions, including the oft-cited Fifth Circuit decision in *Hollis*, *supra*. *Wilkes* acknowledged that directors "must have a large measure of discretion, for example, in declaring or withholding dividends, deciding whether to merge or consolidate, establishing the salaries of corporate officers, **dismissing directors with or without cause**, and hiring and firing corporate employees." *Wilkes v. Springdale Nursing Homes, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976)(emphasis added). While the *Wilkes* court decided that the majority in fact

interfered with the minority's investment-based objectives, the context of that decision is important:

> Each of the four men invested $1,000 and subscribed to ten shares of $100 par value stock in Springside. At the time of incorporation it was understood by all of the parties that each would be a director of Springside and each would participate actively in the management and decision making involved in operating the corporation. It was, further, the understanding and intention of all the parties that, corporate resources permitting, each would receive money from the corporation in equal amounts as long as each assumed an active and ongoing responsibility for carrying a portion of the burdens necessary to operate the business.

Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 659-60 (Mass. 1976).

Those facts bear no resemblance to this case. Under those facts, the *Wilkes* court determined that, once the board identified a legitimate purpose for the termination, it was incumbent upon the shareholder "to demonstrate that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interest." *Id.* Once the shareholder did that,[6] the court should then weigh the two approaches.

The *Wilkes* court recognized that "[a] guaranty of employment with the corporation may have been one of the 'basic reason[s] why a minority owner has invested capital in the firm.'" *Wilkes*, 353 N.E.2d at 663. Thus, a termination might "effectively frustrate the minority stockholder's purposes in entering on the corporate venture and also

6 Although John and Judy articulated several reasons for their vote to terminate (*See*, P. Ex. 13 and discussion *infra* Part VII(3)), Plaintiff never articulated any alternative course of action.

deny him an equal return on his investment." *Id.* However, in *Wilkes*, the Court never had to move past the first step because "no legitimate business purpose has been suggested." *Id.*, at 664. To the contrary, "it appears that Wilkes had always accomplished his assigned share of the duties competently, and that he had never indicated an unwillingness to continue to do so." *Id.*

Relying principally upon *Wilkes*, the Fifth Circuit in *Hollis* identified the following factors to identify a fiduciary component to employment:

> To that end, courts may consider the following non-exclusive factors: whether the corporation typically distributes its profits in the form of salaries; whether the shareholder/employee owns a significant percentage of the firm's shares; whether the shareholder/employee is a founder of the business; whether the shares were received as compensation for services; whether the shareholder/employee expects the value of the shares to increase; whether the shareholder/employee has made a significant capital contribution; whether the shareholder/employee has otherwise demonstrated a reasonable expectation that the returns from the investment will be obtained through continued employment; and whether stock ownership is a requirement of employment.

Hollis, 232 F.3d at 470-71.

Plaintiff cannot demonstrate any legally cognizable injury to her *shareholding* interest:

- Plaintiff was not a founder of PJC
- Plaintiff never "invested" in or committed capital to PJC; she, like her siblings, received her stock as a gift

- Plaintiff cannot contend that her shareholding interest corresponded with a role as a PJC officer—she was her father's third choice for the position
- To the contrary, employment has never been a right attendant to a PJC shareholding interest as evidenced by Judy's relationship with the company
- PJC has never tied salaries to shareholding percentages
- Even Plaintiff did not testify to any unwritten understanding with her siblings governing continued employment

Here, John and Judy asked Respondent to retire from her role as a PJC officer to give John an opportunity to turn the business around. John and Judy anticipated that John would then step aside himself so that PJC could be passed on to the next generation of John's, Judy's, *and Respondent's* children. Respondent declined. Two years later, John and Judy asked Respondent and her son to consider expanding their work efforts to a full 40-hour work week (from their 2 hour/day – 4 days /week schedule) to try to turn around the company's rapidly deteriorating financial condition which had been exacerbated by the 2008-09 recession. They declined. Immediately upon taking over as PJC President, John launched into a 60+ hour/week schedule in an ultimately successful effort to improve PJC's financial performance.

PJC was not an investment; it was a gift from the siblings' father. Respondent presented no evidence of, for example, an "understanding and intention of all the parties that, corporate resources permitting, each would receive money from the

corporation in equal amounts as long as each assumed an active and ongoing responsibility for carrying a portion of the burdens necessary to operate the business." *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 660 (Mass. 1976).

In fact, not only was there no such agreement, but that outcome never happened. Judy held her gift as a passive investment. Plaintiff devoted 8 hours a week to the enterprise and apparently hoped to continue doing so, regardless of the consequences to PJC. Her business calendar, which was virtually blank, provided telling insight into the Board's decision to terminate her.

At most, Plaintiff proved an unspoken, personal desire to retire at age 75, regardless of her contributions to PJC. Plaintiff's wishes, no matter how deeply felt, are not actionable:

> Majority conduct should not be deemed oppressive simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled. Disappointment alone should not necessarily be equated with oppression. Rather, oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, *objectively viewed*, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture.

In the Matter of Kemp & Beatley, Inc., 473 N.E.2d 1173, 64 N.Y.2d 63, 73 (N.Y.App. 1984). In *Kemp & Beatley,* for example, the plaintiffs had invested capital in the company and the "majority shareholders had altered a long-standing policy to distribute corporate earnings *on the basis of stock ownership*." *Id.*, at 67 (emphasis added).[7]

[7] *Hollis* also suggests that Plaintiff should not be allowed to recover *both* for a breach of

Reasonable persons could not differ as to the outcome of the case under the critical elements of the *Hollis* factors. Plaintiff cannot and did not prove any reasonable expectation of continued employment *arising out of her shareholding interest* (as opposed to some type of wrongful discharge claim). This was not a situation, such as that described in *Kemp & Beatley* and other oppression cases, where Plaintiff and her siblings invested their money in PJC with the shared expectation of mutual employment as a return on their investment. Plaintiff's disappointment that the Board did not agree with her subjective hopes and desires, and her view that it was not necessary for her (or anyone else) to invest meaningful time toward the future of PJC, is not legally actionable.

III. THE COURT SHOULD GRANT A NEW TRIAL BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF THE SALARIES PAID TO JOHN LANGENBACH AND OTHER PJC EMPLOYEES AFTER PLAINTIFF'S TERMINATION IN THAT PLAINTIFF OFFERED NO EVIDENCE THAT THE SALARIES WERE EXCESSIVE OR UNWARRANTED AND DID NOT SEEK TO RECOUP THE SALARIES FOR THE BENEFIT OF PJC IN HER DERIVATIVE CLAIMS; THEREFORE THE EVIDENCE WAS IRRELEVANT TO ANY CLAIM OR ISSUE IN THE CASE AND ONLY SERVED TO PREJUDICE AND INFLAME THE JURY.

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fiduciary duty *and* for the repurchase of her stock: "The minority's shareholder interest is not injured, however, if the corporation redeems shares at a fair price or a price determined by prior contract or the shareholder is otherwise able to obtain a fair price." *Id.*, 232 F.3d at 471. Thus, if the Court affirms the trial court's award on Plaintiff's oppression claim, it should reverse the jury's verdict.

Standard of Review

The standard of review governing the erroneous admission of evidence is as follows:

> A trial court has considerable discretion in deciding whether to admit or exclude evidence at trial. We give great deference to the trial court's evidentiary rulings and will reverse the trial court's decision on the admission of evidence only if the court clearly abused its discretion. When reviewing for an "abuse of discretion" we presume the trial court's finding is correct, and reverse only when the ruling is "clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." Upon finding an abuse of discretion, this court will reverse only if the prejudice resulting from the improper admission of evidence is outcome-determinative.

Williams v. Trans States Airlines, Inc., 281 S.W.3d 854, 872 (Mo.App. E.D. 2009).

Argument

Defendants filed a motion in limine to exclude salaries and bonuses that John paid himself and his daughters after the Board terminated Plaintiff because:

> While Plaintiff mentions the salaries of John, Jessica and Alexis, and mentions raises and bonuses paid to them, Plaintiff *does not* allege that the salaries exceed industry norms (in fact testified that she had not investigated industry standards), *does not* allege that the salaries are excessive in light of the work actually performed and, most important, *does not* seek to recoup *even a portion* of the salaries for PJC in the derivative Count of her Third Amended Petition.

(D114, pp. 4-5). The Court allowed defendants a continuing objection to the introduction of the evidence (Tr 80, 119).

Evidence must be both logically and legally relevant to be admissible. *E.g.*, *Pittman v. Ripley County Memorial Hosp.*, 318 S.W.3d 289, 293-94 (Mo.App. S.D. 2010). Thus, even if evidence is logically related to the circumstances of the plaintiff's claim, the trial court must still assess its legal relevance:

> Evidence that is logically relevant is not necessarily admissible. The probative value of logically relevant evidence must be weighed against the risks it poses of unfair prejudice, cumulativeness, confusion of the issues, misleading the jury, undue delay or waste of time. Legally relevant evidence is evidence that survives this balancing and is admissible. By contrast, evidence is not legally relevant and, therefore, must be excluded if its costs outweigh its benefits.

State v. Davis, 318 S.W.3d 618, 640 (Mo. 2010)(citations omitted).

Although Plaintiff filed four versions of her Petition, all of which sought to recoup money for PJC through derivative claims, Plaintiff never challenged *any* salary as unwarranted or excessive. Likewise, although her accountant testified regarding a wide range of PJC financial issues, the accountant did not question any salary or bonus paid post-termination. To the contrary, Plaintiff acknowledged that John and his daughters were working 60 and 40 hour work weeks (as compared with 8 hour work weeks under her leadership)(Tr 146), and that they should be paid more for that effort (Tr 146). More important, she conceded:

Q: So those salaries are fair and that's why you're not asking for them to put it back in the [company], right?

A: I suppose.

(Tr 147).

No one disputed that John and his daughters—and no one else—worked at PJC following Plaintiff's termination. That was enough to make Plaintiff's point. There was no reason to also introduce their salaries and bonuses, other than to inflame the jury with the implicit suggestion that the compensation was excessive. To this end, Plaintiff devoted much of her cross-examination of John *and* Judy to the salaries and raises (Tr 208-10).

The argument was a centerpiece of Plaintiff's closing argument:

> Now, as you continue to look at those numbers the only theory that the evidence supports is that they removed her so that John could have the company, so that he could take it over and pay himself what he wanted to pay, and make all use of the available compensation that was there. We know that because that's exactly what he did. He went in and within months more than doubled his salary, jumped his daughter's salary from 50 something thousand to 75,000, new company car, et cetera, et cetera. You heard all about it.
>
> * * *
>
> Mr. Langenbach has enjoyed the use of that pool of compensation, he's been able to pay himself what he wants to pay himself, pay his daughters what he wants to pay them, provide them with employment. He's been able to pay rent at the building he owns. He's been able to do all those things with that pool of compensation that's been there. Joan has had to sit and

> think about how she's lost out these last four, almost five years. That's what she's had to think about.

(Tr 394, 398).

The "improper admission of [this] evidence [was] outcome-determinative." *Williams, supra.* The Court need look no further the impression the evidence made on *the trial court,* which devoted one quarter of its factual findings to the issue:

> 20. Following the June 2012 expulsion of Joan and her son John Robinson, John and his daughter Jessica were the only remaining PJC employees.
>
> 21. In July 2012, John increased Jessica's salary from $52,000 per year to $75,400 per year.
>
> 22. In October 2012, John increased his salary from the rate of $56,000 per year to $104,000 per year.
>
> 23. In February 2013, John had PJC buy a new company car for his use, a 2013 Ford Edge.
>
> 24. In April 2013, John hired his other daughter, Alexis, to work part-time at PJC, paying her about $600 every two (2) weeks.
>
> 25. In April 2013, John increased his salary again from $104,000 per year to about $123,500 per year.
>
> 26. In September 2013, John paid himself a $15,000 bonus.

(D140, p. 7; A 7).

The evidence was not necessary, except to inflame the jury. In other words, Plaintiff could have made her point simply by pointing out to the jury that, following her termination, John continued to employ only himself and his daughters. How much PJC

paid them was of no moment—unless it was too much, and Plaintiff conceded it was not. The evidence thus was not legally relevant. The evidence had its desired effect, even on an experienced trial judge. It is a fair assumption that the evidence had greater impact on the jury, who ultimately awarded Plaintiff $390,000 for the approximate five year period from her date of termination through trial, even though Plaintiff earned only $153,000 at PJC in the six years prior to her termination. The Court should reverse and remand for a new trial.

IV. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF PLAINTIFF ON PLAINTIFF'S CLAIM FOR SHAREHOLDER OPPRESSION BECAUSE THE TRIAL COURT ERRONEOUSLY APPLIED THE LAW IN THAT PLAINTIFF FAILED TO PLEAD, PROVE OR REQUEST A FINDING THAT EQUITABLE RELIEF WAS NECESSARY TO PREVENT IRREPARABLE INJURY, IMMINENT DANGER OF LOSS OR A MISCARRIAGE OF JUSTICE AND, THEREFORE, PLAINTIFF FAILED TO ESTABLISH, AND THE TRIAL COURT DID NOT FIND, A PREREQUISITE TO RELIEF FOR SHAREHOLDER OPPRESSION.

Standard of Review

The familiar standard of review governing court-tried cases is as follows:

> On review of a court-tried case, an appellate court will affirm the circuit court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously

> declares or applies the law. This standard of review is applied in all types of court-tried cases, regardless of the burden of proof at trial.

Nicolazzi v. Bone, 2018 Mo. App. LEXIS 1442 *10 (Mo.App. E.D. 2018). The Court reviews questions of law *de novo*. *Id.*, at n. 5.

Argument

Under Missouri law, "[d]issolution of a corporation is a drastic remedy and courts should resort to this procedure only to prevent irreparable injury, imminent danger of loss or a miscarriage of justice." *Struckhoff v. Echo Ridge Farm, Inc.*, 833 S.W.2d 463, 466 (Mo.App. 1992).

> We do not mean that a single act in breach of such duty would be sufficient "oppressive" conduct to authorize dissolution of a corporation (unless extremely serious), absent evidence of irreparable injury, imminent danger of loss or miscarriage of justice. *Jesser v. Mayfair Hotel*, 316 S.W.2d 465, 473 [9] (Mo. 1958). We do not foreclose the possibility that the "cumulative effects . . . of many acts and incidents" of misconduct might constitute sufficient evidence of oppressive conduct to compel liquidation without a showing of inevitable ruin.

Fix v. Fix Material Co., 538 S.W.2d 351, 358 (Mo.App. E.D. 1976).

This case presents a case of first impression on the following question: What is a plaintiff's burden of proof under RSMo. §351.494 where the plaintiff elects to pursue a buyout in lieu of dissolution? This is not a case where the Court, after considering the evidence, decided that a buyout was preferable to a claim for dissolution. Respondent withdrew her request for dissolution and *asked for* a buyout. Neither is this a case where the plaintiff alleges *past or ongoing* corporate waste or mismanagement.

Respondent withdrew all her derivative claims—a concession that John and Judy have not and are not causing harm to PJC.

To be sure, the Court may fashion an equitable remedy that fits the case once the plaintiff has satisfied the Court that its intervention is necessary:

> The complaining shareholder has the burden of proof to establish the requisite jurisdictional facts and the equitable grounds for dissolution…. The court is not limited to the remedy of dissolution but may consider other appropriate alternative equitable relief.

Fix, 538 S.W.2d at 357.

Plaintiff did not plead that equitable relief was necessary to protect Plaintiff from "irreparable injury, imminent danger of loss or miscarriage of justice" (D112, pp. 6-8 (Count I)). Plaintiff also did not ask for such a finding, instead directing the trial court that "[a] showing of oppressive behavior alone is sufficient to warrant relief" (D136, p. 2). The trial court concluded that Plaintiff's termination constituted oppression, citing only the general standard governing shareholder oppression from this Court's decision in *Kirchoff v. Moto, Inc.*, 482 S.W.3d 384 (Mo.App. E.D. 2016)—i.e., whether the defendants conduct was "burdensome, harsh, and wrongful conduct; it is a lack of probity and fair dealing resulting in prejudice; it is a visible departure from the standards of fair dealing and a violation of fair play**"** (D140, p. 10). As a result, the trial court erroneously applied the law when it concluded that Plaintiff had satisfied the jurisdictional pre-requisites to equitable relief because Plaintiff did not plead or request any finding that relief was necessary to protect Plaintiff from "irreparable injury, imminent danger of loss or miscarriage of justice".

V. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF PLAINTIFF ON HER SHAREHOLDER OPPRESSION CLAIM BECAUSE THE TRIAL COURT'S RULING THAT "DEFENDANTS' TERMINATION OF JOAN ROBINSON CONSTITUTES SHAREHOLDER OPPRESSION" WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THE ENTIRE RECORD, THE EVIDENCE AND ANY REASONABLE INFERENCES DRAWN THEREFROM DOES NOT REASONABLY SUPPORT A FINDING THAT DEFENDANTS ACTED REGARDLESS OF THE CONSEQUENCES TO THE COMPANY AND IN A MANNER INCONSISTENT WITH THE COMPANY'S INTERESTS BUT RATHER ACTED SOLELY TO SUBSERVE SOME OUTSIDE PURPOSE.

Standard of Review

The trial court's judgment will be affirmed unless there is no substantial evidence to support it, unless it was against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Conseco Fin. Services Corp. v. Mo. Dep't of Revenue,* 98 S.W.3d 540, 542 (Mo. 2003), citing *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 2002).

When reviewing the trial court's factual determinations:

> "A court will overturn a trial court's judgment under these fact-based standards of review only when the court has a firm belief that the judgment is wrong." *Id.* "In reviewing questions of fact, the appellate court defers to the trial court's assessment of the evidence if any facts relevant to an issue are contested."

Hopkins v. Hopkins, 449 S.W.3d 793, 802 (Mo.App. W.D. 2014). To prove that the trial court's ruling was against the weight of the evidence, the appellant must:

> (1) identify a challenged factual proposition necessary to sustain the judgment; (2) identify all of the favorable evidence supporting that position; (3) identify contrary evidence, subject to the trial court's credibility determinations, explicit or implicit; and (4) prove in light of the whole record that the supporting evidence, when considered along with the reasonable inferences drawn therefrom, is so lacking in probative value that the trier of fact could not reasonably believe the proposition.

Id.

Argument

1. Challenged Factual Proposition

To succeed on her shareholder oppression claim, Plaintiff had to prove the following:

> a case must be made out which *plainly shows* that such action is *so far opposed to the true interests of the corporation* itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, *regardless of the consequences to the company*, and in a manner inconsistent with its interests.

Herbick v. Rand, 732 S.W.2d 232, 234-35 (Mo.App. E.D. 1987), quoting *Bellows v. Porter*, 201 F.2d 429, 433-434 (8th Cir. 1953)(emphasis in original). This factual burden is heightened where, as here, Plaintiff complains of a single wrongful act: "Unless

extremely serious, no single act would constitute sufficient oppression to allow dissolution." *Struckhoff*, 833 S.W.2d at 467.

2. Favorable Evidence Supporting The Proposition

The following factual findings support Plaintiff's assertion that John and Judy "acted with an intent to subserve some outside purpose, regardless of the consequences to the company, and in a manner inconsistent with its interests":

- George appointed Plaintiff President (D140, p. 2, ¶ 7; A 2)
- The parties agreed that the Great Recession impacted PJC's business (D140, pp. 2-3, ¶ 8; A 2-3)
- By 2011, PJC was profitable again and business appeared to be improving (D140, pp. 2-3, ¶ 8; A 2-3)
- Plaintiff performed various tasks associated with her position as President, including taking orders, keeping inventory, paying bills, answering the phone and the like (D140, p. 3, ¶ 10; A 3)
- John and Judy exchanged emails critical of Plaintiff and her performance, seeking concerted action and indicating an intention to terminate Plaintiff, none of which were shared with Plaintiff (D140, pp. 4-5, ¶ 13)
- John and his daughter took notes of performance issues relating to Plaintiff (and her son) to prepare a case for dismissal that were not shared or discussed with Plaintiff (D140, p. 6, ¶ 16; A 6)

- Plaintiff did not receive any salary, severance, benefits or dividends post-termination (D140, p. 6, ¶ 17; A 6)
- After Plaintiff's termination, John and his two daughters were the only persons employed or paid by PJC (D140, p. 7, ¶¶ 20, 24; A 7)

The trial court also made a general reference to "additional evidence adduced at trial," but did not specify or otherwise identify the evidence (D140, p. 7, ¶ 27; A 7). In her proposed factual findings, Plaintiff referenced the following additional facts:

- After terminating Plaintiff, John moved PJC's headquarters from property owned by Plaintiff to property owned by John and his wife (D137, p. 6, ¶¶ 28-29)
- PJC has not paid a dividend since 2004 (D137, p. 7, ¶ 32)
- PJC's revenues declined after Plaintiff's termination (D137, p. 7, ¶ 34)

3. Evidence Contrary To The Proposition

The trial court referenced the following facts contrary to the proposition that John and Judy "acted with an intent to subserve some outside purpose, regardless of the consequences to the company, and in a manner inconsistent with its interests":

- PJC's bylaws authorize the Board to terminate an officer "whenever in the judgment to the Board the best interests of the corporation shall be served thereby" (D140, p. 2, ¶ 6; A 2)

- Between 2008 and 2012, PJC either lost money or was marginally profitable (D140, pp. 2-3, ¶ 8; A 2-3)
- John attributed PJC's poor performance to Plaintiff's poor work ethic, including her 8 hour work week, failure to keep records, and the like (D140, p. 3, ¶ 9; A 3)
- Plaintiff's business calendar contained "few, if any" business entries for a period of years (D140, p. 3, ¶ 9; A 3)
- Plaintiff visited PJC franchisees only 4 times over 25 years (D140, p. 4, ¶ 10; A 4)
- Plaintiff visited PJC's fabricator "once or twice" over 25 years (D140, p. 4, ¶ 10; A 4)
- Judy was concerned with PJC's poor performance and a general lack of professionalism (D140, p. 4, ¶ 11; A 4)
- In her private exchange of emails with John, Judy commented: "I am also thinking of extracting myself from this stock. She will take us all down with her. I am so sorry. She is not competent to run this company" (D140, p. 4, ¶ 11; A 4)
- John and Judy approached Plaintiff and asked her to retire prior to taking Board action (D140, p. 5, ¶ 14; A 5)
- Before terminating Plaintiff, John told the PJC officers and employees that "that everyone would have to devote considerably

more time to its operations, including franchisee relations, new product development and recruitment of new franchisees" (D140, p. 5, ¶ 14; A 5)

- John requested that Plaintiff adopt a licensing, rather than franchising arrangement because the franchise arrangement seemed to intimidate prospects (D140, p. 5, ¶ 15; A 5)
- John implemented the licensing arrangement after terminating Plaintiff and PJC has gained 10 new dealers (D140, p. 6, ¶ 15; A 6)
- Since terminating Plaintiff, John now works a 60 hour work week and his daughters also work full time (D140, p. 6, ¶ 18; A 6)
- Since 2012, PJC has increased its franchisees/licensees from 6 to 14 (D140, p. 6, ¶ 19; A 6)

At trial, John and Judy established the following additional facts:

- PJC's profitability in 2012 was due in part to the fact that John and Plaintiff drew nominal salaries (Tr 102)
- PJC had lost 7 franchisees (from 15 to 8) before the Great Recession (Tr 157)
- Plaintiff agreed that the PJC Board could justifiably terminate an officer who "was not aggressively participating in the business" (Tr 177)

- Plaintiff's son did not want to work 60 hours a week or travel (Tr 201)

4. The supporting evidence, when considered along with the reasonable inferences drawn therefrom, is so lacking in probative value that the trial court could not reasonably believe that John and Judy acted regardless of the consequences to PJC

This Court's decision in *Ironite Products Co. v. Samuels*, 17 S.W.3d 566 (Mo.App. E.D. 2000) provides some guidance. In *Samuels*, the Ironite Board sought a declaratory judgment that it could make salary decisions and relocate one of the shareholders. The trial court said no, but this Court reversed:

> Here, the trial court never concluded that the Board of Directors perpetrated fraud or made an irrational business judgment. A director's motivation is different than whether there was a rational basis for a decision. A poor judgment, however motivated, does not equate to fraud or irrationality. **The trial court did conclude that there was "no evidence of any real need or reason" or an "honest believe or fair motivation" for the decision to transfer Mark Samuels to St. Louis. However, this court specifically found that Clifford Goetz and Richard Fox articulated rational reasons to relocate Mark Samuels**.

Id., at 573 (emphasis added).

Here, too, the trial court's conclusion that John and Judy acted "regardless of the consequences to the company, and in a manner inconsistent with its interests" simply does not hold up to the facts. John and Judy articulated rational reasons for their decision to terminate Plaintiff—the loss of franchisees, declining revenues, Plaintiff's poor work ethic and refusal to change.

Even Plaintiff found it difficult to disagree with John and Judy's reasoning:

> Q. And again trying to set aside sort of the personal side of this, I know it's hard, but taking a step back is it possible -- can you see how a Board member of Perma-Jack might think that someone who's working two hours a day, only visited the franchisees a few times, doesn't have the technical knowledge, it didn't try to get the technical knowledge, wasn't aggressively participating in the business?
>
> A. **If all of your statements were correct, I might agree.** But I think you've lumped it into a situation where it looks like I didn't care, and I did. It was my life. So I lost my life, my livelihood and my entire family. And do I think that's fair? No.

(Tr 177-78)(emphasis added). Plaintiff did not challenge the veracity of the statements, because the predicates to John and Judy's decision (only some of which were outlined in the question), were, in fact, correct. While Plaintiff may question the "fairness" of the decision from a selfish perspective, that was not John and Judy's charge as directors of PJC: "In other words, fiduciary duty obliges corporate officers and directors to act in the best interests of all shareholders on a collective basis." *Nickell v. Shanahan*, 439 S.W.3d 223, 227 (Mo. 2014).

Moreover, Plaintiff also cannot dispute that, through hard work, longer hours and the implementation of a licensing arrangement, John has turned the company around. This is not a situation where the promise of hard work—and concern over Plaintiff's work ethic—was employed as a pretext to eliminate a minority shareholder. John did what he said he would do, what he told everyone was necessary, and that work has inured to the benefit of *all* the PJC shareholders.

CONCLUSION

For the foregoing reasons, Defendants request that the Court (i) reverse the February 13, 2018 Memorandum, Order and Judgment in Favor of Plaintiff on Shareholder Oppression (Count I) and enter judgment in favor of Defendants on this claim and (ii) reverse the January 13, 2018 Amended Judgment and enter judgment in favor of Defendants on Plaintiff's Claim for Breach of Fiduciary Duty (Count II), or, alternatively, remand for a new trial as to this claim.

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CERTIFICATE OF COMPLIANCE

The filing attorney certifies that this brief includes the information required by Rule 55.03 and complies with the requirement of Rule 84.06, including the limitations stated in Rule 84.06(c), and Local Rule 360. This brief contains 12,782 words as determined by the software application for Microsoft Word. The typeface is 13 point Times New Roman, except for larger type on cover page.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 20, 2019, a true and accurate copy of this brief was filed electronically via the Missouri Electronic Filing System which sent electronic notification of such filing to all those individuals currently registered with the court to receive electronic notices.

/s/ Paul J. Puricelli