IN THE SUPREME COURT OF MISSOURI

JOAN L. ROBINSON,	)	
	)	
Respondent/Cross-Appellant,	)	
	)	
v.	)	SC97940
	)	
JOHN F. LANGENBACH, JUDY LANFRI, and PERMA-JACK COMPANY,	)	
	)	
Appellants/Cross-Respondents.	)	

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

Circuit Court of St. Louis County; Cause No. 12SL-CC02302-01
Honorable Kristine Allen Kerr
Division 14

SUBSTITUTE BRIEF OF RESPONDENT / CROSS-APPELLANT

John G. Beseau, #56704
FOLEY & MANSFIELD, PLLP
101 S. Hanley Road, Suite 600
St. Louis, Missouri 63105
(314) 925-5700 *telephone*
(314) 925-5701 *facsimile*
jbeseau@foleymansfield.com

Attorneys for Respondent/Cross-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

1216193 v1

Statutes

Rules

Articles

JURISDICTIONAL STATEMENT

Respondent/Cross-Appellant Joan Robinson ("Respondent" or "Joan") adopts the jurisdictional statement of Appellants/Cross-Respondents John Langenbach ("John") and Judy Lanfri ("Judy") (collectively, "Appellants") and further states that Respondent timely filed her Notice of Appeal (D210-213) with the Missouri Court of Appeals, Eastern District, on May 31, 2018, appealing the Trial Court's February 13, 2018 Judgment (D140) ("Equitable Judgment") and its May 22, 2018 Order and Judgment (D148) ("Respondent's Cross-Appeal"). After the Court of Appeals issued its opinion on April 23, 2019 (the "Opinion"), Appellants and Respondent timely filed their Motions for Re-Hearing and Applications for Transfer with the Court of Appeals. Those motions and applications were denied by the Court of Appeals on May 28, 2019. Appellants and Respondent timely filed their Applications for Transfer with this Court, which were both granted on September 3, 2019.

This Court has jurisdiction of Appellant's appeal and Respondent's Cross-Appeal pursuant to Art. V, § 10 of the Missouri Constitution.

STATEMENT OF FACTS ("SOF")

1. Appellants and Respondent are Perma Jack Company's ("PJC") three Directors, each owning equal thirds of PJC's stock. (Tr. 22) Respondent's Third Amended Petition brought three claims against Appellants: Shareholder Oppression (Count I), Breach of Fiduciary Duty to Joan individually (Count II), and Breach of Fiduciary to PJC (Count III). (D112) The Trial Court directed a verdict for Appellants on Count III. (Tr. 382) Count I was tried to the Court on October 26 and November 1, 2017,[1] resulting in the Equitable Judgment (D140). Count II was tried to a jury, which found for Respondent on February 16, 2017 in the amount of $390,000. (D201) Judgment was entered on the verdict the same day (D118), and this judgment was amended on January 30, 2018 (D139). (D118 and D139 are collectively referred to herein as the "Judgment").

2. Count II was submitted to the jury on the following verdict director:

> Your verdict must be for plaintiff Joan Robinson if you believe:
>
> First, defendants John Langenbach and Judy Lanfri removed plaintiff Joan Robinson from Perma-Jack Company; and
>
> Second, defendants 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; and
>
> Third, plaintiff Joan Robinson was thereby damaged.

(D 145 p.9)

3. The first and third elements are undisputed. Appellants removed Joan from Perma-Jack Company on June 20, 2012 and she has been excluded from PJC ever since. As a result of that removal and continued exclusion, Joan was clearly damaged: she lost her management role in the company business; she lost her officer-ships (President and Treasurer); and she lost the pool of compensation available to her and John as the owner-operators of the company. Appellants appointed John as PJC's President in her place.[2]

---

[1] Bench Trial Transcript 1 (referred to herein as "Bench Tr."). "Tr." refers to the 3-volume Jury Trial Transcript.

[2] D 112 ¶12; D115 ¶12; Tr. 8, 16, 28, 36, 97, 121, 134-6, 207, 211-2.

4. Regarding the second element, the evidence showed Appellants' claimed justification for Joan's removal, that PJC would fail, was false. At the time of Joan's removal, PJC had recovered from the Great Recession, returning to pre-recession levels of revenue and profit. (Tr. 66-7; P's Ex. 26, p.8) All PJC employees were being paid at a rate of at least $50,000 per year. (Tr.66-7) PJC had $50,000 in the bank and all but minor bills paid. (Tr. 66-7)

5. The evidence showed that Joan performed her PJC duties. Joan was responsible for the administrative side of PJC's business. She paid PJC's bills, made payroll, invoiced PJC's franchisees, took their orders and phone calls.[3] She was PJC's ambassador to the community, involving herself with the Rotary Club, Chamber of Commerce, and Watson Road Business Association. From time to time, she would fill orders from PJC's franchisees. Joan also handled all the banking and communicated with PJC's accountants and attorneys. (Tr. 23-4, 32-4, 77, 122-5)

6. At trial, John attributed PJC's poor performance to loss of dealers, which he agreed was not Joan's fault. (Tr. 76-7) Appellants repeatedly advanced the proposition that attracting new dealers to PJC was the key factor for PJC's future success. (Tr. 24, 75-6, 328-9) At the same time, they agreed that recruitment of new dealers and visiting and training existing dealers was John's responsibility due to his experience with the PJC system. (Tr. 24, 75-6) Being a male-dominated field and since John was a former PJC dealer, he was best suited for this role. (Tr. 188-9)

7. Appellants' primary complaint was that Joan had not articulated a plan to deal with the fallout from the financial crisis. In truth, she and her son had undertaken targeted mailings to hundreds of possible prospects, an update of PJC's website, a search engine optimization campaign, and a change to the type of steel PJC purchased to combat increasing raw material pricing. (Tr. 193-5, 198-9) At trial, John conceded that Appellants' plans for patenting a new bracket and buying equipment to manufacture it would cost PJC money it did not have. (Tr. 74-5)

[3] The PJC phone line also forwarded to Joan's cell phone and a landline at her home. (Tr. 114, 185-6)

8. When telling everyone they needed to work harder and when asked what he expected Joan to do in that regard, John said she could "run the company, let her pay the bills and answer the phone, that would be fine." (Tr. 358-60, 112) These, obviously, are exactly the duties she had been consistently performing for the entirety of her career at PJC. (Tr. 23-4, 32-4, 77, 122-5)

9. Before removing Joan, Appellants did not notify her of their dissatisfaction with her performance or warn her that they would remove her if certain deficiencies were not cured within a reasonable time. Instead, they kept their plans secret. (Tr. 42-4, 54-5, 58-9, 133-4, 197, 203-4)

10. The evidence supported the proposition that the only reason for Joan's expulsion was to deliver the entirety of compensation that was shared between the Robinson and Langenbach families solely to the Langenbach family. In July 2012, John increased Jessica's salary from $52,000/year to $75,400/year; In October 2012, John increased his salary from $56,000/year to $104,000/year; In April 2013, John increased his salary from $104,000/year to $123,500/year; and in September 2013, John paid himself a $15,000 bonus. (Tr. 80)

11. John had PJC purchase a new company car for his use. (Tr. 80)

12. John fired Joan's son from PJC the day after Joan's expulsion. (P's Ex. 7)

13. John hired his other daughter, Alexis, to work at PJC. (Tr. 80)

14. Through rent and other payments to Avenue I, LLC ("Avenue"), John and his wife's LLC, John is having PJC pay all costs of the Hoffmeister Property (loan payments, maintenance, taxes, etc.). At closing, the Langenbachs contributed $50,000 for a property that appraised for $500,000. This property substantially increased PJC's expenses with no appreciable financial benefit to PJC. (Tr. 254-5, 344, 356; Ds' Ex. W, p.12)

15. John and Joan had intended for PJC to eventually pass to their respective children. (Tr. 126) Following the expulsion of Joan and her son, PJC will pass to Jessica only. Joan has received nothing since her expulsion, and there is no evidence that she will in the future. (Tr. 97-8; D140 ¶40)

ARGUMENT

Points I and II assert that the Trial Court erred by denying them a directed verdict and judgment notwithstanding the verdict ("JNOV") on Joan's breach of fiduciary duty claim. (Appellants' Br. 23-5). To survive these motions, plaintiff must only make a submissible case, which occurs when plaintiff has presented substantial evidence for every fact essential to liability. *Williams v. Daus*, 114 S.W.3d 351, 358-9 (Mo. Ct. App. 2003); *Blue v. Harrah's N. Kansas City*, 170 S.W.3d 466, 472 (Mo. Ct. App. 2005). Substantial evidence is that which, if true, has probative force upon the issues, from which the trier-of-fact can reasonably decide the case. *Williams*, 114 S.W.3d at 359.

Appellants correctly state the Standard of Review applicable to its first two Points Relied On. The evidence in this case is to be viewed in the light most favorable to the jury's verdict, giving Respondent the benefit of all reasonable inferences and disregarding all conflicting evidence and inferences. *Poage v. Crane Co.*, 523 S.W.3d 496, 514 (Mo. Ct. App. E.D. 2017). This Court then applies the law, *de novo*, to that version of the evidence. *Id*.

RESPONSE TO POINTS I & II

Points I and II present the Court with a false choice: the Court can follow the rule of a minority of non-Missouri jurisdictions; or the Court can adopt the majority approach of non-Missouri jurisdictions. This proposition ignores well-established Missouri law that already addresses the issue presented in this case and demonstrates that Points I and II should be denied without the need to resort to foreign jurisdictions.

Appellants begin by distorting the issue. They assert that the question for the Court to decide is "whether a minority shareholder enjoys a fiduciary-rooted right to *permanent* employment because of her shareholder status." (Appellants' Br. 28)(emphasis added.) Joan has never claimed she had a right to permanent employment with PJC. Her claim has always been that she can only be removed in good faith to serve PJC's best interests.

(E.g., Tr. 176-7; Ds' Ex. F at 9, Art. IV, §2)[4] Although they again try to peddle their tale that they removed Joan to save PJC and that PJC has blossomed as a result,[5] the Standard of Review does not permit Appellants to parse the conflicting record in their favor. See *Poage*, 523 S.W.3d at 514. Because Appellants have not challenged the sufficiency of the evidence in support of the jury's verdict, they must own all the bad facts and inferences the evidence supports, yet show they are entitled to prevail as a matter of law in spite of those facts and inferences. Appellants cannot now argue that they expelled Joan for good-faith, legitimate reasons or deny that they did so to enrich John. Rather, they must they must argue that the fiduciary duties they owed to Respondent are not implicated, as a matter of law, in their bad-faith removal of Joan from PJC for John's personal profit. For the reasons set forth below, their argument should not prevail.

Accordingly, the real question posed in this case is: Does removal of a minority shareholder from employment and all participation in the corporation in bad faith and contrary to the company's interests violate the majority's fiduciary duties to that minority shareholder? The answer is a clear "Yes."

A. Established Missouri law mandates denial of Appellants' Points I and II.

Where Appellants primarily emphasize the obligations they owe to the corporation and the shareholders collectively, a review of established Missouri law is helpful to focus on the duties at issue in this case: those owed by the controlling majority to the minority.

---

[4] This position was reflected in Joan's trial testimony in response to Appellants' questioning. Joan testified that one hypothetical ground for removing an officer under this bylaw would be if the officer was "not aggressively participating in the business," i.e., a legitimate reason for removal. (Tr. 176-7) The substantial evidence showed that Joan "aggressively" or satisfactorily participated in PJC's business. (SOF ¶¶4-9)

[5] Joan challenged both propositions at trial. Appellants' claimed justification for Joan's removal, that PJC would fail, was false. At the time of Joan's removal, PJC had recovered from the Great Recession, returning to pre-recession levels of revenue and profit. All PJC employees were being paid at a rate of at least $50,000 per year. PJC had $50,000 in the bank and all but minor bills paid. (SOF ¶4) Moreover, under John's leadership PJC revenues declined (Tr. 258-9), and they filled less orders than PJC did under Joan's leadership (Tr. 35, 275-6; P's Ex. 26 at 10), while expenses were flat or increasing (D's Ex. W at 4).

Missouri has long-recognized that majority shareholders owe a fiduciary duty to minority shareholders. *Peterson v. Cont'l Boiler Works, Inc.*, 783 S.W.2d 896, 904 (Mo. En Banc. 1990), citing *Fix v. Fix Material Co., Inc.*, 538 S.W.2d 351, 358 (Mo. Ct. App. E.D. 1976); and *Kirtz v. Grossman*, 463 S.W.2d 541, 544 (Mo. Ct. App. E.D. 1971). Officers and directors of public and closely-held corporations are fiduciaries because they occupy positions of the highest trust and confidence and are required to exercise the utmost good faith when using the powers conferred upon them to both the corporation and their shareholders." *Western Blue Print Co. v. Roberts*, 367 S.W.3d 7, 15 (Mo. En Banc. 2012), citing *Gieselmann v. Stegeman*, 443 S.W.2d 127, 136 (Mo. 1969) and *Waters v. G&B Feeds, Inc.*, 306 S.W.3d 138, 146 (Mo. Ct. App. 2010). The officers, directors, and controlling shareholders of a close corporation owe a higher degree of fiduciary duty to minority shareholders than do their counterparts at public corporations. *Forinash v. Daugherty*, 697 S.W.2d 294, 302-3 (Mo. Ct. App. 1985) (rev'd on other grounds) cited by *Waters*, 306 S.W.3d at 146-7.[6] Moreover, 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 designed to operate unfairly to the minority. *Fix*, 538 S.W.2d at 358.

To reach their desired result, Appellants attempt to warp Joan's claim into an employment case, but that is not what was submitted to the jury. (Tr. 383-6) In this maneuver, Appellants incorrectly and frequently assert that she only instructed the jury on the single fiduciary breach of her employment termination. The verdict director's plain language belies this claim:

Your verdict must be for plaintiff Joan Robinson if you believe:

> First, defendants John Langenbach and Judy Lanfri removed plaintiff Joan Robinson from Perma-Jack Company; and

---

[6] Specifically incorporating as a statutory closely-held corporation is not a necessary predicate to the application of this standard. The following factors, which are present here, are sufficient: 1) a small number of shareholders; 2) lack of a ready market for the stock; and 3) substantial participation in business operations by the stockholders. *Waters*, 306 S.W.3d at 146-7, FN12.

> Second, defendants 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; and
>
> Third, plaintiff Joan Robinson was thereby damaged.

(D 145 p.9)[7]

The first paragraph does not say, "Appellants terminated Joan's employment." It says Appellants "removed [Joan] from [PJC]." Consistent with the record, "removal" means not only did Appellants terminate her employment, they removed her from all participation in the company: they removed Joan as an officer, ended her management role in the company business, barred her from any further meaningful participation in the company in any role,[8] ended any financial return from her stock and the corporate earnings that she and John has theretofore shared, and expelled the next generation of the Robinsons from any role in the company. (SOF ¶¶3, 15) Appellants' "removal" worked a complete expulsion and exile of Joan from the company from June 20, 2012 to now which goes far beyond the mere termination of her employment, and the Standard of Review does not allow Appellants' attempt to narrow the wider scope of Joan's claim and damages.

1. <u>Joan brought a claim arising from her individual injury.</u>

Next, it is essential to appreciate that the controlling directors' fiduciary duties extend beyond the duty they owe to the corporation and collectively to the shareholders. As the cases above and those cited by Appellants make clear, in addition to derivative actions to enforce the directors' obligations to the corporation and the shareholders as a whole, Missouri law has long held that an individual shareholder may pursue an action for breach of fiduciary duty when the directors inflict a direct injury upon an individual

---

[7] Appellants made no objections to this instruction at trial or in their post-trial motions beyond their arguments that they are entitled to judgment as a matter of law. (Tr. 387-389; D119; D120.)

[8] In name only, Joan remains one of the three PJC Directors, opposite John and Judy. (Tr. 178)

shareholder. *Nickell v. Shanahan*, 439 S.W.3d 223, 227 (Mo. En Banc. 2014). The *Delahoussaye* case cited by Appellants supports this right of individual shareholders to bring claims against the controlling majority for their individual injuries. *Delahoussaye v. Newhard*, 785 S.W.2d 609, 612 (Mo. Ct. App. 1990), citing *Gieselmann*, 443 S.W.2d at 131. As mentioned above, this Court has already held that when controlling directors work an injury directly to the "individual shareholder, director, or officer, depriving him[/her] of his[/her] rights, for instance wrongfully expelling him[/her]," the wrongfully-expelled officer may bring an individual action against the wrongdoing majority. *Gieselmann*, 443 S.W.2d at 131 (emphasis added).

Obviously, Joan was the only PJC shareholder injured by her expulsion; therefore, her injury was individual, not derivative, thereby granting her the opportunity to prove that her removal breached Appellants' duty of the utmost good faith, their duty not to exact a profit for John at Joan's expense, and/or their duty not to take corporate action designed to operate unfairly to Joan. See *Western Blue*, supra. at 16; *Fix*, 538 S.W.2d at 358.

2. Appellants breached their fiduciary duty to exercise the utmost good faith when using the powers conferred upon them, and Respondent was harmed thereby.

The Court of Appeals properly began with this Court's *Western Blue* decision, which held that controlling directors are required to exercise the utmost good faith when using the powers conferred upon them. *Western Blue*, 367 S.W.3d at 15. (Opinion 8) A corporation's bylaws confer certain powers upon the directors. *Robinson v. Langenbach*, 439 S.W.3d. 853, 858 (Mo. Ct. App. E.D. 2014) ("*Robinson I*"). PJC's bylaws conferred a power upon Appellants to remove PJC officers and agents when doing so was in PJC's best interests. (Ds' Ex. F, p. 9) However, as *Western Blue* and *Gieselmann* held, this power was not unfettered. Appellants owed a duty of the utmost good faith in their removal of Joan from PJC, i.e., in exercising these powers under the bylaws.

In the face of Appellants' conflicting evidence, Joan proffered and the jury believed the substantial evidence that there was no business reason justifying her expulsion, that such removal was not done in good faith or in the interests of PJC, but rather was done for the improper purpose of enriching John and serving his self-interest. (SOF ¶¶3-15) The Trial Court and Court of Appeals correctly held that Appellants were not entitled to a directed verdict or judgment notwithstanding the verdict.

The Court of Appeals duly found that this was the proper end of their inquiry. Joan had established by substantial evidence the necessary elements of her claim under Missouri law: 1) that Appellants as directors owed Joan a fiduciary duty of the utmost good faith in exercising their powers under the bylaws to remove her from PJC (a question of law); 2) that Appellants breached this duty by removing Joan in bad faith (a question of fact); and 3) that Joan was harmed by this breach.[9] In truth, there is no further need to follow Appellants down their maze of rabbit holes contrived to bewilder for the very purpose of turning a simple, obvious truth on its head: with Judy's cooperation, John usurped Joan's share of the company, and now, they should finally have to pay for it.

If the Court chooses to continue on this multi-state adventure, the extended detour below takes us right back to the above result.

B. <u>The principle of at-will employment has nothing to do with Joan's claims for breach of fiduciary duty.</u>

Appellants claim that Joan was an at-will employee of her employer, PJC, which they insist somehow relieves them *as individuals* of their fiduciary duties and allows them to act in bad faith contrary to PJC's interests. This position is wrong for many reasons. First, Appellant's claim that Joan alleged in an abandoned pleading she was an at-will employee was never put into evidence at trial. Second, Appellants waived this argument by never making it in the Trial Court, nor including it in its Motion for Directed Verdict. Third, as detailed above, PJC's bylaws limited Appellants' power to remove Joan to those situations where they honestly believed that such removal served PJC's best interests, confirming that Joan's employment was not at-will. Fourth, the concept of at-will employment does not affect the fiduciary duties Appellants owe to Respondent.

[9] Opinion at 7, <u>citing</u> *Western Blue*, 367 S.W.3d at 15, <u>and</u> *Brown v. Brown*, 530 S.W.3d 35, 41 (Mo. Ct. App. E.D. 2017)

1. Appellants cannot use Joan's abandoned pleadings against her.

Appellants claim Joan pleaded she was an employee at-will. Appellants are apparently referring to Respondent's First Amended Petition which alleged a claim for Wrongful Termination (Count III) in addition to Joan's claims for Breach of Fiduciary Duty (Count II) and Shareholder Oppression (Count I). See Exhibit A to Appellants' 3/19/19 Memo. in Opp'n to Resp't's Mot. to Strike.[10] Appellants' claim is without merit. First, Joan is entitled to plead inconsistent and alternative claims. See Mo. R. Civ. P. 55.10. Where a pleader pleads alternatively or inconsistently as permitted by modern pleading rules, these inconsistent and alternative allegations may not be used against the pleader. *Macheca v. Fowler*, 412 S.W.2d 462, 465 (Mo. 1967).

Second, this petition is an abandoned pleading, one replaced by Joan's Third Amended Petition upon which the case was tried (D142), which did not include any claim for wrongful termination. An abandoned pleading is no longer in the case unless it is placed in evidence. *Evans v. Eno*, 903 S.W.2d 258, 260 (Mo. Ct. App. 1995). Appellants never offered this abandoned pleading into evidence. Where the proponent of an admission in a pleading fails to offer the supposed admission into evidence and read that portion of the pleading to the jury, the purported admission is not in evidence and cannot be used against the pleader. *Kelsey v. Nathey*, 869 S.W.2d 213, 217 (Mo. Ct. App. 1993).Therefore, no such pleading can be used against Joan.

2. Appellants waived any argument that Joan's purported at-will employment affects their fiduciary duties or any liability thereon.

More problematic for Appellants is the fact that they never claimed plaintiff was an at-will employee they could fire for no reason or any reason (presumably including self-interested and nefarious reasons). Appellants did not plead at-will employment as an

[10] There was never a specific allegation in that petition claiming Joan was an at-will employee.

affirmative defense (D115),[11] nor does it appear in their Motion for Directed Verdict (D200). The argument has been waived.[12]

3. PJC's bylaw allowing removal of its officers and agents when in the judgment of the directors PJC's best interests will be served thereby does not mean that Joan could be removed for any reason or no reason.

Intermingled with the above argument is Appellant's new idea that the bylaw – on which they base their affirmative defenses by the express language of their own Points I

[11] Failure to plead an affirmative defense waives the defense. *Lake Wauwanoka, Inc. v. Anton*, 277 S.W.3d 298, 300 (Mo. Ct. App. E.D. 2009).

[12] Appellants have waived any argument that the at-will employment doctrine somehow protects them and defeats Joan's claim for breach of fiduciary duty or the PJC bylaws allowed Appellants to remove Joan for any or no reason. Such arguments were never raised in Appellants' Motions for Directed Verdict. (D200; Tr. 297-8, 312-4, 381-2, 385-7) Appellants never pleaded as an affirmative defense that Respondent was an employee at-will or that she could be removed for any or no reason, and these issues were not raised at trial or tried by consent. (D115) Rule 72.01(a) mandates that a "motion for directed verdict shall state the specific grounds therefor." *Howard v. City of Kansas City*, 332 S.W.3d 772, 790 (Mo. En Banc. 2011). To preserve a question for appellate review in a jury-tried case, a motion for directed verdict must be filed at the close of all evidence and, in the event of an adverse verdict, an after-trial motion must assign as error the Trial Court's failure to have directed such a verdict. *Id.* at 790. However, a motion for directed verdict that does not comply with the requirements of Rule 72.01(a) neither presents a basis for relief in the Trial Court, nor preserves the issue in the Appellate Court. *Id*. Where an insufficient motion for directed verdict has been made, a subsequent post-verdict motion is without basis and preserves nothing for review. *Id.* In *Howard*, the defendant did not include in its motion for directed verdict its argument of the insufficiency of evidence regarding plaintiff's claimed future damages. *Id*. at 791. This Court observed that the word "future" did not appear once in defendant's motion. *Id*. Accordingly, because defendant did not make this argument in its motion for directed verdict, the issue was not preserved on appeal. *Id*. Likewise, Appellants never argued in their directed verdict motions that Respondent was an at-will employee or that PJC's Bylaws allowed Appellants to remove Joan for no reason or any reason, including those made in bad faith and contrary to PJC's interests. These concepts were never pleaded in Appellants' answer and affirmative defenses (D115), nor were they ever mentioned in their motions for directed verdict, (D200) or the proceedings thereon (Tr. 297-8, 312-4, 381-2, 385-7), or during the three (3) days of trial. (Tr. *passim*) Therefore, Appellants have failed to preserve their claim that Respondent was an employee at-will or that this status purportedly allowed them to remove her from PJC for no reason or any reason.

and II – does not mean what it says. The bylaw's clear language states when a PJC officer or agent can be removed: in the judgment of the directors that such removal serves the company's best interest. (Ds' Ex. F at 9) These express words require an honest belief that the removal serves PJC's best interests as the necessary predicate for such a removal. Appellants now insist that it really means that John and Judy can remove Joan at-will for any or no reason. In addition to not being raised in the Trial Court, this notion is not supported by the law or the record.

Regarding the record, this bylaw provided the framework for the trial and formed the verdict director for Joan's breach of fiduciary duty claim. (Tr. 28-30, 402, 410-1, 413; D145 at 9) The very affirmative defenses asserted by Appellants as the basis for their Points I and II in this appeal are solely predicated upon the contention that they followed this bylaw to the letter. (Appellants' Br. 28) The horse race at trial was fairly clear: Joan maintained that she was expelled in bad faith and against the PJC's interests to enable John's self-enrichment (SOF ¶¶4-14); whereas, Appellants pressed the opposite narrative that they had to remove Joan to save PJC and turn around its flagging business. (Appellants' Br. 15-20)[13] In the Trial Court, Appellants never maintained that they could remove Joan for no reason at all or that they could do so in bad faith and contrary to PJC's interests. It was always Appellants' position that they had a reason justifying Joan's expulsion that was protected by the business judgment rule. (Tr. 28-30, 402, 410-1, 413; D200 p.1) They cannot change tactics now and claim that the bylaw allows Joan's removal for any or no reason.

The law Appellants cite does not support their claim that the bylaw does not mean what it says and, instead, permits Joan's expulsion for any or no reason.

Appellants' reliance on *Swanger v. Nat'l Juvenile Law Ctr.* is misplaced. The *Swanger* holding centered on a bylaw that was inconsistent with the Missouri nonprofit corporation statute and held that such a bylaw was void as a result of that inconsistency.

[13] Of course, at this point in the case, the Standard of Review requires that Appellants' conflicting evidence and inferences be disregarded in the face of Respondent's substantial evidence set forth in SOF ¶¶3-15. See *Poage*, 523 S.W.3d at 514.

Swanger v. Nat'l Juvenile Law Ctr., 714 S.W.2d 170, 171-2 (Mo. Ct. App. 1986). Here, as the Court of Appeals correctly pointed out, there is no such inconsistency as the PJC bylaw at issue tracks the language of Mo. Rev. Stat. § 351.365, making *Swanger* inapplicable. (Opinion 8 at FN 5).

Another compelling reason shows that *Swanger* does not apply to this case: *Swanger* did not involve any claims for breach of fiduciary duty. *Swanger*, 714 S.W.2d at 170-1 (plaintiff only brought claims for breach of contract, declaratory judgment, and *prima facie* tort).[14] The defendant employer was a nonprofit corporation, and plaintiff was not (and could not be) a shareholder. *Id*. at 171. Unlike the case at bar, the directors of such a nonprofit corporation owed no fiduciary duties to the individual plaintiff. As the opinion notes, plaintiff was without the ability to contest the validity of the directors' removal of him as he was not within the limited scope of persons with standing to make such a claim as specifically defined by the Act. *Id*. at 172. Accordingly, the *Swanger* Court properly found that, without any duties owed between plaintiff and defendants, his causes of action were properly dismissed. *Id*. at 172-3.

Here, the situation is quite the opposite. Unlike the relationship between the *Swanger* parties, Appellants owed fiduciary duties to Joan as a matter of law. These duties and the plain language of the bylaws only allow Joan's removal when done in PJC's best interests and in harmony with Appellants' fiduciary duty of the utmost good faith. <u>See</u> *Western Blue* <u>and</u> *Gieselmann* <u>supra</u> at 16. Accordingly, *Swanger* is no help to

---

[14] The *Piekarski* case suffers from the same defect, rendering it inapplicable to this case. The plaintiff there submitted three (3) claims to the jury: breach of employment contract, retaliatory discharge, and tortious interference with contract, none of which invoke fiduciary duties. *Piekarski v. Home Owners Sav. Bank, F.S.B.*, 956 F.2d 1484, 1488 (8th Cir. 1992). Obviously, these claims are contract and employment claims, which are not at issue here. Joan did not submit contract or employment claims to the jury. Moreover, plaintiff was not a shareholder and was not owed fiduciary duties. The Court correctly held that a bylaw similar to the one at issue here did not create a *contractual right* to be fired only for cause and after notice. *Id.*at 1490. However, Joan is not claiming a contract between her and PJC. Again, this is not a claim by Joan against her former employer. This case concerns the greater duties that Judy and John owed to Joan when exercising their powers under the PJC bylaws, duties not at issue in *Piekarski*.

Appellants and underscores the different results that occur when a non-profit employer and its directors have no duty to the dismissed employee and when controlling directors owe fiduciary duties to minority shareholder-officers when deciding to remove them.

The other cases cited by Appellants are equally unavailing. Like *Swanger*, in three (3) of Appellants' cases, the plaintiff was not a shareholder and, therefore, does not make a breach of fiduciary duty claim.[15] Four (4) other cases do not involve an individual claim for breach of fiduciary duty for the plaintiff-officer's termination.[16]

The *Mannix* case supports Joan's claim and the Court of Appeals holding that the bylaw means what it says. Although the jury in that case decided the issue against him, the *Mannix* plaintiff, even though he was not a shareholder, was able to bring a claim for damages challenging his termination under Montana's best interest statute, wherein the jury was instructed to determine plaintiff's damages if they found his discharge was not, in the judgment of the Board, in the best interest of the company. *Mannix v. Butte Water Co.*, 854 P.2d 834, 846-7 (Mont. 2006).

Wilson Plywood is a lengthy U.S. Tax Court decision which devotes a paragraph or two to Texas fiduciary duty law to determine the propriety of esoteric tax liability. *Wilson Plywood and Door, Inc. v. Comm'r of Internal Revenue*, 39 T.C.M. (CCH) 1132 (U.S.T.C. 1980). Texas law is not consistent with or instructive regarding Missouri law. Unlike Missouri, Texas law takes a hostile view of fiduciary duties and shareholder oppression, making Texas law and the *Wilson Plywood* decision inapposite to this case.

[15] *Cooper v. Anderson-Stokes, Inc.*, 571 A.2d 786 (Del. 1990) (no indication that plaintiff is a shareholder in the defendant *publicly-held* corporation); *Mannix v. Butte Water Co.*, 854 P.2d 834, 838 (Mont. 1993) (a defendant was corporation's sole shareholder, i.e., plaintiff was not a shareholder); *New Founded Indus. Missionary Baptist Ass'n v. Anderson*, 49 So. 2d 342 (La. Ct. App. 1950) (non-profit with no shareholders).

[16] *Bennett v. Damascus Cmty. Bank*, 2006 WL 2458718 *1 (Md. Cir. Ct. 2006) (plaintiff made declaratory judgment claims for wrongful termination and a derivative claim on behalf of the bank); *Chrisman v. Avil's Inc.*, 80 Pa. D. & C. 395, 395-6 (Pa. Ct. C.P. Delaware Co. 1952) (plaintiff is a shareholder but does not appear to be the terminated officer); *Mosely v. De Moya*, 497 So. 2d 696, 697-8 (Fla. Dist. Ct. App. 1986) (claims for declaratory and injunctive relief); *Reedy v. Azzar*, 1993 WL 339095 *2-4 (N.D. Ill. 1993) (claims for breach of employment contract and derivative claim).

For example, the Texas Supreme Court has held that there is no fiduciary duty between directors and a minority shareholder. *Richie v. Rupe*, 443 S.W.3d 856, 890 (Tex. 2014). Clearly, this holding is directly contrary to Missouri law. *Peterson, Fix, Forinash, Waters* and *Kirtz*, supra at 16. These cases confirm that Missouri has long-recognized that majority shareholders owe a fiduciary duty to minority shareholders.

Appellants have failed to show support in the record or the law for their claim that the PJC bylaws do not require good faith or acting in PJC's best interest and allow Joan's removal for any or no reason. The Trial Court and the Court of Appeals properly concluded that Appellants' removal of Joan from PJC required good faith compliance with the PJC bylaws and properly denied Appellants' motions for directed verdict and JNOV. Points I and II should be denied.

4. At-will employment does not affect the fiduciary duties Appellants owe to Respondent.

There is simply no relationship between the concepts of fiduciary duties and at-will employment. Other Courts have conflated or confused these issues, tying Gordian knots that other Courts and scholars have tried to unravel and reconcile.[17] Missouri should add its voice to the chorus that these concepts are unrelated and distinct.

The doctrine of at-will employment is has no effect in cases for breach of fiduciary duty. At-will employment only applies to the relationship between the employer (PJC)

---

[17] For example, the *Ingle* case relied upon by Appellants claims that it is "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 him as an employee. *Ingle v. Glamore Sales, Inc.*, 535 N.E.2d 1311, 1313 (N.Y. 1989). This statement erroneously confuses the fact that the corporation does not owe a minority shareholder any duties as a shareholder – the controlling directors and shareholders do. The following are examples of some scholarly articles attempting to reconcile the notions of at-will employment and fiduciary duties. Douglas K. Moll, *Shareholder Oppression & Reasonable Expectations: Of Change, Gifts, and Inheritances in Close Corporation Disputes*, 86 Minn. L. Rev. 717 (2002) (hereafter, "Moll, *Gifts*"). Samuel E. Neschis, *Reasonable Expectations of Shareholder-Employees in Closely Held Corporations: Towards a Standard of When Termination of Employment Constitutes Shareholder Oppression*, 13 DePaul Bus. & Com. L.J. 301 (2015).

and Joan, i.e., what, if any, duties are owed by PJC to Joan. It is self-evident that Judy and John were not Joan's employers. Therefore, it is absurd for them to claim that they are relieved of their fiduciary duties or from any consequences arising from their breach thereof by the doctrine of at-will employment.

Respondent did not submit a wrongful termination claim against PJC to the jury. While assuming *arguendo* that PJC owed no duties to Joan, John and Judy absolutely did owe fiduciary duties to Joan as a matter of law. Any inability of Joan to make a claim out against PJC does not eliminate the claims she has against John and Judy for the heighted fiduciary duties that they owe her. Contrary to Appellants' assertion, Joan is not trying to create a new exception to employment at-will to bring a claim against PJC; rather, she is enforcing the long-standing, well-established fiduciary duties that controlling shareholders owe to the minority. Therefore, the concept of at-will employment is a red herring in these breach of fiduciary duty claims against parties that were not Joan's employer.

Keeping these concepts in their separate lanes allows liability for tortious acts to land where it should. In these circumstances, the employer does not owe a duty to the dismissed shareholder. Oppositely, the controlling shareholders do. They must exercise their powers in good faith and cannot deploy them for personal gain at the minority's expense or for the purpose of harming the minority. *Fix*, supra at 16. When the controlling shareholders breach these duties by expelling a shareholder, they, not the company, should bear the liability for their wrongful acts, as the company was merely the tool used Appellants used to harm Joan.[18]

This reasoning is supported by the fact that Joan's termination was only one part of Appellants' wrongful conduct. She was not only fired. She has been permanently banished from all participation and management of PJC, and the next generation of her immediate family has been likewise excluded. Moreover, no remuneration has been has been paid to Joan related to her PJC stock since her removal; whereas, John has used PJC

[18] This proposition bolsters Respondent's Point V in her Cross-Appeal, seeking relief concerning Appellants using PJC funds to pay for their defense.

for his benefit like he was its only shareholder. All of these bad-faith acts following Joan's termination were perpetrated by Appellants, not PJC. Therefore, a doctrine protecting an employer for employment decisions should not absolve the sizeable collection of Appellants' individual and wrongful acts before and after Joan's termination.

Cooke v. Fresh Express Foods Corp., Inc. is a convincing illustration of this proposition. In that case, defendants, a father and daughter, started the company. *Cooke v. Fresh Express Foods Corp., Inc.*, 7 P.3d 717, 719 (Or. Ct. App. 2000). Daughter's husband (plaintiff) joined the company several years later, with defendant-father owning 50% of the stock and plaintiff and defendant-daughter each owning 25%. *Id*. Each party was one of the company's three directors; each was an officer; and each was employed by the company. *Id*. The plaintiff and defendant-daughter separated, but the parties continued to cooperate and run the business for several years thereafter. *Id*. The relationship among the parties soured substantially when plaintiff filed for dissolution of the marriage with defendant-daughter. *Id*.

A few months after this filing, defendant-father fired plaintiff after discovering a problem with a governmental audit of the company's trucks for which plaintiff was responsible. *Id*. The parties disagreed as to the severity of this lapse, with plaintiff describing the problem as having a nominal effect and defendants construing it as an existential threat to the company. *Id.* Siding with plaintiff, the fact-finder concluded and the Court of Appeals agreed that the purpose of firing plaintiff was to exclude him from participating in the corporate business or receiving any benefits from the corporation because of the marital breakdown and ensuing animosity. *Id*. at 720. After plaintiff's expulsion, he received no money or other benefits from the company. *Id*.

The Court held that when the majority shareholders of a closely held corporation use their control over the corporation to their own advantage and exclude the minority from the benefits of participating in the corporation without a legitimate business purpose, these actions constitute a breach of their fiduciary duties of loyalty, good faith, and fair dealing. *Id.* at 721-2. Like here, the defendants claimed that they cannot be held liable for plaintiff's termination because he was an at-will employee. *Id.* at 723 FN 13. However, the Court noted that plaintiff did not challenge his expulsion as an employment law matter and, assuming that plaintiff was an at-will employee, held that the majority's ability to terminate plaintiff's employment at-will did not eliminate their liability from oppressing plaintiff as a shareholder. *Id.* at 723 FN 13.

Eventually, defendants eliminated plaintiff's directorship. *Id*. Then, they more than doubled father-defendant's salary[19] and had the company pay for their recently purchased automobiles. *Id.* Not surprisingly, defendants attempted to justify this increased salary by saying the amount was not unreasonable for a firm the size of Fresh Express. *Id*. at 724. Like the purchase of cars for defendants, substantially increasing father-defendant's salary lessened company profits and increased expenses, thereby increasing defendants' "benefits in a form that reduced the money that a nonemployee shareholder like plaintiff might otherwise claim." *Id*. at 723-4.

Ultimately, the Court concluded that the defendants consistently acted to further their individual interests, not those of the corporation, without regard for their fiduciary duties to plaintiff. *Id.* at 724. They did so knowing or intending their actions would harm plaintiff by excluding him from any benefits of his ownership of 25% of the company's stock. *Id*. The Court affirmed that a buyout remedy was appropriate, awarding *both* 25% of the fair value of the company without marketability or minority discounts <u>plus plaintiff's lost wages from termination to trial</u>. *Id*. at 725 (emphasis added).

Like the *Cooke* plaintiff, Joan was terminated from PJC and wholly excluded from all participation in the company management and operations and from all financial benefit of her stock from the date of her removal to the present. (SOF ¶15) Like the *Cooke* defendants, the fact-finder determined that Appellants' expulsion of Joan lacked a legitimate, good-faith business purpose. (SOF ¶2; D201) Also like the *Cooke* defendants,

[19] "Compensation of majority shareholders is often increased substantially soon after majority shareholders have eliminated a minority shareholder from the board of directors and have <u>*caused the corporation*</u> to discharge the shareholder as an employee." *Id*. at 722, <u>quoting</u> F. Hodge O'Neal and Robert B. Thompson, *O'Neal's Oppression of Minority Shareholders* §3:07 at 67 (2d ed. 1999) (emphasis added).

John more than doubled his salary and had PJC buy him a car, in addition to having PJC buy him a $500,000 building. (SOF ¶¶10-15) Similarly, these increased expenses diminished PJC profits while increasing John's fortunes and eliminating excess cash that Joan would have a claim on as a shareholder, all despite Appellants' claims of PJC's purportedly improved financial performance. (Appellants' Br. 20)

Of primary importance, *Cooke* provides persuasive direction on how the doctrine of at-will employment is a non-factor in deciding whether a fiduciary duty was breached in these cases. As *Cooke* acknowledged, while at-will employment may preclude a claim against the company in contract or tort, the decision to terminate plaintiff's employment is still a meaningful factor in determining whether defendants committed shareholder oppression.[20] *Cooke*, 7 P.3d at 723, FN 13. Like Joan (SOF ¶15), plaintiff was wholly excluded from all involvement in the corporation and participation in its profits from his termination and after. *Cooke*, 7 P.3d at 723. The *Cooke* Court wisely reasoned that 1) defendants' continued exclusion of plaintiff from corporate operations and profits related to plaintiff's shareholder status, not that of an employee; and 2) those actions suggest that the purpose of the termination was not to remove an unsatisfactory employee but to exclude plaintiff from corporate participation. *Id*. This reasoning is equally applicable to Joan's situation. Appellants' expulsion and continued exclusion of Joan from PJC in every respect demonstrates, not only the injury to Joan as a shareholder, but that Appellants' purpose was to exile her from corporate participation – a direct injury to her shareholding interest – especially given that Appellants' basis for expulsion was found to be specious. As in *Cooke*, after they fired Joan as an PJC employee, Appellants tried to fire her as a shareholder. See *Id.*

Other Courts have recognized the disconnect between the concepts of at-will employment and fiduciary duties. In *Mink*, the plaintiff was terminated from his

[20] As in Missouri case law, actions for shareholder oppression and breach of fiduciary duty are essentially interchangeable concepts in Oregon. Compare *Cooke*, 7 P.3d at 721 and *Fix*, 538 S.W.2d at 358 (oppressive conduct by those in control of a corporation is analyzed in terms of the fiduciary duties owed by majority shareholders to the minority).

employment by the defendant controlling shareholder to enable defendant to pay himself more money out of the corporation. *W&W Equip. Co. v. Mink*, 568 N.E.2d 564, 573 (Ind. Ct. App. 1991). The defendants unsuccessfully argued that termination of plaintiff's at-will employment precluded a finding that they breached their fiduciary duty. *Id.* at 574. The Court recognized that a controlling shareholder's fiduciary duty owed to the minority is in a completely separate lane from whatever duty an employer owes an employee and pointed out that plaintiff was not suing for and the Trial Court did not grant judgment for wrongful termination. *Id.* The Court upheld the finding of a breach of fiduciary duty because of defendants' dishonesty with plaintiff in terminating his employment and that this termination was part of an overall scheme to get the money he wanted out of the company. *Id.*

Still other Courts have reasonably decided to expressly exclude at-will employment principles from employment decisions in a close corporation when a controlling majority terminates a minority shareholder, simply holding that shareholder-employees in a close corporation are not at-will employees. These Courts hold that the fiduciary duties that shareholders owe each other require that removal of a minority shareholder-employee be based on legitimate business reasons. *Gigax v. Repka*, 615 N.E.2d 644, 650 (Ohio Ct. App. 1992); *Nelson v. Martin*, 1996 WL 47137, *3-4 (Tenn. Ct. App. 1996); *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976).

As shown by the foregoing, Appellant's insistence that Joan was an at-will PJC employee completely misses the point. That doctrine simply has no effect on the issue of whether John and Judy breached their fiduciary duties when they removed Joan from all involvement in PJC. Points I and II should be denied.

5. <u>One more thing…</u>

Contrary to Appellants' hyperbole, Respondent does not claim that the controlling directors "must factor in an officer's subjective wishes for continued employment," or "subjective desires for lifelong employment," regardless of the circumstances. (Appellants' Br. 33, 35) As stated in the preceding paragraphs, Joan's position is and always has been that stated in the bylaws: Appellants can remove her in good faith and in PJC's best interests.[21] Quite the opposite to Appellants' assertion, compliance with such a requirement is really not that hard: a shareholder-employee can only be removed for a legitimate business reason, and after that removal, the minority should be allowed to participate, at least monetarily, in the corporation. E.g., *Gimple v. Bolstien*, 477 N.Y.S.2d 1014, 1020-1 (N.Y. App. Div. 1984) (holding that the majority shareholders properly terminated employment of plaintiff minority shareholder for embezzlement, as plaintiff had no reasonable expectation in continued employment after such conduct, yet finding that plaintiff was still thereafter entitled to his share of company profits).

Appellants' problem is that the evidence in the light most favorable to the verdict, which they cannot now contravene, established that Joan was eliminated to allow John to loot PJC for his exclusive benefit, i.e., in bad faith and contrary to PJC's best interests. This inexorable conclusion keeps Appellants outside of the bylaws' authority to remove Joan. Accordingly, Appellants cannot meet the premise of their affirmative defenses, and their Motions for directed verdict and judgment notwithstanding the verdict were properly denied. Points I and II should be denied.

C. Response to Point I: Missouri would not follow the minority rule.

1. This case is readily distinguishable from the cases following the minority rule.

Appellants' Point I urges the Court to adopt the minority rule espoused in the *Ingle* and *Munos* cases. *Ingle* and *Munos* each hold that no fiduciary duty was breached by the majority where a contract between the parties expressly permitted termination of the minority's employment without cause. *Ingle v. Glamore Sales, Inc.*, 535 N.E.2d 1311,

---

[21] Similarly, Joan does not claim a right to be employed by PJC solely because she is a shareholder. (Appellants' Br. 35) Again, her position is that her existing PJC rights (officer-ship, employment, management authority, etc.) cannot be stripped away by Appellants, unless they act in good faith and in accordance with PJC's bylaws. Appellants fail to appreciate the important distinction between a person's claim that their status *entitles* them to something they do not have and the *deprivation* of something they already have. See *Gieselmann*, supra at 18 (holding that an officer deprived of his/her rights by wrongful expulsion has an individual action against the controlling person(s) who expelled him/her).

1312 and 1314 (N.Y. 1989);[22] *St. Joseph's Reg'l Health Ctr. v. Munos*, 934 S.W.2d 192, 193-4 and 197 (Ark. 1996). Cases like *Ingle* and *Munos* typically involve written employment agreements or buy-sell agreements wherein the minority shareholder specifically agrees that he/she can be terminated without cause. Neschis, 13 DePaul Bus. & Com. L.J. at 313-4. Such cases essentially hold that a shareholder signing such an agreement demonstrates their understanding that they do not have a reasonable expectation of continued employment. *Id.* at 314-5. Because there is no such contract in this case, the sharp distinctions between the case at bar and Appellants' authority for Point I should cause this Point to be denied.

Moreover, unlike the minority parties in *Ingle* and *Munos*, Respondent could not be removed from her corporate offices without cause, as she enjoyed the protection of PJC's bylaws. The jury specifically found and the substantial evidence supported the conclusion that no such cause existed. This reason also differentiates the authority for Appellants' Point I and independently justifies its denial.

Even in the absence of such a bylaw, the Business Judgment Rule demonstrates the submissibility of Joan's claim. The Business Judgment Rule only protects corporate directors and officers from liability for *intra vires* decisions within their authority and made in good faith, uninfluenced by any consideration other than the honest belief the action promotes the corporation's best interest. *Sutherland v. Sutherland*, 348 S.W3d 84, 89-90 (Mo. Ct. App. 2011). PJC's bylaw and the verdict director submitting this case to the jury are simply another expression of this Rule. While the Business Judgment Rule protects the majority's judgment (and Courts will not interfere therewith) if that judgment is exercised <u>fairly and honestly</u>, the converse of that proposition is also true: the Courts

[22] Additional circumstances not present in Joan's case were at work in *Ingle*. The *Ingle* plaintiff's shareholder agreement contained a provision allowing the majority to buy back plaintiff's stock if he ceased being an employee for any reason. *Ingle*, 535 N.E.2d at 1312. The majority exercised its rights under this provision and repurchased plaintiff's stock after his termination. *Id.* The plaintiff accepted the payment without reservation. *Id.* at 1314. Accordingly, plaintiff was not a shareholder when he brought his lawsuit, which also prevented him from asserting a claim under New York's shareholder oppression statute.

will interfere with the majority's decision when their judgment is exercised in an unfair and dishonest manner. *Saigh ex rel. Anheuser-Busch, Inc. v. Busch*, 396 S.W.2d 9, 22 (Mo. Ct. App. 1965).

Appellants advocate for a rule where majority shareholders can expel minority shareholders for any or no reason. The holding sought by Appellants calls for an unwarranted and unique expansion of the Business Judgment Rule, allowing protection not only for fair and honest judgments but extending that shield to arbitrary and capricious judgments (i.e., dismissals for no reason) and even bad faith judgments at odds with the company's interests (i.e., dismissals for any reason). In truth, since such a rule would blindly affirm any majority decision, Appellants' proffered rule is not a "Business Judgment" Rule at all. It is a rule of absolute immunity and impunity for the controlling majority, sanctioning any judgment regardless of whether it advances a business or personal profiteering.

While such a rule may be "freeing" for the controlling directors (Appellants' Br. 34), it would also allow a controlling majority to act out of self-interest, rather than that of the company, and usurp all of the financial benefit of the minority's stock for him/herself. There is no policy that would justify a controlling shareholder's avarice as a permissible motive, and it would directly contradict the law set forth in *Gieselmann*, *Western Blue*, *Nickell*, and *Fix* et al., <u>supra</u> at 16, expressly protecting the rights of an individual shareholders from the majority's abuse of their powers.

2. <u>The rule of a minority of jurisdictions contradicts Missouri law.</u>

Weighing the merits of the minority and majority rules of other jurisdictions, Missouri law more closely aligns with the majority rule espoused in *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657 (Mass. 1976) (discussed below in D).[23] The *Wilkes* Court confirmed that stockholders in a close corporation owe one another substantially the same fiduciary duty in the enterprise's operation that partners owe each other, i.e., a duty of the utmost good faith and loyalty. *Wilkes*, 353 N.E.2d at 661-2.

[23] The well-reasoned, two-judge dissent in *Ingle* urged New York's highest Court to follow *Wilkes*. *Ingle*, 535 N.E.2d at 1314-22.

Missouri adheres to the same standard. Corporate directors and officers owe a fiduciary duty to exercise the utmost good faith in the discharge of their duties. *Robinson I*, 439 S.W.3d at 860. The officers and directors of a closely-held corporation owe a higher degree of fiduciary duty to shareholders than their counterparts at public corporations. *Id*., citing *Waters*, infra.[24] Conversely, *Ingle* states that duties of good faith and loyalty that exist between partners do not exist between shareholders. *Ingle*, 535 N.E.2d at 1314. As the minority rule conflicts with Missouri law, the Court should not follow it and deny Point I.

D. Response to Point II: the majority rule supports Judgment in Joan's favor.

Appellants' Point II endeavors to show that Respondent's case does not fit within the rule applied by a majority of non-Missouri Courts. Those Courts hold that termination of the minority shareholder's at-will employment implicates the fiduciary duty owed by the majority to the minority. E.g., *W&W Equipment Co., Inc. v. Mink*, 568 N.E.2d 564, 574 (Ct. App. Ind. 1991); *Hollis v. Hill*, 232 F.3d 460, 470-1 (5th Cir. 2000). Some Courts express this rule by finding a controlling shareholder liable when the minority's reasonable expectations were defeated by their termination. *Hollis*, 232 F.3d at 465 FN8.

Applying the majority rule, Appellants would still be liable to Joan under the circumstances of this case, even if she was an employee at-will. *Wilkes* was one of the first cases pronouncing this rule.

The *Wilkes* plaintiff was one of four equal shareholders. *Wilkes*, 353 N.E.2d at 659-60. The corporation's earnings were distributed to the shareholders through their salaries. *Id*. at 661, FN13. Bad blood developed between plaintiff and the other three defendant shareholders. *Id*. at 660. The defendant majority expelled plaintiff from the corporation as an officer and employee, cutting off all money plaintiff received from the corporation. *Id*. at 661. The *Wilkes* Court reiterated that, like Missouri, stockholders in a close corporation owe one another substantially the same fiduciary duty in the

---

[24] See FN 6 supra at 16.

enterprise's operation that partners owe to one another, i.e., a duty of the utmost good faith and loyalty. *Id* at 661-2; *Robinson I*, 439 S.W.3d at 860.

One of the most pernicious forms of the majority freeze-out of a minority shareholder is the deprivation of employment and corporate office. *Wilkes*, 353 N.E.2d at 662. The minority shareholder typically depends on his/her salary as the principal return on investment since earnings of a close corporation are distributed in major part in salaries, bonuses, and retirement benefits. *Id*. Such majority action restricts the minority's participation in management of the enterprise by removing the minority from corporate office. *Id*. By terminating a minority stockholder's employment or severing them from a position as an officer or director, the majority effectively frustrates the minority stockholder's purposes in entering the corporate venture and also denies him/her an equal return on investment. *Id*. at 662-3.

Wilkes prescribed a procedure for a minority shareholder's lawsuit against the majority alleging a breach of the strict good-faith duty. *Id*. at 663. In response to this charge, it must be asked whether the majority can demonstrate a legitimate business purpose for its actions. *Id*. If the majority advances a sufficient legitimate purpose, the minority may reply by showing that the same objective could have been achieved through an alternative course less harmful to the minority's interests. *Id*.

The *Wilkes* fact-finder concluded there was no legitimate business purpose for terminating plaintiff as an employee, officer, or director. *Id*. at 663-4. Therefore, defendants were liable to plaintiff for breaching their fiduciary duty, without having to consider whether some lesser course could achieve the majority's purpose. *Id*. at 664. Likewise, supported by substantial evidence, the fact-finder here reached the same result: there was no legitimate business purpose for Appellants' expulsion of Joan, as it was not done in the good-faith belief that doing so served PJC's best interests. (D145 p.9; D201; SOF¶¶3-15) As in *Wilkes*, Appellants breached their fiduciary duty of good faith by terminating Plaintiff's employment.

The *Wilkes* Court found several factors instructive to the duty owed by the majority to plaintiff: 1) at a minimum, the duty of utmost good faith and loyalty would demand that the majority consider that their action was in disregard of a long-standing policy of the stockholders that each would be a director of the corporation and that employment with the corporation would go hand in hand with stock ownership; 2) plaintiff was one of the four originators of the enterprise; 3) plaintiff, like the others, had invested his capital and time for more than fifteen years with the expectation that he would continue to participate in corporate decisions; and 4) most important was the fact that cutting off plaintiff's salary, together with the fact that the corporation never declared a dividend, assured that plaintiff would receive no return at all from the corporation. *Id*.

These factors are at play here. The most important factor certainly is: PJC has not paid a dividend since 2004 and cutting off Joan's salary and related compensation assured that she would get no return from PJC. (Tr. 97-8, 134-6) The substantial evidence proved a long-standing policy that John and Joan would share the responsibility of managing and operating PJC and would similarly share a pool of compensation between them, which allowed them salary and benefits and to employ their respective children. (Tr. 119-21, 124-5, 134-5, 211-2) Joan, like John, invested nearly thirty years of her life in PJC and reasonably expected that her role as a PJC officer and employee would continue. (Tr. 119-21, 124-5, 134-6; SOF¶9) It would have also been reasonable for Joan to expect that she could only be removed by Appellants if they followed PJC's bylaws and/or only if they had a legitimate business reason to do so. (E.g., see FN 4 supra at 15.)

Factors cited by Appellants from *Hollis* buttress Respondent's argument: whether salaries were tied to profits; whether the shareholder-employee owns a significant percentage of stock; whether the shareholder otherwise demonstrated a reasonable expectation that the returns from the stock will be obtained through continued employment, etc. *Hollis*, 232 F.3d at 471. It is important to note that these are non-exclusive factors to be considered, not a list of elements where a showing of each is required. See *Id.*

John and Joan's salaries were tied to PJC's profits. As Appellants mention, when PJC's business was enduring the recession and later recovering from it, John and Joan were not paid any salary, so their respective children could be paid. (Appellants' Br. 15

FN2, 18; Tr. 25, 329) However, when PJC returned to profitability, salaries exceeding $50,000/year resumed for Joan and John in 2012. (Tr. 66-7).

As a one-third owner, Joan owns a significant percentage of PJC's stock. (Tr. 22, 30, 121); see *Hollis*, 232 F.3d at 471. No dividends were paid to PJC's shareholders since 2004. (Tr. 211-2) Joan and John distributed PJC's earnings to themselves and their respective children through employment benefits: salary, cell phone, company car, insurance benefits, etc. (Tr. 124-5, 134-6, 211-2) This evidence supports Joan's reasonable expectation that PJC earnings were obtained through continued employment. Moreover, there is no intent for PJC to be sold, meaning that like the *Hollis* plaintiff, the value of Joan's shares was tied directly to her employment. (Tr. 97-8, 136); See *Id.*

An Indiana Court employed the *Wilkes* holding in *Mink*. In that case, the plaintiff minority shareholder was terminated as an officer, director, and employee. *Mink*, 568 N.E.2d at 569. The majority defendants argued that termination of the minority's employment was not a breach of fiduciary duty because the minority was an employee at-will. *Id*. at 574. The Court disagreed, finding that the bases for the minority's termination were dubiously founded, like here, where the minority's termination was not for a legitimate purpose but rather a scheme to allow one of the members of the majority to receive more money. *Id*. The corporation never issued a dividend, and the company's earnings were distributed through salaries. *Id*. Applying *Mink*, Appellants likewise breached their fiduciary duty when they terminated Respondent's employment.

In determining whether termination of a minority shareholder's employment is actionable, some Courts look to whether the terminated shareholder's expectation of continued employment was reasonable under the circumstances. Neschis,13 DePaul Bus. & Com. L.J. at 312. Appellants' Point II attempts two distinctions of Joan's claim from this reasonable expectations test: first, Joan inherited her PJC stock; and second, Judy has not received anything since 2004 from her PJC stock and was never employed by PJC. It is important to remember that the several factors discussed in *Wilkes* and *Hollis* are non-exclusive; therefore, neither issue pressed by Appellants is determinative. See *Hollis*, 232 F.3d at 471. Nevertheless, Appellants' arguments miss the mark for several reasons.

Respondent and Appellants ALL inherited their shares. (Tr. 30) This factor does not and should not advantage or disadvantage any party. Appellants cannot claim some superior right to the action they took because Joan was not an original investor when they, too, were not original investors. Further, there is no reason, from a policy perspective, why first-generation owners of a family/close corporation should have fiduciary duties from which later generations become untethered. Given the prevalence of squabbles between succeeding generations in family businesses, the continuity of fiduciary responsibilities is essential to keep everyone playing fair.

While some Courts look to the interconnectedness of the shareholder's employment and his/her investment, investment does not necessarily mean payment of capital into the corporation. Neschis,13 DePaul Bus. & Com. L.J. at 312-3. Service to the corporation has been considered as an investment entitling the shareholder to a reasonable expectation of continued employment. *Id.* at 313 and note 85, citing *Gunzberg v. Art-Lloyd Metal Prod. Corp.*, 492 N.YS.2d 83, 85-6 (N.Y. App. Div. 1985) (terminated minority shareholders who received their shares by gift from their father had a reasonable expectation of continued employment as a result of their long history of taking an active part in running the corporation). Overall, Joan worked for and helmed PJC for nearly thirty years. She started there with her father in the late Seventies and was gifted her stock in the late Eighties. (Tr. 119-21)

Additionally, in gifted stock situations, a prolific commentator on this subject matter has proposed that the investment of the founder/transferor be assumed to pass to the transferee. Moll, *Gifts*, 86 Minn. L. Rev. at 777. Professor Moll reasons that upon sale or dissolution of the company, it is the owner of the shares (i.e., the transferee) that has the only rightful claim to the capital represented by the stock certificates, not the party that made the capital contribution. *Id.* This concept makes a good deal of sense here where both Appellants and Respondent were gifted their stock.

As many cases hold, the minority's acquisition of their stock by gift or inheritance does not undermine their claim. Moll, 86 Minn. L. Rev. at 774-7; Neschis,13 DePaul Bus. & Com. L.J. at 308-9, citing *Meiselman v. Meiselman*, 307 S.E.2d 551, 558-9 (N.C.

1983); *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 670-1 (Iowa 2013); *Hendrick v. Hendrick*, 755 A.2d 784, 791 (R.I. 2000).[25]

Judy's choice of a passive role in PJC does not undercut Joan's claims. Joan and John were equal owner-operators of PJC. Judy, as she concedes, was a non-entity in PJC for its entire existence—until she was called into service as John's "ace-in-the-hole" to deliver PJC to him. (P's Ex. 9, p.2; Tr. 22, 211-2, 214) John and Joan managed PJC as officers and were compensated equally as such for nearly thirty years. (Tr. 119-21, 124-5, 134-6, 211-2) No dividends were paid to PJC shareholders since 2004. (Tr. 211-2) Since then, all PJC earnings were distributed by and to John and Joan as they saw fit with Judy's agreement or at least acquiescence. (Tr. 211-2) That is the factual underpinning of Joan's reasonable expectations: that she and John were equal owner-operators of PJC, both entitled to manage PJC, to employment and benefits, and to PJC's earnings to distribute to themselves and their children through employment. This was the agreement, express or implied, between Appellants and Respondent: Judy retains a passive and indifferent investment in PJC; whereas, Joan and John operate and manage the company and split the earnings between the two of them. (Tr. 211-2) See *Meiselman*, 307 S.E.2d at 563.

No credence should be given to Appellants' argument that Judy's perennial indifference to PJC should now somehow be a factor militating against Joan's claims. Judy CHOSE her non-involvement with PJC. Oppositely, Joan was *deprived* of her purposeful engagement with PJC—a role central to her identity that consumed her entire working life. The logical and moral bankruptcy of the notion that Judy's non-participation shields Appellants from the consequences of the injury they perpetrated on

[25] In these and other cases cited in this brief and elsewhere, there is a wide variety of acts perpetrated by the controlling majority leading to a finding of a fiduciary breach, which the defendant-majority in such actions will try to parse for the purpose of distinguishing those similar cases. When these attempted distinctions inevitably come, an observation of the *Cooke* Court is important to recall. "Because many things can constitute oppressive conduct or a breach of fiduciary duty, what matters is not so much matching specific facts of one case to those of another but examining the pattern and intent of the majority and the effect on the minority of those specific facts." *Cooke*, 7 P.3d at 722.

Joan for no legitimate, good-faith reason collapses under the weight of its own temerity and unfairness. If this Court finds that Missouri should adopt the majority rule, the substantial evidence establishes that Appellants' fiduciary duty extends to their termination of Joan's employment, and that duty was breached. Point II should be denied.

RESPONSE TO POINT III

Point III complains that evidence of the salaries John paid himself and his daughters after Respondent's expulsion was irrelevant and prejudicial, and admission of that evidence entitles them to a new trial.

Appellants correctly state the standard of this Court's review. The Trial Court's judgment can only be reversed for the admission of this evidence if the Trial Court clearly abused its discretion <u>and</u> if the prejudice resulting from the improper admission of evidence was outcome-determinative. *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 872 (Mo. Ct. App. E.D. 2009) (emphasis added). The Trial Court has considerable discretion in admitting or excluding evidence at trial. *Trans States*, 281 S.W.3d at 872. Reviewing Courts greatly defer to those rulings. *Id*. When reviewing for an abuse of discretion, the Court presumes the Trial Court was correct and reverses only when the ruling is clearly against the logic of the circumstances before the Trial Court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Id*. If reasonable persons can differ about the propriety of the Trial Court's action, the Trial Court did not abuse its discretion. *Id*.

This evidence was relevant. Relevant evidence is any evidence that tends to prove or disprove a fact-in-issue or corroborates other relevant evidence. *Brandt v. Csaki*, 937 S.W.2d 268, 275 (Mo. Ct. App. 1996).

The relevant issue is not whether the compensation was excessive. The relevant issue was that before her removal, John and Joan shared all compensation, and Appellants' desire for John to have it all was the real, illegitimate motivation for Respondent's removal. As the Court of Appeals remarked in its opinion when this case was before it in 2014:

> The parties do not dispute the basic facts – who took what actions. The real dispute lies in *the reason for the action or whether those actions were justified*, and thus whether the actions constitute shareholder oppression or breach of the [Appellants'] fiduciary duty as directors and controlling shareholders and whether the business judgment rule protects [Appellants]. Virtually every action taken by either Robinson or Langenbach is portrayed as appropriate and justified by the one who took the action and as *sinister and self-serving* by the other side. *Robinson I*, 439 S.W.3d at 860 (emphasis added).

Respondent's theory was: John's removal of Joan was for his own personal profit and that of his daughters, not for PJC's best interests. Accordingly, evidence that John acted to obtain this personal profit after Joan's removal is highly relevant, as he was certainly under no obligation to increase his or his daughters' compensation. Moreover, this limitation would have unduly prejudiced Joan by preventing her from proving that John personally profited at her expense.

Limiting the evidence as Appellants urge to merely telling the jury that PJC only employed John and his daughters after Joan's removal would have misled the jury. Doing so would have given them the false impression that John judiciously and selflessly kept his and Jessica's compensation where it was before Joan's removal.

One could argue that keeping John and Jessica's compensation where it was, the abundance of which Appellants have highlighted (Tr. 23-4), would leave PJC with more cash to pursue avenues advantageous to PJC's business or to distribute *equally* to its shareholders. The parties argued competing inferences from these post-removal compensation increases. Appellants argued that the increases were justified by John and Jessica's increased work schedule. (Tr. 412) Respondent argued that the increases were the product of John's plan to take PJC for himself by ejecting Respondent without a legitimate business reason. (Tr. 393-4) The jury was properly allowed to hear the evidence and decide which inference to accept.

As the Court of Appeals recognized in *Robinson I*, Appellants' motivation for Joan's removal together with the fact that said removal served no legitimate PJC purpose were the key, relevant issues for the jury to decide. *Robinson I*, supra at 41. After Joan's removal, when faced with the choice of whether to benefit PJC, PJC's shareholders, or himself, John chose to benefit himself at nearly every opportunity. Evidence of these choices, including bonuses and salary increases, "tends to prove [this] fact-in-issue," making this evidence relevant. *Brandt*, supra at 40. Admitting this relevant evidence was not an abuse of discretion. Point III should be denied.

Appellants incorrectly argue that Joan failed to meet her burden to prove post-removal compensation was excessive. That burden to show the reasonableness/excessiveness of compensation set by John for himself belonged to Appellants—a burden that they failed to carry or the jury disbelieved. See *Fendelman v. Fenco Handbag Mfg. Co.*, 482 S.W.2d 461, 463 (Mo. En Banc. 1972). The glaring flaw of this argument is that one cannot prove compensation to be reasonable or otherwise if salaries and their increases are kept from the jury.

Appellants agreed to this notion by offering evidence and argument on the topic themselves. Appellants had their expert, Michael Prost, CPA, present an analysis that the post-expulsion salaries were reasonable. Their Exhibit W shows the PJC payroll from 2011 to 2015, as it climbs annually from $104,000 in 2011 to $221,725 in 2015. (Ds' Ex. W p.7) It was specifically pointed out that the cumulative PJC payroll in 2014 ($219,300) was less than the average salary for someone in John's position that same year ($224,613). (Tr. 241-2) Appellants' put this evidence to use in closing argument, urging the jury that these salaries were both the just result and validating evidence of the supposed toil exerted by John and Jessica at PJC, week-in-week-out. (Tr. 412) The jury was free to believe or disbelieve all, part, or none of the evidence, even if unimpeached or uncontradicted. *McGhee v. Schreiber Foods, Inc.*, 502 S.W.3d 658, 670-1 (Mo. Ct. App. 2016).

Appellants made the strategic decision to use the evidence of post-expulsion salaries themselves to argue that such compensation was not evidence of John's overreach but rather was the deserved reward of hard work. A party cannot complain about evidence introduced by their counsel. *State v. Eighinger*, 931 S.W.2d 835, 838

(Mo. Ct. App. 1996); *Bergman v. Service Caster & Truck Co.*, 249 S.W. 973, 976 (Mo. Ct. App. 1923) (no claim of error could be made by admitting plaintiff's evidence that defendant cancelled an order where defendant subsequently introduced its letter showing this cancellation and testimony of its reasons for writing that letter). After the Trial Court declined Appellants' efforts to exclude the complained-of evidence, "[i]t was a reasonable trial strategy for [Appellants'] counsel to attempt to take the sting out of" that evidence by admitting it in evidence himself. *Eighinger*, 931 S.W.2d at 838. Preparing their expert for this purpose, Appellants anticipated and made the tactical choice to try to use this evidence against Respondent, turning her sword against her. Just because that gambit was unsuccessful does not make the evidence unduly prejudicial, let alone outcome-determinative. Point III should be denied. Moreover, at the Court of Appeals correctly noted in its *Robinson II* opinion, "simply because this evidence supported [Respondent's] case does not make it prejudicial." (Opinion 12)

Appellants further argue this evidence "inflamed" the jury. Joan's expert testified that he calculated her damages to be $570,000. (Tr. 284-5) While they argued to the jury that the opinion was deliberately inflated (Tr. 412), Appellants did not challenge its legal sufficiency (another strategic decision likely made to enable the foregoing "deliberate inflation" argument). (Tr. 231-2, 270) It can hardly be said that the jury was "inflamed" when they awarded two-thirds of the amount requested of them.

Because post-expulsion compensation was logically and legally relevant to Joan's claim, Appellants bore the burden to show the reasonableness of such compensation, or Appellants offered evidence and argument on the subject themselves, admission of such evidence was not error. Point III should be denied.

RESPONSE TO POINT IV

Point IV claims that the Trial Court misapplied the law in its judgment for Respondent finding Appellants committed shareholder oppression and granting equitable relief. The error asserted by Appellants is that a supposedly necessary predicate for such relief was lacking. Appellants are incorrect because they urge the application of the wrong legal threshold for equitable relief for shareholder oppression, and Respondent made legally sufficient case to warrant such relief.

Appellants state "[u]nder 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. Ct. App. E.D. 1992). This statement is inapposite to the claim made by Respondent. She did not request dissolution of PJC. In fact, she asked the Court not to dissolve PJC but rather grant less extreme equitable remedies.[26] (D137 p.13 ¶J; D136 pp.4-14) Reading further in *Struckhoff*, the Court recognized that even if dissolution would be inappropriate, other equitable relief is still available.[27] This clearly means that relief for shareholder oppression is still available even if the more extreme, last resort of dissolution is not warranted. That clarity should result in a quick denial of Point IV.

A Court of equity is to take jurisdiction of the cause once the requisite showing is made and then exercise its discretion in granting or refusing equitable relief. *Id.* at 466. With a showing of oppression, Section 351.494(2)(b) provides the Court with such a basis for jurisdiction. *Id.* at 466-7 (to determine whether the elements of equitable jurisdiction have been met, the Court looks to jurisdictional bases provided by Section 351.494, including deadlock or oppression). To obtain relief, Respondent did not need to plead, prove, or request a finding to meet a requirement for dissolution.[28] She only needed to show the jurisdictional predicate of oppression, which she did as follows.

[26] While Appellants opposed Respondent's shareholder oppression claim, they agreed that if the Court found them liable on this claim, a buyout was the proper remedy. (D131 at 12-4)

[27] "Even assuming plaintiff was entitled to some equitable relief, dissolution of the corporation was not the sole remedy available to the trial court. Section 351.494 is permissive in nature and a finding of jurisdiction under the statute does not mandate dissolution of the corporation." *Struckhoff*, 833 S.W.2d at 466.

[28] Even still, Respondent's Third Amended Petition did plead sufficient ultimate facts supporting irreparable injury and/or miscarriage of justice. (D142 ¶¶1-52)

Shareholder oppression derives from Section 351.494 RSMo., which provides:

> The circuit court may dissolve a corporation:
>
> …
>
> (2) In a proceeding by a shareholder if it is established that:
>
> …
>
> (b) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent.

It is well-established that a showing of oppressive behavior alone is sufficient to warrant relief. *Waters*, 306 S.W.3d at 147; *Fix*, 538 S.W.2d at 357-8; *Kirtz v. Grossman*, 463 S.W.2d 541, 544-5 (Mo. App. 1971) (emphasis added). The *Fix* case lists an array of different remedies. *Id.* at 357, FN3. Just some of those remedies are: an order to the corporation or the majority shareholders to purchase the minority shares at a specified formula or price determined by the Court to be fair, the payment of a dividend, and/or damages. *Id.*

Shareholder oppression suggests 1) burdensome, harsh, and wrongful conduct; 2) a lack of probity and fair dealing in the company's affairs to the prejudice of some of its members; or 3) a visible departure from the standards of fair dealing and a violation of fair play on which every shareholder is entitled to rely when entrusting her money to a company. *Kirchoff v. Moto, Inc.*, 482 S.W.3d 384, 387 (Mo. Ct. App. E.D. 2016).[29] Allegations of oppressive conduct are analyzed in terms of fiduciary duties owed by directors and controlling shareholders to minority shareholders. *Kirtz*, 463 S.W.2d at 544.

The substantial evidence showed and the Trial Court properly found that Respondent proved her claim of shareholder oppression sufficient to warrant equitable

---

[29] Appellants *now* claim that proof sufficient for corporate dissolution is necessary to allow any relief for oppression and fault the Trial Court for following the above standard for finding oppression cited in *Kirchoff* above. (Appellants' Br. 51) However, in their proposed judgment and brief in support for determination of Count I, they urged the Trial Court to use definition of oppression from *Kirchoff*. (D131 pp.8-9; D132 p.7) A party may not invite error and then complain on appeal that the error invited was in fact made. *Pierson v. Kirkpatrick*, 357 S.W.3d 293, 299 (Mo. Ct. App. 2012).

relief. As two of three PJC Directors, Appellants were acting in concert and were in control of PJC at all times relevant in this matter. (D140 p.11 ¶¶40-41). PJC's Bylaws provide that the action of a majority of the Directors is an act of the Board of Directors. (D140 ¶6; Ds' Ex. F p.7).

Because this control carries the power to destroy or impair the interests of minority owners, the law imposes equitable limitations on the rights of dominant shareholders to act in their own self-interest. *Fix*, 538 S.W.2d at 358. Controlling shareholders 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. *Id*. When a shareholder exercises absolute de facto control over a corporation, such actual dominion carries with it a fiduciary responsibility. *Whale Art Co., Inc. v. Docter*, 743 S.W.2d 511, 514 (Mo. App. E.D. 1987).

In *Whale Art*, the dominant and minority shareholders were the only employees of the company. *Whale Art*, 743 S.W.2d at 513. The minority shareholder oversaw manufacturing operations, and the dominant shareholder handled corporate accounting. *Id*. The dominant shareholder stockpiled earnings rather than paying the minority shareholder money due to him, yet paid himself a salary. *Id*. at 514. The dominant shareholder paid a cooperating shareholder rent for a building that largely went unused. *Id*. at 514-5. The Court found these actions to be oppressive, even justifying dissolution because they effectively cut the minority shareholder out of the corporation's business and profits. *Id.* at 512. If such acts were allowed to continue, all corporate assets would end up in the controlling shareholders' hands, with nothing for the minority shareholder. *Id.* at 515.

Here in this case, Appellants conduct rises to that of the *Whale Art* defendants, which that Court found met the higher bar warranting dissolution of the corporation. Appellants used their control of PJC to expel Joan and her son, cut her off from PJC business and profits, place all of the previously-shared PJC compensation into John's hands, with nothing for Joan, contrary to good faith and the interests of PJC. If such acts are allowed to continue, all financial benefits of PJC will be in John's possession (if they are not already). Joan has not received any benefit from her shares from her 2012 expulsion to the present; whereas, John and his immediate family have exclusively reaped all of PJC's fruits. While it was not necessary to meet the standard for dissolution urged by Appellants, their complete decimation of Joan's participation in and management of PJC and her share of PJC earnings, John's looting of PJC, and the *fait accompli* that nothing will change without Court intervention, demonstrated "irreparable injury, imminent danger of loss, or a miscarriage of justice." In any event, Joan made a sufficient showing of shareholder oppression per Section 351.494 to invoke the Trial Court's equitable jurisdiction and warrant relief. (D140 ¶¶40-41). Respondent sufficiently proved shareholder oppression, and the Trial Court properly applied the law in so finding. Point IV should be denied.

RESPONSE TO POINT V

Point V argues that the Trial Court's judgment finding shareholder oppression was against the weight of the evidence.

Appellate Courts act with caution in exercising the power to set aside a judgment on the ground that it is against the weight of the evidence. *Ivie v. Smith*, 439 S.W.3d 189, 205 (Mo. En Banc. 2014). A claim that the judgment is against the weight of the evidence presupposes that there is sufficient evidence to support the judgment. *Id*. In other words, "weight of the evidence" denotes an appellate test of how much persuasive value evidence has, not just whether sufficient evidence exists that tends to prove a necessary fact. *Id*. at 206. The against-the-weight-of-the-evidence standard serves only as a check on the Trial Court's potential abuse of power in weighing the evidence, and an Appellate Court will reverse only in rare cases when it has a firm belief that the judgment is wrong. *Id*.

In such a challenge, this Court defers to the Trial Court's findings of fact when the factual issues are contested and when the facts as found by the Trial Court depend on credibility determinations. *Id*. A Trial Court's judgment is against the weight of the evidence only if the Trial Court could not have reasonably found from the record at trial the existence of a fact that is necessary to sustain the judgment. *Id*. When the evidence poses two reasonable but different conclusions, Appellate Courts must defer to the Trial Court's assessment of that evidence. *Id.* The Trial Court is free to believe all, some, or none of the evidence offered to prove a contested fact, and the Appellate Court will not re-find facts based on credibility determinations through its own perspective. This includes facts expressly found in the written judgment or necessarily deemed found in accordance with the result reached. *Id.*

In these cases with both legal and equitable claims, the claims at law are to be tried to a jury, with the Trial Court reserving for its own determination only equitable claims and defenses, which it should decide consistently with the factual findings made by the jury. See *State ex rel. Leonardi v. Sherry*, 137 S.W.3d 462, 473 (Mo. En Banc. 2004).

Some districts of the Court of Appeals have adopted a framework for an against-the-weight-of-the-evidence challenge. *Hopkins v. Hopkins*, 449 S.W.3d 793, 802 (Mo. Ct. App. 2014); *O'Gorman & Sandroni, P.C. v. Dodson*, 478 S.W.3d 539, 544 (Mo. Ct. App. E.D. 2015). It does not appear that this Court has embraced this formula; therefore, in Part A, Respondent will follow the *Ivie* analysis, and Part B will follow the *Hopkins* rubric.

A. The Trial Court's judgment finding shareholder oppression is not against the weight of the evidence under the *Ivie* case.

The analysis of the Court of Appeals in *Robinson II* is spot-on. Appellants have claimed that their removal of Joan was not done regardless of the interests of PJC. (Appellants' Br. 53), citing *Herbik v. Rand*, 732 S.W.2d 232, 234-5 (Mo. Ct. App. E.D. 1987).[30] The Court of Appeals properly pointed out that this "ends justify the means" argument is not dispositive. (Opinion 16-7)

[30] *Herbik* is not germane to this case for several reasons. Appellants' quote therefrom is essentially an overcooked recitation of the Business Judgment Rule that the *Herbik* Court quoted from an Eighth Circuit opinion (*Bellows v. Porter*, 201 F.2d 429, 433-4 (8th Cir. 1953)), which was a quote from a New York case (*Gamble v. Queens County Water Co.*,

Fix and other cases make it clear that allegations of oppressive conduct are analyzed in terms of fiduciary duties owed by controlling directors and shareholders to minority shareholders. *Fix*, 538 S.W.2d at 357-8; *Kirchoff*, 482 S.W.3d at 840; *Whale Art*, 743 S.W.2d at 514. In addition to serving the company's interests, controlling shareholders 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 designed to operate unfairly to the minority. *Fix*, 538 S.W.2d at 358.

The evidence on the record showed that the Trial Court reached the reasonable conclusion that Appellants breached the one or both of the foregoing fiduciary duties. Appellants used their control of PJC to expel Joan (SOF ¶3), cut her off from PJC profits (SOF ¶15), and put all compensation into John's control (SOF ¶¶10-15), leaving Joan with unmarketable shares (Tr. 136). Appellants did not attempt to discuss these actions in advance with Joan, give her any warning, or attempt to negotiate a buyout or other accommodation; rather, Appellants coordinated between themselves and concealed their plans from Respondent. (SOF ¶¶9, 15) The foregoing led the Trial Court to conclude that Appellants' did not act in good faith, thereby obviating their reliance on the Business Judgment Rule, which requires good faith. (D140 ¶¶40-1), <u>citing</u> *Sutherland*, 348 S.W.3d at 89-90 <u>and</u> *Robinson I*, 439 S.W.3d at 860.

Because the reasonable conclusions of the Trial Court counter the conclusions asserted by Appellants, Point V should be denied. When the evidence poses two reasonable but different conclusions, Appellate Courts must defer to the Trial Court's assessment of that evidence. *Ivie*, 439 S.W.3d at 206. Because the Trial Court reasonably found from the record at trial the existence of a fact that is necessary to sustain the

---

25 N.E. 201, 202 (N.Y. 1890). Missouri's version of the Business Judgment Rule is set forth above in *Sutherland*, <u>supra</u> at 32. Moreover, there was no allegation of bad faith in *Herbik*. There, the claimed oppressive act was that the majority voted to issue and sell more stock to its existing shareholders to raise needed capital. *Herbik*, 732 S.W.2d at 233. There was no dispute that the company was in immediate need of capital to survive, nor was there evidence that the minority would be unable to purchase their pro rata amount of stock at the sale. *Id*. at 235. There was no evidence of the majority's bad faith or acting in self-interest. *Id.*

judgment, that judgment is not against the weight of the evidence, and Point V should be denied. See *Id.*

B. Point V should also be denied under the formula employed by some Districts of the Court of Appeals.

The case cited by Appellants states that a Court will overturn a Trial Court's judgment under this fact-based standard only when the Court has a firm belief that the judgment is wrong. *Hopkins* 449 S.W.3d at 802, citing *Sauvain v. Acceptance Indem. Ins. Co.*, 437 S.W.3d 296, 302 (Mo. Ct. App. 2014). Reviewing these 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. *Sauvain*, 437 S.W.3d at 303. A party can contest the evidence in many ways, including arguing the meaning of evidence. *Id*. The Trial Court is free to disbelieve any, all, or none of the evidence, and the Appellate Court's role is not to re-evaluate the evidence through its own perspective. *Id*. Accordingly, the Court reviews the evidence in the light most favorable to the judgment, accepts that favorable evidence as true, and disregards any contradictory evidence. *Id*. The Trial Court's judgment is presumed valid, and it is Appellants' burden to demonstrate its incorrectness. *Id*. All factual issues upon which the Trial Court does not make specific findings are presumed to have been made in accordance with the result reached. Rule 73.01(c).

By making an against-the-weight-of-the-evidence argument, Appellants concede there is substantial evidence in the record supporting the Trial Court's judgment. *Id.* at 304; *O'Gorman & Sandroni, P.C. v. Dodson*, 478 S.W.3d 539, 544 (Mo. Ct. App. E.D. 2015).

To make this argument, Appellants 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. *Hopkins*, 449 S.W.3d at 802.

The existence of substantial evidence in the record supporting Appellants' conclusion is insufficient to prevail on this ground. *Sauvain*, 437 S.W.3d at 306. Appellants must show that the evidence *only* supports their conclusion. *Id*. (emphasis in original).

In *Hopkins*, the appellant failed to identify a factual finding necessary to sustain the judgment. *Hopkins*, 449 S.W.3d at 802. Appellants have similarly failed in this respect. Instead of stating a specific fact upon which the Trial Court's judgment hinges, they repeat a vague proposition of law:

> Where such action is within corporate powers, a case must be made out which plainly shows that the 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 intent to subserve some outside purpose, regardless of the consequences to the company, and in a manner inconsistent with its interests." Citing *Herbik v. Rand*, 732 S.W.2d 232, 234-5 (Mo. Ct. App. E.D. 1987).[31]

Like the appellants in *Hopkins* and *O'Gorman*, Appellants have utterly failed to identify a *factual* finding necessary to sustain the judgment. *Hopkins*, 449 S.W.3d at 802; *O'Gorman*, 478 S.W.3d at 544. Where the appellant fails to follow the prescribed framework, the appellant's argument is analytically useless and provides no support for his/her challenge. *O'Gorman*, 478 S.W.3d at 544.

Appellants also failed to properly follow Step 2, requiring the identification of all favorable evidence submitted during the trial that would support the challenged factual finding. *Id.* (emphasis added). Appellants omitted the following evidence favorable to the Trial Court's finding.

A. PJC revenues in 2012 had returned to pre-recession levels. (Tr. 67; A03¶8)

B. Joan and John had resumed receiving salaries in January 2012, each being paid at the rate of $56,000 per year. (Tr. 67; P's Ex. 1, pp.2,6)

[31] See FN 30 supra.

C. John Robinson and Jessica each continued to be paid at the rate of $52,000 per year. (Tr. 67; P's Ex. 1, pp.3,5)

D. At the time of Joan's removal, PJC had $50,000 in its bank account with all but nominal bills paid, which Appellants specifically recognized in their May 14, 2012 email, aware of PJC's sound financial condition. (Tr. 66-7; P's Ex. 9, p.4; A05¶13(c))

E. Appellants knew before Joan bought the Watson Property they would be moving PJC elsewhere. They did not inform Joan of this material fact before closing, and they both received $225,000 from that sale. (Tr. 58-63)

F. John's bonus and salary increases for himself and Jessica. (Tr. 80; D140 ¶¶21-2,25-6; SOF¶10)

G. John had PJC purchase a new company car for his use. (Tr. 80; D140 ¶23)

H. John fired Joan's son from PJC. (P's Ex. 7; D140 ¶17)

I. John hired his other daughter, Alexis, at PJC. (Tr. 80; D140 ¶24)

J. Through rent and other payments to Avenue, John is having PJC pay all costs of the Hoffmeister Property (purchase, maintenance, taxes, etc.), essentially buying it for the Langenbachs. At closing, the Langenbachs contributed $50,000 for a property that appraised for $500,000. This property substantially increased PJC's expenses with no appreciable financial benefit to PJC. (SOF¶14; Bench Tr. 18-20, 113-4)

K. While PJC revenues after John took over were flat or declining, he increased expenses. (Bench Tr. 18-20; P's Ex. 29, pp.23-4)

L. Appellants cut the Robinsons out of PJC's next generations. (SOF¶15)

Like *Hopkins*, Appellants improperly focus their 3rd Step on <u>contested</u> evidence contrary to the Trial Court's judgment, which the Trial Court resolved in favor of Joan, explicitly or implicitly, and to which this Court defers. *Hopkins*, 449 S.W.3d at 802-3.

<u>Appellants' Assertion</u>	<u>Joan's Contesting Evidence</u>
PJC's bylaws authorize the Board to	1. The jury and Trial Court found

terminate an officer "whenever in the judgment of the Board the best interests of the corporation shall be served thereby.	Appellants did not believe in good faith that Joan's removal was in PJC's best interests. (D145 p.9; D201; D140 ¶41)
Between 2008 and 2012, PJC either lost money or was marginally profitable.	2. See A-D above.
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.	3. See SOF¶¶4-8.
Plaintiff's business calendar contained few if any business entries for a period of years.	4. See SOF¶¶4-8.
Plaintiff visited PJC franchisees on 4 times over 25 years.	5. See SOF¶¶4-8. While John's responsibility was to visit existing dealers, Joan maintained communication with them, getting to know them on a personal level. (Tr. 123)
Plaintiff visited PJC's fabricator once or twice over 25 years.	6. See 3-5 above.
Judy was concerned with PJC's poor performance and a general lack of professionalism.	7. The Great Recession was difficult for all businesses. (Tr. 20, 40; D140 ¶8) When Judy broached issues regarding lack of professionalism to Joan, Joan corrected those problems. (Tr. 217; D140 ¶11) See A-D above.
In her private exchange of emails with John, Judy commented: "I am thinking of extracting myself from this stock. She will take us all down with her. I am so sorry.	8. John's response correctly states they were not personally liable. (P's Ex. 9 p.2) See A-D above.

She is not competent to run this company."	
Appellants approached Plaintiff and asked her to retire prior to taking Board action.	9. John asked Joan in 2010 to retire on the condition that he would groom John Robinson and Jessica to take over PJC and would retire himself, passing PJC to them within a few years. However, the document John prepared to accomplish this only provided for Joan's resignation. (Tr. 130-1,166-7) Appellants did not warn Joan or provide her an opportunity to cure claimed deficiencies before her removal. (SOF¶9) Instead, they kept their plans secret, having decided to remove Joan, despite PJC's improved financial performance. See A-D above. (Tr. 42-4, 54-5, 58-9, 133-4, 197, 203-4; D140 ¶¶13-4,16-7, 40)
Before terminating Plaintiff, John told the PJC officers and employees "that everyone would have to devote more time to its operations, including franchisee relations, new product development and recruitment of new franchisees.	10. See 9 above and SOF¶¶4-8.
John requested that Plaintiff adopt a licensing, rather than franchising arrangement because the franchise arrangement seemed to intimidate prospects.	11. This was in 2010. (Tr. 222) See 9 above. John did not follow through on the licensing agreement. (D140 ¶15) If Appellants deemed a licensing arrangement important, they could have insisted upon the same and implemented it, as they were

	in control of PJC. (Tr. 30; D140 ¶6) Appellants could have warned Joan before her 2012 removal that failure to do so could result in her removal or other Board action. (SOF¶9; D140 ¶¶14,16-7, 40)
John implemented the licensing arrangement after terminating Plaintiff and PJC has gained 10 new dealers.	12. See 11 above. Revenues have declined under John's direction. (Tr. 258-9) Those licensees are not productive. PJC's revenue still comes the same top dealers as it did in 2012 and before. (Tr. 349-51; P's Ex. 26, p.9)
Since terminating Plaintiff, John now a 60-hour work week and his daughter work full time.	13. Revenues have declined under John's direction. (See 12) PJC fills less orders under John's direction, with supposedly more than 100 hours of labor per week than PJC did in 2012 (and before) with 32 hours of labor per week. (Tr. 35, 275-6; P's Ex. 26 p.10)
Since 2012, PJC has increased its franchisees / licensees from 6 to 14.	14. See 11-12 above.
PJC's profitability in 2012 was due in part to the fact that John and Plaintiff drew nominal salaries.	15. See A-D above.
PJC had lost 7 franchisees (from 15 to 8) before the Great Recession.	16. John testified that these lost franchisees were not Joan's fault. Recruitment of dealers was John's responsibility. (SOF¶6)
Plaintiff agreed that the PJC Board could justifiably terminate an officer who "was	17. Joan performed her duties at all times and met John's expectations of her efforts.

not aggressively participating in the business."	(SOF¶¶4-8)
Plaintiff's son did not want to work 60 hours a week and travel.	18. Any lack of desire by John Robinson expressed in 2010 to work 60 hours per week and travel would not justify Joan's unwarned expulsion in 2012. (Tr. 200-1)

As shown, Appellants' contrary evidence is contested. See *Sauvain*, 437 S.W.3d at 305-6. Because it is contested, none of the contrary evidence proffered by Appellants moves the needle in their against-the-weight-of-the-evidence argument, as the Court defers to the Trial Court's explicit and implicit determinations on those issues. *Id.* at 303.

Instead, evidence presented to the Trial Court supports its finding of shareholder oppression. Appellants discussed certain business ideas with Joan in 2010 and claim that nothing was done to advance those ideas, but all parties agree that no notice was given to Joan warning of her potential removal unless certain actions were taken. Appellants were in control of PJC. Had they wanted a certain business plan executed, they could have insisted upon the same, with John implementing it himself or informing Joan that she was to do so or be subject to certain consequences. Instead, Appellants decided to secretly plot Joan's expulsion and John's takeover for his exclusive benefit.

Appellants' actions beget the logical inference that they did not want to fix any of PJC's perceived problems. They wanted to accumulate enough "evidence" to purportedly justify Joan's removal. Had their intentions been pure, they could have acted out in the open to make whatever ostensible improvements to PJC. One only has to conspire in the shadows when acting in bad faith. Then, PJC's business recovered, and with that, whatever shred of a plausible business purpose for Joan's removal disappeared, yet Appellants continued with their plan.

The kind of action they chose, expelling Joan and her son, is revealing of their true purposes. If Appellants had any commitment to the long-standing policy of John and Joan as joint owner-operators of PJC to which their respective children would succeed, there was no requirement or evidence that this evisceration was necessary or justified. During the relevant period (in and around 2010), after adequate warning, Appellants could have switched John and Joan's roles: John as President and Joan as Vice-President. Rather, they chose the harshest and most burdensome option.

There was also no requirement for John to take all financial benefits of PJC, without distributing a cent to any other shareholder. His use of every opportunity to his enrichment confirms the true and only purpose of Appellants' actions: allowing John's use of PJC as if he was its sole shareholder. But for Court intercession, this would not have changed.

At every turn, Appellants opted for burdensome, harsh, and wrongful conduct. Their concealment is the benchmark for a lack of probity and fair dealing in the company's affairs to Joan's prejudice or a visible departure from the standards of fair dealing and a violation of fair play. See *Robinson I*, 439 S.W.3d at 859-60. As in *Whale Art*, Appellants effectively cut the minority shareholder out of the business and profits of the corporation. See *Whale Art*, 743 S.W.2d at 512. If allowed to continue, all PJC assets are or would end up in John's hands with nothing for Joan. See *Id.* at 515. Appellants have not shown that the *only* conclusion from the evidence is one in their favor. *Sauvain*, 437 S.W.3d at 306 (emphasis in original). Quite the opposite, the evidence firmly supports the Trial Court's finding of shareholder oppression, and Point V should be denied.

CONCLUSION

The Court should deny Points I-V, affirm the Judgment on Count II, and affirm the Trial Court's finding of shareholder oppression in Count I.

RESPONDENT'S CROSS-APPEAL

STATEMENT OF FACTS

In its February 13, 2018 Equitable Judgment finding shareholder oppression, the Trial Court ordered Appellants to purchase Joan's PJC stock for $59,000. (D140 p.12) This price was calculated by Appellants' expert, based on his valuation of PJC as of September 30, 2012, which the Court found to be the value of Joan's stock at her expulsion on June 20, 2012. (D140 pp.9, 12; Ds' Ex. 10-26 B, p.4) This price includes a 15% minority discount plus a 10% marketability discount. Per Appellants' expert, the undiscounted value of Joan's stock as of that date was $77,724. (Ds' Ex. 10-26 B, p.4) Excluding discounts, Appellants' expert valued Joan's stock as of June 30, 2017 at $119,010. (Ds' Ex. 10-26A p.5) Respondent's expert found Joan's stock to have a fair value of $197,222 as of that date. (P's Ex. 29 p.3)

As of October 25, 2017, PJC had paid $131,040.37 for defense of Appellants in this case while not paying anything to Joan since her 2012 expulsion. (D128 ¶¶1-2) Joan has paid her own attorney's fees and costs in excess of $100,000. (Bench Tr. 67-8)

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN APPLYING A MARKETABILITY DISCOUNT TO THE PURCHASE PRICE FOR RESPONDENT'S STOCK BECAUSE DOING SO ERRONEOUSLY APPLIED OR DECLARED THE LAW, AS THIS DISCOUNT IS INCOMPATIBLE WITH THE "FAIR VALUE" STANDARD APPLICABLE TO SHAREHOLDER OPPRESSION CLAMS, IN THAT THIS DISCOUNT REWARDS OPPRESSIVE DOMINANT SHAREHOLDERS AT THE EXPENSE OF MINORITY SHAREHOLDERS, AND THE MARKET CONSIDERATIONS NORMALLY JUSTIFYING SUCH DISCOUNTS ARE NON-EXISTENT HERE.

Swope v. Siegel-Robert, Inc., 243 F.3d 486 (8th Cir. 2001).

Kirtz v. Grossman, 463 S.W.2d 541 (Mo. App. 1971).

II. THE TRIAL COURT ERRED IN APPLYING A MINORITY DISCOUNT TO THE PURCHASE PRICE FOR RESPONDENT'S STOCK BECAUSE DOING SO ERRONEOUSLY APPLIED OR DECLARED THE LAW, AS THIS DISCOUNT IS INCOMPATIBLE WITH THE "FAIR VALUE" STANDARD APPLICABLE TO SHAREHOLDER OPPRESSION CLAMS, IN THAT THIS DISCOUNT REWARDS OPPRESSIVE DOMINANT SHAREHOLDERS AT THE EXPENSE OF MINORITY SHAREHOLDERS, AND THE MARKET CONSIDERATIONS NORMALLY JUSTIFYING SUCH DISCOUNTS ARE NON-EXISTENT HERE.

Swope v. Siegel-Robert, Inc., 243 F.3d 486 (8th Cir. 2001).

Kirtz v. Grossman, 463 S.W.2d 541 (Mo. App. 1971).

III. THE TRIAL COURT ERRED BY SELECTING JUNE 20, 2012 AS THE VALUATION DATE FOR THE PURCHASE PRICE FOR RESPONDENT'S STOCK BECAUSE CHOOSING THAT DATE WAS AN ABUSE OF DISCRETION IN CRAFTING SUITABLE EQUITABLE RELIEF FOR RESPONDENT, IN THAT A 2012 VALUATION DATE FAILS TO FIT THE CIRCUMSTANCES OF THE CASE BY CONFORMING WITH THE JURY'S VERDICT.

21 West, Inc. v. Meadowgreen Trails, Inc., 913 S.W.2d 858 (Mo. Ct. App. E.D. 1995).

IV. THE TRIAL COURT ERRED IN REFUSING TO EQUITABLY AWARD RESPONDENT PRE-JUDGMENT INTEREST ON THE PURCHASE PRICE OF RESPONDENT'S STOCK FROM THE VALUATION DATE TO THE JUDGMENT DATE BECAUSE SUCH REFUSAL WAS AN ABUSE OF DISCRETION IN CRAFTING SUITABLE RELIEF FOR RESPONDENT, IN THAT REFUSING PRE-JUDGMENT INTEREST FAILS TO COMPENSATE RESPONDENT FOR THE DELAY BETWEEN THE VALUATION DATE AND THE JUDGMENT.

Swope v. Siegel-Robert, Inc., 243 F.3d 486 (8th Cir. 2001).

Health Care Foundation of Greater Kansas City v. HM Acquisition, LLC, 507 S.W.3d 646 (Mo. Ct. App. 2017).

V. THE TRIAL COURT ERRED IN DENYING RESPONDENT EQUITABLE RELIEF FOR PJC'S INDEMNIFICATION OF APPELLANTS' DEFENSE COSTS BECAUSE SUCH DENIAL MISAPPLIED THE LAW CONCERNING THE LEGALITY OF SUCH INDEMNIFICATION AND WAS AN ABUSE OF DISCRETION IN CRAFTING SUITABLE RELIEF FOR RESPONDENT, IN THAT THE TRIAL COURT'S FINDING THAT APPELLANTS DID NOT ACT IN GOOD FAITH BARRED SUCH INDEMNIFICATION PER MO.REV.STAT. §351.355.1, AND RESPONDENT PAID HER OWN ATTORNEYS' FEES AND COSTS WITHOUT ANY PAYMENT FROM PJC.

Mo. Rev. Stat. §351.355

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

VI. THE TRIAL COURT ERRED IN DENYING RESPONDENT'S REQUEST FOR ATTORNEYS' FEES TO EQUITABLY BALANCE THE BENEFITS BECAUSE SUCH DENIAL WAS AN ABUSE OF DISCRETION IN CRAFTING SUITABLE EQUITABLE RELIEF FOR RESPONDENT, IN THAT THE COMPLICATED AND UNUSUAL NATURE OF THIS CASE CONSTITUTES UNUSUAL

CIRCUMSTANCES, JUSTIFYING AN ATTORNEYS' FEES AWARD TO RESPONDENT.

21 West, Inc. v. Meadowgreen Trails, Inc., 913 S.W.2d 858 (Mo. Ct. App. E.D. 1995).

ARGUMENT

I. THE TRIAL COURT ERRED IN APPLYING A MARKETABILITY DISCOUNT TO THE PURCHASE PRICE FOR RESPONDENT'S STOCK BECAUSE DOING SO ERRONEOUSLY APPLIED OR DECLARED THE LAW, AS THIS DISCOUNT IS INCOMPATIBLE WITH THE "FAIR VALUE" STANDARD APPLICABLE TO SHAREHOLDER OPPRESSION CLAMS, IN THAT THIS DISCOUNT REWARDS OPPRESSIVE DOMINANT SHAREHOLDERS AT THE EXPENSE OF MINORITY SHAREHOLDERS, AND THE MARKET CONSIDERATIONS NORMALLY JUSTIFYING SUCH DISCOUNTS ARE NON-EXISTENT HERE.

Standard of Review

The Trial Court's judgment will be sustained by the Appellate Court, 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. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976). The Trial Court's determination of the fair value of Joan's PJC stock is a question of fact; however, whether marketability or minority discounts are applied to this determination is a question of law. *Swope v. Siegel-Robert, Inc.*, 243 F.3d 486, 491 (8th Cir. 2001). Appellate Courts do not accord any deference to the Trial Court's application or declaration of law. *Brown v. Brown*, 152 S.W.3d 911, 914 (Mo. Ct. App. 2005).

Argument

The Trial Court erroneously declared or applied the law in applying a marketability discount. This Court should join the majority of Courts holding that both marketability and minority discounts should not be applied to a buyout remedy in cases like these where the majority shareholder is to buy the minority's stock for Fair Value.

A somewhat analogous situation to this case is a dissenting shareholder action, wherein a minority shareholder objecting to a corporate merger can obtain the remedy provided by Mo. Rev. Stat. §351.455: the corporation or the majority must buy the minority's shares at Fair Value.[32] In that context, no Missouri Court has applied a marketability discount. *Swope*, 243 F.3d at 494.

A. **This Court should adopt the modern, majority rule, which does not allow application of discounts in determining Fair Value of a minority shareholder's stock in the context of a buyout remedy.**[33]

In *Swope*, the Eighth Circuit recognized that most Courts have refused to apply marketability and minority discounts in fair value cases. *Id.* at 495-6. In reaching this conclusion, *Swope* recognized the contemporary view that "Fair Market Value" is not the equivalent of "Fair Value." *Id.* at 492-3. "Fair Market Value" is the price yielded in a hypothetical sale between a willing seller and buyer. *Id.* at 493, citing Harry J. Haynsworth, *Valuation of Business Interests*, 33 Mercer L. Rev. 457, 459 (1982). Conversely, "Fair Value" carries with it the statutory purpose that the shareholders be fairly compensated, which may or may not equate with the market's judgment about the stock's value. *Id.* quoting Joseph W. Anthony & Karlyn V. Boraas, *Betrayed, Belittled… But Triumphant: Claims of Shareholders in Closely Held Corporations*, 22 Wm. Mitchell L. Rev. 1173, 1186 (1996). The American Law Institute explicitly confirms the interpretation of Fair Value as the proportionate share of the value of 100% of the equity, by entitling a dissenting shareholder to a proportionate interest in the corporation, without any discount for minority status or, absent extraordinary circumstances, lack of marketability. *Id.* at 492, quoting American Law Institute, Standards for Determining Fair

[32] In a dissenting shareholder case, the forced sale is a product of a typically innocuous corporate restructuring action (i.e. a sale or merger). An important difference between this and that situation is the forced-sale here is caused by Appellants' misconduct.

[33] Respondent will address this argument here in Point I (regarding marketability discounts), but the same rationale applies to preclude the application of *minority* discounts (Point II) as well.

Value, Principles of Corporate Governance: Analysis and Recommendations ("ALI") § 7.22(a) (1994).

Further, both parties' experts agreed that Fair Value is the appropriate standard in shareholder oppression cases.[34] Fair Market Value and market forces are irrelevant to a determination of Fair Value. *Id.* at 493. The *Kirtz* opinion suggests that discounts should not be applied in oppression cases. After finding oppression, *Kirtz* stated the proper remedy to be for the majority shareholders to pay the minority "the amount of [the minority's] proportionate share" of the "fair value" of the company's assets, without any mention of discounts. *Kirtz,* 463 S.W.2d at 545; *21 West*, 913 S.W.2d at 867. Moreover, such discounts penalize the forced minority seller and secure a windfall for the purchaser by allowing them to get all the shares for less than their full proportionate value. *Swope*, 243 F.3d at 495. Especially in this case, it would be highly inequitable for the Court to allow Appellants to pay a discounted price for Joan's shares in a sale caused by their wrongdoing. Shareholder oppression should not yield a bargain-priced opportunity for the oppressors.

B. <u>To the extent the *Phelps* case contradicts adoption of the foregoing well-reasoned majority rule, it should no longer be followed.</u>[35]

However, in declining to follow *Swope*, the Court of Appeals pointed out that the Missouri Supreme Court in 1956 did not distinguish between Fair Value and Fair Market Value. (Opinion, 25-6).

> [T]he terms 'value,' 'fair value,' 'fair cash value,' and 'fair market value'… have the same general meaning and purposefully if not wisely establish a flexible general standard for fixing value between parties who are either unable or unwilling to voluntarily agree." *Phelps v. Watson-Stillman Co.*, 293 S.W.2d 429, 433 (Mo. 1956).

---

[34] <u>See</u> *21 West, Inc. v. Meadowgreen Trails, Inc*., 913 S.W.2d 858, 867 (Mo. Ct. App. E.D. 1995), citing *Kirtz* and dissenting shareholder statutes with approval that "fair value" is to be paid.

[35] Respondent will address this argument here in Point I (regarding marketability discounts), but the same rationale applies to preclude the application of *minority* discounts (Point II) as well.

The Court of Appeals reasoned that the conflict between the federal *Swope* decision finding a distinction between Fair Value and Fair Market Value and the foregoing *Phelps* statement that the terms are synonymous prevented it from following *Swope*. (Opinion, pp. 25-6)

Yet, the issue in *Phelps*, a dissenting shareholder case, was whether the referee who used 'net asset value' to determine the Fair Value of plaintiff's minority stake employed an appropriate method to do so. *Phelps*, 293 S.W.2d at 431-2. The *Phelps* Court concluded that net asset value by itself was not a proper method for determining Fair Value and remanded the case for further proceedings, presumably for a proper determination of Fair Value. *Id*. at 432, 435. The application of minority, marketability, or any other discount was not at issue. *Phelps*, passim; *Swope*, 243 F.3d at 496-7. This absence makes *Phelps* inapposite to the case at bar.

Moreover, it would appear that *Phelps's* statement of the interchangeability of Fair Value and Fair Market Value was not essential to its holding that Fair Value cannot be reached by net asset value alone, making the statement of term equivalence non-binding *obiter dicta*. See *Husch & Eppenberger, LLC v. Eisenberg*, 213 S.W3d 124, 132 (Mo. Ct. App. E.D. 2006) (*dicta* in Missouri Supreme Court decisions is not binding on lower Courts).

Accordingly, to the extent *Phelps* conflicts with the modern tenet that Fair Value and Fair Market Value are distinct concepts, it should no longer be followed. This Court should join the majority of other states finding minority and marketability discounts equitably and factually inapplicable or irrelevant to a finding of Fair Value.[36]

[36] Resolution of this question will also resolve the conflict between two (2) Court of Appeals decisions. In *Dreiseszun v. FLM Indus., Inc.*, the Court held that Fair Value prohibits any penalty being visited upon a minority shareholder for exercising his/her rights to elect a buyout, as a share of stock has equal value to any other share, regardless of whether it is owned by the minority or majority shareholder. *Dreiseszun v. FLM Indus., Inc.*, 577 S.W.2d 902, 906-8 (Mo. Ct. App. 1979) Despite this holding, a later case found that application of discounts in a determination of Fair Value is a matter within the Trial Court's sound discretion, affirming the imposition of a minority discount

C. A marketability discount is not warranted by the facts of this case.

Additionally, when deciding whether discounts should apply, Courts should logically reject discounts when the rationale for the discount is absent in the circumstances of the case. Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 Duke L.J. 293, 335 (2004) (Hereafter as "Moll, *Fair Value*.")

In addition to the equitable principles substantiating the impropriety of discounts in oppression cases, there is no evidence in this case that would predicate the discounts imposed by the Trial Court. As the proponents of these discounts, Appellants had the burden of proving their applicability. The party asserting the positive of a proposition bears the burden of proving that proposition. *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. En Banc. 1994). The basis asserted by Appellants' expert for the discounts in this case was that the jury had awarded Joan damages in the jury trial. (Bench Tr. 82-3) However, this fact is meaningless in deciding the application of discounts.

A marketability discount presumes that purchasers will pay less for close corporation stock because the lack of an established market makes such shares difficult to sell. Moll, *Fair Value* 54 Duke L.J. at 329. Where the purchaser is a majority shareholder, however, this rationale is weak because Appellants' resulting, controlling position in the company is far easier to sell than a minority position. See *Id.* While the lack of a market affects the ability to sell a minority interest, the market for all of a company's assets or shares operates differently and may not be adversely influenced by the fact that the company's shares are not traded on a securities market. *Id.* at 329-30. By acquiring Joan's stock, Appellants' interest in PJC becomes more marketable, which vitiates the premise for a marketability discount.

---

and rejection of a marketability discount, albeit with little to no analysis. *King v. F.T.J., Inc.*, 765 S.W.2d 301, 305-6 (Mo. Ct. App. 1988). The *Swope* Court held that the Missouri Supreme Court would likely follow the growing majority of Courts in recognizing these discounts as inappropriate, especially since this contrary decision preceded the landmark holding in *Cavalier Oil Corp.v. Harnett*, 564 A.2d 1137 (Del. 1989), rejecting such discounts. *Swope*, 243 F.3d at 496-7.

There was no evidence that Appellants would have any discount-worthy difficulty selling *the entirety* of PJC after their purchase of Joan's minority position. Therefore, circumstances that could possibly justify a marketability discount were wholly absent in this case, and no evidence was presented that would support such a discount. Therefore, the Trial Court erred in imposing a marketability discount, and, this Court should vacate the portions of the Equitable Judgment applying this discount.

D. The jury verdict does not warrant imposition of discounts.[37]

Furthermore, by following Appellants' argument that the jury verdict somehow justified imposition of discounts, the Trial Court (D140 ¶35) and Court of Appeals (Opinion 25-6) ventured onto questionable logical and legal ground. The Opinion cites *21 West*, 913 S.W.2d at 881 for the proposition that the imposition of discounts is permissible because the jury verdict offsets or ameliorates the effect of the discounts. (Opinion 26) *21 West* is distinct from this case because all claims in *21 West* were tried to the Court. *Id*. at 862. There, the Court as the ultimate finder of fact and law can craft a remedy as it saw fit, offsetting or invading relief granted in one claim with that awarded in another.

The Trial Court here was not so unfettered. Cross-Appellant's right to a trial of her legal claim of Breach of Fiduciary Duty by a jury is enshrined in Article I, Section 22(a) of the Missouri Constitution. See *Sherry*, 137 S.W.3d at 472. The jury's verdict on that claim cannot be reduced, invaded, or remitted without due process being followed, i.e. that provided by Rule 78.10 or Mo. Rev. Stat. § 537.068. There is no dispute that such process was not invoked here, as no motion was made under Rule 78.10 and the findings required by the aforesaid statute were not made. The Trial Court and the Appellate Court's employment of the jury verdict as extra 'scrap material' for offsetting discounts or the denial of any other relief impermissibly reduces that jury verdict, which cannot be put to that use.

[37] Respondent will address this argument here in Point I (regarding marketability discounts), but the same rationale applies to preclude the application of *minority* discounts (Point II) as well.

The jury found in its verdict Joan's damages for the period from June 2012 up to trial proximately resulting from Appellants' wrongful expulsion of her from PJC. (Tr. 19; Appellants' Br. 21) The Trial Court ordered Appellants to purchase Joan's stock for Fair Value. (D140 ¶¶35, 44) The Fair Value of Joan's stock is a function of the value of PJC, i.e. one-third of the value of the entire company. The value of PJC is not dependent on or affected by the jury verdict entered only against John and Judy, and the verdict did not lessen Joan's ownership interest in PJC. Accordingly, the value of Joan's shares is likewise logically unaffected by the jury verdict, and the jury verdict is not properly considered in deciding the applicability of discounts.

E. No "Extenuating Circumstances" exist to support imposition of discounts.[38]

In The Court of Appeals, Appellants were silent on the merits of the applicability of the marketability or minority discounts. They acknowledged *Swope*, wherein the Court noted that the American Law Institute interprets Fair Value as not including any discounts (minority, marketability, or otherwise), "absent extraordinary circumstances." *Swope*, 243 F.3d at 492. However, Appellants argued that the facts of the instant fell within that narrow "extraordinary circumstances" exception. Appellants argued that "extraordinary circumstances" exist warranting imposition of discounts here because Joan was not an "unwilling seller," that she "held out through two, trials threatening dissolution, and ultimately *chose* to sell her shares," and "picked her remedy." (Appellants' Reply, pp. 31, 32).

At this point, it should go without saying that Joan did not choose any of this. Undoubtedly, like anyone that finds themself in her position, she wishes none of this ever happened. Appellants are the only ones who chose their fate. They *chose* to fire her, exclude her from all management and participation in PJC, terminate her son's legacy in the company, and award the entire company and its earnings to John, ratifying the same year-after-year, etc. It is these very choices eliminating all the value of Joan's stock

[38] Respondent will address this argument here in Point I (regarding marketability discounts), but the same rationale applies to preclude the application of *minority* discounts (Point II) as well.

(terminating her employment, management authority, income, and share of PJC's earnings and by making no distributions thereafter) and the lack of a market for Joan's *minority stake* that make the buyout remedy, among others, necessary.[39] See Moll, *Gifts*, 86 Minn. L. Rev. at 733-4 (the absence of a market is the motivating force behind the development of the oppression doctrine).

The Trial Court correctly found that Appellants were guilty of shareholder oppression, and equity's jurisdiction was thereby invoked. Upon this invocation, the Trial Court retains jurisdiction of the cause "to do full and complete justice, and may give relief different from that sought by the plaintiff." *Kirtz*, 463 S.W.2d at 545. It is obvious that Respondent does not control the Trial Court, who ultimately decides what remedy to grant.

Appellants' "extraordinary circumstances" argument that Joan picked her remedy is wholly negated by the fact that, like Joan, Appellants suggested that the Trial Court to order a sale of Joan's stock to Appellants. (D131, pp. 12-4) While the Trial Court always had discretion to grant relief other than that proponed by the parties, it should not be surprising or "extraordinary" that it chose the remedy suggested by them.

Attempting to overcome the annoyance this reality poses, Appellants concocted a fantasy in which Joan "chose" to drag out this case even though only she is paying legal bills in order to obtain a remedy which Appellants also found to be appropriate. (D128 ¶¶1-2; Bench Tr. 67-8) Perhaps, Appellants have simply forgotten their two improvident motions for summary judgment, the intervening trip to Court of Appeals between those motions (*Robinson I*, 439 S.W.3d. 853; D144), and the current appellate process in which we are engaged.

In truth, Joan had no real choice. Her options were take nothing or pursue this lawsuit.[40] The Trial Court expressly found that Appellants never offered any buyout or other accommodation, a finding which Appellants do not challenge. (D140 ¶40) To date,

[39] D112 ¶12; D115 ¶12; Tr. 8, 16, 28, 36, 97-8, 121, 134-6, 207, 211-2.

[40] It should not be forgotten that Joan still has not received anything for her efforts.

Appellants deny any liability. Having lost an appeal, a jury trial, a bench trial, and asserting every imagined issue in this appeal, a rational observer would deduce that Appellants are the ones dragging this case out. In fact, because PJC is paying for Appellants' defense (see Point V infra) and Joan is the only one absorbing the legal costs of the last seven (7) years, a slightly cynical, yet reasonable person could logically conclude that a costly war of attrition was a central premise of *Appellants' strategy*. (D128 ¶¶1-2; Bench Tr. 67-8)

A fatal flaw of Appellants' argument that a plaintiff advocating for her desired remedy creates "extraordinary circumstances" is revealed by a moment's consideration of its practical application. If Appellants' argument was accepted, no plaintiff could urge a buyout as a preferred outcome to the Court without inviting the discounts that are not supported by the factual circumstances or equitable considerations of such a remedy. This is especially problematic because the buyout of the minority's interest is a Court's preferred remedy in these situations, as it compensates the wronged plaintiff, cuts ties between warring shareholders, and preserves the company and its business relationships with third parties. Neschis, 13 DePaul Bus. & Com. L.J. at 325-6. If Appellants' view prevails, our adversarial system, wherein each side advocates for its desired end, would render "extraordinary circumstances" out of nearly every case.

* * *

Giving Appellants a discount benefits them at Joan's expense, which rewards their wrongdoing and is anathematic to the remedial purpose of the sale. Because neither the facts, equitable circumstances, nor "extraordinary circumstances" support the application of discounts in this case, the Court should find the Trial Court's deployment of a marketability discount to be erroneous. This Court should hold as a matter of law that marketability discounts cannot be employed in determining the fair value of a minority shareholder's stock in a buyout remedy for shareholder oppression, or the Court should limit the availability of a marketability discount to circumstances showing that a majority's stake would become less marketable after purchase of the minority's shares. In either event, the Court should vacate the portion of the Equitable Judgment applying this discount.

II. THE TRIAL COURT ERRED IN APPLYING A MINORITY DISCOUNT TO THE PURCHASE PRICE FOR RESPONDENT'S STOCK BECAUSE DOING SO ERRONEOUSLY APPLIED OR DECLARED THE LAW, AS THIS DISCOUNT IS INCOMPATIBLE WITH THE "FAIR VALUE" STANDARD APPLICABLE TO SHAREHOLDER OPPRESSION CLAMS, IN THAT THIS DISCOUNT REWARDS OPPRESSIVE DOMINANT SHAREHOLDERS AT THE EXPENSE OF MINORITY SHAREHOLDERS, AND THE MARKET CONSIDERATIONS NORMALLY JUSTIFYING SUCH DISCOUNTS ARE NON-EXISTENT HERE.

Standard of Review

No deference is accorded the Trial Court's application of a minority discount. *Swope* and *Brown* supra in Point I.

Argument

The Trial Court erroneously declared or applied the law in applying a minority discount. The purpose of a minority discount is to adjust for lack of control over a business entity on the theory that non-controlling shares of stock are not worth their proportionate share of the firm's value because they lack voting power to control corporate actions. *Swope*, 243 F.3d at 495. While such a discount holds logic where a third-party-stranger is buying a minority share in a company, in this context where the majority shareholders are the buyers, this discount makes no sense whatsoever. Appellants are/were in control of PJC before this sale, and they will control PJC after it. (D140 ¶40) They are not becoming a PJC minority shareholder; they are consolidating their ownership interests and becoming the sole PJC shareholders.

A minority discount is inappropriate in determining Fair Value. *Swope*, 243 F.3d at 495. Application of a minority discount when selling to an insider would result in a windfall to the buyer because it simply consolidates or increases the interests of those already in control. *Id.*; *Kirtz*, 463 S.W.2d at 545 (ordering the oppressive majority to pay the minority its proportionate share of the fair value of the company's assets, without mentioning any discount).

Courts should reject discounts when the rationale for the discount is absent in the case. Moll, *Fair Value*, 54 Duke L.J. at 335. Implicit in the justification for a minority discount is the assumption that the buyer, post-purchase, will lack control over the company's affairs. Moll, *Fair Value*, 54 Duke L.J at 326. This assumption is rarely, if ever, true in the shareholder oppression context. *Id.* Where, as here, the purchase of Joan's stock by Appellants indisputably enables the majority shareholders to consolidate their control and become 100% owners of PJC, the premise of the minority discount is absent. See *Id.* at 326-7. Therefore, as Appellants are not becoming minority shareholders, a minority discount should not be imposed in this or any shareholder oppression case.

As set forth above in Sections A and B of Respondent's Point I, the Court should adopt the majority rule rejecting discounts (including minority discounts), eschewing *Phelps* if necessary. Moreover, as Section D of that Point reasons, the jury verdict cannot be used as justification for any discount. Further, as explained in Section E of Point I above, no "extraordinary circumstances" exist here that would justify a minority discount. Respondent was not a willing seller. Pursuing her remedies in this case is the only way for Joan to recover the value Appellants wrongfully took.[41] While Joan would much rather that Appellants never undertook their Draconian folly, they made that choice for her. Joan does not become a "willing seller" just by trying to salvage something out of the wreckage Appellants perpetrated.

Again, giving Appellants a discount benefits them at Joan's expense, rewarding their transgressions and antagonizing the remedial purpose of the sale. Because neither the facts, equitable circumstances, nor "extraordinary circumstances" support the application of discounts in this case, the Court should find the Trial Court's deployment

[41] See Neschis, 13 DePaul Bus. & Com. L.J. at 326 (discussing the need for the oppression remedy to also compensate a plaintiff for their lost income in addition to a buyout), citing *Cooke v. Fresh Exp. Foods Corp.*, 7 P.3d 717, 725 (Or. Ct. App. 2000).

of a minority discount to be erroneous. As there are no circumstances where a majority shareholder purchasing the minority stake would somehow become a minority shareholder, this Court should hold as a matter of law that minority discounts cannot be employed in determining the fair value of the minority's shares in a buyout remedy for shareholder oppression. The Court should vacate the portion of the Equitable Judgment applying this discount.

III. THE TRIAL COURT ERRED BY SELECTING JUNE 20, 2012 AS THE VALUATION DATE FOR THE PURCHASE PRICE FOR RESPONDENT'S STOCK BECAUSE CHOOSING THAT DATE WAS AN ABUSE OF DISCRETION IN CRAFTING SUITABLE EQUITABLE RELIEF FOR RESPONDENT, IN THAT A 2012 VALUATION DATE FAILS TO FIT THE CIRCUMSTANCES OF CASE BY CONFORMING WITH THE JURY'S VERDICT.

Standard of Review

The Trial Court is vested with broad discretionary power to shape and fashion the relief it grants to fit particular facts, circumstances, and equities of the case before it. Errors claimed in this respect are reviewed for an abuse of discretion. *Southern Star Cent. Gas Pipeline v. Murray*, 190 S.W.3d 423, 432 (Mo. Ct. App. 2006).

Argument

The *21 West* Court noted that, unlike the dissenting shareholder statutes, the shareholder oppression statute does not specify a date for valuation and further declined to state a bright-line rule for the same, leaving the issue to the Trial Court's discretion. *21 West*, 913 S.W.2d at 867-8.

In its Equitable Judgment, the Trial Court erred by using the date of Joan's termination, June 20, 2012, as the valuation date for her stock. (D140 ¶35) As the Trial Court must make factual findings in Joan's shareholder oppression claim consistent with the facts found by the jury,[42] the equitable remedy prescribed by the Trial Court should

[42] *Sherry*, 137 S.W.3d at 473.

likewise dovetail with the jury's award. The parties seemingly agree that the damages the jury awarded cover the period from Joan's 2012 termination to the 2017 trial. (Tr. 19; Appellants' Br. 21) When the Judgment is paid, Joan would be compensated for her lost share of PJC earnings for that past period. However, Joan would still own her shares as of and after the verdict, and her interests would still be uncompensated and oppressed from the verdict into the future. The remedy crafted by the Court should encompass the value of Joan's stock from 2017 into the future. A proper valuation date can accomplish that.

Appellants' expert described that when determining the value of a company, the evaluator is trying find the present value of future cash flows, i.e., the value of a company is based on its expected future earnings. (Bench Tr. 82-3; Tr. 259). Therefore, a valuation of PJC in 2017 is an aggregation of PJC's expected future earnings from 2017 forward. Simply put, payment of the Judgment would compensate Joan for her past damages up to 2017, and purchasing her PJC stock for its 2017 value would compensate her for her damages after 2017. For this case's circumstances, Joan's shares should be valued as of 2017.

The parties agree that there is no bright-line rule in Missouri setting the date for valuing Respondent's shares. *21 West*, 913 S.W.2d at 867-8. However, the law is clear that in cases with mixed claims at law and equity, the legal claims are to be first tried to a jury with the remaining equitable claims to be thereafter resolved by the Trial Court consistently with the facts found by the jury. *Sherry*, 137 S.W.3d at 473. The jury in this case found that Joan was entitled to compensation for the period from 2012 to 2017 for her lost income and share of PJC's earnings. (Tr. 19; Appellants' Br. 21)

Per *Sherry*, the Trial Court's finding of the valuation date must be consistent with the compensation awarded by the jury for the time period posed to them. Only a 2017 valuation date does so. (Resp't's Br. pp. 46-7).

In the Court of Appeals, Appellants argued that the analogy of the Dissenting Shareholder Action should control the valuation date, making the Joan's 2012 removal the appropriate date. Appellants' argument was based on these incorrect notions: a) their oppression was the single act of Joan's 2012 termination;[43] and b) a 2017 value improperly rewards Joan with the increase in value of PJC caused by John's purported hard work which Joan presumably could not have attained. Of course, whether Joan would have gotten better or worse results than John is pure speculation. No one can be certain what would have happened if Appellants had not breached the duties they owed Joan and oppressed her interests. To the extent this uncertainty gravitates in favor of a 2012 valuation date, that idea should be jettisoned because it was Appellants' wrongful conduct that created that uncertainty. See Moll, *Fair Value*, 54 Duke L.J. at 376-7.

Further, Appellants do not explain why Joan should not benefit from positive changes in value.[44] She remains an uncompensated PJC shareholder and Appellants' continued oppression and protraction of this case do not negate that, nor is it equitable to deny Joan this appreciation when the compensation divested from her by Appellants has undoubtedly fueled any improvement in PJC's performance, to the extent John did not syphon it off.

The Court should find that the Trial Court abused its discretion by using a 2012 valuation date and remand the case for determination of an appropriate 2017 value.[45] Excluding discounts, Mr. Prost valued Joan's stock as of June 30, 2017 at $119,010. (Ds' Ex. 10-26A p.5) Respondent's expert found Joan's stock to have a fair value of $197,222 as of that date. (P's Ex. 29 p.3) This Court should vacate the portion of the Equitable

---

[43] Joan's 2012 expulsion was Appellants' first *overt* oppressive act. Their unrelenting deprivation of any financial benefit to Joan, John's exclusive consumption of all PJC value, and PJC's improper funding of Appellants' defense, all demonstrate that their oppression persists to the present.

[44] Every shareholder has a right to, among other things, any stock appreciation. Moll, *Gifts*, 86 Minn. L. Rev. at endnote 157.

[45] For an example of the use of a later valuation date, please see *Hendley v. Lee*, 676 F. Supp. 1317, 1327 (D.S.C. 1987) (using the trial date as the appropriate valuation date). This case is similar to Joan's circumstances. The minority shareholder continued to be employed and compensated by the company through trial. *Id.* at 1330. Here, analogously, the jury verdict compensates Joan up to the verdict.

Judgment setting the price of Joan's stock at $59,000 as of June 2012 and remand this case to the Trial Court to determine the 2017 value of Joan's stock.

IV. THE TRIAL COURT ERRED IN REFUSING TO EQUITABLY AWARD RESPONDENT PRE-JUDGMENT INTEREST ON THE PURCHASE PRICE OF RESPONDENT'S STOCK FROM THE VALUATION DATE TO THE JUDGMENT DATE BECAUSE SUCH REFUSAL WAS AN ABUSE OF DISCRETION IN CRAFTING SUITABLE RELIEF FOR RESPONDENT, IN THAT REFUSING PRE-JUDGMENT INTEREST FAILS TO COMPENSATE RESPONDENT FOR THE DELAY BETWEEN THE VALUATION DATE AND THE JUDGMENT.

Standard of Review

Refusal of pre-judgment interest is reviewed for an abuse of discretion. *Southern Star*, supra in Respondent's Point III.

Argument

In its February 13, 2018 Equitable Judgment, the Trial Court adopted June 20, 2012 as the appropriate valuation date for Joan's stock. (D140 pp.9,12). Appellants argued and the Trial Court accepted the analogy of this case to a dissenting shareholder case. (D131 pp.12-3; D140 pp.8-9) Respondent timely filed a Motion to Amend the Equitable Judgment, requesting the Trial Court to add pre-judgment interest to the price for Joan's stock (D146), which was denied. (D148)[46]

Per the dissenting shareholder statute, pre-judgment interest under Mo. Rev. Stat. § 408.020 is to be awarded from the date of the vote on the corporate action to which the shareholder dissents to the date of the price-setting judgment. *Swope*, 243 F.3d at 497, quoting Mo. Rev. Stat. § 351.455(3). The purpose of this pre-judgment interest is to fully compensate plaintiff for his/her loss. *Id*. A Court sitting in equity has discretion to award

[46] Any argument that pre-judgment interest was not pleaded should be disregarded. Count I's prayer for relief seeks "any and such other and further relief as the Court deems just and proper under the circumstances." (D112 p.8) This invocation is sufficient to allow an award of pre-judgment interest. *Dierker Assoc. v. Gillis*, 859 S.W.2d 737, 746 (Mo. Ct. App. E.D. 1993).

pre-judgment interest, the rate of which is to be the 9% provided by Mo. Rev. Stat. § 408.020. *Health Care Foundation of Greater Kansas City v. HM Acquisition, LLC*, 507 S.W.3d 646, 668 (Mo. Ct. App. 2017).

Respondent is not claiming that she is entitled to pre-judgment interest under § 408.020 itself. Rather, her argument is that if a dissenting shareholder is entitled to such interest and that analogy is being followed here, it should be followed in full, so that Joan is compensated for the passage in time between the valuation date and the judgment valuing the stock. After all, as the Trial Court found, Appellants never offered any buyout or other accommodation (D140 ¶40) and elected to deny all liability and defend the case to where it now stands. This passage of time should have been compensated, and the Trial Court sitting in equity had discretion to award pre-judgment interest and abused that discretion when it declined this relief. This Court should reverse the portion of the Equitable Judgment denying pre-judgment interest and remand with instructions to impose such interest from the valuation date to the date of the final judgment valuing Joan's stock.

Whatever valuation date is used, it was error not to award prejudgment interest from the valuation date to the date of judgment fixing that value. Prejudgment interest can be awarded in these situations, among others: 1) expressly or impliedly by statute or contract; and 2) under principles of equity. *Mitchell v. Residential Funding Corp.*, 334 S.W.3d 477, 508 (Mo. Ct. App. 2010). Respondent proceeds under the latter equitable route; therefore, compliance with statutes requiring demand or otherwise is unnecessary. The purpose of prejudgment interest is to fully compensate a plaintiff for the time-value of money. *Mitchell*, 334 S.W.3d at 509.

At the Court of Appeals, Appellants argued that a 2012 valuation date, provides Joan with the full value she created as PJC's president. If so, Joan has been deprived of that value for the last seven (7) years, and Appellants have had use of that value for that time. Where defendant has use of plaintiff's money from his/her wrong until judgment, plaintiff is entitled to prejudgment interest under equitable principles because denial of such interest gives plaintiff an incomplete remedy. *Id.*; *Musto v. Vidas*, 754 A.2d 586, 598 (N.J. Super. Ct. App. Div. 2000) (holding that *compounded* prejudgment interest from the valuation date to judgment was appropriate under equitable principles, even when the majority's pre-suit buyout offer was greater than that ultimately awarded by the Court.)

Wise policy also supports a prejudgment interest award because prejudgment interest also serves to promote settlement and deter unnecessary delay in litigation. *Mitchell*, 334 S.W.3d at 509. Appellants' war of attrition certainly merits utilizing prejudgment interest.

Regardless, what Joan is entitled to is a complete remedy. Whether the valuation date is in 2012 or 2017, Joan has been deprived of that value since that date and Appellants have had the benefit thereof. Joan is due compensation for the time-value of that money, which is the purpose of prejudgment interest. See *Id.* Like the Mitchell Court, this Court should reverse the Trial Court's judgment denying prejudgment interest (D148) and award Joan such interest from the valuation date to the date of the judgment setting such value. See *Id.* at 509-10.

V. THE TRIAL COURT ERRED IN DENYING RESPONDENT EQUITABLE RELIEF FOR PJC'S INDEMNIFICATION OF APPELLANTS' DEFENSE COSTS BECAUSE SUCH DENIAL MISAPPLIED THE LAW CONCERNING THE LEGALITY OF SUCH INDEMNIFICATION AND WAS AN ABUSE OF DISCRETION IN CRAFTING SUITABLE RELIEF FOR RESPONDENT, IN THAT THE TRIAL COURT'S FINDING THAT APPELLANTS DID NOT ACT IN GOOD FAITH BARRED SUCH INDEMNIFICATION PER MO.REV.STAT. §351.355.1, AND RESPONDENT PAID HER OWN ATTORNEYS' FEES AND COSTS WITHOUT ANY PAYMENT FROM PJC.

Standard of Review

This Court accords no deference to the Trial Court's determination that PJC's indemnity was proper under Mo.Rev.Stat. §351.355.1. *Brown*, 152 S.W.3d at 914.

Whether the Trial Court erred in refusing equitable relief for PJC's indemnification of Appellants is reviewed for an abuse of discretion. *Southern Star*, 190 S.W.3d at 432.

Argument

Points V and VI are related. As of October 25, 2017, PJC had paid $131,040.37 for defense of Appellants in this case while not paying anything to Joan since her 2012 expulsion. (D128 ¶¶1-2) The Trial Court declined to award Respondent any relief regarding PJC's indemnification of Appellants for their defense costs in this case. (D140 ¶¶45-7) However, the Trial Court correctly found Appellants had not acted in good faith in their oppression of Joan. (D140 ¶41)

Per Mo. Rev. Stat. § 351.355.1, a corporation may indemnify its directors for costs of defense in a lawsuit brought against them by reason of their actions as a director only "if he or she acted in good faith **and** in a manner he or she reasonably believed to be in or not opposed to the best interests of the corporation." (emphasis added) The Trial Court found Appellants had not acted with the requisite good faith. (D140 ¶41) Accordingly, Appellants were not allowed indemnification under this statute, and such indemnity was improper. The Trial Court's apparent finding to the contrary (D140 ¶47) was a misapplication of law, which should be reversed.

This improper indemnification is akin to Appellants receiving a cash distribution, i.e., a dividend, of at least $131,000. Yet, Joan has had to pay her own attorney's fees and costs in excess of $100,000. (Bench Tr. 67-8) Equitable remedies at the Court's disposal in this case include damages and ordering the payment of a dividend. *Fix*, 538 S.W.2d at 357, FN 3 (g), (j). The Trial Court abused its discretion when it overlooked this improper indemnification and refused to grant Respondent relief for it.

At the Court of Appeals, Appellants did not dispute that such indemnification was and is improper. Rather, they argued that recovery of the fees paid by PJC is a derivative claim, which Joan has not made. Joan did not make a derivative claim because she is not trying to recover PJC's funds on PJC's behalf. She is seeking to recover her proportionate share of the benefit Appellants obtained for themselves and did not share with her as a co-equal shareholder. This claim is not a derivative claim. Derivative claims are for redress of injuries to the shareholders collectively. *Nickell*, 439 S.W.3d at 227. Conversely, individual actions are permitted, and provide the logical remedy, if the injury is to the individual shareholder. *Id*.

Here, all shareholders are parties to this case. Appellants' wrongful exaction of indemnity did/does not injure the shareholders collectively. Appellants benefited from this conduct, i.e. they were not injured by it. Only Joan was injured by Defendants' exclusion of her from this dividend or her proportionate share thereof. Accordingly, her injury was individual and was properly pursued in her individual capacity. E.g., *Gieselmann*, 443 S.W.2d at 131; *Mink*, 568 N.E.2d at 571 (where the plaintiff is the only shareholder injured by defendants' actions, no derivative action was required).

Despite the finding that Appellants did not act in good faith, the Trial Court denied Joan any relief on this basis, which the Court of Appeals affirmed as being within the Trial Court's discretion. (Opinion, pp. 29-31)

To the extent this benefit is a *de facto* dividend, Joan, as an equal shareholder with Appellants, is entitled to her share of the dividend. See *Brown v. Luce Mfg. Co.*, 96 S.W.2d 1098, 1101 (Mo. Ct. App. 1936) (when a dividend is declared, it is a general dividend applicable to all stockholders); Moll, *Gifts*, 86 Minn. L. Rev. at 768-70 (discussing *de facto* dividends).

Appellants' exaction of indemnity from PJC is a separate wrong for which Joan is entitled to a remedy. It is an abuse of discretion to deny a remedy for that wrong. E.g., *Mitchell*, 334 S.W.3d at 509 (it was an abuse of discretion to deny the prejudgment interest to which plaintiff was equitably entitled). Also, the Appellate Court's citation to the jury verdict as an available offset to the denial of relief is inappropriate as set forth above at 66-7. (Opinion 30-1)

This Court should reverse the finding that PJC's indemnity of Appellants was proper and remand the cause, instructing the Trial Court to ascertain by hearing or otherwise all amounts paid by PJC in defense of Appellants and enter a judgment in favor of Joan against Appellants for one-third of that sum or order PJC to pay half of this amount to Joan.

VI. THE TRIAL COURT ERRED IN DENYING RESPONDENT'S REQUEST FOR ATTORNEYS' FEES TO EQUITABLY BALANCE THE BENEFITS BECAUSE SUCH DENIAL WAS AN ABUSE OF DISCRETION IN CRAFTING SUITABLE EQUITABLE RELIEF FOR RESPONDENT, IN THAT THE COMPLICATED AND UNUSUAL NATURE OF THIS CASE CONSTITUTES UNUSUAL CIRCUMSTANCES, JUSTIFYING AN ATTORNEYS' FEES AWARD TO RESPONDENT.

Standard of Review

Refusal of Respondent's request for attorneys' fees is reviewed for an abuse of discretion. *Southern Star*, supra in Respondent's Point III.

Argument

The Trial Court declined to award Respondent her attorneys' fees in this case. (D140 ¶¶45-7) Awards of attorney's fees are permitted only: 1) when called for by contract; 2) when provided by statute; 3) when incurred, as an item of damages, because of involvement in collateral litigation; or 4) when a Court of equity finds it necessary to adjudge them in order to balance benefits. *21 West*, 913 S.W.2d at 881. Attorneys' fees should be awarded in this case under the Court's equitable powers to balance benefits.

Missouri Courts are extremely reluctant to deviate from the "American Rule," which is that each litigant bears the expense of his or her own attorney's fees. *Id*. However, here, that concern is ameliorated because each litigant has not borne the expense of their own attorneys' fees. As discussed in Point V above, because of the improper indemnification Appellants worked by their domination of PJC, only Joan has carried that weight.

Attorney's fees are awarded to balance benefits only if the party seeking the fees has demonstrated very unusual circumstances justifying an award of fees. *Id.* at 881. Examples of sufficient unusual circumstances include intentional misconduct (*Klinkerfuss v. Cronin*, 289 S.W.3d 607, 618 (Mo. Ct. App. E.D. 2009)) or an unusual or complicated case (*21 West*, 913 S.W.2d at 881). While only one is necessary, both scenarios are met in this case.

A. Sufficiently unusual circumstances exist to award Joan her attorney's fees in this case because it is unusual or complicated.

"Very unusual circumstances" means an unusual type of case, or unusually complicated litigation. *Id*. Under these facts, no Missouri case is directly on point. *Kirtz v. Grossman* is the closest case where minority shareholders demonstrated oppression in a corporate dissolution plan, showing the price of their shares proposed by the majority to be inadequate. However, that case did not involve the intermingling issues of a jury verdict, competing valuation dates, pre-judgment interest, discount applicability, attorney's fees, and corporate indemnity of the majority. The proper determination of equitable relief for a successful plaintiff in this unique shareholder oppression case is undoubtedly unusual and complicated. Were it not, this case would not likely be in its present posture before this Court. Unusual circumstances exist in this case to warrant an award of attorneys' fees to Respondent.

B. Appellants' misconduct warrants an award of attorney's fees to Respondent.

More importantly, Appellants' misconduct justifies a finding of unusual circumstances. Appellants perpetrated several wrongs against Joan. They fired her without justification or warning, which deprived her of income. (D140 ¶¶40-1) They fired her son, ending the Robinson legacy in PJC. Then, with Joan out of the company, they allowed John to operate PJC as though he was its only shareholder, with its earnings only going to him and his non-shareholder family members. For all Appellants' trumpeting of PJC's success with John at the helm, it is unconscionable and inexcusable that not a single cent has been distributed to PJC's shareholders since Joan's expulsion.[47]

---

[47] Even where, unlike this case, the majority was justified in terminating the minority's employment, it is undoubtedly oppressive to continue distributing the company's earnings through employment when the minority is no longer an employee. Moll, *Fair Value*, 54 Duke L.J. at 362 and endnote 258, citing *Gimple v. Bolstien*, 477 N.Y.S.2d 1014, 1020-1 (N.Y. App. Div. 1984) (holding that the majority shareholders properly terminated employment of plaintiff minority shareholder for embezzlement, as plaintiff

Moreover, Appellants' wrongful indemnity by PJC appears to have continued after the jury and Trial Court findings of bad faith. John's wholesale appropriation of PJC is self-dealing at its worst. This conduct would only find redress and Joan would only recover the wrongfully-deprived financial benefit of her stock by her prosecution of this action. To get that which she is undoubtedly entitled,[48] Appellants have essentially forced her to bring this action and incur her attorneys' fees to resuscitate the value of her PJC stock their misconduct eliminated. The Court cited with approval the proposition that unusual circumstances justifying an award of attorneys' fees exist where the plaintiff incurred fees that would not have been incurred but for defendant's intentional acts. *Klinkerfuss*, 289 S.W.3d at 618. Had she not brought this action, the evidence only shows that she would have never received anything from her PJC stock. (SOF ¶15) Joan's only other avenue was to bring this action and incur the resulting fees. The denial of any relief for her fees when she alone has carried the burden of legal expenses confirms that she will not receive the full fair value of her PJC stock. Appellants' misconduct merits an award of attorneys' fees to Joan.

Alternatively or additionally to the relief sought in Point V, the Court should reverse the Trial Court's judgment that Joan is not entitled to her attorneys' fees, enter judgment that she is entitled thereto, and remand this cause for the Trial Court's determination of the amount of that award.

CONCLUSION

This Court should grant Points I and II and vacate the Trial Court's application of discounts on the purchase price for Joan's PJC stock. The Court should grant Point III,

---

had no reasonable expectation in continued employment after such conduct, yet finding that plaintiff was still thereafter entitled to his share of company profits).

[48] Every shareholder reasonably expects that he/she is entitled to a proportionate share of the company's profits, and whenever this expectation is frustrated by the majority squeezing out the minority from the company's earnings while the majority continues to receive those earnings themselves, oppression liability should arise. Moll, *Gifts*, 86 Minn. L. Rev. at 766.

vacate the portion of the Equitable Judgment setting the price of Joan's stock at $59,000 as of June 2012, and remand the case to the Trial Court to determine the 2017 value of Joan's stock. The Court should grant Point IV, holding that pre-judgment interest at 9% per annum on the value of Joan's stock should run from the date of valuation to the judgment date finding that valuation. The Court should grant Points V and VI, 1) reversing the Trial Court's judgment finding PJC's indemnification of Appellants permissible, declining Joan relief thereon, and refusing an award of her attorneys' fees; and 2) remanding the case to the Trial Court to determine the amount to be awarded to Joan for such improper indemnification and/or her attorneys' fees.

Respectfully submitted,

FOLEY & MANSFIELD, PLLP

/s/ *John G. Beseau*
John G. Beseau, #56704
101 S. Hanley Road, Suite 600
St. Louis, Missouri 63105
(314) 925-5700 *telephone*
(314) 925-5701 *facsimile*
jbeseau@foleymansfield.com

Attorneys for Joan L. Robinson,
Respondent / Cross-Appellant

CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief includes the information required by Rule 55.03; that the undersigned attorney signed the original brief and the original will be maintained by the undersigned for the time provided by Rule 55.03(a); that this brief complies with the requirements of Rule 84.06, including the limitations stated in Rule 84.06; that this brief contains 26,864 words (excluding the cover, signature block, this certificate, the following certificate of service) as determined by the word count function of Microsoft Word; and that the font size is no less than 13-point Times New Roman.

/s/ *John G. Beseau*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 16, 2019, a true and correct copy of this brief was filed electronically with the Clerk of the Missouri Supreme Court and served by operation of the Court's electronic filing system and via electronic mail to the following counsel of record:

Paul J. Puricelli, Esq.
Stone, Leyton & Gershman, P.C.
7733 Forsyth Blvd., Suite 500
St. Louis, MO 63105
ppuricelli@stoneleyton.com
Attorneys for Appellants / Cross-Respondents
John F. Langenbach, Judy Lanfri, and
Perma-Jack Company

/s/ *John G. Beseau*